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Department and other state or federal agencies having jurisdiction over fish and wildlife.

(2) seek to quantify in a timely fashion the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing, by species, stock, or population of fish and wildlife and by population of customary and traditional subsistence users, and by subsistence use area;

(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 customary and traditional 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 effecting subsistence hunting and fishing; provided that such recommendations shall be made after prior consultation with other divisions of the department, or when appropriate with other state or

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federal agencies having jurisdiction over fish and wildlife; and provided further that such recommendations must be approved by the Commissioner of the department;

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(7) participate with other divisions of the department and with other departments of state and federal government in the preparation of statewide, [AND] regional or area management plans affecting fish, wildlife and their habitats so that those plans recognize [REORGANIZE] and incorporate the needs of subsistence users of fish and game.

* Sec. 3. AS 16.05.251(a) is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart and designating fish reserve areas, refuges and sanctuaries in the water of the state over which it has jurisdiction, subject to approval of the legislature;

(2) management of fish reserve areas, refuges and sanctuary;

[(2)] (3) establishing open and closed seasons and areas for the taking of fish;

[(3)] (4) setting quotas, bag limits, harvest levels, escapements, and sex, [AND] size, age and other limitations pertaining to [on] the taking of fish in Alaska waters or migratory fish when bound for Alaska waters;

[(4)] (5) establishing the means and methods, such as appropriate gear, tackle, vessels and other such items, employed in the pursuit, capture, and transport of fish;

[(5)] (6) establishing marking and identification requirements used in pursuit, capture, possession, tagging and transport of fish;

[(6)] (7) classifying as commercial fish, sport fish, personal use fish, subsistence fish, native fish, exotic fish, non-native fish, hatchery fish, or predators or other categories essential for regulatory purposes; provided that a fish stock or game population may be the subject of more than one classification;

[(7)] (8) watershed and habitat protection, maintenance and improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish; provided that any habitat regulations shall be co-ordinated with the Department of Natural Resources;

[(8)] (9) investigating and determining the extent and effect of disease, predation, competition among fish in the state. exercising control measures considered necessary to the resources of the state;

[(9)] (10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

[(10)] (11) establishing seasons, areas, quotas, and methods of harvest for aquatic plants;

[(11)] (12) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43;

(13) designating and regulating special fishing areas, including but not limited to personal use areas, trophy management areas, catch-and-release areas, children's fishing areas, and the like, and designating species in such areas appropriate for such special management;

(14) establishing a procedure for administrative appeal of decisions by the Board; and

(15) otherwise regulating commercial, sport, subsistence, and personal use fishing as necessary for the conservation, development and utilization of fisheries.

* Sec. 4. AS 16.05.251(b) is amended to read:

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) for [PERMITTING] the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations could [WILL] jeopardize or interfere with the maintenance of fish stocks so as to be inconsistent with sound management principles, the maintenance of healthy and natural populations of fish, or [ON] a sustained-yield basis. Except as otherwise provided in this Act or in other state or federal laws, the taking of fish on all lands and waters subject to Alaska jurisdiction for nonwasteful customary and traditional subsistence uses shall be accorded subsistence preference over other consumptive taking and uses of fish; provided that such preference shall not be construed as a preference over non-consumptive taking and uses of fish such as catch-and-release fisheries where the fish population or stock is not substantially related to customary and traditional subsistence need or where the taking, capture, tagging or transport of fish is done for

define

biological or management purposes. Whenever it is necessary to restrict the taking of fish stocks on such lands or waters for subsistence uses in order to protect the continued viability of such stocks as healthy and natural fish stocks, or to assure sound management or to assure the maintenance of fish stocks on a sustained-yield basis, or to continue subsistence uses [ASSURE THE CONTINUATION OF SUBSISTENCE USES OF SUCH RESOURCES], such preference shall be implemented through appropriate limitations based on the application of the following criteria: [SUBSISTENCE USE SHALL BE THE PRIORITY USE. IF FURTHER RESTRICTION IS NECESSARY, THE BOARD SHALL ESTABLISH RESTRICTIONS AND LIMITATIONS ON AND PRIORITIES FOR THESE CONSUMPTIVE USES ON THE BASIS OF THE FOLLOWING CRITERIA:]

(1) customary and direct dependence [UPON] on the [POPULATIONS RESOURCE] subsistence fish stocks as the mainstay of [ONE'S] subsistence livelihood;

(2) local residency; and

(3) the availability of alternative resources.

* Sec. 5. AS 16.05.251 is amended by adding new subsections to read:

(d) Subsistence fishing authorized under this section is subject to reasonable regulation of seasons, catch limits, methods, and means.

(e) If the Board of Fisheries determines that (1) a particular fish stock is not a customary and traditional subsistence resource or not a significant source of subsistence use for rural subsistence area residents and (2) subsistence is not the best use of that fish stock, the board may provide that the fish stock may not be taken under subsistence regulations, but may be taken under other regulations if appropriate; and provided further that the board may shift subsistence use of a fish stock to another stock only if there is a prior or contemporaneous stock of the same species or a different species that is suitable and available.

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(f) The Board of Fisheries shall establish an appeal procedure for persons aggrieved by the adoption or repeal of a regulation of the board. The aggrieved person must exhaust this administrative remedy before bringing a legal action challenging the regulation.

* Sec. 6. AS 16.05.255(a) is amended to read:

(a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for:

(1) setting apart <u>and designating</u> game reserve areas, refuges and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) management of game reserve areas, refuges and sanctuaries;

[(2)] (3) establishing open and closed seasons and areas for the taking of game;

[(3)] (4) establishing the means, [AND] methods, marking and identification requirements employed in the pursuit, capture, possession, tagging and transport of game;

[(4)] (5) setting quotas, bag limits, harvest levels, and sex, age, [AND] size, and other limitations and game population goals pertaining to the taking of game;

[(5)] (6) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;

[(6)] (7)methods, means, and harvest levels necessary to control predation and competition among game in the state;

[(7)] (8) watershed and habitat protection, maintenance and improvement, and management conservation, protection, use, disposal, propagation and stocking of game; provided that any habitat regulations shall be co-ordinated with the Department of Natural Resources;

[(8)] (9) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

[(9)] (10) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed;

(11) regulating sport hunts and subsistence hunts as necessary for the conservation, development and utilization of game and non-game species.

* Sec. 7. AS 16.05.255(b) is amended to read:

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) for [PERMITTING] the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations could [WILL] jeopardize or interfere with the maintenance of game populations so as to be inconsistent with sound management principles, the maintenance of healthy [and natural] populations of game, or [ON] a sustained-yield basis. Except as otherwise provided in this Act or in other state or federal laws, the taking of game on all lands and waters subject to Alaska jurisdiction for nonwasteful customary and traditional subsistence uses shall be accorded subsistence preference over the consumptive taking and uses of game for other purposes; provided that such preference shall not be

construed as a preference over either non-consumptive uses of game in areas such as national parks that are closed to all but subsistence hunting, or over non-consumptive taking of game such as the taking, capture, tagging or transport of game when done for biological or management purposes. Whenever it is necessary to restrict the taking of populations of game on such lands or waters for subsistence uses in order to protect the continued viability of such populations [as healthy and natural populations, or to assure sound management or to assure the maintenance of game resources on a sustained-yield basis, or to continue subsistence uses [ASSURE THE CONTINUATION OF SUBSISTENCE USES OF SUCH RESOURCES], such preference shall be implemented through appropriate limitations based on the application of the following criteria: [SUBSISTENCE USE SHALL BE THE PRIORITY USE. IF FURTHER RESTRICTION IS NECESSARY, THE BOARD SHALL ESTABLISH RESTRICTIONS AND LIMITATIONS ON AND PRIORITIES FOR THESE CONSUMPTIVE USES ON THE BASIS OF THE FOLLOWING CRITERIA:]

(1) customary and direct dependence [UPON] on the [POPULATIONS'] subsistence population of game [RESOURCE] as the mainstay of [ONE'S] subsistence livelihood;

(2) local residency; and

(3) the availability of alternative resources.

* Sec. 8. AS 16.05.255 is amended by adding a new subsection to read:

(d) Subsistence hunting authorized under this section is subject to reasonable regulation of seasons, bag limits, methods, and means.

(e) If the Board of Game determines that (1) a particular game species is not a customary and traditional subsistence resource or not a significant source of subsistence use for rural subsistence area residents and (2) subsistence is not the best use of that game population, the board may provide that the game population may not be taken under subsistence regulations but may be taken under other regulations. The board may shift subsistence use of a game population if there is a suitable and available alternative population of the species or a different species.

(f) The Board of Game shall establish an appeal procedure for persons aggrieved by the adoption or repeal or enforcement of a subsistence hunting regulation of the board. The aggrieved person must exhaust this administrative remedy before bringing a legal action challenging the regulation.

* Sec. 9. AS 16.05.257(h)(1) is amended to read:

(h) "subsistence hunting" means the taking of game animals by a [STATE] rural resident of Alaska qualified for nonwasteful,

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customary and traditional subsistence uses by methods and means defined by the Board of Game;

* Sec. 10. AS 16.05.257(h)(2) is repealed.

* Sec. 11. AS 16.05 is amended by adding the following section:

Sec. 16.05.258. METHODS OF DETERMINING CUSTOMARY AND TRADITIONAL SUBSISTENCE USE AND ALLOCATIONS OF FISH AND GAME. (a) In joint session, the Board of Fisheries and the Board of Game shall:

(1) identify and quantify the amount of customary and traditional subsistence uses of fish and game that is necessary to provide a reasonable opportunity for rural residents engaged in a subsistence way of life to do so; provided that such determinations shall be based at least upon the research, analysis, comments and recommendations of the subsistence division of the department that are reviewed and concurred in by the other divisions of the department.

(2) identify and designate customary and traditional subsistence use zones utilized by such rural residents; provided that such zones may overlap where different groups of subsistence users have customarily and traditionally used the same areas;

(3) identify fish stocks and game populations that customarily and traditionally have been important subsistence stocks and populations utilized by such rural residents for subsistence use.

(b) The Board of Fisheries or the Board of Game will assess the biological status of respective fish stocks and game populations that are important subsistence stocks and populations within the use zones and determine whether a surplus may be harvested during a regulatory year consistent with the utilization, development and conservation of such stocks and populations on the sustained yield principle, consistent with the maintenance of healthy and natural populations of the resource, and consistent with the public interest.

(c) After identifying subsistence uses of a fish stock or game population that is important to customary and traditional subsistence use and after determining tne amount of harvestable surplus, the appropriate board will determine the amount of harvestable surplus of such stock or population required to provide a reasonable opportunity to engage in customary and traditional subsistence uses, and will adopt regulations which authorize the taking of such stock or population for subsistence uses; provided that such regulations may be the same as, different from or in addition to regulations governing other consumptive uses of the stock or population.

(d) Each board will, in its discretion, adopt regulations pursuant to AS 16.05 which authorize the taking, for non-subsistence uses, of any stock or population identified as important for

subsistence use, to the extent that the non-subsistence uses do not jeopardize or interfere with sound management principles, with the conservation, utilization and development of fish and game resources on a sustained yield basis or the maintenance of natural and healthy populations, or with the opportunity for taking these resources for customary and traditional subsistence uses, as provided by the chapter.

