

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672

4222.39 RES SUBSISTENCE: PUBLICATIONS (file 3)

1220

Eskimo's list of wild foods. It is the fatted pig of the North, both staple and *pièce de résistance* at the saltwater people's table. Custom, taste, and the availability of species vary somewhat, place to place, so that among the gifts of the sea, it is not always the *uguruk* that scores the highest. Some villages place greater merit with the beluga whale, others with the choice parts of the walrus. But in Kivalina, the *uguruk* is all things to all people, though landward the Barren Ground caribou is also important, when circumstance and game laws allow it to be had.

In June, the seals begin to follow the ice as it recedes to the north. They bask in the sun at the edge of the floes, each adult weighing four to seven hundred pounds (the largest of all the hair seals); and yielding, when taken, a great store of flavorful meat, enough blubber to fill a barrel, and a tough yet pliable hide from which the Eskimos fashion their snug *mukluk* boots—*mukluk* being the Yupik word for the bearded seal. In earlier times, the hide was also used to cover the ribs of the *umiak*, the old skin boat that has now been replaced, for the most part, by the long, double-hulled wood dory with the engine of many horses and the spoor of unburned hydrocarbons awash in its wake.

We are cruising south, now, through the jagged leads two or three miles offshore. Ray Hawley is at the wheel. His son, Abner, sits next to him, with binoculars. In the bow, in a white parka and rubber hip boots, head turning slowly from side to side as he scans the ice, is James Hawley. And David Swan is there, too. The elder Hawleys are brothers, members of one of Kivalina's oldest and largest families. It is said in the village that all of the Hawleys are great hunters, though possibly James is the greatest when the *uguruks* are taking the sun on the ice and his fast, flat-shooting .25/06 is close at hand under the covered prow of the boat. There is no doubt who is in charge here, yet no one speaks in tones of deference or command. In fact, no one speaks. James points with his hand, the boat follows. The hand reaches back, fingers spread wide above the open palm, and the engine stops. The boat drifts through the water. There is a sound as from a thousand fountains, slowly

dripping. In shining droplets, the ice returns itself to the glass-smooth sea.

Hawley and Swan crouch low in the bow of the boat. Now I can see the *uguruk*, a hundred yards out from the edge of the ice, sleeping. It is a big one, probably a bull. Hawley takes his rifle from under the prow and locks a cartridge into the chamber. The drifting boat grinds lightly against the ice. The animal raises its head. Hawley leans forward and rests his elbows on the prow for support. Steady. Steady now. Taking his time to make sure the *uguruk* has not been alarmed. Knowing he cannot afford to miss this time. Not after the pup, the little one a few miles back, shot clean but then lost in the water, sunk. If it was the best of times to be going for *uguruk*, it was also the worst, for the ice-floe fountains render the seawater fresh to a depth of twenty feet, and what goes down into it, deprived of saline buoyancy, does not soon come up. We tried to retrieve the pup, using a barbed, weighted *niksik* like a grappling hook in the water, to no avail. So many seals are lost, and few recovered, when they go like this, flopping head-shot into the unbuoyant sea. The critics of subsistence call it wanton waste, as if the loss were intentional. The hunters call it bad luck. And mourn the loss, not only for themselves but for the animal, believing, as I am told they do, that the life of an animal taken will somehow flow on through the people who use it, as long as they use it well.

The recoil from the .25/06 kicks a puff of dust out of the shoulder of Hawley's parka. The head of the *uguruk* falls to the ice. There is the briefest silence after the shot, except for the water, dripping, and then the echo comes back at us, bouncing like a pinball off the *innipkak* walls of the Chukchi Sea. Hawley snaps the bolt of his rifle open and shut, leans forward across the prow—steady, steady now—and squeezes off one more, for insurance. Now the seal is surely dead. Even so, no one speaks.

There is a certain rhythm to subsistence in the North that is scored by the cycle of the seasons. In Kivalina and in scattered

camp along the Chukchi coast toward Kotzebue, each month or two seems to offer a special harvest or, if not, at least a time to prepare for the next. The Hawley brothers tell of this, as does David Swan; and there is also the splendid monograph prepared by William and Carrie Uhl for the Cooperative Park Studies Unit at the University of Alaska, a work that examines the subsistence patterns of the beach dwellers of the Cape Krusenstern area. Piecing these written and oral reports together, one might construct a calendar running on from *uguruk* time somewhat like this:

July and August, in the old days, were the months for trade, chiefly with the people of the Noatak Valley, inland. Now, for those who can, the summer is a time of harvesting cash. Sometimes there are jobs in the commercial salmon fishery at Kotzebue, or with the U.S. Bureau of Land Management, fighting fires in the interior. One summer, seventeen of the men of Kivalina went off to the fire lines, and that was a lot, in wages, even for a village of two hundred and fifty people. Summer, too, is for harvesting sour dock and berries. The sour dock, a rhubarb-like plant, is ready for picking in July, and some families will put away as much as one hundred pounds of it, for cooking, or will store it in barrels and sealskin pokes. Raw, sour dock ferments and is used for pickling certain fishes and meats. No sooner has this been done than it is time to harvest blueberries and *akpik*, the cherished salmonberry with its citrus flavor. Inupiat Eskimos are so fond of *akpik* they will travel far afield, and at great expense of time and energy, to gather it. Groups of women will go off for ten days, camping and picking *akpik*, while the men, the hunters, stay at home minding children. A hunter will do even that, for *akpik*.

In the fall, September and October, char return from the sea to the Wulik and Kivalina rivers, and the people take them with lures and nets. There are a few late-flying geese and ducks also, though not as many as in the spring; and offshore, new ice brings *natchiq*, the ringed seal, the little cousin of *uguruk*. Now *tutu*, the caribou, are coming down from the passes of the Brooks Range, and it is good to take them at this time of year when they are still fat and the meat is not yet too strong from

the rut. And down in the lagoons of Cape Krusenstern are whitefish that, in aggregate, can only be measured in tons.

According to the Uhls—and to Robert Belous, a National Parks Service specialist who flew charter with me one day over the Krusenstern lagoons—the saltwater people have developed an ingenious method of exploiting these whitefish. And nature does most of the work. The whitefish come to the lagoons in the spring, flushed from the mouths of the Kobuk and Noatak rivers by the crest of the runoff and carried by it to the cape across Kotzebue Sound. Here, the fish enter the lagoons through open sloughs, and spend the summer subsisting on insects. And what the whitefish don't know will ultimately hurt them, for some lagoons in the summer soon become traps.

It happens like this. When the fish find the open sloughs in the spring, there is still enough ice offshore to block the sea's natural urge to hurl swells at the shore. The inshore water is therefore glass-smooth. But after the ice recedes, the sea becomes its old bitchy self, scratching the face of the shore and redistributing loose sand and gravel in such a way as to plug up the outlets of the whitefish lagoons.

Now come the Eskimos with shovels and sucks in September. They dig a ditch. They start on the beach and dig inland toward the lagoon. The ditch is wide and shallow near the sea, then becomes progressively narrower as it approaches the lip of the plugged-up lagoon. When the final break is made with the shovels, the water of the lagoon rushes toward the sea. But never quite gets there; the porous gravel of the beach sops it up. The whitefish in the lagoon feel the pull of the water, and perceiving a way to the sea, follow the flow—only to be left, flopping, high and dry on the beach. Where the Eskimos sack them.

The days grow shorter, the ice is almost fast once again at the shore. Now, in November and December, some of the men turn to trapping, running their lines up the rivers and creeks. In Kotzebue, the skin of a wolf will fetch \$250; a good wolverine, more than \$300. A white fox brings \$50. And sometimes, with luck, there is lynx. Its fur is considered by some the best for the insides of parkas, and the meat is good, too—like the

breast of a turkey, some *gussoks* say. Short days also bring snowshoe hare and ptarmigan to the hunter's pot, and the large Arctic hare, *ukallisugruk*. Then the midday sun hangs low on the southern horizon, the snow piles high, and the people wait. For February.

With increasing daylight in late winter, and generally good conditions for snow-machine travel, the men go out from the village after ringed seal in one direction, and caribou in the other. And some of the women jig through holes in the ice for whitefish and Bering cisco. Then April comes, and May and June with the birds nesting, the sky playing tricks, the hunters in white parkas going out in their boats, the hand of James Hawley reaching back, stopping the engine, now drifting, the bolt of the rifle snapping in place, the elbows braced, and once again, between the shot and the echo, a sound as of fountains, slowly dripping.

Our boat rides low in the water. It is late in the day, and we are returning to Kivalina with a ton and a half of *uguruks*, five of them side by side under the tarps. The last killed is my cushion, I can feel its lingering warmth through the canvas. When the boat swerves to starboard to avoid an ice floe, the yielding blubber beneath me rolls the same way. I move to the floor.

James Hawley, my windbreak, still sits in the bow, scanning the ice. I admire his skill with the rifle. Besides the first pup, only one other seal was lost in the water. So it is five for seven, and Hawley has taken them all. That is the uncommon thing about subsistence hunters. It seems not to matter at all who gets the shot, so long as the shooting is clean and effective. There is no taking of turns, no prize for the first or the biggest. It is not a game they are playing. True, Abner did take one shot, but only because it is part of his education to learn to kill seals. Ray Hawley and David Swan did not fire once. They did not have to. They already know how to kill seals, though not as well as James Hawley does.

The boat grinds against the gravel shore. Village boys, fishing nearby with handlines for char, pull in their lures and run

down the beach to see what the boat brings. Village men stroll our way, waving. The hunters attach ropes through slits in each *uguruk's* jaw and flippers, and the people heave and pull, laughing when someone slips on the gravel; and one by one the great silver animals slide reluctantly over the gunwale and up the wide beach to a bench of grass where the women are waiting with their sharpened *ulus*, the meat cleavers of the North.

Now the *uguruk* is rolled on its back. The knife moves swiftly along the belly, from chin to the anus. Then the skin is pulled off with the blubber attached. The abdomen flesh is cut away. Out come the internal organs. The ribs are sectioned and removed. The animal is reduced to smaller and smaller pieces. A young woman with a cup scoops blood from the carcass and pours it into a barrel that is sunk in the ground. Two others begin to slice the blubber into small strips the length of store-bought bacon. The strips will be stored in sealskin pokes, where fermentation renders the blubber into an oil that is used not only as preservative of other foods but as condiment for almost every meal. The head of the seal will be boiled for four hours and come out of the pot as a head cheese to be shared with neighbors. The shoulder meat will be hung to dry for a few days before pot-roasting. The flippers will be buried with oil in a grass-lined hole until the hair slips off, then savored as *uguruk's* most succulent gift. The ribs will be hung on racks, drying for wintertime. The outer layers of the small intestines will be pinched from the inners and minced with blubber to make the delicacy called *qaiq*. And the blood in the barrel? The blood will be saved for broth, or mixed with wood ashes to coat the outside of a sealskin poke. So who is to say that the Eskimos are wrong? I mean about life after death, and the way in which animals live again in the viscera of the people who use them.

Still, there is a suspicion among city folk, inside and outside Alaska, that the corollary of subsistence is waste, in terms of both absolute animal numbers and the utilization of individual animal parts. Perhaps it is not enough that the outer layer of the *uguruk's* intestine is eaten with blubber, and the inner part fed to the dogs; though the inners were once blown full of air and dried, for ditty bags, before some *gussok* invented plastic.

As for the absolute number of animals taken, sometimes there is waste. It has been documented, for example, that at the time of the crash of the Western Arctic caribou herd, some young Native men—not necessarily from Kivalina—did indeed kill more *tuttu* than their villages could possibly use, chasing the animals on snow machines and leaving the carcasses cached in the snow for ravens and wolves. Yet a white man at Kotzebue confessed to the same. Rotten apples in every barrel, I suppose; and besides, there was no legal limit then on how many *tuttu* a hunter might take. Now the trigger fingers are not quite so heavy throughout bush Alaska, for the people are warned.

"Let me lay it right on the table," said Congressman Morris Udall at a hearing in Shishmaref, speaking to Eskimos. "You want to cover thirty miles a day, instead of the five or ten the way you used to. I think the motorboat is here to stay and the snow machine is here to stay. We will write this [d-2] bill so that subsistence includes the right to use motorboats and snow machines. I think we ought to recognize, however, that subsistence is only going to be good if we can keep up the permanent level of the cache, if we can keep the walrus and seal populations coming back year after year. . . . To the extent that you have machines and modern equipment to go off after them, there is a danger you will deplete the species on which subsistence depends. You better bear that in mind."

On the bench of grass at Kivalina, the men stand apart, watching the women with *ulus* and talking among themselves of the hunt. The talk drifts to walrus. Many have been sighted on the ice to the north. Too many, maybe, a hunter says. And skinny—not enough clams for so many walrus. And these newspaper stories from Seattle and Anchorage, all about "head-hunting." Sure, there may be a few Eskimos here and there who take the walrus only for its tusks, ivory bringing the price that it does. But what about the walrus that die of natural causes, or the ones that are mournfully lost to the sea by a misplaced shot, and which later wash up on the beach, only to be de-tusked or beheaded by some *gussok* from a Cessna cruising the coast between Barrow and Nome? It happens both ways. Besides, when the too many walrus go the way of the caribou,

crashing, then the federal and state Fish 'n' Game men will have to find scapegoats. And one Eskimo hunter says to another, "Hey, Scapegoat. Guess who?"

It is getting on toward midnight now, yet the sun still hangs in the sky, poised like an *innipkak* mirage over the coastal hills of the Brooks Range. I walk to the edge of the gravel beach and stare at the water. There is an iridescent film of petrol lapping at the shore, no doubt the smallest of spills from some outboard nearby. Or could it be a seep from the floor of the sea? Possibly, for geologists tell us that under the floor of the Chukchi is a mother lode of gases and oil. The same federal agency that would zealously protect the subsistence way of life in Alaska—the Department of the Interior—has published maps showing areas of the state's outer continental shelf that are under consideration for petroleum exploration and leasing. And drilling. One of these areas is identified as the Hope Basin. Across the lead of open water and the edge of the ice, I am looking at the Hope Basin now. And I recall a voice that I heard once in Washington, D.C., a voice concerned about walrus and *uguruk* and other creatures essential to the people who live on these shores. "Have you ever seen the rigs off Santa Barbara?" the voice is saying. "Well, that's the Hope Basin. When they get around to it, it's going to be full-tilt boogie."

Game on the Rivers

Alaskans are hugely partial to moose. No other big-game animal is distributed so widely across the Great Land, and none pursued with such fierce loving determination. Alaskans are in fact so determined to have their moose and eat them, too, that they kill about ten thousand every year, though fewer than half this number are officially tagged and reported to the authorities who keep score of the harvest. Moose steak is no less cherished in Anchorage than in Allakaket; it pleases the Euro-American to about the same high degree as the Athapaskan. Total consumption statewide runs to more than five million

edible pounds each year, or about twelve and a half pounds per capita; which, though not a great deal, is still more than the national per capita ingestion of fish, and more than twice the consumption, per capita, of lamb and veal in the Lower Forty-eight. However you slice it, there is nothing quite like the prospect of moose, or of no moose at all, to bring out the feist in Alaskans. Men break laws to assure a fresh moose in the meat locker. Given the gap between supply and demand in the woods, men may soon be breaking each other.