(e) In joint session the boards shall adopt regulations establishing criteria which the boards shall consider for purposes of defining and identifying customary and traditional subsistence use and, where appropriate, customary and traditional subsistence use areas. Such regulations may include, but need not be limited to, the following previously adopted criteria, which shall be in effect until such time as the boards re-adopt, supplement or amend the following criteria: ~~-~~ weight of the evidence ~~-~~

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

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

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

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

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

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

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community of persons, including customary trade, barter, sharing and gift-giving; customary trade does not include sign ficant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in t..is subsection; and

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

[(f) Each board may adopt regulations, pursuant to the Administrative Procedure Act (AS 44.62), which in the board's discretion allow or prohibit new entrants into being eligible for subsistence uses. Dependent children of subsistence users shall be qualified so long as their parents are qualified.] The boards shall evaluate whether or not recipients of a [state] land disposals shall be qualified for subsistence; provided that the boards may, in their discretion, permit, revoke or deny the availability of the subsistence preference to such recipients.]

* Sec. 12. AS 16.05.330 is amended by adding the following subsection:

(c)(1) The Board of Fisheries ard the Board of Game may adopt regulations, in accordance with the Administration Procedure Act (AS 44.62), providing for the issuance of subsistence fishing permits, subsistence hunting permits, and combination subsistence fishing and hunting permits as necessary for authorizing, regulating and

monitoring subsistence harvest of fish and game. This authority shall be implemented when significant competition for fish stocks and game populations, resource shortage, or other management or biological considerations make such a program of permits a useful tool of fish and game management. This authority shall not be construed as [automatically] requiring such a permit program in any particular area of the state or upon any particular stock of fish or game population unless circumstances of significant competition, shortage, or other management or biological considerations exist which warrant such a program. For purposes of this subsection, "significant competition" or "shortage" occurs whenever the preference for subsistence uses requires a reduction in the harvest of a fish stock or game population by non-subsistence users or whenever special seasons, bag limits or other provisions are necessary to provide a reasonable opportunity for subsistence.

(2) In determining an appropriate method of permitting each board in its discretion, may adopt subsistence [licensing] programs that permit individuals, identifiable groups of individuals, residents of a community or village, or residents of an area to engage in authorized subsistence uses. Nothing in this subsection shall be construed as altering any other requirements of state or federal law for licenses,

permits, stamps, tags, or seals that are otherwise required even if the boards do not adopt regulations requiring subsistence permits.

(3) With the assistance of the department, the boards shall notify or otherwise make available to subsistence users -

(A) the terms of any applicable permit issued;

(B) the types of licenses or permits available;

(C) the fish stocks and game populations for which subsistence uses are authorized;

(D) subsistence use areas covered by such permits;

(E) other regulations governing subsistence and non-subsistence uses, such as harvest limits, seasons, and methods and means restrictions.

Regardless of whether or not a permit program is in effect pertaining to a particular area, fish stock, or game population, the boards shall seek to notify or otherwise make available to subsistence users the information described in this subsection. In notifying or making available such information the boards may utilize village and regional corporations formed under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) and community, postal, media or other services appropriate for providing notice to subsistence users.

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(4) The Department of Fish and Game shall administer any subsistence permit program through its own staff and may also enter into agreements to utilize the services of native village or regional corporations, local officials, or others to assist in administering a subsistence permit program; provided that no agreement for such assistance shall obligate the state to pay for such services unless paid for by prior authorization by the legislature.

(5) No person who holds a limited entry commercial fishing permit may participate in subsistence fishing for the same specie or species of fish authorized under the limited entry permit unless such person shows:

(A) that he did not take fish of the same species under the commercial permit for personal or family consumption, or

(B) that he did not utilize his commercial permit, or

(C) that if he did take commercially caught fish for personal or family consumption he needs to subsistence fish for the same species for reasons acceptable to the department.

* Sec. 13. AS 16.05.930(e) is amended to read:

(b) insert new paragraph

(e) ~~This~~ chapter does not prevent the traditional trade and barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the trade and barter of

subsistence-taken fish and game by regulation, emergency order or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

* Sec. 14. AS 16.05.940(22) is amended to read:

(22) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resource, by a rural Alaska resident qualified for nonwasteful, customary and traditional subsistence uses with gill net, seine, fish wheel, long line, or other methods and means defined by the Board of Fisheries; *

* Sec. 15. AS 16.05.940(23) is amended to read:

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

* Sec. 16. DEFINITIONS. For purposes of this Act,

(1) "fish stock" means a species, subspecies, geographic grouping or other category of fish capable of management as a unit which at any time during any season of the year may be found in waters subject to the jurisdiction of the State of Alaska.

(2) "game population" means a group of game animals of the same species or smaller sub-group whose members in whole or in part use or may be found at any time or during any season of the year upon land, in the air or on water subject to the jurisdiction of the State of Alaska.

(3) "the maintenance of healthy [and natural] populations" means that for some species, stocks, or populations of fish and game the application of sustained-yield principles may not alone provide sufficient guidence in terms of sound management to assure wise conservation, use and development of those species, stocks or populations. Sustained yield principles are appropriate for wildlife of which all or most of the harvested animals are of the same or similar age class, size, reproductive value, and biological significance. Use of phrase "maintenance of healthy [and natural] populations" is intended to clarify, rather than replace, sustained yield principles in appropriate circumstances, including but not

limited to circumstances where maintenance of age classes within the population is either a biological consideration or where such maintenance is important to the sound conservation, development and utilization of the resource. Use of the word "natural" is not intended to mean that the resource may not be harvested, unless otherwise probihited.

(4) "non-wasteful" means harvests, and use of fish and game that results from harvests, that are primarily oriented toward consumption as opposed to harvest and use that does not reasonably utilize the harvested animal or most parts thereof.

(5) "rural Alaska resident" in the context of subsistence hunting and subsistence fishing means an Alaska resident engaged in customary and traditional subsistence as a way of life.

(6) "subsistence preference" describes the concept that regulatory actions necessary to provide a reasonable opportunity for subsistence fishing and hunting should vary, should be graduated, and should be balanced against the degree of economic and ~~cultural~~ dependence for subsistence purposes on the resource in question. Where dependence on the resource in question is high, the preference should provide a full opportunity for satisfaction of subsistence needs, including potentially exclusive subsistence use when resource

shortage occurs. However, where dependence on the resource in question is low, the preference should be less and need not be potentially exclusive. As the degree of dependence varies, the degree of the preference should vary accordingly.

Eff. date June 1

Active duty military personnel assigned to Alaska, ~~who have lived in~~ Alaska for more than 30 days, ~~shall~~ have the right to fully participate on an equal basis with all other eligible Alaska residents in all hunts (and fisheries) authorized on military ~~land~~ installations and facilities. This right shall not be diminished by ~~limitations~~ ~~restrictions~~ on the taking of ~~fish~~ game ~~(fish)~~ ~~limitations on the taking of fish and game~~ caused by temporary reductions of subsistence preference.

SECTION BY SECTION ANALYSIS
OF PROPOSED COMMITTEE
SUBSISTENCE BILL -- DISCUSSION DRAFT

SENATE STATE AFFAIRS COMMITTEE

Senator Mitch Abood, Chairman November 19, 1985

Introduction

The proposed draft subsistence bill attempts to strike a delicate balance on many different issues that are involved in the current subsistence debate. In striking that balance, the bill seeks to satisfy two goals that are equally important: (1) protecting subsistence use of fish and wildlife by those who are truly dependent on the resources, and (2) improving the opportunity for sport users of the resources. If those two goals can be accomplished, then hopefully the "subsistence issue" will subside.

The draft bill goes much further in addressing issues related to subsistence than has any bill that was previously submitted to the Legislature. Last session, the Senate declined to act hastily on legislation originally submitted by the Governor. In so doing, the Senate established an opportunity to examine many issues that deserve to be addressed. The draft bill addresses these issues in a manner that more fairly protects subsistence and non-subsistence uses than did either the previously submitted legislation or the existing state and federal law.

In order for the State to manage fish and wildlife on state, federal, and private lands, including Native lands, the State must be consistent with three aspects of the federal law. Those "consistency requirements" concern the definition of "subsistence uses", a preference for subsistence uses in certain circumstances, and a mechanism for public participation in regulating subsistence. Regarding the definition of "subsistence uses", the federal law says that it applies only to rural residents of Alaska. The present state statute does not use the word "rural". In February 1985, the Alaska Supreme Court issued a decision, the Madison decision, that said that subsistence privileges could not be limited to rural residents under the state subsistence law as it presently exists. Therefore, the Madison decision puts the State at odds with the federal law. Accordingly, the U.S. Department of the Interior has notified the State that it will be required to implement the federal statute on federal lands and waters unless the State amends the state law so as to again be consistent with the definition of subsistence uses.

The draft bill meets the consistency requirements. In doing so it retains for Alaska the authority to manage fish and wildlife on all lands and waters in Alaska, regardless of ownership. Furthermore, to the fullest extent legally possible, the draft bill even extends Alaskan authority beyond the borders of Alaska when fish and wildlife of Alaska origin migrate beyond Alaskan borders.

There are several reasons for being consistent with the three requirements of the federal subsistence law. First, fish and wildlife do not pay attention to legal boundaries. It makes biological sense to manage populations of fish and game as biological populations, rather than under inconsistent regulations depending upon whether the population at any given moment is on state, federal or Native land.

Second, people who hunt and fish often do not know whether they are hunting or fishing on state, federal or Native land. Boundaries are unmarked and unsurveyed, and land ownership is changing as the federal government conveys state and Native land selections.

Third, even when all state and Native selections have been conveyed, sixty percent of Alaska will remain federal. Many federal lands, such as wildlife refuges, national forests, national park preserves, and unclassified federal lands, are heavily utilized for sport, commercial and subsistence harvest of fish and game. Therefore, for the state to lose regulatory authority over those harvests could jeopardize or diminish the privileges of those Alaskans and non-Alaskans who utilize federal lands, whether for subsistence, sport or commercial purposes.

Fourth, the regulatory process of the Alaska Board of Fisheries and the Alaska Board of Game is an open public process involving many opportunities for the public to propose and comment upon proposed regulations. In contrast, the federal process is much more closed, in that it involves only the publication of proposed regulations in the Federal Register and a limited opportunity for comment. It is hard to expect many Alaskans to avail themselves to the Federal Register. Therefore, any assertion of federal authority over subsistence and non-subsistence uses on federal lands would result in a loss of those open state procedures with respect to federal lands.

A section by section analysis of the proposed draft subsistence bill follows.

Section 1: Findings and Intent

Section 1 states the findings and intent of the draft bill.

A primary concern in any debate over fish and wildlife ought to be the health of the resources. Therefore, the first finding in Section 1 recognizes that all management decisions, even allocation decisions, must rest upon good biological information. Management according to land ownership, particularly where fish and wildlife utilize different lands under different ownerships, would be contrary to sound biological management.

The second finding recognizes the importance of fish and wildlife to all Alaskans in that fish and wildlife provide opportunities and benefits that are rarely available or are less available in other states. The reason that the draft bill recognizes this obvious fact is that by recognizing it the bill sets the stage for the delicate balance that the bill seeks to achieve by establishing mechanisms and granting authority to deal fairly with subsistence, sport, commercial, and non-consumptive needs for fish and wildlife.

The third and last statement of findings and intent is important. It incorporates the several basic intentions of the bill as a whole. First, it almost goes without saying that the subsistence issue is a source of division and controvery among Alaskans. It must be resolved in a manner that is fair and generally perceived as fair. Therefore, the third statement of findings and intent recognizes that there needs to be an equitable balance between sport, commercial, subsistence and non-conumptive users of fish and game.

Second, it also recognizes that in times of resource shortage there needs to be a reasonable preference for subsistence use of fish stocks and game populations that are truly important subsistence stocks. The Alaska Constitution provides that fish and wildlife are reserved to the people for common use. The Constitution also provides that fish and wildlife may be subject to preferences among users. Therefore, the Legislature has authority to establish a preference for subsistence and define it, protect it and limit it as provided by the bill.

Third, this section also states the intention of the Legislature that the Board of Fisheries and the Board of Game have sufficient authority, flexibility and information necessary to manage the resources and deal sensibly and knowledgeably with the many issues that come to the boards. The purpose of this provision is to state that the authorities delegated by this bill to the boards and to the Department of Fish and Game are intended to be sufficiently broad and flexible so that the boards can deal with allocation issues, protect subsistence, sport, commercial and other uses and protect, maintain and manage the resources upon which they depend.

Section 2: Responsibilities of the Subsistence Division

Section 2 amends existing law concerning the responsibilities of the Subsistence Division in the Department of Fish and Game. The Subsistence Division is a research and informational arm of the Department, rather than a management arm.

The draft bill expands and clarifies the informational duties of the Subsistence Division in that it requires the division to compile and analyze many different types of data that are useful to the boards in making knowledgeable decisions. The amendments require the division to assist the boards by identifying stocks of fish and populations of game that are used for subsistence, identifying the degree of importance that those stocks and populations have to customary and traditional subsistence use, the areas used by groups of subsistence users, the areas used by the wildlife upon which subsistence occurs, and the impacts of subsistence use and non-subsistence use. The bill also recognizes that in performing this informational role to assist the boards the division must interrelate many related needs for information. That is to say, for example, that identifying a population of game as an important subsistence resource is most useful if the division also identifies to the board other information about the resource in question, such as the uses to which the game is put, the importance of the use for subsistence purposes, the amount of those uses presently and traditionally occurring, the amount of the resource that is necessary to provide a reasonable opportunity for important uses to continue, the areas utilized for harvest, and the areas utilized by the game even when not under Alaska harvest since impacts of Alaskan activities may be felt outside of Alaska. Thus, these and other provisions in section 2 require the Subsistence Division to put subsistence use and subsistence issues in a broad factual context in order that the boards may make sound decisions.

Sections 3, 4, 6 and 7: Authority of the Board of Fisheries and the Board of Game

Sections 3 and 4 amend the existing authorities of the Board of Fisheries, and sections 6 and 7 amend the existing authorities of the Board of Game. The provisions of sections 3

and 4 parallel those of sections 6 and 7. In most respects, only the boards are different. The amendments are in separate sections because the first of each pair of sections (i.e. sections 3 and 6) relates to the general authorities of the Board of Fisheries and the Board of Game respectively, and the second of each pair of sections (i.e. sections 4 and 7) deals specifically with the regulatory authority of the respective board over subsistence. In existing state law, the general regulatory authority of the Board of Fisheries is found in AS 16.05.251(a); the subsistence regulatory authority of the Board of Fisheries is found in AS 16.05.251(b); the general regulatory authority of the Board of Game is found in AS 16.05.255(a); and the subsistence regulatory authority is found in AS 16.05.255(b) and AS 16.05.257. Because the authorities of the boards are found in different sections and subsections of the present statutes, the draft bill deals with them separately, but similarly. However, for purposes of this section-by-section analysis, it is simplier to discuss them as a package of related and similar amendments.

The amendments of sections 3 and 6 to the general authorities are largely self-explanatory. They clarify and fill gaps in authority that have arisen in the context of many issues related to the management of fish and game. Most of these are technical amendments. All previous subsistence bills have addressed these general provisions in one form or another, and this bill more than others tries to deal with many technical and legal problems that have arisen before the Board of Fisheries and the Board of Game.

The amendments in sections 4 and 7 are to the main subsistence provisions of existing law. Several important concepts are stated. Section 4 and 7 establishe a subsistence preference for subsistence use of fish and game. However, the preference does not apply to all fish stocks or game populations. One of the problems with the present subsistence law is that it arguablly creates a subsistence priority on every stock of fish or population of game for which there is a harvestable surplus, even if the resource is not an important subsistence fish stock or game population. This made little sense to sport users and inhibited public acceptance of the subsistence laws.

In the draft bill, the language of the preference is more clearly consistent with federal law than is the present language adopted in 1978. In many respects it is modeled after the federal language creating the federal subsistence preference, so as to assure consistency. Nevertheless, the federal law on the preference is sufficiently general and flexible, such that it provides the state with an opportunity to be consistent yet also protect and manage sport, commercial, and subsistence uses, and the resources themselves, more specifically and more appropriately than either existing state law or federal law. The following changes are significant.

First, the subsistence preference is only for nonwasteful subsistence uses. The concept of protecting only nonwasteful subsistence is found in federal law, but not in present state law. Therefore, there will be no problem with consistency. "Nonwasteful" is defined in section 16 of the bill.

Second, subsistence preference, as defined by section 16 of the bill, is a flexible preference. It seeks to balance the degree of preference with the degree of dependence on the resource. The federal law does not require that in all cases of resource shortage there must be a total exclusion of other uses. The concept of a flexible preference recignizes that when dependence on the fish stock in question is very high and shortages are severe, then total exclusion may be necessary in order to provide a reasonable preference. However, when the fish stock is only marginally significant to subsistence, or when it is only incidentally harvested, or when it is consistently harvested by sport means regardless of the ultimate use and the character of the user, or when it is practically unimportant as a subsistence resource, then any preference for subsistence use clearly should not automatically exclude non-subsistence uses even when shortage occurs. Instead, a less than exclusive preference would be appropriate and may be provided in a manner in which there is still some degree of preference even though other uses continue and even though all user groups reduce their harvests. For example, although there are exceptions, generally dall sheep, sandhill cranes and steelhead and rainbow trout have not been important customary and traditional subsistence stocks in many parts of the state. Even where they have been subsistence stocks, they have often been only occasionally harvested in a historic sense, simply because other resources were more plentiful and easily accessible. They are generally not highly important subsistence stocks for purposes of assuring that a reasonable opportunity for subsistence uses will continue. Nevertheless, sheep, cranes and steelhead and rainbow trout are very highly prized recreational resouces for sport and non-consuptive users. Accordingly, any preference at all should be less strict than would occur on stocks that are truly important for purposes of assuring that the opportunity for a subsistence lifestyle continues.

Third, the preference is only a preference over other consumptive uses. This is consistent with federal law. It means that the subsistence preference will not be a preference over certain practices that constitute taking of fish and game but which are non-consumptive in the usual sense of the term. For example, the Board of Fisheries has established some catch and release trout fisheries in which people take, but are not allowed to kill deliberately or consume, the resource. Similarly, the Department of Fish and Game often "takes" (as the term is defined legally) all the fish in a lake by poisoning them in order to clean out undesireable species prior to stocking. With respect to game, the department also "takes" game for purposes of transplanting game, controlling predators, and other reasons. In

national parks, opportunities for wildlife viewing and maintenance of substantially unhunted populations of game are non-consumptive dedications of the resources. Management tools like catch-and-release sport fisheries, "takings" for bioloigical or management reasons, and parks should not be prohibited or made substantially more difficult because of a subsistence preference, particularly if there is no significant subsistence dependence on a resource in question.

Fourth, this section addresses what has become known as Tier I and Tier II subsistence. The most important point in any discussion about Tier II subsistence is whether or not any bill considered by the legislature will re-open hunts (and allow repeal of present Tier II hunts and fisheries) that were created by necessity of the Madison decision. This bill will re-open those hunts and it will allow repeal of the Tier II hunts and fisheries. The manner of accomplishing that is complex, however, due to the interplay of the two levels of the preference (Tiers I and II) with the absence of the word "rural" in the existing state law. Therefore, in order to understand how we get those hunts re-opened, it is necessary to understand what tiers I and II mean in state and federal law and also who gets the preference.

The existing state law more clearly states the two levels of the subsistence preference than does the federal law, and the Alaska Supreme Court found in the Madison case that these two levels exist in the present state law. The federal subsistence law is less precise with respect to whether or not it, like the state law, contains two levels for the preference. However, legislative history of the federal law indicates that even the federal law contains the two levels now known as Tier I and Tier II. In both the federal and the present state statutes, the first level (Tier I) is when non-subsistence uses are restrained or eliminated, and the second level (Tier II) is when further restriction of harvest is necessary to protect the stock. In the latter instance, the preference goes to only those subsistence users who are customarily and directly dependent on the resource as a mainstay of livelihood, who are local residents, and who lack alternative resources.

A technical issue, with respect to solving the present Tier I and Tier II problems, arises because it is difficult (and quite an achievement) to be consistent with a less than precise federal statute. Therefore, by modeling sections 4 and 7 after the analogous provision in federal law, the draft bill is consistent, regardless of what the federal law says imprecisely about whether Tier I and Tier II implicitly exist in the federal statute.

Sections 5 and 8: "Targeting Issues" -- What are appropriate subsistence stocks; what are not appropriate subsistence stocks; when should the boards be allowed to shift or prohibited from shifting subsistence harvest to other stocks?

For lack of a better term, the issues addressed in sections 5 and 8 may be called "trageting issues". Sections 5 and 8 are parallel sections, with the former dealing with fish stocks and the latter dealing with game populations. In each section, subsections (e) and (f) of the amending language are the key provisions. Subsections (e) provide that if a fish (or game) stock or population is not a significant subsistence resource and if subsistence is not the best use of the resource, then subsistence may be prohibited even if the resource may be taken under other regulations. Subsections (e) also state the circumstances in which subsistence use of a resource may be shifted and may not be shifted to alternative fish stocks and game populations. With respect to fish stocks, the bill permits shifting only if there is a prior or contemporaneous stock that is suitable and available. With respect to game populations, shifting is only permitted if there is a suitable and available population. These legal standards for allowing or prohibiting shifting of a target stock are consistent with the federal law. They are consistent with several aspects of the federal law, including (1) the provisions of the federal law which make subsistence subject to sound management principles, (2) the federal constraint against wasteful subsistence use and (3) the guiding purpose of the federal statute, which is to provide the opportunity for rural Alaska residents engaged in a subsistence way of life to continue to do so.

In sections 5 and 8, subsection (f) of the amending language allows the respective boards to establish administrative appeal procedures and requires any potential plainfiff to exhaust administrative appeals before going into state court. This should keep many allocation issues out of the courts in that an administrative appeal process is a more economical and less time consuming method of settling many disputes than is judicial action.

Sections 5 and 8 also provide that subsistence fishing and hunting are subject to seasons, bag limits, methods and means restrictions and other regulations adopted by the boards. This is consistent with existing state law.

Section 9: Subsistence Hunting Defined

Section 9 amends the existing definition of subsistence hunting by clarifying that it is for "rural residents" of Alaska. This is necessary in order to accomplish repeal of the Tier II hunts, since they are the direct result of the absence of the word "rural" in the existing state statute. A very important question,

other than addressing Tier II problems, is how to define "rural", and the bill answers this in section 16 by defining "rural residents", rather than by defining "rural". The explanation is found under "Section 16" in this section-by-section analysis.

Section 10: Repeal of Automatically Exclusive Subsistence Hunting Areas

Under existing state law, AS 16.05.257(h)(2), any subsistence hunting area created by the Board of Game must be managed solely for subsistence hunting of the game population for which the area was created. Since the degree of the preference at Tier I subsistence may vary according to the importance of the stock and the degree of dependency, such subsistence hunting areas are in conflict with the preference as stated in the draft bill. Accordingly, they are repealed as defined in AS 16.05.257(h)(2). This is not to say however, that subsistence hunting areas may not be created or that they may not be exclusive. It is only to say that the present definition of them is at odds with the rest of the bill.

Section 11: Methods of Determining Customary and Traditional Subsistence Use and Allocations of Fish and Game

Section 11 establishes the rational procedure by which the boards shall determine customary and traditional subsistence uses and allocate resources. The provisions of section 11 are consistent with the informational tasks of the Subsistence Division, as stated in section 2 of the bill. Section 11, however, is new statutory language that says the boards shall first identify: (1) the amount of resources needed to reasonably provide a subsistence opportunity, (2) the customary and traditional subsistence use areas by species, stock or game population, and by groups of users, and (3) the important subsistence fish stocks and game populations. Second, each board then assess the biological status of the resources in question. Third, each board then determines the amount of harvestable surplus necessary to provide a reasonable subsistence opportunity with respect to the particular resource in question. Fourth, after that is determined, non-subsistence uses may be accommodated.