Time used to be, say twenty years ago, a man could take his moose in his own backyard, or not far beyond it. At dawn, he could drive a few miles past the city limits of Anchorage, or go out of Fairbanks, across the Tanana River and into the willow flats, and, with luck, have his moose on the ground by noon. Time, too, when the Indian stalking a moose on the banks of the faraway Koyukuk River never saw white men on Opening Day. Times change. Now, because of increasing mobility and leisure, but mostly because of intolerable pressures on game near the cities, the hunters of Fairbanks and Anchorage are pushing into gamier places farther from home, into places the villagers view as their own.

Consider the Koyukuk, a remote watershed rolling from the Central Brooks Range to the Yukon River near Galena, some three hundred miles from Fairbanks. According to one estimate, about six thousand pounds of game meat was taken out of this area by airplane in 1975. By 1977, the airborne meat had quadrupled to nearly twenty-four thousand pounds, much of which went to Anchorage and Fairbanks. There could have been more. By the same estimate, for every four pounds of game flown out, six were left behind on the ground, at the site of the kill. And the sports speak of waste.

The prospect of meat left to rot on the ground and of moose antlers flying to faraway cities infuriates the people of bush Alaska. Their councillors write angry letters to the Board of Game. Their Native associations demand regulations to discourage the influx of alien guns. In response to these demands—in reluctant response, some would have it—the Board

approved a number of changes in the rules. For critical areas here and there, the season for moose was drastically shortened, which turned away some of the urban hunters (but few of the rural ones, since much of the local harvest occurs out of season in any event). For some areas, too, the Board authorized "registration hunts," and these require each hunter to obtain, carry, and later surrender for the record a special permit bearing his home address. Not that this of itself is a deterrent to urban hunters; it simply gives the game managers a more accurate picture of where hunters are coming from and of what they are taking away.

The only real deterrent, so far, is what is known as a controlled use zone. The control is of transportation. In effect, you may walk in, or swim in—but fly into a controlled use zone you must not. Leaving is easier: You may fly out. Yet if you do, and have killed a moose, you can't take it with you. Controlled use zones are nice places to visit, but you wouldn't want to hunt there. The last I heard, only two had been approved by the Board, both on the Koyukuk River.

Under the state's new subsistence provisions, the ultimate step would be to declare an area off limits to all hunters from Outside, whatever their mode of travel. But the sports are certain to test this provision in court. They have promised as much. Tom Scarborough, a director of the Real Alaska Coalition and past president of the Tanana Valley Sportsmen's Association, told me in Fairbanks that attorneys are prepared to challenge subsistence zoning on constitutional grounds. "We'll stir up a lawsuit," he said, "to settle this issue of common use once and for all." Shades of the caribou permits at Nuiqsut.

So anger in the bush is matched by pique in the cities. Among hunting folk, the distemper seems to run strongest in Fairbanks, where sporting bias is carried by the hometown press, the *Daily News-Miner*, and by the newsletter of the Interior Wildlife Association of Alaska ("the voice of the hunter in the State of Alaska"), which holds that "hunting, fishing, and trapping as we have known it [*sic*] is practically wiped out" as a result of the Alaska Native Claims Settlement Act and Presi-

dent "Adolf Carter's Salt Agreement: Steal Alaskans' Land Today," otherwise known as the Antiquities Act. Fairbanks provides fertile ground for such palaver. Regardless of its voting profile, despite its university, I'd guess Fairbanks ranks among the most intrinsically conservative cities of America—a legacy, no doubt, of past or present affiliation with Big Oil, Big Military, and Regular Guys who believe that bigness is the best way to go. Except in government.

Poking into the woof and warp of hunting sentiment in Fairbanks, I found people more or less hanging to the ends of two threads. One led to the conclusion that those who pay should have the say; that whereas fish and game management in Alaska is financed through license fees and matching funds, and whereas most of these fees are paid by urban sportsmen and Outsiders on guided trips, and whereas many bush folk pay nothing at all, now therefore be it resolved that sportsmen, having paid their dues, should be entitled to take moose anywhere that moose are available for common-use taking, subject to reasonable biological, rather than socioeconomic, constraints. Moreover, the feeling goes, the Natives had better get flexible about subsistence. Otherwise the rug will come out from under them as legislative reapportionment deflates the Bush Caucus and restores power to the solons of Fairbanks and Anchorage, where more than half of Alaska's people already live.

The other thread leads back to the Alaska Native Claims Settlement Act (ANCSA) of 1971. The act extinguished all claims based on "aboriginal title" in exchange for the transfer to Native groups of 44 million acres of federal land and the payment, over time, of some \$900 million. Sportsmen of a certain pique say this should have been more than enough to keep the Natives happy. They say that ANCSA effectively abolished for all Natives any preferential right to fish and game. Yet the final report of the House-Senate conference committee on ANCSA said otherwise. The committee said it believed that "all Native interest in subsistence resource lands can and will be protected by the Secretary [of the Interior] through the exercise of his existing withdrawal authority. The Secretary

could, for example, withdraw appropriate lands and classify them in a manner which would protect Native subsistence needs and requirements . . . when the subsistence resources of these lands are in short supply or otherwise threatened. The conference committee expects both the Secretary and the state to take any action necessary to protect subsistence needs of the Natives."

Pique and anger in moose country are heightened further by a good bit of confusion as to who may or may not qualify as a bona fide subsistence hunter. The intent of the language from Congress may be clear enough insofar as Indians and Eskimos are concerned, but what about the pale-skin sourdough loners who have come into the country with the dew of Boston or Birmingham behind their ears? Congressman John Seiberling wondered about this himself at a hearing in Anaktuvuk.

"Let me ask you the sixty-four-thousand-dollar question," he said to Rosita Worl, a Harvard anthropologist who was offering d-2 testimony on the strength of two years' work among the people of the Arctic Slope. "As a practical matter, how can the authorities, whether they are federal or state, know which are subsistence hunters and which are not? . . . We can't just say Natives have the right because I think that would probably violate the federal constitution. . . . We are going to have to make it clear if a white man comes up here and starts to live Native-style and live on the land, that he is a subsistence user also. Do you agree with that?"

"No," Rosita Worl responded. "I said that subsistence is a right that has been achieved after three thousand years or ten thousand years."

Seiberling did not buy altogether the Worl criteria. Neither do those Indians and Eskimos who are married to bush whites, much less the sourdoughs themselves. "Damn it to hell," a boondock exile from Outside told me one day in a middle Yukon village. "My people were eating moose meat ten thousand years ago, too. The Pilgrims ate wild turkeys. And my great-great-grandpappy lived on deer. So because my own folks eat cows in Missouri, who's the dropout? Papa or me?"

The village hangs above the river where the rounded ridges of the Kuskokwim Mountains tumble down to the Yukon trench. Indians once called the place Melozikaket, after the Melozitna River, which comes out of the Ray Mountains and enters the Yukon two miles upstream, on the other side. That was before 1907, when white men discovered gold in the village creek. Afterwards, many of the Indians moved out, to a place called Kokrines, upriver, and many white men moved in. By 1912, there were one thousand whites in Melozikaket, only they didn't call it that any more. They called it Ruby. And in honor of their own cultural heritage and their individual expectations, they went about renaming almost everything; so that before long the maps showed Boston Dome and New York Creek, and Easy Money Creek, and down the trail a faraway piece, an outpost called Poorman, which proved in time to be the most appropriate name of all. Then the Indians came home again from Kokrines. When I flew into Ruby last time out, the census digits showed a population of 190 Indians and 30 whites. But the digits keep going up, for in addition to being a splendid place for Indians, Ruby is as likely a perch as any for those moose-hungry sourdough loners from Outside.

Moose and salmon are the mainstays of Ruby. The salmon come in seasonal waves, silvers and chums, the latter being known by Eskimos downstream as dog salmon, since these are the fish which they feed to their dogs. Indians do not especially care what Eskimo dogs eat. But to hear the word "dog"—applied to a salmon *they* eat—hurts. It is a small enough matter, inter-tribally, though it adds somewhat to the ancient territorial rancor.

The moose also come in waves; not seasonally, but decade to decade, depending on weather and wolves and browse, and more recently on the number of boats and floatplanes bringing urban hunters from far away. Ruby hunters, and their subsistence counterparts from Tanana upstream, have a special place that is generally better than others for moose. It is the taiga country of the Nowitna River, which joins the Yukon between

the two villages. But now the Nowitna has become a special place for autumn travelers from Fairbanks and Anchorage, too. In the autumn of my own visit, the Game Board had imposed a ten-day season along the Nowitna, and ordered that the hunt be by registration, so that permits would show where the hunters were coming from and what they were taking away. "We wanted this four years ago," said Harold Esmailka, operator of Harold's Air Service, which is based in Galena, though Harold himself lives in Ruby. "But the urban votes on the Board were against it. Now we have it. The game is here for everyone. And God help us all if the moose should ever be shot out from under us."

Down a dirt road from Esmailka's place is the home of Albert and Dolly Yryana, the elders of Ruby's pale-skin tribe. Dolly's parents mined for gold near Dawson, in the Yukon Territory, then moved to Alaska in 1917. By the time she reached Ruby, most of the miners and grubstakers were gone, but new folk were moving in, including Albert Yryana, who arrived from a farm near Houghton, Michigan, by way of Southeast, in 1935. Houghton is in the iron and tall-timber precincts of Michigan's Upper Peninsula. It is a place of tough-minded Finns and irascible winters; and there was and is, probably, no better turf for seasoning those who would trade the Outside for the bush of Alaska. Albert Yryana, pushing seventy, hunts moose and traps marten and beaver and takes fish from the river, prospects a little for gold, and, with Dolly, tends to a summer garden where cabbages grow bigger than basketballs under round-the-clock sun. "It's the best place in the world to make a living," he said to me in his backyard, sweeping his arm from the cabbage patch toward the dark spruce forest beyond. "You fertilize the garden, throw down the seeds, and jump back—just in time to get out of the vegetables' way."

The prospect of agriculture in Alaska is intriguing to white-haired Albert Yryana, as it is to many whose ethnic roots lie behind them somewhere deep in the hardscrabble fields of Northern Europe. It seems an incongruity to hear them speaking of farming here on the edge of nowhere. Yet farming is what all pioneers have eventually wanted to do, after the moose

and beaver were gone, and the gold. Down the Alaska Highway from Fairbanks, near a place called Delta Junction, ten thousand acres are in cultivation, mostly to barley, and agronomists already are speaking of seeding a half million more. There are expectations of a market in Japan. And if that doesn't work, then the grain will be used to support a domestic meat industry. Barnyard sheep—grain-fed in winter, in summer grazing Granite Mountain and the Macomb Plateau. And this greatly worries the wildlife people, who remember what happened to the wild bighorns, Outside, when domestics were unleashed on the Rocky Mountains. But Albert Yryana wasn't speaking of the Delta project in his backyard at Ruby. He was speaking of *Ruby*, and of Yukon River places round about, the Flats upriver, possibly, and of fields of waving grain, and barges, and draglines dredging a fifty-mile canal to spill the Yukon's waters into the Kuskokwim at Bethel, the nearest seaport.

"What's wrong with *that* idea?" said Albert Yryana. I said nothing, though I expect I should have, if only to inquire how one could possibly hold agribusiness by one hand and salmon and beaver and moose by the other.

We walked out in front of his place and stood on the dusty road that goes down to the edge of the river, and then I did ask Yryana to share with me his thoughts on subsistence in general, and moose in particular. He addressed himself to both succinctly, and democratically. "Each man is entitled to the same privileges," he said. "That is the American way. If a man wants to hunt, *any* man, then let him hunt. But we must not forget that people are increasing in Alaska, and so are wolves. One or another is going to have to give up moose meat. Or there won't be any left."

Jim and Betsy Hart are the proprietors of the Ruby Roadhouse, a homey hostel offering bed and board, downhill from Albert Yryana's cabbage patch. The roadhouse dates to mining days, when there was a little more traffic than there is today; although the roads, now as then, go nowhere, except to Poorman,

which is also nowhere in any event. Judged by the criteria of Harvard anthropologist Rosita Worl, the Harts, with their modest business and white skin, would not qualify as subsistence users, for they lack the uninterrupted ten-thousand-year continuum of scratching a living out of the woods. But under less rigid values, the Harts would seem to come about as close as village white folk can, for they do take fish from the river and game and fuel from the woods, and without these resources they would not in all likelihood be able to carry on. Nor would they want to.

Jim and Betsy Hart met in 1970 at a commune near Fort Collins, Colorado. He was a carpenter; she, a candlemaker. In the youthful, earthy spirit of that time, they longed to be off to wilder places, which, at least on this continent, are generally known to be found by following the compass north by northwest. Soon they were heading for Alaska, but got only as far as Washington State. In Washington, they encountered other young couples who had already tested their verve against the long Alaskan winters and, deciding that discretion was the better part of valor, had returned to the Outside. The Harts agreed they would put Alaska out of their minds. They bought a piece of land west of Spokane, miles from the nearest human settlement, erected a tent, and proceeded to build a log cabin, where they lived for nearly three years. But Jim kept dreaming of Alaska. "Forget it," said Betsy. "We're not going." Jim said they were. And they did. Fairbanks was booming in 1975. Good carpenters could count on good money. If the work slowed in one place, you simply moved to another. Still, there was this yearning for the bush, for living close to the land. For a while, they lived at Emmonak, a Yupik village near the mouth of the Yukon. And then Galena. And after four years in Alaska, they felt they were seasoned. Jim and Betsy Hart were ready for Ruby.

I stayed with the Harts at the Ruby Roadhouse for two days in early September, waiting for the moose season to open on the Nowitna, the "Nuvi," as everyone seemed to call it in town. We ate salmon hearts for breakfast and sheefish for supper—fresh, and no cardboard and cellophane for the trash. On

the third day, Jim Hart took me to the Novi in his boat, about fifty miles the way the Yukon turns, two and a half hours by the clock, with the big outboard engine straining against the knotty current. And as the golden foliage of riverbank birches flicked by, we talked about city and country things, and hunting, and how bush people feel when strangers come into their woods, looking to take away moose.

"Even in Washington," Hart was saying, "it used to drive me nuts. You're living out there in the woods, making a huge payment on the land every month, and here come these guys in hunting season, who are living in town on hundred-foot lots, making huge payments on houses. Well, hell. It was *their* choice." He pointed to the left bank, where a cluster of tumble-down huts hunkered above the river. "Kokrines," he said. "The old village. Just ghosts, now." And then picked up the train of his thoughts. "I have these friends in Fairbanks," he said. "Nice guys. They live there, I live here. They have movies and fancy clothes. I do without. But I have moose and salmon. That's *my* choice. So why shouldn't they do without some of the things we have here?"

The river straightened out ahead of us like a lake. Hart lowered his head behind the windscreen, lit a cigarette, and said, "You know? So many people spend so much time getting ready to move to the country, they never quite get here."

"There're still a lot who do," I said.

"Nine out of ten won't stay."

"That still leaves one. Times how many?"

"Who knows?" he said.