This framework is similar to existing board policies found in 5 AAC 99.010, the validity of which was threatened by the Madison decision. By statutorily enacting the framework, the problem of potential invalidity is solved.

More importantly, the provisions establish a rational means of making allocation decisions which protect sport, subsistence, commercial, and non-consumptive users from unfair competition. The provisions do so by focusing on important subsistence stocks, by analyzing subsistence use in terms of areas used, and by protecting all uses accordingly.

Section 11 also allows the boards to adopt criteria for defining customary and traditional subsistence use, and until the boards do so, the draft bill re-adopts the eight point criteria for defining customary and traditional subsistence use that the boards have previously used.

Section 12: Subsistence Permits

Section 12 grants the boards authority to adopts programs for subsistence permits. No fee is suggested since the permits are technically not a license issued by the Department of Revenue. The draft language allows flexibility in designing a permit program. It recognizes that permits should be required when significant resource competition or other reasons make the gathering of data, through a permit system, a useful tool in management. Part of the flexible design of the permit authority contained in this section is the provision that permits need not always be handled on an individual basis, and that for purposes of efficiency it may be sufficient to design permits for areas, communities, discreet groups of individuals within communities, or simply individuals. The permit process will identify the fish stocks and the game populations that may be taken under the permit for subsistence.

Section 13: Technical amendment to existing law.

This corrects a misspelling in the existing statute and performs one other technical amendment.

Section 14: Definition of Subsistence Fishing

This is similar to the previously discussed definition for subsistence hunting.

Section 15: Definition of Subsistence Uses

This incorporates "rural residents" into the definition of subsistence uses. It is necessary for federal consistency.

Sections 16: New Definitions

Section 16 contains several new definitions. The most important ones concern the "maintenance of healthy and natural populations" as a clarification of sustained-yield principles, the definition of "rural Alaska resident" which is tied to the criteria for customary and traditional use rather than to the concept of some area of the state, and the definition of the variable and flexible "subsistence preference" which seeks to vary the degree of the preference with the degree of dependence on the resource in question.

Reported p 304, supra

ANNOTATION

CONSTITUTIONALITY OF STATE LAWS WHICH DISCRIMINATE AGAINST NONRESIDENTS OR ALIENS AS TO FISHING AND HUNTING RIGHTS

I. Prefatory Matters

II. General Considerations

III. Validity of Particular Legislation

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

3 Am Jur 2d, Aliens and Citizens §§ 10, 37; 35 Am Jur 2d, Fish and Game § 35; 51 Am Jur 2d, Licenses and Permits § 31

12 Am Jur Pl & Pr Forms (Rev Ed), Fish and Game, Forms 7, 8, 28

8 Am Jur Legal Forms 2d, Fish and Game §§ 118:61 et seq.

USCS, Constitution, Art I, § 8, cl 3; Art IV, § 2, cl 1; Art VI, cl 2; Amendment 14; 46 USCS §§ 251, 263

US L Ed Digest, Constitutional Law §§ 338, 351, 355, 364, 461; Fish and Fisheries § 3

ALR Digests, Fish and Fisheries § 17

L Ed Index to Annos, Aliens; Equal Protection of the Laws; Fish; Game; Licenses and Licensing Taxes; Nonresidents; States; Wildlife

ALR Quick Index, Aliens; Discrimination; Equal Protection of Laws; Fish and Fisheries; Game and Gaming Laws; Hunting; Licenses and Permits; Nonresidents

Federal Quick Index, Discrimination; Fish and Game; Licenses and Permits; Pre-emption; Supremacy Clause

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I. Prefatory matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the federal cases involving the validity, under the United States Constitution, of state or territorial[1] enactments[2] which are alleged to discriminate, with respect to hunting or fishing rights,[3] against nonresidents of the state or against aliens.[4]

State constitutional, statutory, and

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1. Although the annotation includes cases decided under the supremacy clause (Article VI) of the Constitution involving possible conflict between federal and state statutes, it does not include cases dealing solely with the question whether the legislature of a United States Territory has exceeded the powers conferred upon it by Congress.

2. In the cases discussed herein these are generally statutes, but they may be state constitutional provisions or agency regulations in some instances.

3. It is a restriction on the actual killing or capturing of animals or fish that is the focus of this annotation; thus, for example, cases dealing solely with the right to transport out of the state animals already killed are outside the present scope.

For the purposes of this annotation, the harvesting of species such as oysters is treated as a type of fishing.

4. Cases are not included herein to the extent that they deal solely with any alleged infringement of treaty rights.

regulatory provisions affecting the matters dealt with herein are considered only insofar as they are reflected in the cases discussed, and no attempt has been made to set forth the present law of any state.

[b] Related matters

Supreme Court's application of Fourteenth Amendment's equal protection clause to foreign corporations. 49 L Ed 2d 1296.

Validity of state laws denying aliens living in United States rights enjoyed by citizens. 47 L Ed 2d 876.

Validity of alien land laws. 92 L Ed 281.

Validity and construction of statutes or rules conditioning right to practice law upon residence or citizenship. 53 ALR3d 1163.

Constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works. 38 ALR3d 1213.

Rights of fishing, boating, bathing, or the like in inland lakes. 57 ALR2d 560.

Validity of prohibition or regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply. 56 ALR2d 790.

Right created by private grant or reservation to hunt or fish on another's land. 49 ALR2d 1395.

§ 2. Summary and comment

The perceived role of state government with respect to the state's natural resources has varied through the years according to economic conditions and according to the nature of the particular resources involved. Despite prevailing attitudes of laissez faire in many other contexts, with respect to fish and game the nineteenth-century legal view of the state's role was that the state was the "owner" of animals ferae naturae, in trust for its people, and had more or less complete authority to regulate fish and game as it saw fit (§ 3, infra). Whether out of a desire to conserve the food supply or to protect the state's own hunters and fishermen from outside competition, states occasionally adopted the expedient of forbidding aliens or nonresidents, or both, from hunting or fishing within the state's borders, or of discouraging such activities on the outsiders' parts by imposing higher licensing fees upon them than upon others. The enactment of such legislation did not end in the nineteenth century, but as will be seen below, the courts' attitudes toward it have altered somewhat since then.

Legislation of the type under consideration has most frequently dealt with commercial hunting and fishing, as opposed to hunting and fishing purely for sport, which latter type would normally involve the killing or capture of smaller numbers of animals on a given expedition. Also, nonresidents rather than aliens have usually been the targets of such statutes, although discrimination against aliens has been involved in a number of the cases discussed in this annotation.

Although, as mentioned, the early prevailing view was that the state government was the "owner" of the state's wildlife, the more recent view has been that referring to state "ownership" is merely a way of emphasizing the state's duty to preserve its wildlife from depletion and regulate its exploitation; in reaching this conclusion the courts have reasoned that free-swimming and free-roaming animals cannot realistically be said to be "owned" by anyone prior to capture (§ 3, infra).[5]

Challenges to legislation said to discriminate against aliens or nonresidents as to hunting or fishing rights have been brought under numerous provisions of the United States Constitution. The provision most frequently relied upon has been the privileges and immunities clause of Article IV, but successful challenges have been brought as well under the equal protection clause (Fourteenth Amendment), the commerce clause (Arti-

5. Inasmuch as some of the early cases expounding the "state ownership" theory dealt with the rather limited situation involving animals—such as oysters—which are not constantly moving from place to place, there may still be some limited scope for the "ownership" theory, such cases never having actually been overruled (§ 3, infra).

cle I, § 8), and the supremacy clause (Article VI). Regardless of which constitutional provision has been involved in a given case, modern courts have emphasized, instead of some blanket theory of state ownership of wildlife, the need for analysis of the factors said to support the particular legislation in question and for determining whether the measures adopted are reasonably appropriate to fulfill the asserted needs (§ 4, infra). As the above suggests, whatever may be the case with respect to hunting or fishing for sport, or with respect to non-free-swimming sea animals, it would appear from recent cases that as to commercial fishing for free-swimming fish, a state seeking to justify legislation which discriminates against aliens or nonresidents must do more than merely allege its ownership of the fish or its desire to conserve natural resources;[6] to judge from Supreme Court cases beginning with Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, there must be some showing that there are valid independent reasons (beyond the mere factor of alienage or nonresidence) for the disparity in treatment, and that the measures adopted and the degree of discrimination involved bear a close relationship to such factors. This is evidently considered to be the case whether the constitutional conflict alleged is with the privileges and immunities clause of Article IV, the equal protection clause of the Fourteenth Amendment, or the supremacy clause of Article VI via pre-empting federal statutes relating to licensing and enrollment of vessels (§ 4, infra).

Recognizing that not all facially unequal state treatment of nonresidents or aliens is necessarily unconstitutional, the courts have considered a number of factors said to justify disparate treatment of nonresidents or aliens (§ 5, infra). The Supreme Court has acknowledged, for example (Toomer v Witsell, supra), that a somewhat higher fishing license fee may be applied to nonresidents than to residents to the extent that such a higher fee merely compensates the state for the added financial burdens involved in its enforcement of the fishing laws against nonresidents or eliminates a disparity between residents and nonresidents as to their tax contributions to the enforcement programs.[7] And although there is very little case law on the subject, it has been suggested that hunting or fishing for sport may not be entitled to the same degree of constitutional protection as is hunting or fishing pursued as a livelihood (§ 5, infra). Also, there may be a wider scope for the operation of state legislation in waters wholly within the state or with respect to fish or animals that do not habitually migrate from state to state (§ 5, infra).

From the few cases in point, it would appear that the governments of Federal Territories are normally subject to the same constitutional restrictions with respect to aliens' and nonresidents' fishing rights as are states, whether by operation of law or by congressional decree (§ 6, infra).

With respect to fishing rights, legislation which appeared to discriminate against nonresidents was upheld in a number of cases—most of them rather old—either in reliance on the state ownership rationale or on the basis that the disparity in treatment was justifiable under the circumstances (§ 7[a], infra). On the other hand, in a number of cases in which courts found insufficient justification for legislation discriminating against nonresidents as to fishing rights, such legislation was held to violate various provisions of the Constitution (§ 7[b], infra). The courts also invalidated various statutes which forbade or severely restricted aliens (or certain categories of aliens) from engaging in commercial fishing, although in one early case the

6. In a number of the cases discussed in this annotation, courts have found the claim that the statute in question was a conservation measure to be lacking in substance, in view of the fact that the statute placed little or no restriction on the amount of fish or game that could be taken by the state's own citizens.

7. Presumably this justification would rarely support an outright ban on nonresident (or alien) fishing.

court refused to disturb a statute of this type (§ 8, infra). In one recent case of potentially wide application, the Supreme Court held that a legislative scheme which placed severe limitations on commercial fishing by both nonresidents and aliens was of a type preempted by federal law dealing with the licensing of vessels and was thus invalid under the supremacy clause (Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, infra § 8).

Among the comparatively few cases involving discrimination as to hunting privileges, legislation imposing higher sport-hunting license fees on nonresidents than on residents was upheld in two instances (§ 9[a], infra), while statutes restricting the right of nonresidents to trap alligators were held to deny equal protection of the laws where they would have prevented a nonresident who owned land within the state from authorizing trapping operations on his land (§ 9[b], infra). The Supreme Court in an early case upheld a state statute forbidding resident aliens from killing wildlife, indicating that it thought the legislature had had a sufficient basis for concluding that the class in question represented a particular threat to the state's wildlife resources (§ 10, infra).