No one knows how many young men and women from tamer places are moving to rural Alaska, and staying, as the Harts did. By some accounts, the rate of immigration has leveled off. By other estimates, it is growing yearly. In Juneau, Robert LeResche, the state's Commissioner of Natural Resources, told me: "Everyone's dream of Alaska is a little cabin out in the bush. The Natives are getting worried. And I don't blame them." In Kotzebue, John Schaeffer of the Northwest Alaska Native Association said: "The hippies—I don't mean that nastily, but that's what most of them were ten years ago—

the hippies bring the Western culture with them. When you have twenty of them moving into an Eskimo village of, say, a hundred people, then you are going to have disruption."

The state of Alaska no longer officially tolerates squatters in cabins on its own remote lands. Instead, it encourages a kind of pay-as-you-go homesteading, parochially known as "open to entry." After just one year's residency, for example, a *nouveau* Alaskan might purchase, near Circle Hot Springs northeast of Fairbanks, a 4.3-acre lot for as little as \$2,600; or rent it, on a five-year lease, for \$182 a year, with the right to build and an option either to buy or to renew the lease for another five years. Or, if a parcel is unsurveyed, one might stake out five acres himself and pay annual rental of only \$150 for ten years, meanwhile living there in a homemade cabin, with an option to buy at the expiration of the lease. Or, with at least three years' residency under the belt, one might apply for a "home-site entry," also of five acres, and live and die on it at absolutely no cost other than the expense of filing the application, platting the land, and building the cabin. Given the price of housing Outside, where the most modest of homes on a hundred-foot lot starts somewhere around \$40,000, I'd guess one hell of a lot of young folks in the years ahead will be spending less time getting ready to move to the country, and more of it living there. Which isn't good news for Robert LeResche or John Schaeffer. Or Jim Hart, for that matter.

"So what are you going to do," I asked him, "when it starts getting crowded around here?"

We had come to the mouth of the Novi, and now Hart swung the boat in a wide arc that carried us out of the silt-creamed Yukon into the tannin waters of the tributary stream. "I don't know what I'm going to do," he said. "Maybe I'll buy an old paddle-wheel steamboat and take the tourists up and down the river. And maybe I won't. Maybe Betsy and the kids and I—we'll go on down the river somewhere and build a cabin and fish and hunt and trap—goodbye, roadhouse—and just watch all the water roll by. Maybe."

The two Indian men had pitched their tent on a point of land a mile up from the mouth of the Novi. With a chain saw, they laid in a good supply of spruce logs for the fire. Then they hung some salmon strips on the branch of a willow, set up a latrine back in the brush, and fashioned a sign out of two spruce stakes, an old poncho, and some paint. The sign addressed itself to the river and to whoever might be passing by. It said, though not in so many words, that this was where, if you didn't have one already, you could pick up a Fish 'n' Game permit to go up the Novi with rifles, for moose. Having done all of this, the two men, Fred Jordan of Tanana and Jim Honea of Ruby, sat down on a couple of stumps and waited for Roland Quimby.

September is a splendid time to be on the Novi. Warm days and cool nights, mosquitoes in full retreat, hardwood foliage bright against the Gothic spruce. It is a flat, muskeggy kind of country upstream, with ponds and bogs enough to wet the fetlocks of a fair number of moose, and browse enough to give the bulls a head start toward trophy antlers. Probably, the Novi has always been a pretty good place for browsers, though, going back far enough, of a different kind. Upriver a way, years ago, earlier travelers found mastodon bones exposed in the side of an undercut bank; and ever since, there has been speculation as to whether these great Pleistocene elephants were ever hunted here by men, and if so, whether the hunters were settled-down residents of the country or outsiders trespassing through, on their way to Nowhere from Asia.

Roland Quimby was coming to the Novi more or less from that direction though he had started a good bit closer, in Galena. Quimby is the state's wildlife biologist for the middle Yukon region. Into this turf of his, you could drop the entire state of Kentucky and still have room for Maryland, if you spread it around the edges. In Louisville or Annapolis, a biologist gets in his car and is out of bounds in an hour. In Galena, Quimby gets in his putt-putt to make the rounds and has to count days to make sure he'll get home before freeze-up. And now he was up beyond Ruby and Kokrines, turning at the Novi to Jordan and Honea's camp on the eve of Opening Day.

All through the afternoon, before Quimby's arrival, and my own, Jordan and Honea had sat on the point of land counting boats. Eighteen had come by since noon, mostly small boats with two or three hunters in each, but some with groups much larger. Altogether, Jordan figured, there were probably sixty rifles upriver, not counting those coming in by floatplane. The traffic let up for a while and then, just before dark, four more boats came by, including a cabin cruiser and a larger vessel of a kind that once might have been used for commercial fishing. I counted eight faces on the fishing boat, but there might have been more hidden among the crates and duffels and coolers and tarps and tents, and oil drums, cluttering the deck.

Two of the men needed permits and came ashore. They were from Fairbanks. They said they had put into the Yukon off the Haul Road, 230 miles upriver. They hoped to rendezvous in the morning with another boat that had put in at Manley Hot Springs, on the Tanana River. They wanted to know how many hunters were already checked through, ahead of them. "Lots," said Fred Jordan. Honea and Jordan were filling out the permits. They were not regular employees of the Department of Fish and Game; just temporaries, salaried under a grant to the state from the Bureau of Indian Affairs. One of the Fairbanks hunters kept looking at Quimby and me as Jordan asked him some routine questions for the permit. The hunter seemed to be wondering what an Indian was doing here on white man's business. I wanted to say to him, but didn't: What are *you* doing here on *Indian* business? Then the two went away with their permits, and Quimby called after them, "Take 'er easy." The hunters turned and waved. "Don't know what they'll do if they get a moose," said Quimby, watching the boat pull away with its gunwales scant inches out of the water. "If they try to take one out of here, they'll sink."

After supper, we sat by the fire, roasting our boots. Fred Jordan told us of the people's resentment in Tanana when the boat hunters come through. Jim Honea said it was probably not as bad in Ruby since the boat hunters rarely went that far, though a few went even beyond, past Galena and then up the Koyukuk.

"Most of the hunters are from Fairbanks," I said. "Where are the local people?"

"Busy with other things," Jim Hart put in. He had decided to spend the night and go back to Ruby in the morning. "Commercial fishing just ended here the other day. People are getting in their firewood now. And the weather's still warm. Lot of the people don't have the freezer capacity for a moose. They'll wait until the end of the month. Then it'll be cold enough to hang the meat in a shed."

"So a ten-day season in September doesn't have much value for the local people."

"Let's just say," said Jim Hart, "that it's not used."

Quimby dropped another spruce log into the fire. The log flared, and light flickered softly across his face. After a while, he said, "If there's anything that's really impacting the boreal ecosystem up here, it's not mineral development and it's not the pipeline. It's the BLM [Bureau of Land Management] and its policy of putting out fires." Around the campfire, heads nodded agreement. "I don't know," he went on. "If it keeps going like this—I mean as far as moose are concerned—only thing to do is drop back and punt."

Forest fires seem to be the key to moose survival in interior Alaska. A fire will sweep away the spruce cover, fertilize the earth with its ashes, and bring on a bloom of rich browse. Studies show a big difference between moose densities in old-growth forests and those on burnt-over lands some five years, say, after the fire. Yet the BLM, for the most part, still subscribes to the gospel according to Smokey the Bear. And so does the state of Alaska, which, for all its official obeisance to hunting, seems more intent on growing mortgages than moose.

In the morning, Hart went back to Ruby, to put away fish for the winter, while Quimby and I moseyed along the Novi, checking out sloughs for moose. And it wasn't long before we saw one, a cow, about a hundred yards off at the dry end of a meander. Quimby throttled down the outboard, stilled it, and we drifted. "I guess this beats going to meetings," he said.

"It ought to," I said. "You must take a lot of heat."

"They never prepared me for it at Syracuse. Few years ago, the forestry school sent letters to alumni asking how well we felt the curriculum prepared us for our work. I wrote back saying everything was fine, but that I sure could have used some learning in the politics of wildlife."

"The Natives don't think very highly of you guys."

"So I've discovered. But we're not trying to win a popularity contest. We're trying to manage a— There she goes." I looked down the slough in time to see the cow pussyfoot into a line of willows. Quimby went on. "I see RurAL CAP people and sport hunting people come into these meetings and shout, 'Hey! How about us?' But I've never seen a moose come to any meeting. I kind of feel *someone's* got to speak for the moose."

Onion Portage

Before it was over, there was another river, another golden autumn morning looking for game. This river was the Kobuk, two hundred miles from Ruby, north by northwest; the morning, at a place known as Onion Portage, where Kobuk people used to shortcut a riverine oxbow before aft-slung motors and fossil fuel made portaging silly. Bob Belous of the National Park Service was with us, and David Cline of the National Audubon Society, and Nelson and Edna Greist, an Eskimo couple from Ambler, upstream. Proof of the pudding that State Game Director Ron Somerville was right on the target: an "unholy alliance between the Natives and preservationists." What more could you ask?

The previous afternoon, we had come downriver from Ambler in Greist's boat. We passed some fish camps, a few other boats with berry pickers chugging upstream, passed the Portage and Greist's own camp nearby, and pulled in at the homestead of Howard and Erna Kantner on a hill overlooking a broad valley near the Kobuk's confluence with the Hunt River. Beyond the hill were the Baird Mountains, and unseen

beyond them, the Noatak Valley and the main stem of the Brooks Range. Beyond that, the Arctic Slope, north by northwest. And then, nothing. Not even Nowhere.

Howard and Erna Kantner—he from Toledo, she from Cleveland—have lived on the Kobuk River for sixteen years. They have two children. Their home is a log igloo built into the side of the hill, sod-roofed, one room with alcoves, and windows on one side only, facing the river. There is a wood stove, made from an oil drum; a small windmill with generator, for light in the winter; a garden with zucchini, for the summer; an out-house, a sauna also built into the hillside, and a meat shack on stilts. For a month in the summer, the family goes to Kotzebue to work in the commercial fishery. In the winter, Kantner traps lynx. They eat the lynx meat; also berries, fish, and caribou, and sometimes moose. In good years, the caribou come south out of the mountains along the Hunt River in the fall, and Kantner takes them on the tundra plain behind his hill, as the ancient people may have done when they, too, lived in igloos of log at Onion Portage.

We climbed the hill and sat with the Kantners, drinking coffee and talking about the country. Their place, and the Portage, lie just inside the eastern boundary of Kobuk National Monument. The Kantners are uneasy about living inside a park, especially since it happens they don't own the land. They simply moved onto it, sixteen years ago, and no one in the federal government seemed to care much, one way or the other. But suddenly the government does care, for Bob Belous of the Park Service was here in their home now, speaking of options, of leases or conveyances. There would surely be some accommodation. And the Kantners listened closely, nodding their heads; wondering, possibly, how different it might be with the Smokey the Bear hats cruising back and forth on their street, the river.

Dave Cline and Belous wrestled with that idea far into the night, after we left the Kantners, in a candlelit cabin not far from the Greists' fish camp. The cabin was built by the late J. L. Giddings, the Brown University scientist whose trowel first uncovered the middens and house pits of the long-ago

caribou hunters of Onion Portage. And Giddings had lived here through all the summers of his painstaking dig.

In the morning, while Nelson Greist loaded the boat with turnips from his garden, and Cline scouted the shoreline for wild onions, Belous and I walked up through the site of the main dig to a knoll overlooking the river on one side, and, on the other, tundra rolling off to the barren slopes of the Bairds and the notch where the Hunt River comes out of the mountains.

Belous said: "From here you can see forever. From here, people for ten thousand years have been looking up at that pass, and at this time of year, too. There weren't any spruce or birch here then, along the river. The trees didn't come in until about seven thousand years ago. But the people were here then. Imagine it. The men with their spears, coming up here to wait for the caribou. The herd coming down from the mountains, piling up at the edge of the river, then plunging across. That's probably where the people took most of them. In the water, from boats. All those years. My God, what a resource."

Giddings himself had pictured the early hunts in much the same fashion. In his book *Ancient Men of the Arctic*, he wrote of the caribou streaming "determinedly by the thousands down past the slopes of Jade Mountain onto the high ground leading to Onion Portage." And there, he guessed, the Kobuk people had built "diverting fences to lead the caribou down slopes and into the water where they might be slaughtered with spears from one-man bark canoes. As soon as the animals began to appear," Giddings went on, "men, women, and children all took part, urging the caribou along until they plunged into the stream where the spearsmen waited. I could visualize the brown-gray herds pouring rhythmically over the bare slopes between the mouth of Jade Creek and Onion Portage, the splashing of paddles in the boats, the plunging of spears and knives into the demoralized swimmers, the spurts of blood mingling with the rush of the blue Kobuk water, and the dead and dying animals, held aloft by their buoyant coats, drifting with the current to the gravel beach at Onion Portage."

The caribou would be coming soon. We had seen the lead-

ers the day before, from the air, survivors of the herd that had crashed and was on its way back, building strength in numbers. The lead bulls were out on the plain below Jade Mountain, breasts showing white against the purpled heath. Already the word had gone out in Ambler and Kiana and Noorvik. The men in their boats would be on their way any day now. With rifles.

Belous had been watching the pass with his hand at an angle against the temple, shading his eyes. Suddenly the hand came down, the wrist flicked out of the cuff of his jacket, the edge of a watch flashed in the sunlight. Belous seemed surprised, and maybe a little bit sorry, that the watch was there.

"Time we were getting back?" I asked.

Belous nodded, but his eyes were still fixed on that notch in the mountains.

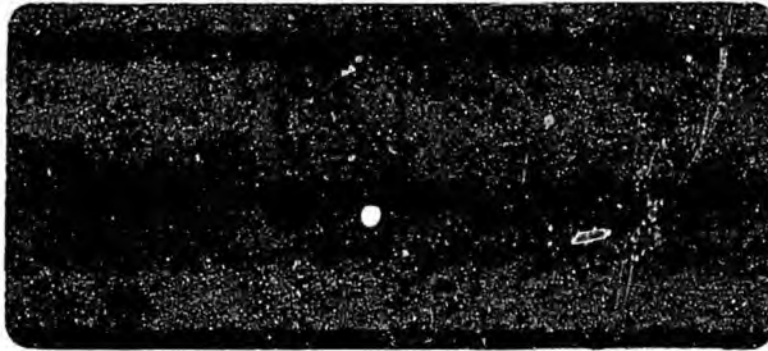
Book Five

COUNTRY MATTERS

ALASKA OUTDOOR COUNCIL
SUBSISTENCE CONSENSUS POINTS

AUGUST 21, 1985

1. Permitting: A permit will be required for subsistence preference use. Permitting will be based on personal or family qualifications--not on the locality in which one lives nor upon racial, cultural or ethnic considerations.
2. Limiting Qualifications: Qualifications for the permit will be very restrictive, requiring that: (1) the wild resource taken be used for personal and family consumptive use only; (2) the applicant must assert and establish that he needs the subsistence because it is reasonably necessary for his survival or the survival of his dependent family; and (3) the permit should be limited to a family unit with income from all sources at or below Federal poverty levels with no more than one subsistence license per family unit.
3. Subsistence Seasons and Bag Limits: The permit holders will be subject to specific subsistence regulations regarding applicable or substituted species by area, seasons, quotas, bag limits and methods and means as authorized by the Boards of Fish or Game. The opportunity to harvest will be given a preference but no guarantee of harvest is intended.
4. Preference Not Priority: The preference will not be an absolute priority over sport, commercial or recreational use. These latter uses need not necessarily be eliminated before subsistence preference use is restricted or regulated.
5. Trade and Barter: Trade provisions will be similar to those in current state law. Subsistence use may include trade, barter or sharing for personal or family consumption of wild renewable resources and must be limited to the first exchange. No cash exchanges or commercial sale shall be included in subsistence use.