II. General considerations

§ 3. "State ownership" theory as supportive of discriminatory regulation

In the early decisions in which the courts upheld a state's right to discriminate between residents and nonresidents (or between American citizens and aliens), they did so most frequently on the basis that the state was the "owner" of the fish and wildlife within its jurisdiction and that it consequently had the power (or even obligation) to maintain them for the benefit of its own citizens. As will be seen, this theory has been given little scope in recent years, but a brief tracing of its development, with emphasis on Supreme Court cases, may give some indication of its applicability to various situations today.

Although earlier decisions not involving discriminatory legislation had recognized the view that the state owns the game and wildlife within its jurisdiction and may regulate them for the benefit of its citizens,[8] the first Supreme Court case within the scope of this annotation in which such theory was recognized was McCready v Virginia (1877) 94 US 391, 24 L Ed 248, where the court upheld a state law prohibiting citizens of other states from raising oysters in the tidewater beds of a river within the state. Saying that the state owns the tidewater beds and the animal life in them "so far as the latter are capable of ownership while running," the court expressed the view that the citizens of one state are not invested by the privileges and immunities clause of Article IV or other provisions of the Constitution with any interest in such common property of the citizens of another state. In this connection the court deemed the planting of oysters to be no different in principle than the planting of corn on dry land owned by the state.

The possibly limited scope of the McCready decision was illustrated by Manchester v Massachusetts (1891) 139 US 240, 35 L Ed 159, 11 S Ct 559, where the court was dealing with a statute regulating fishing in a bay located wholly within a state. Noting that the statute in question made no discrimination between that state's citizens and others, the court specifically mentioned that it expressed no opinion on whether there is a liberty of fishing for swimming fish in navigable waters common to inhabitants or citizens of the United States.

The state's right to control the taking of game within its borders was recognized in Geer v Connecticut (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600, where the court answered in the affirmative the question whether the state had the power to regulate the killing of game within its borders so as to confine its use to the limits of the state and to forbid its transportation outside the state. The statute involved in the Geer Case, how-

8. For example, see Smith v Maryland (1855) 59 US 71, 15 L Ed 269.

ever, made no distinction between residents and nonresidents or between citizens and aliens.

In Patsone v Pennsylvania (1914) 232 US 138, 58 L Ed 539, 34 S Ct 281, a case involving a statute forbidding resident aliens from hunting within the state, the court similarly recognized the "lawful object, the protection of wild life," but it upheld the statute primarily on the basis that the state could not be said to have been totally unwarranted in concluding that resident aliens were (under presumed local circumstances) the peculiar source of the evil that the legislature desired to prevent.

Prior to Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, infra, several lower federal courts relied heavily on the "ownership" theory in upholding legislation apparently discriminating against nonresidents or aliens with respect to hunting or fishing rights: Corfield v Coryell (1823, CC Pa) F Cas No 3230 (gathering of clams, oysters, and shells in inland or coastal waters); Re Eberle (1899, CC Ill) 98 F 295 (hunting and fishing generally); Lubetich v Pollock (1925, DC Wash) 6 F2d 237 (commercial fishing generally); Anderson v Smith (1934, CA9 Alaska) 71 F2d 493 (hunting-license fees).

In declining to extend the "ownership" theory to a situation involving free-swimming fish in the marginal sea, the court in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, stated that the whole ownership theory is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. In the court's view, there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power—like its other powers—so as not to discriminate without reason against citizens of other states. The McCready and Patsone cases were not overruled but were distinguished, the former because it involved fish which would remain in the state until removed by man and because the earlier case dealt with inland waters. In distinguishing Patsone the court relied on that decision's conclusion that there was a substantial reason for the discrimination beyond the mere fact of alienage.

Similarly, in Takahashi v Fish & Game Com. (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138, involving a statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship, the court agreed with the view that in the present type of situation, "to put the claim of the State upon title is to lean upon a slender reed."[9] The court said that to whatever extent the fish in the 3-mile belt off California's coast might be capable of ownership by that state, such "ownership" was inadequate to justify California in excluding any or all aliens who were lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so.

And in Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, the court declared that a state does not stand in the same position as the owner of a private game preserve and that it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the states nor the Federal Government, said the court, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture.

☆ COMMENT: While clearly the "ownership" theory is no longer to be relied on as a sole basis for upholding legislation discriminating against aliens or nonresidents in many situations, the failure of the Supreme Court to actually overrule its early decisions on the subject may suggest that the theory still has some vitality in at least the types of situations involved in the McCready Case: regulation of non-free-swimming species and regulation of inland waters. It would be difficult,

9. Missouri v Holland (1920) 252 US 416, 64 L Ed 641, 40 S Ct 382, 11 ALR 984.

however, to argue that the Patsone Case, supra, has any continuing vitality, in view of the rationale used in cases such as Douglas v Seacoast Products, Inc., supra, to the effect that a state does not really "own" wild animals or birds; in response to a Fourteenth Amendment challenge, the Patsone court appeared to assume that the legislature in that case had a good reason for discriminating against aliens—on assumption that the court today might no longer be willing to make, as demonstrated by cases such as Takahashi, supra.

§ 4. Constitutional bases for adjudication of claims of discrimination

One striking feature of most of the case law dealing with the subject matter of this annotation is that the courts' analyses have been largely the same whether the statute in question was alleged to violate the privileges and immunities clause of Article IV, the equal protection clause of the Fourteenth Amendment, or some other provision. Thus, while the particular constitutional provision involved in the particular case must always be kept in mind, points made by some courts with respect to, for instance, the privileges and immunities clause may be involved in equal protection analysis as well.[10]

☆ NOTE: Although the courts in the cases within the scope of this annotation have almost never stated that their rationales would be applicable only with respect to the particular constitutional provision under discussion therein, there is clearly at least one situation in which persons who could not take advantage of one provision might be able to make use of others. The privileges and immunities clause referred to above is clearly of no use to aliens in and of itself, since by its terms it protects only citizens of a state of the Union; see 16 Am Jur 2d, Constitutional Law §§ 471, 472, for discussion. As to the view that hunting or fishing for sport should be considered wholly outside the privileges and immunities clause, see § 5, infra.

Thus, the court in Edwards v Leaver (1952, DC RI) 102 F Supp 698, in invalidating a discriminatory state fishing law, relied on the privileges and immunities clause with respect to the individual plaintiffs in the case, but relied on the equal protection clause with respect to the corporate plaintiffs, stating that the latter were not "citizens" under the privileges and immunities clause, but were "persons" for equal protection purposes.

The following general discussion under the privileges and immunities clause, emphasizing the need for analysis of the particular factors said by the state to justify the disparity in treatment, is illustrative of the general approach followed in many of the cases in later sections of this annotation.

In discussing the privileges and immunities clause of Article 4 of the Constitution, the court, in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, said that this provision, while barring discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, does not preclude disparity of treatment where there are perfectly valid independent reasons for it. The inquiry in each case, stated the court, must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The court cautioned that the inquiry must also be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures. Using this analysis, the court held that the privileges and immunities clause was violated by a state statute requiring payment of a much higher license fee by nonresident shrimpers than that required of residents, the practical effect of which

10. The courts' treatment of the "ownership theory," discussed in § 3, supra, is one example.

scheme was to virtually exclude nonresidents from the shrimping trade in the state's coastal waters.

Although striking down a discriminatory fishing law under the privileges and immunities clause, the court in Russo v Reed (1950, DC Me) 93 F Supp 554, observed, citing the Toomer case, supra, that the privileges and immunities clause does not always require *complete* equality. The court also endorsed the view that states should have considerable leeway in analyzing local evils.

☆ NOTE: In considering the validity of a state law which discriminated against nonresident fishermen, the court in Brown v Anderson (1962, DC Alaska) 202 F Supp 96, declared that there is no exception in the privileges and immunities clause providing for differentiation on the basis of the general welfare of citizens of any state. If such were the case, the court pointed out, it would be possible to couch a legislative act in such words as to regulate almost all types of endeavor on the sole basis of welfare. The court said it specifically could not agree with the contention that there was authority to avoid the effect of the privileges and immunities clause of Article IV solely under the guise of avoiding economic losses to residents.

The cases which have involved constitutional challenges to legislation allegedly discriminating against aliens or nonresidents as to hunting or fishing rights are discussed in detail in the succeeding sections of the annotation with respect to their particular factual situations. However, in order to provide an overview of the variety of constitutional provisions which have been involved, the following summary lists such cases in which a challenge was successful, together with the particular provision(s) of the Constitution relied on by the court.

Sup Ct—Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, infra, § 7[b] (privileges and immunities);[11] Takahashi v Fish & Game Com. (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138, infra § 8 (apparently Fourteenth Amendment); Mullaney v Anderson (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, infra § 7[b] (apparently privileges and immunities); Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, infra § 8 (supremacy clause).[12]

First Circuit—Russo v Reed (1950, DC Me) 93 F Supp 554, infra § 7[b] (privileges and immunities); Edwards v Leaver (1952, DC RI) 102 F Supp 698, infra § 7[b] (equal protection,[13] privileges and immunities).

Fifth Circuit—Pavel v Pattison (1938, DC La) 24 F Supp 915, infra § 9[b] (equal protection); Pavel v Richard (1938, DC La) 28 F Supp 992, infra § 9[b] (equal protection); Steed v Dodgen (1949, DC Tex) 85 F Supp 956, infra § 7[b] (privileges and immunities); Gospodonovich v Clements (1951, DC La) 108 F Supp 234, app dismd 344 US 911, 97 L Ed 702, 73 S Ct 334, infra § 7[b] (privileges and immunities).

Ninth Circuit—Re Ah Chong (1880, CC Cal) 2 F 733, infra § 8 (equal protection); Brown v Anderson (1962, DC Alaska) 202 F Supp 96, infra § 7[b] (privileges and immunities; commerce clause).[14]

In Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, infra § 8, the court struck down a statute which restricted certain fishing rights of aliens and nonresidents, finding that the statute in question was preempted by the Enrollment & Licensing Act (46 USCS §§ 251 et seq.) relating to commercial vessels. The court relied in part on some of its earlier cases which did not involve supremacy clause contentions.

In the following cases, also discussed in more detail in succeeding sections of the annotation, challenges to allegedly discriminatory hunting and fishing laws were unsuccessful, the courts rejecting

11. Article IV, § 2.
12. Article VI.
13. Fourteenth Amendment.
14. Article I, § 8.

contentions raised under the particular constitutional provisions noted.

Sup Ct—McCready v Virginia (1877) 94 US 391, 24 L Ed 248, infra § 7[a] (privileges and immunities; commerce clause); Patsone v Pennsylvania (1914) 232 US 138, 58 L Ed 539, 34 S Ct 281, infra § 10 (equal protection; due process);[15] Haavik v Alaska Packers Asso. (1924) 263 US 510, 68 L Ed 414, 44 S Ct 177, infra § 7[a] (privileges and immunities).

Second Circuit—American Commuters Asso. v Levitt (1969, CA2 NY) 405 F2d 1148, infra § 7[a] (apparently equal protection).

Third Circuit—Corfield v Coryell (1823, CC Pa) F Cas No. 3230, infra § 7[a] (commerce clause; privileges and immunities; and admiralty cases clause).[16]

Seventh Circuit—Re Eberle (1899, CC Ill) 98 F 295, infra § 9[a] (privileges and immunities; Fourteenth Amendment).

Ninth Circuit—Lubetich v Pollock (1925, DC Wash) 6 F2d 237, infra §§ 7[a], 8 (Fourteenth Amendment); Montana Outfitters Action Group v Fish & Game Com. (1976, DC Mont) 417 F Supp 1005, jur noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, infra § 9[a] (privileges and immunities; equal protection; due process).

In Montana Outfitters Action Group v Fish & Game Com. (1976, DC Mont) 417 F Supp 1005, jur noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, infra § 9[a], the court rejected challenges under three constitutional provisions in holding that hunting elk for sport was not a constitutionally protected right of a nature which should require the state to show more than a rational basis for prescribing a higher license fee for hunting as to nonresidents than to residents.

§ 5. Factors affecting validity of challenged legislation

A number of factors have been suggested as possibly affecting the question whether legislation which apparently discriminates against aliens or nonresidents as to fishing or hunting rights is invalid. One such factor that has been recognized—although it was apparently not decisive with regard to any of the state statutes discussed in this annotation—is the added cost that may be involved in enforcing hunting and fishing laws in the case of persons other than citizens or residents of the state, such cost arguably justifying an appropriate license fee differential.

In rejecting the contention that the allegedly greater cost of enforcing the South Carolina fishing laws against nonresidents justified the imposition of an arbitrarily high boat license fee against them, the court in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, said that the state was not without power to charge nonresidents a differential which would merely compensate the state for any added enforcement burden nonresidents may cause or for any conservation expenditures from taxes which only residents pay. In the instant case, the court concluded that it would be closing its eyes to reality if it were to determine that there was a reasonable relationship between the danger represented by noncitizens and the severe discrimination practiced upon them here.[17]

In Mullaney v Anderson (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, the court struck down a territorial fishing law which discriminated against nonresidents, noting, inter alia, that the law's prescribed fee differential was not shown to merely compensate for an added enforcement burden with respect to nonresidents or for any conservation expenditures which only residents paid. The court said that it did not mean to suggest that the state or territory actually has the burden of proof to establish the validity of a license tax, but it emphasized that a tax's validity is not to be deemed established by the mere fact of its imposition.

See American Commuters Asso. v Levitt (1969, CA2 NY) 405 F2d 1148, where

15. Fourteenth Amendment.
16. Article III, § 2.
17. For the category of boat in question, the fee was $25 for residents and $2,500 for nonresidents.

the court observed that tax burdens are not always equal as between residents and nonresidents, and that nonresidents of New York could not demand the same low fishing-license fees in that state that New York residents paid, since it would be "administratively infeasible and probably impossible" to determine what a fair share of the state's largesse would be for every one of the nonresidents involved in the case.

Note may be taken of Gospodonovich v Clements (1951, DC La) 108 F Supp 234, app dismd 344 US 911, 97 L Ed 702, 73 S Ct 334, where, in striking down a commercial license fee scheme which charged nonresidents substantially more than residents, the court made particular note of the fact that there was nothing in the record to support a conclusion that the cost of enforcing the fishing laws against nonresidents was greater than for residents.

The propriety of charging nonresidents more for hunting and fishing privileges than residents where residents would otherwise bear a disproportionately high burden of enforcement costs was also recognized in Montana Outfitters Action Group v Fish & Game Com. (1976, DC Mont) 417 F Supp 1005, jur noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, but the court in that case held, on the factual evidence before it, that a fee ratio of 7.5 to 1 could not be justified on any theory of cost allocation.

◆

With respect to fishing legislation, two closely related factors which may affect the validity of regulations which differentiate between residents and nonresidents (or between citizens and aliens) are the [illegible] of fish involved and the location of the waters in question.

Having held, in McCready v Virginia (1877) 94 US 391, 24 L Ed 248, that a state could prohibit citizens of other states from raising oysters in the tidewater beds of a river, the Supreme Court, as early as Manchester v Massachusetts (1891) 139 US 240, 35 L Ed 159, 11 S Ct 559, reserved judgment on the question whether there is a liberty of fishing for swimming fish in navigable waters common to inhabitants or citizens of the United States.

In distinguishing the McCready Case and striking down under the privileges and immunities clause of Article IV of the Constitution legislation which discriminated against nonresidents as to commercial shrimp-fishing rights in coastal waters, the court in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, relied to some extent on the factual distinctions between the two cases: the facts that the instant case involved free-swimming rather than stationary species, and that coastal rather than inland waters were involved.

And in Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, the court, construing the scope of the Enrollment and Licensing Act (46 USCS §§ 251 et seq.) for supremacy clause purposes, placed considerable emphasis on the migratory nature of the fish there involved.

Apparently the only other case in which these factors were discussed was Edwards v Leaver (1952, DC RI) 102 F Supp 698, involving the regulation of menhaden fishing.

Invalidating a law which prohibited nonresident fishing during part of the year when such fishing by residents was permitted, the court said that it did not regard as important the fact that the areas designated by the statute might be regarded as inland waters. The important fact, the court said, was that menhaden were migratory fish. The court's decision was based on the privileges and immunities clause of Article IV and the equal protection clause of the Fourteenth Amendment.

☆ COMMENT: Whatever importance the type of fish or the locale may have with respect to the validity of allegedly discriminatory fishing legislation would not necessarily be limited to its effect on the "state ownership" theory discussed in § 3, supra. As illustrated by the Douglas Case, supra, these factors may bear on the application of a federal statute under the supremacy clause, or they might in some cases affect a determination as to whether interstate commerce is involved within

the meaning of Article I, § 8, of the Constitution.

☆ NOTE: Obviously, not all free-swimming fish are migratory. Arguably a somewhat stronger case for state regulation could be made in the case of free-swimming but nonmigratory fish than with respect to migratory species.

◆

The court in the following case held valid an apparently discriminatory elk-hunting license fee system on the basis that the hunting in question was purely for sport and thus not subject to the full measure of constitutional protection.

Hunting for sport was distinguished from hunting for a livelihood in Montana Outfitters Action Group v Fish and Game Com. (1976, DC Mont) 417 F Supp 1005, jur noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, where the court upheld a legislative scheme involving a substantial disparity in elk-hunting license fees as between residents of the state and nonresidents. Noting that practically all of the earlier cases invalidating discriminatory hunting and fishing laws had involved commercial pursuits, the court declared that there is no nexus between hunting elk for sport and any fundamental right such as pursuing a common calling. This being so, said the court, all that was required to sustain a program such as that in question under the privileges and immunities clause of Article IV and the equal protection and due process clauses of the Fourteenth Amendment was a rational basis for the scheme, which the court found present as to the scheme in question.

Hunting laws involving disparities of treatment with respect to aliens or nonresidents were upheld with respect to sport hunting in Patsone v Pennsylvania (1914) 232 US 138, 58 L Ed 539, 34 S Ct 281, (aliens; statute also covered commercial hunting); and Re Eberle (1899, CC Ill) 98 F 295 (nonresidents), but the courts devoted no discussion to any distinction between sport and commercial hunting.

☆ COMMENT: It may be observed from the cases discussed in this annotation that the vast majority of them involved commercial fishing or hunting, as opposed to hunting or fishing carried out purely for sport; in fact, no cases have been noted subsequent to Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, in which courts have devoted any substantial discussion to the problem of discrimination against aliens or nonresidents with respect to sport fishing rights.[18] It is probably unsafe, therefore, to assume that the rationale of cases wherein discriminatory commercial hunting or fishing laws were invalidated would apply with equal force to sport hunting or fishing. Such an assumption might be particularly unsafe with respect to the privileges and immunities clause, on the basis that sport hunting or fishing, perhaps unlike commercial hunting and fishing, may not fall within the scope of "privileges and immunities." On the other hand, sport hunting or fishing may actually stand on a better footing in some respects than do commercial hunting and fishing, since frequently the former pose less of a threat to the state's supply of natural resources.

§ 6. Powers of territorial governments under Federal Constitution

Actions of territorial governments of United States Territories stand on a

18. The court in American Commuters Asso. v Levitt (1969, CA2 NY) 405 F2d 1148, rejected the contention that the plaintiff nonresident commuters were entitled to obtain fishing licenses (presumably for sport) for exactly the same fee as that paid by residents, but in the very narrow context of the court's decision it is not clear that the court relied on the apparently sporting nature of the activity in question.

Sport fishing was apparently involved in Re Eberle (1899, CC Ill) 98 F 295, but the court's decision in this pre-Toomer case clearly did not rest on any distinction between sport and commercial fishing.

somewhat different footing than actions of state governments, since the territorial governments possess only those powers which Congress confers on them.[19] However, constitutional provisions are generally deemed applicable to incorporated Territories, whether by the Constitution's own force or by acts of Congress which have usually extended the Constitution's application to such Territories.[20] Accordingly, in the following case the Supreme Court ruled that an act of a territorial legislature establishing different commercial fishing-license fees for residents and nonresidents was in violation of the Constitution and therefore invalid, notwithstanding that it was a Territory, not a state, which was involved.

In Mullaney v Anderson (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, the court held that the privileges and immunities clause of the Constitution was applicable to an act of the Alaska territorial legislature setting a $50 commercial fishing-license fee for nonresidents and a fee of only $5 for residents. The court stated that it had no occasion to reconsider the holding of Haavik v Alaska Packers Asso. (1924) 263 US 510, 68 L Ed 414, 44 S Ct 177, that it was within the power of Congress to relieve the Territory of some of the restrictions applicable to states with respect to fishing licenses, but it disagreed with the assumption of the Haavik court that the Organic Act of Alaska (48 USCS §§ 21 et seq.) had so relieved the Territory. The court pointed out that two sections of the Act had provided that the Constitution should have the same force in Alaska as elsewhere and that the legislative power of the Territory was extended to "all rightful subjects of legislation not inconsistent with the Constitution . . ." The Court said that in light of such provisions, it could not presume that Congress authorized the territorial legislature to treat citizens of states differently from the way states must treat citizens of sister states. Only the clearest expression of congressional intent could induce such a result, the court said, adding that, if anything, congressional pronouncements since Haavik concerning the very subject matter here in issue fortified the conclusion that Alaska was granted no greater power over citizens of other states in the regulation of fisheries than a state legislature would have.

☆ NOTE: In the Haavik Case, referred to in Mullaney v Anderson, supra, the court had upheld a similar act of the Alaska legislature partly on the basis that such provision was implicitly authorized by the Organic Act; the Haavik court, in fact, emphasized, "We are not here concerned with taxation by a state." While the court's assumption as to congressional authorization was rejected in the Mullaney Case, the Haavik Case may still stand for the proposition that Congress has the power to authorize a Territory to enact fishing or hunting license statutes which discriminate against nonresidents. Of course, the question is now moot as to Alaska itself, that jurisdiction having attained statehood subsequent to the Supreme Court's decision in Mullaney v Anderson.

III. Validity of particular legislation

§ 7. Fishing laws; discrimination against nonresidents of state

[a] Law held valid

In the following decisions involving various types of fishing, the courts upheld legislation which disadvantaged nonresidents of the state or Territory as against residents, rejecting challenges based on various provisions of the Federal Constitution.

The Commonwealth of Virginia was held to have the power to prohibit citizens of other states from raising oysters in the tidewater beds of a river in Virginia, in McCready v Virginia (1877) 94 US 391, 24 L Ed 248. The court pro-

19. See 72 Am Jur 2d, States, Territories, and Dependencies § 154 for discussion.

20. See 72 Am Jur 2d, States, Territories, and Dependencies § 146 for discussion.

ceeded on the theory that each state owns the beds of all tidewaters within its jurisdiction and the animal life in them insofar as the latter are capable of ownership while running, and that the citizens of one state are not invested by the privileges and immunities clause of Article 4 of the Constitution with any interest in the common property of the citizens of another state. The court deemed the planting of oysters in soil covered by water owned in common by the people of a state to be no different in principle than the planting of corn on dry land held in the same way, as to which the court thought it clear that the state might reserve to its citizens the exclusive use of state property. The court also held the commerce clause not to be offended by the state action in question, on the basis that there was no question of transportation or exchange of commodities but only of cultivation and production.