Alaska Department of Fish & Game
Division of Subsistence
Technical Paper Series



TECHNICAL OVERVIEW OF THE STATE'S
SUBSISTENCE PROGRAM

by
Dennis D. Kelso

Technical Paper Number 64

Alaska Department of Fish and Game
Division of Subsistence
Juneau, Alaska
December 1, 1981

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I. INTRODUCTION

Alaska's human history is thoroughly entwined with the use of wild, renewable resources. Among northern aboriginal peoples, adaptations directly related to patterns and cycles of resource availability are among the key elements of sociocultural differentiation. After contact with western society, the harvest and distribution of locally available food and materials continued to provide essential economic, nutritional, cultural and social benefits to a large number of communities and households. For non-Native residents, as well, the traditional use of fish and game has satisfied similarly important needs. Today both Natives and non-Natives participate in subsistence economic systems. These economies may be understood as non-codified systems of production and distribution which effectively facilitate the harvest, use and exchange of renewable resources. Although modern subsistence systems in Alaska usually have some cash flow, they produce goods primarily for local consumption rather than for export and have only limited connections to the market economy. See Lonner, T., Subsistence as an Economic System in Alaska: Theoretical and Policy Implications (1980). Even in towns having viable non-subsistence economic elements, subsistence systems nevertheless may be functional and vital to the entire community at certain times of the year, or to subcommunities, groups, or households which rely on subsistence harvests.

II. POLICY DEVELOPMENT PRIOR TO ENACTMENT OF THE STATE'S SUBSISTENCE STATUTE

Against this background, the State of Alaska has generated policies, research, and regulations to address subsistence. The evolution of

to residents of northern and western Alaska. See 1961 Alaska Sess. L., House Resolution No. 29 (April 3, 1961).. In 1963, the Senate requested the Secretary of the Interior to rule formally "that migratory waterfowl may be taken in Alaska by persons who have been traditionally or are otherwise dependent on them for subsistence." 1963 Resolutions of Alaska, Senate Resolution No. 50 (March 26, 1963).

In 1975 the Alaska Legislature divided the Board into distinct Boards of Fisheries and Game. See AS 16.05.251 and AS 16.05.255. For the first time the legislature also authorized the Board of Game to regulate subsistence hunting apart from other types of hunting. See AS 16.05.257 other provisions governing the Board's authority in relation to subsistence use appear in AS 16.05.255). The legislative letter of intent accompanying House Bill 369, which was adopted as chapter 199, Session Laws of Alaska 1975, contained the following language:

It is the intent of the majority of the House Resources Committee in reporting out HB 369 to have the Board of Fish and Game adopt regulations relating to subsistence hunting parallel to the regulations governing the existing fishing regulations.

It is not the intent of the committee to deny subsistence hunting to any resident of the state of Alaska who is eligible to subsistence hunt. It is further the intent of the committee that the Board define subsistence hunting by regulation.

In 1976, the legislature changed the subsistence hunting provisions so that local residents could petition for subsistence hunting areas. See AS 16.05.257. In its findings, the legislature stated:

[T]raditional dependence on fish and game resources is a continuing and necessary way of life in many areas of the state and . . . the protection of subsistence usage of these resources is essential to the health, safety and general welfare of the citizens of the state in those areas.

Section 1, chapter 269, Session Laws of Alaska 1976.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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these developments began at statehood. However, the State's first Fish and Game Title, enacted in 1959, contained only one reference to subsistence. Subsistence fishing was identified as non-commercial fishing with a gill net, seine or fish wheel. See AS 16.05.940(17). Accordingly, the Board of Fish and Game regulated non-commercial gill net and fish wheel fishing as subsistence. Although subsistence fishing regulations were adopted, the Board did not establish specific criteria for participation in the fishery; anyone could apply for a subsistence fishing permit.

In regulating game harvests, the Board did not adopt explicit subsistence provisions or differentiate between subsistence hunting and other types of hunting.

This approach to subsistence must be considered in context: harvest competition was still relatively low from Alaska's small population; in many areas enforcement of regulations was minimal or non-existent; and information on the extent and patterns of subsistence use was not readily available. Under these circumstances the Board concluded that its bag limits and seasons were sufficient to provide for subsistence.

Even before increased harvest demands from all user groups led the Board to adopt formal policies on subsistence, the Alaska Legislature demonstrated its concern for the continuation of subsistence opportunities. In 1961, the House passed a resolution urging amendments to the federal Migratory Waterfowl Act which would have allowed spring hunting of migratory waterfowl; the House emphasized the importance of this harvest

to residents of northern and western Alaska. See 1961 Alaska Sess. L., House Resolution No. 29 (April 3, 1961). In 1963, the Senate requested the Secretary of the Interior to rule formally "that migratory waterfowl may be taken in Alaska by persons who have been traditionally or are otherwise dependent on them for subsistence." 1963 Resolutions of Alaska, Senate Resolution No. 50 (March 26, 1963).

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Section 1, chapter 269, Session Laws of Alaska 1976.

During the same year, the Boards adopted a policy statement which provided, in part:

By reason of culture, location, economic situation or choice, large numbers of people will find it impossible to abandon or alter their way of life at a pace paralleling changes brought by new shifts in land status and ownership, nonrenewable resource developments, road extensions and transportation improvements and a phenomenal rate of population growth. . . .

The existing variety of cultures and life styles in Alaska are of great value and should be preserved. While limitations on the productivity of fish and game must discourage continued increases in the numbers of subsistence type resource users, domestic utilization is still of fundamental importance to many Alaskans, and accordingly it is assigned the highest priority among beneficial uses.

Policy Statement on Subsistence Utilization of Fish and Game, Alaska Board of Fish and Game and the Commissioner of Fish and Game, #75-12-FB.

The Board of Game soon attempted to implement this policy through an emergency regulation allowing a limited harvest of bulls from the then-declining Western Arctic Caribou Herd. The regulation authorized 3,000 permits to be distributed among 16 northern villages. The village allocations were to be based on recommendations of village councils and corporations in light of population, need, availability of alternative food and employment, and other factors which assist in meeting "minimum sustenance" needs. This action would have provided a clear priority for rural users of the Western Arctic Herd. However, the Alaska courts ruled that improper administrative procedures had been used in implementing the regulatory decision. Thus, without reaching the question of the Board's authority to allocate on the bases chosen, the court nullified the action. See State v. Tanana Valley Sportsmen's Association, 583 P. 2d 854 (Alaska 1977).

III. POLICY DEVELOPMENT IN THE PERIOD BETWEEN ENACTMENT OF CHAPTER 151, SESSION LAWS OF ALASKA 1978, AND ENACTMENT OF PUBLIC LAW 96-487 (DECEMBER 2, 1980)

Between 1975 and 1978 numerous bills were introduced in the Alaska Legislature to make provision for subsistence. Ultimately, House Bill 960 emerged as the composite legislative vehicle for resolving the various policy approaches. H.B. 960 became chapter 151 of the 1978 Alaska Session Laws. The full text of the statute appears in Appendix 1. When it became effective on October 10, 1978, the new statute established specific parameters for the State's subsistence program. Among the most significant provisions are the following:

1. A definition of "subsistence uses" which leaves to the Boards of Fisheries and Game the task of giving content to "customary and traditional uses" through the Board's normal administrative procedures;
2. Priority for subsistence uses in allocations of both fish and game resources;
3. Mandatory procedures for use by the Board of Game when considering special hunting regulations for subsistence;
4. A new research program within the Department of Fish and Game to provide baseline data, issue-specific information, and policy recommendations related to subsistence use of fish and game.

A. The Department of Fish and Game Subsistence Task Force

The enactment of chapter 151, Session Laws of Alaska 1978, meant that the Department and the Boards would have to make certain adjustments to meet the statutory mandate. In August 1978, the Commissioner of Fish and Game appointed a Subsistence Task Force to advise him on appropriate steps for implementation of the new law. In November 1978 the Task Force issued its report containing numerous recommendations. This report is attached as Appendix 2. Its conclusions were of necessity

limited by the extremely small amount of data then available on subsistence systems, but they emphasized the importance of an energetic, integrated program -- including critical regulatory steps:

[T]he Boards of Fisheries and Game will carry the principal burden in defining terms expressed in the law, in determining what constitutes 'subsistence use' in practice, in deciding where and for what species a subsistence priority should be established, and in deciding by what regulatory means this priority will be implemented.

Final Report of the Subsistence Task Force, Alaska Department of Fish and Game (November 20, 1978) at 2.

The Task Force noted that "a number of existing policies, regulations, and management strategies accommodate or provide a preference to subsistence-type uses." Id. at 4. In addition, the report observed:

A wide range of regulations have been promulgated which favor local uses through timing and duration of seasons, liberal or non-existent bag limits, legalization of sale or barter in some cases, constraints on means of access, and even selective enforcement. . . . However, it is also clear that in some cases these mechanisms are no longer adequate in practice, or may not meet new legal criteria. While the Task Force recognizes that various changes in details of policy and in regulations will be necessary, it is important to emphasize that the flexibility of the present regulatory system can accommodate the changing needs of both subsistence and other resource users.

Id. at 4-5.

B. The Boards of Fisheries and Game: Policy Statements and Regulatory Actions

The Alaska Boards of Fisheries and Game also acted quickly to clarify how the existing system would be used to meet the new law's requirements. During their spring 1979 joint meeting, the Boards adopted a policy statement which provided, in part:

Whenever possible, the subsistence priority should be achieved by existing regulatory techniques, such as open and closed seasons, bag limits, control of methods and means of take, and controlled use areas. When a resource is plentiful enough to accommodate all uses, the Boards may not need to distinguish between different types of use. Special regulations such as designation of a subsistence hunting or fishing area to allocate a subsistence resource to local subsistence users may be enacted if the above approach is inappropriate or ineffective.

If further restriction is necessary, priority among subsistence users will be based on 1) customary and direct dependence upon the resource as the mainstay of one's livelihood; 2) local residency; and 3) availability of alternative resources. The Board will depend heavily on data gathered by the Subsistence Section in achieving priority for subsistence and in considering the three factors above.

Alaska Boards of Fisheries and Game, Policy #79-5-JB (March 1979).

This policy is attached as Appendix 3.

The Alaska Attorney General's opinion which accompanies this overview analyzes how the Tier I - Tier II priority structure addresses the interests of rural residents. It is important to note here, though, that the Boards' statement expressly considered the needs of users residing in rural areas, i.e., those users who are "local" to the resource:

Implicit in the two criteria of 'direct dependence' and 'availability of alternative resources' is the idea that a subsistence priority is based to some extent on the actual needs of people. Subsistence needs of individuals, families, and cultural groups may differ in type and degree. . . . Elements to consider in establishing the level of subsistence need include location, local cultures, tradition, customs, and alternative resources.

The Boards recognize the need for regional differences in the approach to fish and game management and they will maintain flexibility by periodically examining social and economic conditions, as well as biological conditions which may warrant a change in subsistence uses and the Board's regulations.

Id.

The non-binding guidelines adopted by the Boards also articulate steps to protect local harvest opportunities. These guidelines provide, in part:

1. When the Board finds it necessary to restrict the harvest of a resource, the Board shall determine appropriate bag limits and season restrictions governing all user groups. The subsistence preference may be accomplished by setting limits and seasons sensitive to local use patterns in the area affected.
2. When the Board finds it necessary to restrict the harvest further, the Board shall determine appropriate controls on access governing all user groups. The subsistence preference may be accomplished by making it more inconvenient for distant user groups to engage in harvest.
3. When the Board finds it necessary to restrict the harvest further, the Board shall determine appropriate methods and means governing all user groups. The subsistence preference may be accomplished by adopting methods and means most available to local user groups.
4. When the Board finds it necessary to restrict the harvest further, the Board may create a regulation which allows for adequate subsistence harvest by residents of the area and a limited sport harvest by other user groups. This area accomplishes the subsistence priority addressed in 1978 SLA 151.
5. When the Board finds it necessary to restrict the harvest further and still implement the subsistence priority, the Board shall create a subsistence area which allows for a quota-controlled harvest by residents of the area only. . . .
6. When the Board finds it necessary to restrict the harvest to a limited number of area residents, the Board shall utilize criteria for allocation (consistent with 1978 SLA 151) among area residents based, in part, on the suggestions and evidence provided by area residents. . . .

Alaska Boards of Fisheries and Game, Proposed Procedure for Implementation of 1978 SLA-151 (March 1979) (emphasis added). The full text of the Proposed Procedure is attached as Appendix 4.

The Boards' policy statement also noted that subsistence uses provide a variety of benefits which are not limited to nutrition:

The Board of Fisheries and the Board of Game recognize that existing cultures and life styles in Alaska are of great value and should be preserved. Accordingly, customary and traditional subsistence uses of fish and game are assigned a priority among beneficial uses. . . .

Beyond directly satisfying food requirements, home consumption of fish and game tends to preserve cultures and traditions and gives gratification to a strong desire possessed by many Alaskans to harvest their own food. The latter functions seem genuinely important to the physical and psychological well-being of a large number of Alaskans.

Alaska Boards of Fisheries and Game, Policy #79-5-JB (March 1979).

C. The Subsistence Section, Alaska Department of Fish and Game in the Period Prior to December 2, 1980.

At about the same time as the Boards were considering their policy statement, the new Subsistence Section of the Department of Fish and Game was just beginning operations. Its role, development and funding are significant indices of the State's progress in creating a high quality subsistence program which satisfies Title VIII requirements.

The duties of the Subsistence Section were specified in AS 16.05.094:

The section of subsistence hunting and fishing shall:

- (1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;
- (2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;
- (3) make information gathered available to the public, appropriate agencies, and other organized bodies;
- (4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;

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

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

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

The research responsibilities of the Section fall into two major areas:

(a) baseline research having multiple utility for informing the public, government agencies and other entities, see AS 16.05.094 (1), (2) and (3); and (b) issue-specific information gathering for use by the Department, the Boards, and the public. See AS 16.05.094 (4), (5) and (7). In addition, the Section's policy recommendation roles extend beyond allocation to include the full range of regulatory matters which may affect subsistence uses. See AS 16.05.094 (4), (5) and (6).

The Alaska House of Representatives Special Committee on Subsistence described the evolution of the Subsistence Section as follows:

Much of the responsibility for implementation of the subsistence law was assigned to the new, statutorily created, Subsistence Section in the Department of Fish and Game. See AS 16.05.094. Because the Department had never conducted social research, an immense gap existed between programs for biological studies and programs needed for socio-economic research on subsistence. Indeed, the Department was in no position to provide the extensive data needed by the Boards to make reasonable decisions affecting subsistence. By contrast to the other divisions of the Department, the duties specified by AS 16.05.094 for the Subsistence Section give heavy emphasis to socio-economic research with none of the management and enforcement functions normally associated with the Department.