In Haavik v Alaska Packers Asso. (1924) 263 US 510, 68 L Ed 414, 44 S Ct 177, the court upheld the imposition by the Territory of Alaska of a $5 license tax for nonresident commercial fishermen, the view being taken that there was nothing in the Constitution (particularly Article IV, § 2) prohibiting Congress from favoring those who had acquired local residence and upon whose efforts the future development of the Territory would largely depend.[21]

In American Commuters Asso. v Levitt (1969, CA2 NY) 405 F2d 1148, the court held that the "novel" argument that there should be an undiscriminatory interrelationship between taxes and benefits, and that if certain challenged tax statutes were upheld the appellant nonresidents should be entitled to receive various benefits—including the lower fishing-license fees that New York residents paid—commensurate with such residents' entitlement to them, presented no substantial issue under the Federal Constitution. The court observed that tax burdens were not always equal as between residents and nonresidents and that it would be administratively infeasible and probably impossible to determine what a fair share of New York's largesse would be for every one of the commuting nonresidents.

An early decision upholding the validity of a statute restricting the use of a state's oyster beds was Corfield v Coryell (1823, CC Pa) F Cas No. 3230, involving a statute which made it unlawful for any person who was not at the time an actual inhabitant and resident of the state to gather clams, oysters, or shells in any of the inland or coastal waters of the state on board any vessel not wholly owned by an inhabitant and resident. The court held the statute not violative of the commerce clause, the privileges and immunities clause, or the provision of the Constitution giving the federal courts control over cases in admiralty, the court using much of the same reasoning later used in McCready v Virginia, supra.

For an early Seventh Circuit case wherein the court upheld a statute imposing a fishing-license fee on nonresidents of the state but not on residents, see Re Eberle (1899, CC Ill) 98 F 295, infra § 9[a].

Also following the "state ownership" rationale in upholding under the Fourteenth Amendment a discriminatory fishing law is Lubetich v Pollock (1925, DC Wash) 6 F2d 237, where the statute restricted the right to fish (other than with hook and line) to persons who were both citizens of the United States and

21. Even though the proposition that Congress could authorize a statutory provision such as that involved here may itself still be good law, the authority of the Haavik Case as to the validity of a scheme such as that involved therein has been eroded by Mullaney v Anderson (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428 (invalidating a scheme levying a $5 fee on resident commercial fishermen and a $50 fee on nonresidents), both because that case rejected the assumption that Congress had actually intended to authorize the licensing provision which was actually enacted by the Alaska territorial legislature, and because the analysis of the scheme itself followed a much different course in Mullaney from the one adopted in Haavik.

residents "of this state or an adjoining state" for the preceding 12 months.

[b] Law held invalid

Relying primarily on the privileges and immunities clause of Article IV, but in some instances on other provisions, the courts in the following cases held that provisions of state fishing legislation improperly discriminated against nonresidents of the state and therefore violated the United States Constitution.

A South Carolina statute requiring payment of a license fee by commercial shrimp fishermen of $25 for each boat owned by a resident and of $2,500 for each boat owned by a nonresident, the practical effect of which was to virtually exclude nonresidents, was held to violate the privileges and immunities clause of Article 4, in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, even where the difference in license fees was supposedly justified because it was based on the assumptions that (as alleged by the state) nonresidents used larger boats or different fishing methods than residents, that the cost of enforcing the laws against them was appreciably greater, and that the state conservation program for shrimp required expenditure of funds beyond those collected in license fees. Recognizing that the privileges and immunities clause, while barring discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, does not preclude disparity of treatment in many situations where there are sufficient independent reasons for it, the court took the position that the reasons relied on by the state in this instance did not support a remedy so drastic as to practically effect a total exclusion of nonresidents. The court observed that the state was not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge nonresidents a differential which would merely compensate the state for any added enforcement burden nonresidents may impose or for any conservation expenditures paid from taxes levied only upon residents.[22] It was contended, on the authority of McCready v Virginia (1877) 94 US 391, 24 L Ed 248, that the present case was an exception to the above analysis because the state was the owner of the fish for the benefit of its citizens; however, the court declined to extend to the present situation the rationale of McCready, which case it noted involved oysters rather than free-swimming fish and involved inland tidewaters rather than coastal waters. The court accordingly held that commercial shrimping in the marginal sea, "like other common callings," was within the purview of the privileges and immunities clause of Article 4 of the Constitution.

The conclusion reached in the above case was reaffirmed in Kleppe v New Mexico (1976) 426 US 529, 49 L Ed 2d 34, 96 S Ct 2285, reh den 429 US 873, 50 L Ed 2d 154, 97 S Ct 189.

In Mullaney v Anderson (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, the court held that a territorial law requiring commercial fishing license fees of $5 in the case of residents and $50 in the case of nonresidents violated the Constitution. In sustaining the attack on the statute, the court relied on Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, supra, as holding that Article IV, § 2, would bar any state from imposing the license fee here contested. The court emphasized that the fee differential was not designed merely to compensate the state for an added enforcement burden with respect to nonresidents or for any conservation expenditures which only residents paid. The plaintiffs' burden to establish the unconstitutionality of the statute was held to have been met since their attempts to elicit, by interrogatories and cross-examination, the facts as to higher enforcement costs had been without avail and because they had

22. The court also thought it worthy of note that the statute imposed no limitation on the number of resident boats which might be licensed.

negatived other possible bases for the discrimination raised by the pleadings.[23]

See Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, infra § 8, where a legislative scheme involving discrimination as to commercial fishing rights with respect to both nonresidents and aliens was invalidated.

Relying heavily on Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, supra, the court in Russo v Reed (1950, DC Me) 93 F Supp 554, held that a statute which allowed commercial fishing in the maritime belt by 3-year residents of the state year-round, but prohibited such fishing during the summer on the part of persons who had not been Maine residents for 3 years, to be in violation of the privileges and immunities clause of Article IV of the Constitution. The effect of the statutory scheme was, in effect, to exclude non-3-year residents altogether from fishing for certain species since these were only available in the summer months. The court held that the fact that the statute was expressed in terms of "residence" rather than "citizenship" was not determinative under the privileges and immunities clause, relying on dicta in Toomer v Witsell to the effect that such an argument would be without force. In addition to rejecting several of the same contentions which were unsuccessful in Toomer v Witsell, the court took the view that the statute in question was not a conservation measure, and noted that there was nothing in the record to indicate that nonresident commercial fishermen constituted a local evil of some sort when pursuing their occupation in the maritime belt during the period of the year in question.

Where a careful consideration of the record failed to disclose to the court any adequate explanation for the discrimination worked against nonresidents by a statute prohibiting them from fishing for menhaden while permitting residents to do so during a certain portion of the year, it was held in Edwards v Leaver (1952, DC RI) 102 F Supp 698, that the statute violated the privileges and immunities clause of Article IV (with respect to the individual plaintiffs) and the equal protection clause of the Fourteenth Amendment (with respect to the corporate plaintiffs). The court noted that there was no evidence that any local evils caused by nonresidents would be eliminated by the statute, and that there could be no question of the necessity of preserving the food supply since menhaden are not food fish. The court stated that the evidence refuted the contention that the statute was validly aimed at preserving true game fish which would otherwise be caught in the menhaden fishermen's nets, observing that no restrictions were placed on the number of licenses which might be issued to Rhode Island residents and that in any event testimony in the case indicated that the amount of game fish caught in menhaden nets was usually negligible. In view of "the discriminatory character" of the statute, the court did not regard as important the fact that the area designated by the statute might be regarded as inland waters; the important fact, in the court's view, was that menhaden are migratory fish.

☆ NOTE: The court in the Edwards Case applied no separate analyses as between the privileges and immunities and equal protection clauses, except to indicate that the corporate plaintiffs were clearly not citizens within the meaning of the former, but were "persons" within the meaning of the latter (citing Grosjean v American Press Co. (1936) 297 US 233, 80 L Ed 660, 56 S Ct 444).

In Steed v Dodgen (1949, CA5 Tex) 85 F Supp 956, the court invalidated a Texas statute which imposed on a nonresident commercial fisherman an annual license tax of $200 and upon a "nonresident commercial fishing boat" an annual tax of $2,500, while requiring

23. The court also rejected the contention that the constitutional limitations laid down in Toomer v Witsell were not applicable because Alaska was a territory and not a state; as to this point, see § 6, supra.

a resident commercial fisherman to pay a license tax of only $3 and a fee of no more than $15 for his boat. In holding this scheme violative of Article IV, § 2, of the Constitution, the court deemed it sufficient to observe that the facts of the case were in all material respects substantially the same as those involved in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, and that the instant case therefore controlled that decision.

The court held in Gospodonovich v Clements (1951, DC La) 108 F Supp 234, app dismd 344 US 911, 97 L Ed 702, 73 S Ct 334, that certain Louisiana statutes, insofar as they undertook to regulate and govern nonresident fishermen and fishing vessels owned by nonresidents, were violative of Article IV, § 2, of the Constitution. The statutes in question (applicable to both inland and coastal waters), at least as enforced, did not permit the licensing of fishing boats owned by nonresidents,[24] while allowing the licensing and use of boats owned by citizen-residents on the payment of small fees; the laws also allowed residents to fish commercially on the payment of fees for themselves ranging to no more than $25 while requiring nonresidents to pay a fee of $200. According to the court, the evidence disclosed that resident and nonresident fishermen used substantially the same means and methods and that there was no real distinction between the fishing vessels owned and operated by residents and those operated by nonresidents; the court noted particularly that there was nothing in the record to support a conclusion that the cost of enforcing the laws against nonresidents was greater. It was clear, said the court, that the distinction between the two sets of licensing requirements was based solely upon citizenship. They were not conservation measures, declared the court, but were intended to exclude nonresidents from pursuing a common calling of citizens of states bordering on the Gulf of Mexico. The court noted that the statutes placed no limitation on the number of resident fishermen or resident fishing boats which might be licensed, and that apparently the supply of at least shrimp bore no relationship to the number of vessels harvesting the crop, provided that the fishing methods used were properly supervised. In these circumstances, the court deemed the case to be clearly within the holdings of Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12.

A law which granted state authorities power to prohibit, on a temporary basis, salmon fishing by nonresidents was held to be in violation of both the commerce clause and the privileges and immunities clause of Article IV of the Constitution, in Brown v Anderson (1962, DC Alaska) 202 F Supp 96. The statute recited that while the state was forbidden from creating an economic advantage for its residents under normal circumstances, it had both a practical and moral responsibility to provide for its citizens in situations where economic competition would create community destitution. The statute therefore gave authorities the power to establish, for each salmon registration area or district, an optimum number for the total run of salmon within that district, and to prohibit nonresident fishing whenever the authorities should determine that the yearly run would be less than the optimum number and that under anticipated conditions resident fishermen would not catch sufficient fish to sustain themselves. The fishermen licensed were about one-third residents and two-thirds nonresidents of the state; they fished side by side in the same manner without distinction as to method or technique. In the court's view, the law frankly discriminated against nonresidents upon the happening of certain events and there was no reasonable differentiation to take the situation outside the rationale of Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12. It was contended that the statute

24. An exception was made, with respect to certain categories of boats, for boats owned by residents of states which had a reciprocal agreement with Louisiana.

was a reasonable regulation of fishing and provided a means to prevent or alleviate the possible destitution of the residents of the state, but the court held that this rationale was insufficient to save the statute. Stating that any discrimination must be reasonable to be sustained, the court found nothing that would in any way justify the application of the prohibition to nonresidents and not to residents, and it therefore concluded that the privileges and immunities clause was violated. As to the commerce clause, the court noted that while fishing itself may be a local activity, it is only one step in the whole process resulting in the shipment of the finished canned product. In the court's opinion, the statute's provisions did place a burden on the movement in interstate commerce of the nonresident fishermen.