In order to meet [its statutory] responsibilities, the Subsistence Section needed a staff which could not only understand basic biological relationships, but also conduct effective socio-

economic research. Of course, this required the Department to hire personnel with substantially different skills than those normally associated with fish and game management. As a result, the Subsistence Section was not actually operational until mid-1979.

Although the subsistence law was approved by the Governor in July 1978, staffing the new Subsistence Section was a time-consuming process. A Chief and Assistant Chief were appointed in February 1979; and hiring of 'resource specialists,' the new Subsistence Section job class, was underway in mid-1979. Positions in Anchorage, Barrow, Bethel, Dillingham, Kotzebue and Nome were filled by late 1979. Addition of resource specialists in Fairbanks, Galena and Juneau required several more months; and regional supervisors were not hired until early 1980. Applicants also were recruited through the fish and game technician registers and assigned to specific field offices.

In addition to these personnel matters, the Section made administrative arrangements and equipment purchases associated with field office start-up. Taken together, the normal steps necessary to become operational meant that the Subsistence Section was not able to begin actual field work until mid-1979, and was not fully operational until 1980.

Since its inception, the Section has produced more than 30 technical reports. Initial Subsistence Section projects were directed primarily toward resource allocation problems and regulatory proposals to be considered by the Alaska Boards of Fisheries and Game. In addition to these matters, recent studies have addressed a variety of critical resource use problems, and have substantially increased the information available on the roles of subsistence in family and community life; historical and present patterns of use; elements of subsistence economic systems, and many other issues. . . .

The Section's highly productive research program has provided essential data for decision making by the Boards and has established fundamental baseline data for many areas. Such studies often are the only work ever addressed to these problems; and the Section's ground-breaking applied research has moved the Department of Fish and Game into a potentially productive era of using both biological and socio-economic research tools.

The Section's program continues to be exceptionally active. Numerous projects currently are in progress throughout the state. Staff members conduct their field operations from offices in Anchorage, Barrow, Bethel, Dillingham, Fairbanks, Juneau, Kotzebue, and Nome, as well as several small communities.

"History and Implementation of CH. 151, SLA 1978, the State's Subsistence

Law," Special Committee on Subsistence, Alaska House of Representatives, First Session, Twelfth Legislature (May 15, 1981) at 16-20.

Despite the difficulties inherent in establishing a new program where none had existed previously, the Subsistence Section rapidly established a field base and a set of preliminary research priorities. Initial research products were used directly by the Boards during the 1980 regulatory cycle. For example, the highly successful Copper River Subsistence Salmon Management Plan was based substantially on Subsistence Section research data. See 5 AAC 01.647. The Plan is attached as Appendix 5. Research projects were begun as rapidly as field positions could be filled. In addition, bilingual local persons were hired to work with the Section's resource specialists. By December 1980 a statewide staffing pattern had been established, two mid-level program staff had been added outside of Section headquarters, and studies were in progress for all regions.

Although the Section's early research efforts were aimed primarily at major allocation issues, the unavailability of reliable baseline data compelled the Section to begin developing its own program of applied research to address these data needs. Potential subsistence impacts resulting primarily from proposed land use changes and industrial development underscored the importance of high quality baseline information which could be used in various processes: impact assessments, land and resource use planning, and community decision making. Accordingly, during calendar year 1980 the Subsistence Section planned projects within each region to conduct applied baseline research. By December

1980 these efforts were developing as the foundation of the Section's program, and other issue-specific studies were designed in conjunction with sound baseline work.

D. Subsistence Regulations and Public Participation in Regulatory Processes

Alaska law expressly provides for a system of advisory committees "composed of persons well informed on the fish or game resources of the locality." AS 16.05.260. The advisory committee chairman has authority to hold public hearings on fish or game matters. Id. In addition, the statute explicitly contemplates regulatory recommendations by the committees:

Recommendations from the advisory committees shall be forwarded to the appropriate board for their consideration but if the Board of Fisheries or the Board of Game chooses not to follow the recommendations of the local advisory committee the appropriate board shall inform the appropriate advisory committee of this action and state the reasons for not following the recommendations.

Id.

In making regulatory decisions affecting subsistence uses, the Boards directly utilize information provided by advisory committee representatives at regulatory meetings. Although the procedures of the two Boards differ in detail, both provide opportunities for advisory committee representatives to offer information as the Boards consider particular regulatory proposals. This goes well beyond the participation normally provided to the general public.

In addition to the local advisory committees, the Boards established "a system of regional fish and game councils to provide a regional forum

for the collection and expression of opinions and recommendations on matters relating to fish and wildlife resources and to assist the Board of Fisheries and Game in deliberations concerning promulgation of regulations." 5 AAC 96.200. The Boards also created six "fish and game resource management regions": Southeast, Southcentral, Southwest, Western, Arctic, and Interior. 5 AAC 96.210. These regions encompass all lands and fresh waters and were identified "[f]or the purposes of conservation and management of the fish and wildlife resources of the state." 5 AAC 96.210. A copy of the 1980 Regulations for Local Fish and Game Advisory Committees and Regional Councils is attached as Appendix 6.

The Board of Fisheries and the Board of Game utilized substantially different approaches in adopting regulations for subsistence uses. The Fisheries Board enacted separate regulations for subsistence fishing; this approach was consistent with the formal divisions between commercial, sport, and subsistence fishing which had existed since statehood. The Alaska Subsistence Fishing Regulations for 1979 and 1980 are attached as Appendices 7 and 8. In contrast to this approach, the Board of Game provided for all harvests within the same regulatory framework. This approach was consistent with the Boards' policy statement which emphasized that special regulations to accommodate the subsistence priority would be used only when other methods are not sufficient. See Alaska Boards of Fisheries and Game, Policy #79-5-JB (March 1979). The 1979 and 1980 Alaska Game Regulations are attached as Appendices 9 and 10.

IV. DEVELOPMENT OF POLICIES AND REGULATIONS IN THE PERIOD FROM DECEMBER 1980 UNTIL DECEMBER 1981

A. Joint Board Consideration of the Analytical Approach Suggested By the Department of Fish and Game¹⁹

The Alaska National Interest Lands Conservation Act (ANILCA), Public Law 96-487 (December 2, 1980), became effective while the Boards of Fisheries and Game were conducting their fall joint meetings. The Boards listened to an explanation of the new law's implications from staff of the Governor and of the Attorney General, and were advised to proceed cautiously in assuring that the State retains full management authority. The Boards also reviewed the Tier I - Tier II priority format suggested by the Alaska Department of Law and approved the Department of Fish and Game position paper on subsistence.

The Department of Law suggested three levels of priority implementation corresponding to three general levels of resource abundance:

1. When resource populations are adequate to satisfy all user demands without impairing sustained yield, the priority does not come into play;
2. Tier I: When resource populations are such that some harvest restrictions are necessary to maintain sustained yield or to assure continuation of subsistence uses, a priority must be provided to subsistence;
 - a. The Boards have discretion to determine how the priority should be structured;
 - b. The Boards can allow non-subsistence uses to continue as long as the priority for subsistence is adequate;
3. Tier II: When further restriction is necessary to maintain sustained yield or to assure continuation of subsistence uses, three statutory criteria must be employed:
 - a. Customary and direct dependence upon the resource as the mainstay of one's livelihood;
 - b. Local residency; and
 - c. Availability of alternative resources.

The Board can allow non-subsistence uses to continue if it concludes that they are in the public interest and that the core subsistence use will receive adequate priority.

The Department of Fish and Game presented a position paper containing five recommendations for specific steps to assure that the subsistence priority is met:

1. Examine existing subsistence uses and regulations by area and species;
2. Characterize subsistence uses in Alaska on the basis of identifiable factors;
3. Select criteria and evaluative measures by which the statutory language will be implemented;
4. Include subsistence provisions in all management plans;
5. Follow decision-making procedures which integrate the subsistence priority and make statutory compliance a routine matter.

See Subsistence: A Position Paper, Alaska Department of Fish and Game (November 24, 1980). The position paper is attached as Appendix 11.

Of particular significance to the present overview are the two parts of the position paper covering characteristics of subsistence use and implementation of statutory language.

The Department of Fish and Game suggested a set of interlocked continua which might be helpful in describing customary and traditional uses:

Long <-----Time Depth----->Short
Rural<-----Community Base----->Urban
Kinship<-----Social Role----->Individual/Family
Community<-----Economic Role----->Personal Use
and regional
economic and nutritional
self-sufficiency

Food, clothing, fuel, tools, shelter, handicraft, barter, etc. <-----Actual Uses-----> Primarily food

Many resources (fish, game, fowl, vegetation, etc.) <-----Range of Uses-----> Few Species

More stable patterns <-----Pattern of Uses-----> Less stable opportunistic
(area, time, species, gear, efficiency, productivity, use level, sharing/bartering, division of labor, effort level, etc.)

Due to changing economic and resource conditions, and local population growth <-----Variation in use level and pattern-----> Due to high urban immigration

Primarily extended kinship community, inter-generational, and cultural <-----Social and Psychological Products-----> Primarily individual and immediate family

Subsistence: A Position Paper, Alaska Department of Fish and Game (November 24, 1980) at 3-4.

The position paper noted that the Boards have administrative authority to determine what combination of points along these continua constitutes customary and traditional use in order to provide the priority. In addition, the left ends of these continua taken together may be understood as corresponding generally to rural subsistence patterns.

However, the Department emphasized that the continua were not intended as absolute formulas but rather were offered as a framework within which

the Boards can make decisions on a case-by-case basis. That is, although the Boards might rely upon the continua as analytical tools, the particular combination of factors indicating customary and traditional use should be determined specifically for each situation considered.

In suggesting methods for implementing the statutory language, the position paper recommended ways in which subsistence could be accommodated using routine procedures and case-specific data:

It is suggested that the Boards consider customary and traditional uses to be those noncommercial and nonwasteful uses (as defined in AS 16.05.940[]) . . . which have been pursued by a community or a group of persons for a significant period of time. . . .

[I]t is the historic use pattern of the community or group which is to be accorded a priority in regulation. the use pattern for Tier I is made up of a number of elements needing consideration (e.g., areas, times, methods and means, species, stocks, productivity, efficiency, and so on). Evidence on these elements should be considered by the Boards.

The range of elements useful for consideration by the Boards in Tier I and Tier II decisions may be applied on a statewide basis. However, the criteria and measures within each element may vary on an area-by-area, case-by-case basis.

For example, in Tier II decisions, 'direct dependence' is a statutory element for consideration. The Board may conclude that one criterion within 'dependence' is the role of the resource in meeting nutritional needs. The measure within the criterion may be, for example, the number of meals per week in which the resource is normally used. Other measures could be the timing of consumption (e.g., first fresh meat in spring) or nutritional significance (e.g., source of particular fats or oils, foods that preserve well for winter.) It is suggested that the Boards begin their analysis of customary and traditional use with an assessment of user profiles and use patterns on a case-by-case basis. This would give the Department an opportunity to uncover the elements which appear naturally in real-life situations. After consideration of a number of cases, the Boards could then identify those elements, criteria, and measures which they have found most useful in their analyses. This process will, in turn, make the Department['s] research and Boards' decision-making more routine.

Id. at 6-7.

B. Board of Fisheries Regulatory Actions

At the December 1980 meetings, only the Board of Fisheries considered regulatory proposals. (The Board of Game normally conducts regulatory business during its spring meeting.) At that session, the Board received advisory committee and staff reports as well as public testimony on subsistence and adopted most of its finfish regulations for 1981. The Alaska Subsistence Fishing Regulations 1981 are attached as Appendix 12.

The Board also adopted Findings and Policy Regarding Subsistence Use of Cook Inlet Salmon, #80-79-FB, which established ten characteristics for identifying "customary and traditional" uses of Cook Inlet Salmon. The findings and policy #80-79-FB are attached as Appendix 13. The Board deferred final action on Cook Inlet salmon regulations until its spring meeting. In April 1981 it considered additional testimony and reaffirmed the basic thrust of the previously adopted criteria. In its Amended Findings and Policy Regarding Subsistence Use of Cook Inlet Salmon, Resolution #81-91-FB, the Board recognized that "the past and current permitting system and regulations governing subsistence fishing in Cook Inlet do not necessarily reflect and protect the customary and traditional use of salmon resources in the area." In order to rectify these inconsistencies, the Board adopted the following "characteristics", all of which were to be applied in identifying customary and traditional uses:

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, sub-

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

Alaska Board of Fisheries, Amended Findings and Policy Regarding Subsistence Use of Cook Inlet Salmon, Resolution #81-91-FB (April 6, 1981) (attached as Appendix 14).

The Board also applied these ten criteria to information on the record concerning uses of Cook Inlet salmon. The villages of English Bay, Port Graham, and Tyonek were found to have customary and traditional uses because they had established all ten characteristics. Accordingly, the Board adopted subsistence fishing regulations applicable to those communities.

For purposes of the present overview, it is important to note that the

ten criteria provide substantial protection for rural communities. Indeed, the content of these characteristics clearly makes it easier for residents of rural villages to establish their customary and traditional uses than for urban residents to make a similar showing. All ten criteria must be applied in evaluating evidence which indicates customary and traditional use; therefore, it is much more difficult for residents of urbanized areas to make the requisite showing. The communities which demonstrated their subsistence uses of Cook Inlet Salmon under the ten criteria were all small villages without road connections to a major urban area.¹

The Board's development and use of specific eligibility criteria are important for several reasons. Although the Board had adopted regulations since statehood in order to govern subsistence fishing and had made subsistence allocations since long before the effective date of the State's subsistence statute, this was the first time the Board had made a formal regulatory decision about which uses should be designated as subsistence.

In the past, subsistence fishing permits had been available to any applicant; no explicit eligibility standards had been applied. Accordingly, in many areas "subsistence" fishing had grown to mean something other

¹/ The Board recognized that "these use patterns may occur in road-connected communities as well as in non-road-connected areas" and that the ten characteristics may be established not only by communities but also by subcommunities, groups and individuals. Alaska Board of Fisheries, Amended Findings and Policy Regarding Subsistence Use of Cook Inlet Salmon, Resolution #81-91-FB, (April 6, 1981). However, on the record presented, the Board concluded that no other showing of customary and traditional uses of Cook Inlet Salmon had been made.

than the subsistence use contemplated by chapter 151, Session Laws of Alaska 1978. That is, in certain areas a high proportion of subsistence permittees were new participants in the fishery who had few, if any, historic, economic, or other established connections to the resource.

By using its 10-point formula, the Board was able to allocate salmon in an area of resource competition which previously had been characterized by unlimited issuance of "subsistence" fishing permits without regard to whether the use was customary and traditional. Accordingly, the Board's 1981 spring meeting laid important groundwork for a regular, predictable inquiry using the general approach suggested in the Department's position paper on subsistence.

C. Board of Game Regulatory Actions

The Board of Game took steps at its 1981 spring regulatory meeting which increased the likelihood that certain rural residents would receive a permit to hunt the Nelchina Caribou Herd. After hearing staff reports, advisory committee recommendations, and public testimony, the Board expressed its view that all Alaska residents who hunt the Nelchina herd for meat should be considered eligible for a permit at Tier I. The Board also noted that within this group is a smaller segment having a higher level of reliance on the resource.

The Board adopted regulations allocating 1600 permits to hunt the Nelchina Caribou Herd. Of this total, 1450 were reserved for resident meat hunters (Tier I in the Board's analysis) and non-resident hunters; 150 were tentatively reserved for users meeting Tier II standards. All permits were to be issued by random drawing. In addition, a special winter

season was created so that applicants receiving Tier II permits could take caribou when the herd is in the eastern part of its range.

To participate in the Tier II drawing for a permit to hunt the Nelchina Caribou Herd during the winter season, each applicant was required, in part, to show that he or she:

1. Resides in game management unit 13, 14A or 14B and has no permanent abode elsewhere;
2. Lives or has lived for the previous five years in a household "where not commercially taken fish and game have comprised more than half of the meat and fish of the diet"; and
3. Is a member of a household having a gross income of \$12,000 or less for the previous income tax filing year.

See 5 AAC 81.055(c) (3).

The Nelchina Caribou hunt conditions provided, in part:

1. No more than five percent of the permits will be issued to non-residents of Alaska;
2. Up to 150 Tier II permits will be valid for the fall and winter seasons; the remaining permits will be valid for the fall season only;
3. Applications for Tier II permits will be drawn first;
 - a. If all 150 permits are issued, the remaining unsuccessful applications will be included in the drawing for the fall hunt;
 - b. If fewer than 150 permit applications are received, excess permits will be available as part of the permit pool for the fall season.

See 5 AAC 81.055. A copy of Alaska 1981-82 Permit Drawing Hunts is attached as Appendix 15; the drawing for the 150 Tier II permits is described at page 3 under "Caribou Hunt 503". General application requirements and fees are summarized on page 1 of the drawing hunt brochure.

The Board of Game intended that the eligibility characteristics described

above correspond to the Tier II requirements of the Alaska subsistence law:

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

AS 16.05.255(b). Adoption of Tier II criteria represents the Board's clearest statement about eligibility for the subsistence priority, and it indicates how the Board intends to use these standards to protect the most dependent users. The Alaska Game Regulations 1981 are attached as Appendix 16.

D. Summary of Subsistence-Related Board Activities

The foregoing descriptions of Board policies and regulations are intended only to highlight Board actions affecting subsistence; this overview is not intended to suggest that the final form of Board policy has been reached. Prior to enactment of the State subsistence statute, the Boards had considered a variety of subsistence allocation issues; and subsistence regulatory proposals have been addressed on a case by case basis since the new law became effective. The Boards' approaches to subsistence continue to be refined. Indeed, regulatory proposals before the Boards at their December 1981 meetings may further this evolutionary process.

Although the Boards have chosen different approaches, both have adopted certain measures which tend to benefit rural residents. The diverse specific measures chosen are too detailed to be discussed here, but memoranda by the Department staff members who serve, in part, as

regulations advisors during Board meetings are attached as Appendices 17 and 18; these memoranda describe the Boards' diverse regulatory actions related to subsistence.

E. The Subsistence Division

The Subsistence Section was elevated to Division status by order of the Governor during 1981. This change recognized the importance of the subsistence program to the Department's mission. As of July 1, 1981, the Subsistence Division has the same status as all other divisions of the Department.

The Division has continued to develop its field-based research program in the directions discussed previously. The planning which was begun in 1980 for more comprehensive baseline research in all regions of the State was transformed into initial field efforts -- including contractual work in areas without Subsistence Division staff -- and into budget requests. These research functions have become even more important in light of the Fisheries Board's emphasis on community characteristics. In addition, the enactment of ANILCA has generated a variety of planning processes in which regional councils have a role. Accordingly, the Subsistence Division has strengthened its baseline efforts for fiscal year 1982 and plans enhanced baseline research activities for fiscal year 1983 to provide a better foundation for other ANILCA-related projects.

In 1981, the Subsistence Division also opened two new offices in rural communities, Nikolai and Fort Yukon, and staffed them with qualified local residents. In addition, Resource Specialists were hired for the

Southeast Alaska Region and for the Copper River Basin-Prince William Sound area in the Southcentral Alaska Region.

The following Subsistence Division research products ² were completed between December 1980 and December 1981:

- Andersen, D., Statewide Subsistence Bibliography and Index;
- Andersen, D., Subsistence Bibliography Project--Arctic Coast;
- Andersen, D., Subsistence Bibliography Project--Northwest Alaska;
- Andersen, D., Subsistence Bibliography Project--Northern Interior;
- Cunningham, P., A Technical Report Describing an Algorithm to Estimate Number of Persons Who Have Participated in the Cook Inlet Subsistence Fishery Four or More Years;
- Behnke, S., Contemporary Fish and Wildlife Use and the Economy of the Inland Denaina (draft);
- Behnke, S., Draft Options for Naknek River Subsistence Fishery;
- Behnke, S., Memorandum: Status of Subsistence Fisheries in Bristol Bay, 1980;
- Behnke, S., Naknek River Subsistence Proposals;
- Behnke, S., Subsistence Use of Brown Bear in the Bristol Bay Area: A Review of Available Information;
- Caulfield, R., Interim Report on the Survey of Permit Holders in the Tanana River Subsistence Permit Fishery (Subunit Y6-C);
- Caulfield, R., Tanana River (Y-6C) Subsistence Permit Fishery Utilization Study, 1981 Operational Plan;
- Huntington, C., Survey Information for Subsistence King Salmon Drift Gill Netting in Yukon Area District 4A;
- Kelso, D., Presentation to the Special Committee on Subsistence;
- Langdon, S., and Worl, R., Distribution and Exchange of Subsistence Resource Use in Alaska (Note: contractual study);

^{2/} A list of the Subsistence Division's major written products completed since the Division began operating in 1979 appears as Appendix 19.

Pedersen S., and Caulfield R., Some Elements of Subsistence Land and Resource Use Within the Range of the Porcupine Caribou Herd in Alaska;

Stanek, R., Subsistence Fishery Permit Survey: Cook Inlet -- 1980;

Stanek, R., Nelchina Caribou Use Assessment;

Stanek, R., Tyonek King Salmon Subsistence Fishery: 1980 Activities Report;

Stickney, A., Subsistence Resource Utilization: Nikolai and Telida -- Interim Report;

Stickney, A., Subsistence Resource Utilization: Nikolai and Telida -- Interim Report II;

Thomas, D., Nome River Subsistence Research Report;

Thomas, D., Norton Sound - Bering Strait Subsistence King Crab Fishery;

Thomas, D., Norton Sound Baseline Subsistence Study: Shaktoolik;

Veltre, D., and Veltre, M., A Preliminary Baseline Study of Subsistence Resource Utilization in the Pribilof Islands;

Wolfe, R., Yukon Delta Sociocultural Systems Analysis (draft) (Note: contractual study prepared for Alaska Outer Continental Shelf Socio-economic Studies Program, Bureau of Land Management).

V. THE DEPARTMENT'S ANILCA TITLE VIII IMPLEMENTATION PROGRAM

The Department began planning in 1980 for ANILCA implementation.

By early 1981, a comprehensive plan and a budget request had been prepared. During the 1981 legislative session, the Department's ANILCA implementation budget was approved. Approximately three and one-half million dollars were appropriated specifically for Title VIII implementation during fiscal year 1982 in the following project categories:

1. Establishing regional councils;
2. Operational and technical support for regional councils;
3. Resource assessments;

4. Litigation;

5. Data support for state and regional council representatives to park and park monument commissions.

The Department began full implementation efforts on July 1, 1981. The sequential phases of the Department's Title VIII effort will be implemented throughout fiscal year 1982 and will continue as a regular part of the Department's ongoing program.

A. Establishment of Regional Councils

Prior to ANILCA, the State's regional councils operated within general, flexible regions. The Department and the Boards have now initiated action to clarify the regional boundaries in order to reinforce the institutional role of the councils.

The Boards have always believed that flexibility is essential if the councils are to be effective. That is, fish and game frequently cross political and geographical boundaries. These resource populations may be taken in more than one region. In order for the regional council system to address the concerns of all the people who may harvest these animals, the councils must be structured to allow participation by all groups interested in a particular resource question.

In order to assure that regional differences in subsistence use are adequately accommodated and workable boundaries are developed, a public participation process was initiated during the summer of 1981. Two boundary delineation workshops were held in late September as the first steps in this public participation process. One of these workshops was organized specifically to include representatives of local advisory

first steps in this public participation process. One of these workshops was organized specifically to include representatives of local advisory committees and of groups interested in subsistence. The materials resulting from these workshops are attached as Appendix 20. Packets of information, including a variety of boundary options, were distributed to advisory committees, workshop participants, legislators, and others. Additional public comment was solicited prior to the Commissioner's selection of regional boundaries for submission as a proposal to the Boards. Substantial comment was received before the Commissioner's final choice. Proposed boundaries will be submitted to the joint meeting of the Boards of Fisheries and Game in December.

The Boards also will be considering regulations to govern the conduct of regional council business and the manner in which council recommendations are addressed. Although existing regulations establish procedures for regional council functioning, proposals will be offered which articulate the councils' authority and operations so as to make clear that the regular, formal council role apparently intended by Congress has been firmly established. In addition, the Board will consider proposals which incorporate the Title VIII standards for Board review of regional council recommendations.

Regulations governing the regional councils can be adopted only by the Boards of Fisheries and Game acting jointly. The Boards meet regularly in the spring and fall of each year to consider regulatory proposals. Accordingly, the December 1981 meeting is the Boards' first opportunity to consider proposals since the Department's ANILCA response program was

approved by the Alaska Legislature. It is also the first time specific proposals reflecting Title VIII regional council considerations have been submitted to the Boards. Because consideration of these proposals will not be completed prior to December 2, 1981, a summary of relevant action by the Boards will be submitted as a supplement to this submission.

B. Staffing, Technical Support and Scientific Data for the Regional Councils

The Department has begun to implement three kinds of support for the regional councils: (1) operational-logistical support, (2) technical liaison and social science data support, and (3) biological data support. The first of these, operational-logistical support, will be provided by six new professional positions plus clerical staff attached to the Executive Director, Alaska Boards of Fisheries and Game. To the extent practicable, these staff will be assigned to a particular council and be located full time in the region served by that council. They will assist the council in conduct of its day-to-day operations, including: arranging travel, agendas, and accounting services; distributing Board-related materials; responding to questions; facilitating intracouncil and intercouncil communication; recording minutes of meetings; assisting councils in transmitting their views to the Boards; advising the councils concerning available resources which may be useful in performance of council work; and providing logistical support for all phases of the council's authorized functions.

The Executive Director has prepared position descriptions which have been submitted for approval by the Alaska Department of Administration.

Recruitment and hiring can begin as soon as these administrative steps are completed. Because of the time lags involved in this process, it is unlikely that full staffing will be achieved by December 2, 1981. Nevertheless, the positions have been funded and the Department is committed to hiring qualified professionals. Progress in staff development for the councils will be summarized in a supplement to this submission.

The Subsistence Division currently is hiring two levels of professional staff to provide technical liaison and social science data to the regional councils. As part of its operating budget, the Division will add six Resource Specialist III positions. To the extent practicable, these staff will be assigned to and located in regions associated with particular councils. These staff will be qualified social science professionals with expertise in a range of field and institutional settings. Their functions will include: direct technical liaison to the regional councils; technical consultation with councils and staff regarding conduct of council functions; provision of extant technical and scientific data to councils; coordination and supervision of Division field research related to regional council concerns throughout the region; design and quality control of studies conducted at the regional council's request; and provision of technical services to the council in formulating its work products (e.g., annual reports and regulatory recommendations).

In light of these responsibilities, the Resource Specialist III's will have little time for original field research; accordingly, the Alaska Legislature approved two years of funding for six Resource Specialist II's

to conduct field studies in response to regional council needs. These efforts will build upon ongoing baseline work conducted as part of the Division's core program and will address three areas:

1. Problem-specific, applied research directed toward anticipated data needs of the councils;
2. Issue-specific, applied research in response to data requests of the councils;
3. Issue-specific, applied research in response to data requests of the councils' representatives to park and park monument commissions.

The Resource Specialist II positions are intended as full time field research positions, and to the extent practicable they will be located in the region served by a particular council.

Because Title VIII makes clear that the highest quality, most current social science data are necessary in order to fulfill regional council functions, the Subsistence Division's program is intended to provide sound baseline data (ongoing project), current data and technical liaison (new Resource Specialist III positions), and issue or problem area studies (new Resource Specialist II positions).

All the new resource specialist positions have been approved and recruitment is underway. Three of the six R.S. III's have been hired. It is anticipated that staffing will be substantially complete by early 1981.

In order to fulfill the regional councils' authorized functions, reliable biological information also is required. Accordingly, the Department's management divisions -- Commercial Fisheries, Game, and Sport Fish -- have been authorized to conduct data analyses and field studies which will

provide resource information to the councils. Although these tasks will differ depending upon the species and questions being studied, the following are representative steps:

1. Determine key harvest or conflict areas;
2. Review and assemble existing data for use by the councils;
3. Design and conduct field studies (e.g., surveys of harvest catch and effort, catch sampling, life histories, catalogs and inventories, surveys of resource abundance and population structure);
4. Compile and analyze new field data, including data processing functions;
5. Assemble and distribute new data to local advisory committees and regional councils.

The management divisions also will provide limited operational and technical support to the regional councils. Services anticipated for the local advisory committees and regional councils include preparing and presenting proposals and supporting materials, staff comments, and data or technical information on resource status and use. The Game Division also will supplement the council staff with clerical assistance, formal recording of the proceedings, audio-visual equipment, and other logistical services.

VI. SUMMARY

The State of Alaska has implemented a comprehensive subsistence program based upon the priority appearing in Alaska's subsistence statute. Research leading to both baseline and issue-specific data is conducted by the Subsistence Division, Alaska Department of Fish and Game. These data are used by the Boards of Fisheries and Game in considering allo-

cation proposals. The information also is used by state and federal agencies, local communities, and other entities in making decisions affecting subsistence land and resource use.

The existing local advisory committee and regional council system provides a participation framework that is consistent with Title VIII provisions. The Department and the boards presently are in the process of delineating regional boundaries within which the councils will operate. In addition, the Boards will consider proposals for regulations to govern the conduct of regional council business and the standards by which council recommendations are considered. The Department also has developed a plan for providing adequate, qualified staff to the regional councils and for fulfilling other Title VIII functions.

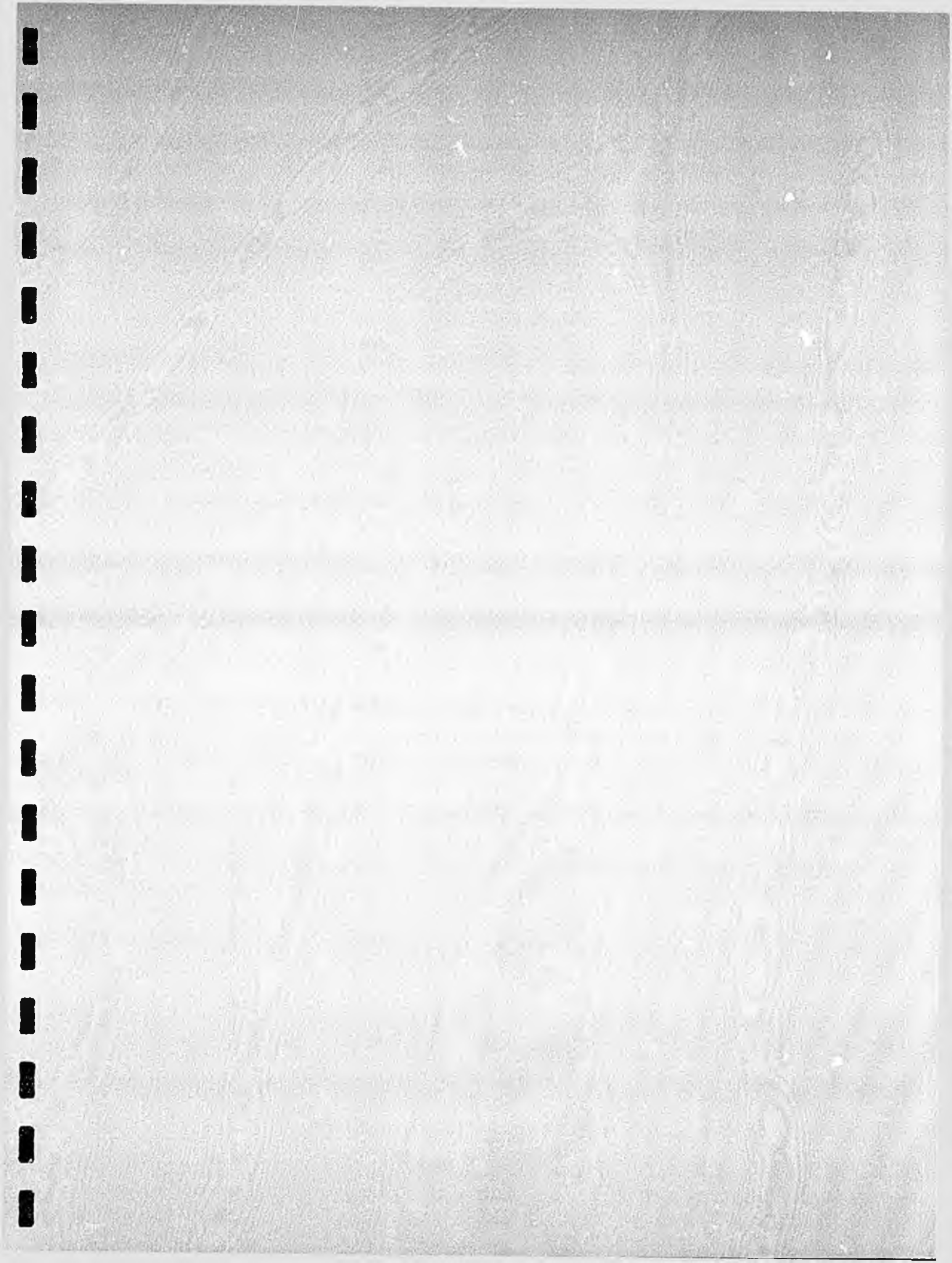
When these refinements and extensions are complete, the State will have a fully integrated system of research, management, and regulatory participation. These diverse program elements, together with the provisions of law discussed in the Attorney General's opinion, establish the performance required by Title VIII of the Alaska National Interests Lands Conservation Act.

Appendices

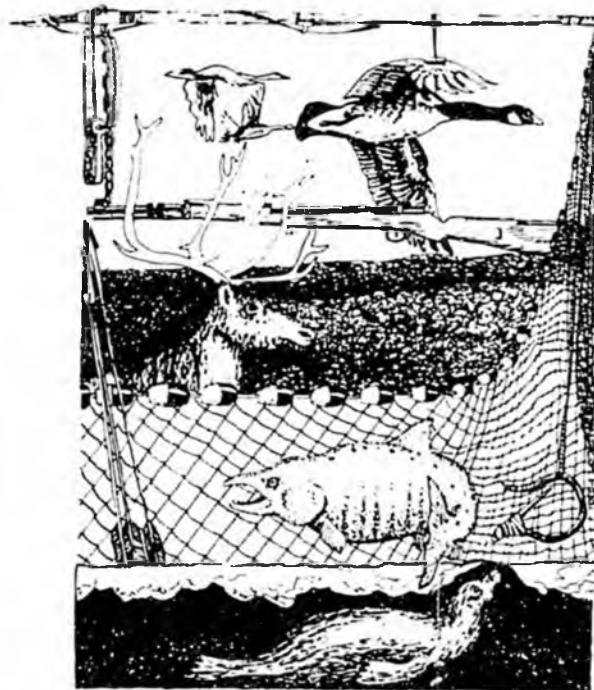
1. Chapter 151, Alaska Session Laws of 1978
2. Final Report of the Subsistence Task Force, Alaska Department of Fish and Game (November 20, 1978)
3. Alaska Boards of Fisheries and Game, Policy # 79-5-JB (March 1979)
4. Alaska Boards of Fisheries and Game, Proposed Procedure for Implementation of 1978 SLA-151 (March 1979)
5. Copper River Subsistence Salmon Management Plan, 5 AAC 01.630 and 5 AAC 01.647
6. 1980 Regulations for Local Fish and Game Advisory Committees and Regional Councils
7. 1979 Alaska Subsistence Fishing Regulations
8. 1980 Alaska Subsistence Fishing Regulations
9. 1979 Alaska Game Regulations
10. 1980 Alaska Game Regulations
11. Subsistence: A Position Paper, Alaska Department of Fish and Game (November 24, 1980)
12. 1981 Alaska Subsistence Fishing Regulations
13. Alaska Board of Fisheries, Findings and Policy Regarding Subsistence Use of Cook Inlet Salmon, #80-79-FB
14. Alaska Board of Fisheries, Amended Findings and Policy Regarding Subsistence Use of Cook Inlet Salmon, Resolution #81-91-FB (April 6, 1981)
15. Alaska 1981-82 Permit Drawing Hunts
16. 1981 Alaska Game Regulations
17. Memorandum from Robert A. Hinman, Deputy Director, Division of Game to Greg Cook, Executive Director, Boards of Fisheries and Game, "Subsistence Provisions in 5 AAC" (May 27, 1981)
18. Memorandum from Robert C. Clasby, Regulation Specialist, Division of Commercial Fisheries, to Ronald O. Skoog, Commissioner, "Subsistence Provisions in 5 AAC - Fish Regulations" (August 4, 1981).

19. Subsistence Division Written Work Products

20. Alyeska Regional Boundary Workshop Summary



SUBSISTENCE



Alaska Department of Fish & Game
Division of Subsistence
Technical Paper Series



IMPLEMENTATION ISSUES POSED BY TITLE VIII
OF THE SENATE-PASSED D-2 BILL

by
Dennis D. Kelso

Technical Paper Number 62

Alaska Department of Fish and Game
Division of Subsistence
Fairbanks, Alaska
October 29, 1980

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October 29, 1980

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Implementation Issues
Posed By Title VIII
of the Senate-Passed
d-2 Bill

I. Introduction

Two questions have been posed:

1. What legal issues must be evaluated in the course of the Department's interpretation and implementation of Title VIII?
2. ,To what extent can the existing frameworks of the Department and the Boards (including advisory committees and regional councils) accommodate the requirements of Title VIII?

In considering these matters, I shall make the following assumptions in order to consider directly the problems that may arise in management by the State of Alaska:

1. Title VIII is adopted by Congress.
2. Potential difficulties under the United States Constitution do not invalidate Title VIII. 1

3. Binding provisions of Title VIII supersede existing state subsistence provisions. ²
4. The State of Alaska wishes to continue managing fish and game resources on federal lands.

If any of these assumptions does not hold, an entirely new analysis would be required.

Almost every section of Title VIII can be viewed as affecting the state's management approach to some extent. I have selected for discussion those provisions which, in my view, have the most direct or problematical implications. The present draft of Title VIII contains numerous editorial inconsistencies and ambiguities; I have not examined these internal difficulties unless they seem likely to hamper state implementation or interpretation.

The present analysis attempts only to identify potential problems. My assessment of these matters is preliminary; it would be premature to suggest how a court actually would deal with any of these issues. Additional legal research could provide a clearer indication of the likely outcome for any particular problem.

II. Overview of Major Questions

Numerous questions may arise in conjunction with specific sections of Title VIII. Not all of these issues are equally important. The following

broad areas of potential difficulty are, in my view, most likely to require resolution in the course of interpreting and implementing Title VIII. The discussion in III., infra, highlights additional questions as well.

A. Does Title VIII require the State of Alaska to implement the section 804 subsistence preference for taking of fish and game on federal lands regardless of whether the state wishes to supersede, pursuant to section 805, the Secretary of the Interior's authority?
(III. F.)

1. Can the state be compelled to participate if the management criteria are impermissible under the Alaska Constitution?
(III. F.)

B. If the state wishes to assume full management authority via section 805, is new enabling legislation needed, or do existing state statutes provide sufficient authority? (III. D.)

1. Are the section 804 preference and the underlying section 803 definition of "subsistence uses" consistent with the existing state priority and definition? (III. B. & C.)

a. If not, is new enabling legislation required?
(III. B. & C.)

b. Would state statutes adopting the section 304 preference and the underlying section 803 definition of "subsistence uses" be valid under the Alaska Constitution? (III. B. & C.)

2. Is the framework for local and regional participation of section 805 consistent with the present fish and game local advisory committee and regional council structure? (III. D.)

a. If not, is new enabling legislation required? (III. D.)

b. Would state legislation containing the limitations and standards of section 805 be valid under the Alaska Constitution? (III. D.)

III. Discussion

A. Congressional findings (Section 301) and policy (Section 302)

Legislative findings generally are viewed by courts as supplying reasons and explanations--not conferring power or determining rights. C. Sands, 1A Sutherland Statutory Construction §20.03, at 54 (4th ed. 1972 and supp. 1980). Accordingly, although they do not enlarge the scope or effect of a statute, findings may be used to explain

the basis for the legislative action--particularly if compliance with constitutional requirements is a potential issue. Id. §20.04.

The findings section of Title VIII, therefore, poses no problems by itself for State management. However, the findings describe the Title's general objectives and provide "factual" background against which the policy declarations of section 802 must be read. Because enforcement of Title VIII depends on regulatory actions by administrators and rule making bodies that have not participated in formulation of the legislative language, these stated purposes are significant not only for judicial clarification of ambiguous statutory provisions but also for administrative guidance in implementing such provisions. See id. §§20.12-.13.

The findings and policy sections introduce several themes suggesting potential conflicts with state regulatory, statutory or constitutional requirements:

- (1) Emphasis on protection of subsistence opportunities for rural residents, §§801 (1), 801 (5), 802 (1);
- (2) Suggestion that dependency is a threshold characteristic for subsistence, §§801 (2), 802 (1);³
- (3) Suggestion that subsistence uses have priority only over other consumptive uses, §802 (2);⁴

(4) Introduction of different standards for management of fish and game populations: "continued viability," e.g., §§802 (1), 802 (2)-(3), 816 (b), "healthy populations," e.g., §§802 (1), 815 (1), 815 (3), "natural and healthy populations," e.g., §815 (1),

(5) Indication that "meaningful" participation by certain rural residents in management--both of fish and wildlife and of subsistence uses--requires a new "administrative structure," §801 (5).

The specific questions raised by each of these potential problem areas are discussed in connection with the specific implementation language of Title VIII.

B. Definitions (Section 803)

The definition of "subsistence uses" in Title VIII differs from the Alaska statutory language in two major respects. (The relevant language appears in Appendix I.) First, Title VIII limits subsistence to customary and traditional uses of wild renewable resources by rural Alaska residents. This limitation to rural residents does not appear in the Alaska definition. See AS 16.05.940(26). A second difference is reflected in the characterizations of trade, barter and sharing. AS 16.05.940(26) states that subsistence use includes "customary trade, barter or sharing for personal or

family consumption." Section 803 is phrased: "for barter, or sharing for personal or family consumption and for customary trade." In section 803, the modifier "customary" is separated clearly from both "barter" and "sharing;" similarly, the phrase "for personal or family consumption" modifies "sharing" only--not "barter" or "trade."

This discontinuity between Title VIII and the Alaska statute also is shown by a shift in the definition of "barter." In part, AS 16.05.940(27) defines "barter" as "the exchange or trade of fish or game, or their parts, taken for subsistence uses." Section 803 omits the words "or trade." Thus, the language of Title VIII suggests that (1) "customary trade" differs in kind from "barter" and (2) neither barter nor customary trade expressly is required to be "for personal or family consumption." In the absence of a judicial decision, the proper construction of the Alaska definition remains open to argument because the applicability of modifying language can be interpreted in more than one way. Title VIII avoids these subtle ambiguities but may diverge from the meanings of these terms in Alaska law.

Two levels of potential legal problems are implicated by these differences:

- (1) Does AS 16.05.940(26) preclude the Boards and the Department from managing resources for subsistence uses on federal lands

if those uses are defined more narrowly than the meaning provided by the state law?

(2) Does the Alaska Constitution preclude the state from providing a preference for taking fish and game on federal lands for subsistence uses when one of the eligibility criteria is rural residence?

With regard to the first set of potential problems, it should be noted that the Boards of Fisheries and Game have only the authority delegated by the legislature through statutes. See AS 44.62.030; Hootch v. Alaska State-Operated School System, 536 P.2d 793, 807 n. 56 (Alaska 1975); see generally AS 16.05.221, .241, .251, .255, .257; State v. Tanana Valley Sportsmen's Ass'n., 583 P.2d 854, 858 (Alaska 1973).

The Boards are authorized to adopt regulations which permit taking of fish and game for subsistence uses as defined by statute. See AS 16.05.251, .255, .940(26). There is a serious question whether the Boards may adopt regulations that allow such taking for uses defined in a manner deviating from AS 16.05.940(26). If not, a valid enabling statute would be required before the Boards could adopt regulations addressing the "subsistence uses" contemplated by Title VIII.

Even if a statutory adjustment were made, it would be subject to provisions of the Alaska Constitution. If the constitution does

not permit such distinctions among residents, then neither the statute nor the regulations adopted under authority of the statute would be valid. ⁵ An adequate treatment of the constitutional implications of the present AS 16.05,940(26) and of the narrower "rural" definition of subsistence would require additional research and is beyond the scope of the present discussion.

C. Preference for Subsistence Uses (Section 804).

Section 804 diverges from Alaska's existing priority in several respects. (The relevant language appears in Appendix II). One significant difference may be Title VIII's provision that "the taking . . . for non-wasteful subsistence needs shall be accorded preference over the taking on such lands of fish and wildlife for other purposes." This statement suggests that the preference operates constantly regardless of whether populations are adequate to satisfy demands for both subsistence and non-subsistence uses. However, the second sentence of section 804 creates ambiguity about when the preference takes effect. It lists three criteria to be used in formulating "appropriate limitations" for implementing the preference "[w]henever it is necessary to restrict the taking of populations of fish and wildlife . . . to protect the continued viability of such populations, or to continue [subsistence] uses."

Two interpretations are possible:

(1) In contrast to Alaska's statutory provisions, ⁶ the preference is effective at all times on federal lands, but limitations based on the listed criteria must be used to implement the preference when the specified circumstances occur;

(2) The first sentence of section 804 merely indicates Congress' general view of the preference, and the operational language in the second sentence means that the priority becomes effective only when restrictions on taking are necessary for the described reasons.

The uncertainty is not reduced by the somewhat confusing language of the policy statement in section 802 (2):

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

If punctuation is supplied after the word "Alaska," the resulting compound sentence seems to contemplate a priority for subsistence uses and a preference for the taking of fish and wildlife populations under circumstances parallel to those listed in section 304. Although the significance of the language variation is not clarified elsewhere

in Title VIII, this reading may offer some support for the second interpretation of section 804, i.e., a meaning parallel to that of Alaska's statutory priority.

If there is a substantive difference in meaning as suggested in the first interpretation, however, such a preference may be intended to convey rights or benefits different from those provided by 1978 Session Laws of Alaska, chapter 151. This is a matter of more than syntax. If Title VIII requires enactment of preferential measures which operate regardless of population status, amendment of Alaska's subsistence statute may be necessary to authorize valid Board action consistent with such a preference and thereby to satisfy the requirements of section 805 (d).

A second set of potentially important language differences between section 804 and current Alaska law involves the standards which trigger "appropriate limitations" based on the three criteria⁷ listed in section 304 (1)-(3). As noted above, one of the circumstances requiring application of these criteria in section 804 is the need to restrict the taking of populations of fish and wildlife in order to protect their "continued viability."

It is not clear whether "continued viability" is a standard as rigorous as the "sustained-yield" requirements of AS 16.05.251(b) and AS 16.05.255(b). If "continued viability" deviates from "sustained-yield," a pair of potential problems exists similar to those described above in discussing the definitional language for

"subsistence uses." That is, by statute the Boards of Fisheries and Game are required to make subsistence uses the priority when taking of fish or game must be restricted to assure sustained-yield. See AS 16.05.251(b), .255(b). In addition, the Alaska Constitution states that "[f]ish, . . . wildlife . . . and other replenishable resources belonging to the State shall be . . . maintained on the sustained yield principle." Alaska Const. art. VIII, §4. Under American legal principles, fish and wildlife resources are held in trust by the state for the benefit of the people.⁸ That is, even if the federal government has the power to mandate certain management regimes on federally owned lands, the state's interest in fish and wildlife nevertheless may be sufficient to implicate requirements of the Alaska Constitution. Accordingly, two questions may arise:

(1) Does "continued viability" differ from "the sustained yield principle"?

(2) If so, does the Alaska Constitution prohibit the legislature from authorizing the Boards to manage subsistence uses under any principle other than sustained yield?

Arguably, the Boards simply could manage subsistence uses on a sustained-yield basis since a population necessarily would be "viable" if it produces sustained yield. The question then becomes:

Does application of the three criteria of section 304 at the sustained-yield threshold violate the intent of Congress in enacting this section? ⁹

Even if "appropriate limitations" based on the three criteria of section 804 are triggered by the necessity for restrictions--either to protect continued viability of populations or to continue subsistence uses--the timing of such limitations may differ significantly from current state statutory requirements. As discussed in note four, the first tier of Alaska's subsistence priority becomes effective when restrictions on taking are necessary either to assure maintenance of sustained yield or to assure continuation of subsistence uses. However, Alaska's three criteria, which are essentially equivalent to the criteria of section 804, are not triggered until additional restrictions become necessary--beyond those associated with the first tier of the priority. Alaska statutes 16.05.251(b) and 16.05.255(b) provide:

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.

The parallel criteria in Title VIII operate regardless of whether "further restriction is necessary." Unlike the two-tiered priority structure of Alaska's statute, these criteria must be used as the

bases for "appropriate limitations" to implement the preference at roughly the threshold level of the State's first-tier priority. That is, the criteria of section 804 (1), (2) and (3) function "whenever it is necessary to restrict the taking of populations of fish and wildlife . . . for subsistence uses in order to protect the continued viability of such populations, or to continue such uses."

One other potential problem should be mentioned. The preference extends to taking of fish and wildlife for "nonwasteful subsistence uses." The term "nonwasteful" is not defined in Title VIII; obviously, its meaning is important in determining whether Alaska's statutory and regulatory provisions are compatible with congressional intent. See generally AS 16.30.020.

D. Local and Regional Participation (Section 805)

Title VIII establishes a framework for local and regional involvement in fish and game policy making for all federally owned lands in Alaska. See §805 (a) - (c). If the State of Alaska timely "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," the state's laws may supersede those sections. §805 (d). The apparent purpose of section 805 (d) is to create a mechanism by which the State of Alaska may retain management over fish and game on federal lands. ¹⁰ The cited language--"consistent with, and which provide for

the definition, preference, and participation specified"--leaves at least one question unresolved: whether the definition and preference set forth in sections 803 and 804 must be adopted essentially verbatim in order to satisfy section 805 requirements. Potential legal problems with the specific language of sections 803 and 804 have been discussed previously.

The local and regional participation contemplated by section 805 requires the State of Alaska to provide a local and regional advisory structure as described in section 805. ¹¹ The regional councils must be authorized to perform at least one function which is not part of their presently existing responsibilities--preparation of an annual report containing certain information and recommendations. See §805 (a) (3) (D); Memorandum from Greg Cook, Executive Director, Alaska Boards of Fisheries and Game, to the Alaska Board of Fisheries and Board of Game (September 2, 1980) at 2; see generally 5 AAC 96.070, .250, .270.

The requirements and functions listed in section 805 (a) and (b) differ in certain respects from Alaska's regulations presently governing local advisory committees and regional councils. E.g., compare 5 AAC 96.250 with Title VIII, §805 (a) (3) (A) - (D); compare 5 AAC 96.500 and 5 AAC 96.510 with Title VIII, §805 (b). However, the enabling statute, AS 16.05.260, appears broad enough to authorize validly enacted regulations along the lines indicated by these provisions.

Section 805 (d) does not expressly require members of local advisory committees or regional councils to be rural residents of the region or to be subsistence users. Although regional residency is necessary for membership on the regional council, this requirement already is established by 5 AAC 96.230. However, the local advisory committees must be able to advise and assist the regional councils in carrying out their functions; and the Secretary of the Interior is authorized to supplant the state's fish and game advisory committees if they "do not adequately perform" these duties. §805 (a) (emphasis added). The congressional findings specify an administrative structure enabling "rural residents who have personal knowledge of local conditions and requirements to have a meaningful role" in management. §801 (5) (emphasis added). Thus, although Title VIII does not by its terms preclude non-subsistence users or non-rural residents from serving on these advisory bodies, the state's representation structure may be displaced by the Secretary's actions under section 805 (a) - (c) unless local advisory committees and regional councils have substantial rural, subsistence-oriented membership. Nevertheless, as long as the advisory committees and regional councils are constituted so as to perform the functions listed in section 805, the state's current regulations relating to composition of advisory committees and regional councils apparently would be sufficient. See 5 AAC 96.030, .040, .230.

More serious difficulties are presented by section 805 (d), which would limit the Boards of Fisheries and Game ("the State rulemaking authority") in their handling of recommendations from

the regional councils. (Section 805 (d) appears in Appendix III.) That is, the rulemaking authority is required to consider the regional councils' advice and recommendations on taking of fish and game within their regions for subsistence uses. The rulemaking authority "may choose not to follow any recommendation" but only if it determines that the recommendation:

- (1) is not supported by substantial evidence presented during the course of the rulemaking authority's administrative proceedings;
- (2) violates recognized principles of fish and wildlife conservation; or
- (3) would be detrimental to the satisfaction of rural subsistence needs.

If the state rulemaking authority does not "adopt" the recommendation of a regional council, the "factual basis and the reasons for its decision" must be set forth.

Current regulations require the Boards of Fisheries and Game to meet at least once a year and also to hold in each region at least one hearing per year. See 5 AAC 96.600; see also AS 16.05.300. In addition, the Boards must meet jointly a minimum of once each year to consider matters of mutual concern--including topics relating to local fish and game advisory committees." Id. The regulations

make clear that the Boards are to consider recommendations of local fish and game advisory committees and of regional fish and game councils. See 5 AAC 96.600; see also 5 AAC 96.050(1)-(2), .050(4), .050(5), .250(a)(3), .250(c). However, present statutes and regulations do not limit the Boards in determining whether to follow recommendations of the local advisory committees or regional councils.

Presumably, the three types of reasons listed in section 805 (d) for choosing not to follow recommendations of regional councils already are within the scope of the Board's authority under AS 16.05.260; but section 805 (d) expressly requires the state to go beyond de facto compliance with the three permissible rationales. According to Section 805 (d), state management over the taking of fish and game for subsistence uses may not supersede management by the Secretary of the Interior pursuant to sections 803, 804 and 805 unless "[l]aws establishing a system of local advisory committees and regional advisory councils" require the state rulemaking authority to consider the advice and recommendations of the regional councils. Section 805 (d) then goes on to describe the limited circumstances under which the Boards may reject the councils' recommendations. As discussed above, section 805 (d) also establishes as a prerequisite for state management that the state "enacts and implements laws of general applicability which are consistent with, and which provide for the . . . participation specified in . . . [section 805]." Taken together, then, these references to state enactments necessary to retain management over taking of fish and game resources for subsistence use imply that a statutory change is needed which

explicitly limits the Boards' power to reject recommendations from the regional councils. 12

A related problem may arise concerning the extent of each Board's reporting responsibilities should it decide not to follow the recommendation of a regional council. Under the present regulations and enabling statute, the Board must inform the local advisory committee if the committee's recommendations are not followed. See AS 16.05.260; see generally 5 AAC 96.610(f). Section 805 (d) of Title VIII appears to go farther than the state requirements. If regional council recommendations are "not adopted," the state's rulemaking authority "shall set forth the factual basis and the reasons for its decision" (emphasis added). Thus, section 805 (d) apparently would require the Board (1) to make findings of fact--or at least to identify the evidence upon which its decision is based--and (2) to explain its reasoning process. Such a reporting requirement is consistent with making a record to facilitate the judicial enforcement provisions of section 207, but may not be addressed adequately by current Alaska law.

In summary, the major question raised by the provisions of section 205 (d) is whether the participation guidelines of Title VIII require amendment of state legislation under which the local and regional fish and game advisory system now operates. Because the new requirements substantially shift the authority over regulatory decisions affecting fish and game management related to subsistence uses, additional questions also should be examined:

(1) Is such a sharing of authority consistent with the requirements of other Alaska statutes and of Alaska case law concerning administrative rulemaking and delegation of rulemaking authority?

(2) Does such heavily weighted input from local and regional subsistence users contravene any provision of the Alaska Constitution? 13

E. Federal Monitoring (Section 306)

This section underscores the importance of the Secretary of the Interior's role regardless of whether the State of Alaska complies with Title VIII's formal requirements. Apparently, this monitoring section would be utilized only if the state chose to retain management authority related to taking of fish or game for subsistence uses on federal lands--although application of section 806 is not expressly limited by its language. 14 Section 806 requires monitoring of the state's performance in implementing the section 304 preference. Title VIII's local and regional participation framework is not mentioned in the monitoring provisions. Section 805 (a) (2) does indicate that the Secretary of the Interior must establish local advisory committees "at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in [§805 (a) (3) (D) (iv)]." However, Title VIII does not expressly indicate whether the Secretary's authority under

section 805 (a) remains effective beyond the specified timetable: one year from the date of Title VIII's enactment.

Several potential questions remain: Does the Secretary of the Interior have authority to create local advisory committees or regional advisory councils to supplant the state system more than a year after Title VIII's enactment date? If so, what procedure must be followed? If not, how would reimbursement to the state under section 805 (e) (1) be affected if the Secretary determines, more than a year after Title VIII's enactment date, that the state advisory committees and regional councils do not adequately perform the functions required by section 805? Does the Secretary have implied authority to enforce the provisions of Title VIII--other than that expressly granted by sections 805 and 807?

F. Judicial Enforcement (Section 807)

This section creates an elaborate, interactive enforcement format potentially involving local advisory committees, regional councils, the Secretary of the Interior, an "appropriate State agency," the Alaska governor and the federal court system. This is an entirely new enforcement mechanism, and a variety of practical and policy implications are suggested. The limited scope of this memorandum precludes a full examination of possible implementation problems. It should be noted, however, that section 807 provides, in part:

This section shall constitute the sole Federal judicial remedy created by this title for a local advisory committee or regional advisory council which determines that the preference for subsistence uses set forth in subsection (sic) 804 has not been adequately provided by the State in its region.

§807 at 142 (emphasis added). This language implies (1) that state judicial remedies may remain open to local advisory committees or regional councils and (2) that additional federal remedies may be available to parties other than the committees or councils.

One other potential problem with section 807 should be identified. The first sentence speaks of notification to the Secretary "by a local advisory committee or regional advisory council established by the Secretary or the State pursuant to section 805" (emphasis added) that inadequate provision is being made to implement the section 804 preference. The rest of the section addresses correction of such alleged inadequacies in state management. If the Secretary has taken over the advisory bodies but the state is still expected to manage for the subsistence preference of section 804, a potentially major cluster of questions is raised:

(1) Does Title VIII contemplate some level of state management on federal lands regardless of whether the state complies with the standards of sections 803, 804 and 805?

(2) Can the state assume full management of fish and game resources on federal lands even if the Secretary of the Interior

concludes that the state has not met section 805 requirements?

That is, if the Secretary:

(a) establishes at the outset local advisory committees and/or regional advisory councils to take the place of the state's existing system; or

(b) allows the state's existing system to function initially but later determines pursuant to section 805 (a) (2) that the state system does not meet the requirements of section 805.

(3) Does Title VIII attempt to require the State of Alaska to implement the section 804 preference on federal lands regardless of whether the state chooses to preclude under section 805 (d) the Secretary's implementation of sections 803, 804 and 805 (a), (b) and (c)? 15

Finally, it should be noted that section 807 specifically provides for judicial review of the state's performance only in providing section 804 preference. The local and regional participation framework is not addressed; accordingly, the adequacy of the state's advisory committee and regional council structure may not be a proper basis for an action under section 807 unless such alleged shortcomings can be shown to have resulted in the state's failure to provide adequately for the section 804 preference. When read with sections 805 and 806, this limited scope of judicial review is especially

confusing. That is, section 806 explicitly grants the Secretary only the authority to monitor and report on the state's performance in providing the section 804 preference. Section 805 authorizes the Secretary to implement a federal system of advisory committees and regional councils to perform certain functions, but the Secretary is not permitted to take such actions if the State of Alaska has enacted and implemented within one year laws containing certain provisions. See §805 (d). Accordingly, it is possible that complaints by local advisory committees or regional advisory councils about the state's compliance with section 805's policy participation standards could not be brought in federal court under section 807. A lawsuit in state court might be the only avenue open to the committee or council, and there may be a question whether advisory committees or regional councils can maintain such a suit against the state in light of their status as part of the administrative structure.

G. Park and Park Monument Subsistence Resource Commissions
(Section 808)

The framework of commissions created by this section raises a variety of practical and policy implications which are beyond the scope of this memorandum. I do note, however, that no mechanism appears in section 808 for the State of Alaska to assume the Secretary's role in considering or implementing the program and recommendations submitted by each commission. The significance of this for the state's implementation of other Title VIII provisions depends on the meaning of "program for subsistence hunting." §806 (a).