§ 8. —Aliens

In the following decisions involving fishing legislation placing restrictions on commercial fishing by aliens, it was held that such provisions infringed the United States Constitution.

Reversing a state court's judgment dismissing a petition for a writ of mandamus to compel issuance of a commercial fisherman's license to the petitioner, the Supreme Court in Takahashi v Fish & Game Com. (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138, held that a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship violated the United States Constitution. The court observed that the case would appear to be controlled by Truax v Raich (1915) 239 US 33, 60 L Ed 131, 36 S Ct 7, which decision embraced the general proposition that an alien legally admitted to the country has the right to work for a living in the common occupations of the community, unless (said the Takahashi court) California could show that the legislation here in question was necessary to protect special interests either of the state or of its citizens as such. The court rejected the state's contention that the statute's prohibition was based on a reasonable classification in that the state merely followed the Federal Government's lead in adopting that classification from the naturalization laws. Pointing out that the Federal Government has broad constitutional powers over immigration and naturalization, but that the states were granted no such powers under the Constitution, the court said that this demonstrated the tenuousness of the state's claim that it had power to single out and ban its lawful alien inhabitants from following a vocation simply because Congress had put some such groups in special classifications in the exercise of its broad and wholly distinguishable powers over immigration and naturalization. The court was also unable to find sufficient "special public interest" for the legislation in the supposed collective public ownership of fish swimming within the 3-mile limit. Agreeing with earlier case law that "to put the claim of the State upon title is to lean upon a slender reed,"[25] the court was of the view that to whatever extent the fish in the 3-mile limit off California might be "capable of ownership" by the state, such "ownership" was inadequate to justify the exclusion of lawfully resident aliens from making a living by fishing in the ocean, while permitting all others to do so. The court also rejected the argument that the statute should be upheld on the authority of cases sustaining state laws barring aliens ineligible from citizenship from land ownership, pointing out that such cases rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property.

☆ COMMENT: The court in the Takahashi case did not explicitly state what provision(s) of the Federal Constitution it deemed to have been violated by the legislation in question, but to judge from the cases cited in the court's opinion, it was apparently relying primarily on the Fourteenth Amendment—either on

25. See Missouri v Holland (1920) 252 US 416, 64 L Ed 641, 40 S Ct 382, 11 ALR 984.

the equal protection clause alone or on that clause in combination with the due process clause. Compare Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, decided the same day, where (in a case involving discrimination against United States citizens who were nonresidents of the jurisdiction in question), in an opinion written by another Justice, the court relied on the privileges and immunities clause of Article IV in overturning the disputed legislation, and expressly disclaimed any reliance on the equal protection clause.

Virginia statutes which prohibited commercial fishing by aliens or by corporations controlled by aliens in the state's waters, and which also restricted menhaden fishing by nonresidents to certain waters, were struck down as violative of the supremacy clause of the Constitution (Article VI), in Douglas v Seacoast Products, Inc. (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, because in the court's view the state laws were pre-empted by federal enrollment and licensing laws for fishing vessels. The court acknowledged that pre-emption should not be found unless it was the clear and manifest purpose of Congress, but it found such intent in what it deemed Congress' tacit ratification of the courts' construction of the Enrollment and Licensing Act of 1793 (46 USCS §§ 251 et seq.). The court discussed and relied heavily on Gibbons v Ogden (1824) 22 US 1, 6 L Ed 23, where discriminatory state regulation of shipping was invalidated as to vessels federally licensed to engage in the coasting trade. In Gibbons, Chief Justice Marshall interpreted the Act, and particularly the section governing the granting of licenses,[26] as implying, unequivocally, a legislative authority to licensed vessels to carry on the trade in question, and not as merely conferring a national character upon the ship. In the instant case the Commonwealth of Virginia argued that the challenged statutes in no way interfered with navigation of the vessels in question and that thus Gibbons was distinguishable; the court disagreed, emphasizing Chief Justice Marshall's language that a license transfers to the grantee all the right which the grantor can transfer, to do whatever is within the terms of the license, the court also noting that it was now established that Congress has the power to regulate the taking of fish from state waters. The court observed that while the Gibbons construction of the Act had received criticism, Congress had repeatedly re-enacted the statute in substantially the same form while undoubtedly fully aware of a case as renowned as Gibbons. The court also rejected the contention that the Submerged Lands Act (43 USCS §§ 1301 et seq.) effectively repealed the traditional understanding of the effect of the Licensing Act. While the Submerged Lands Act did give states "ownership" and control over natural resources within state territorial jurisdiction, it also reserved to the United States all constitutional powers of regulation for purposes of commerce. The court also considered its decision to be supported by the policy against Balkanization of interstate commercial activity which the Constitution was intended to prevent, but which would likely result if each state could prevent fishermen from following migrating menhaden (for example) across state lines. The court concluded that while the states were not prevented from imposing reasonable, nondiscriminatory conservation measures otherwise within their police power, Virginia had failed to do so here.[27]

☆ OBSERVATION: Although presumably the Enrollment and Licensing Act would have been just as

26. 46 USCS § 263 mandates that the license is to provide that "license is hereby granted for the . . . [vessel] to be employed in carrying on the . . . [trade] for one year from the date hereof . . ."

27. The court noted, inter alia, that while the Commonwealth claimed the statute to be a conservation measure, it made no restriction whatever on the quantity of menhaden which could be caught by Virginia residents.

applicable in at least some of the earlier commercial fishing cases (discussed infra and in § 7, supra) as it was held to be in the Douglas Case, that case was apparently the first within the present scope of this annotation in which the Act's pre-emptive effect under the supremacy clause was discussed.

Apparently the earliest decision invalidating a provision of state law which involved discrimination against aliens was Re Ah Chong (1880, CC Cal) 2 F 733, where, pursuant to an article of the state constitution headed "Chinese," the legislature passed a statute prohibiting "aliens incapable of becoming electors of this state" from fishing in state waters. Conceding, under the existing authority of McCready v Virginia (1877) 94 US 391, 24 L Ed 248, and other cases, that the state could exclude *all* aliens from fishing in its waters, the court said that to subject Chinese to imprisonment while aliens of all European nations under the same circumstances were exempt from any punishment whatever was to deny the former the equal protection of the laws guaranteed by the Fourteenth Amendment. It was also obvious, in the court's view, that the statute was not passed in pursuance of any public policy relating to the fisheries of the state, but was employed simply as a means of carrying out a policy of excluding the Chinese from the state. Further, the court noted that since the statute was actually couched in terms of aliens "incapable of becoming electors," it also would irrationally exclude many other groups from fishing rights—such as all alien women (including European), since women were ineligible (at that time) to vote in California.

◆

A statute restricting the right to fish (other than with hook and line) to persons who were both citizens of the United States and residents "of this state or an adjoining state" for the preceding 12 months was upheld in Lubetich v Pollock (1925, DC Wash) 6 F2d 237, the court relying on the "state ownership" theory discussed in § 3, supra.

§ 9. Hunting laws; discrimination against nonresidents of state

[a] Law held valid

In the following cases in which various state legislatures imposed higher hunting license fees for nonresidents of the state than for residents, the courts held that such enactments did not violate either the privileges and immunities clause of Article IV of the Constitution or the Fourteenth Amendment.

An early case, wherein the court upheld a statutory scheme imposing hunting and fishing license fees for nonresidents ($10) but none for residents, was Re Eberle (1899, CC Ill) 98 F 295. The court, citing Geer v Connecticut (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600, rested its decision on what it called the sovereign ownership of animals ferae naturae and the police power of the state to preserve for its people a valuable food supply. The court upheld the conviction of a nonresident individual who was hunting on premises belonging to a hunting club and corporation of which he was a member and stockholder; the court reserved the question whether a nonresident landowner would be relieved from the provision of the statute in question when shooting wild game on his own premises.

Distinguishing hunting for sport from hunting for a livelihood, the court in Montana Outfitters Action Group v Fish & Game Com. (1976, DC Mont) 417 F Supp 1005, jur noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, held that a statute imposing a much higher elk-hunting fee for nonresidents than for residents was valid as a conservation measure. The court said preliminarily that elk are not hunted commercially but are much sought after for their trophy value, that elks do not really migrate,[28] and that there were many more

28. According to the court, "The movement of the elk is more a drifting than a true migration." The point was apparently made for the purpose of distinguishing the case from cases such as Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, which the

nonresident than resident elk hunters. Agreeing with those challenging the statute that the nonresident-resident fee ratio[29] could not be justified on a relative cost allocation basis, the court nevertheless said that there must be some restriction on the number of individuals who could hunt elk since there were "not enough elk to go around." The court said that a scheme based on a pure lottery would be discrimination-free, but that a legislature might with some rationality conclude that such a lottery open to all potential elk hunters in the United States might (given the small percentage of those licensed who would be Montana residents) destroy the political motivation to Montana citizens to underwrite the elk management program without which the species would disappear. There being, in the court's view, no nexus between hunting elk for sport and any fundamental right (such as pursuing a common calling), such a rational basis was all that was required to sustain the program under the privileges and immunities clause of Article IV and the equal protection and due process clauses of the Fourteenth Amendment, the court said.

☆ NOTE: Although the case actually involved a prohibition of the transportation outside the state (by anyone) of game birds killed within the state—rather than the actual killing of the birds—note may be taken of Geer v Connecticut (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600, where the court acknowledged that the purpose of the law was to restrict the use of game to the people of the state. In that decision, which involved only the commerce clause, the court concluded that the police power of the state to preserve game birds as a valuable food supply for the people of the state justified the regulation in question, even if interstate commerce might be remotely and indirectly affected thereby.

[b] Law held invalid

In the following cases, the courts held that state statutes discriminating against nonresidents of the state with respect to alligator-trapping rights were violative of the equal protection clause of the Fourteenth Amendment, at least as applied to a nonresident landowner who wished to employ persons to hunt game on his lands.

In Pavel v Pattison (1938, DC La) 24 F Supp 915, the court invalidated, with respect to a nonresident Louisiana landowner who wished to trap alligators on his own land, a Louisiana law which denied the right to trap to anyone who had not resided within the state for at least one year. With respect to this statute, the court said that if the state could deny trapping privileges except to those who had resided in the state for one year, it could also make the term 10 or 20 years. Conceding that a state might, under proper conditions, confine the taking of fish and game to its own citizens, the court said that in the instant case no justification for the statute's provisions was proffered except that it was fair to exclude nonresidents, who were not taxpayers and thus did not contribute to the enforcement of the state's game laws; however, the court pointed out that the nonresident's land was subject to taxation like anyone else's. The court concluded that the statutory provision in question violated the equal protection clause of the Fourteenth Amendment in denying the landowner the right to use his property on the same footing with other landowners residing in the state. Where, after the decision in Pavel v Pattison, supra, the state legislature had amended its statute to permit nonresidents to obtain trapping licenses on the payment of a $200 fee and the posting of a $300 deposit (whereas for residents the fee was only $2 and there was no deposit requirement), the court held, in Pavel v Richard (1938, DC La) 28 F Supp 992, without elaboration, that this statute also denied the landowner and his em-

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District Court said were concerned with migrating fish and birds.

29. 28.2 to 1, in effect, for a license to hunt elk alone, and 7.5 to 1 for a license to hunt elk and other specified animals.

ployees or lessees equal protection of the law.

§ 10. —Aliens

In the following case, the Supreme Court held constitutional and valid a state statute prohibiting the killing of any wild bird or animal by an unnaturalized foreign-born resident, except in defense of person or property, and "to that end" making it unlawful for any such person to own or possess a shotgun or rifle.

Affirming the defendant alien's conviction for violation of a state statute prohibiting the killing of any wild bird or animal by any unnaturalized foreign-born resident, except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle, the Supreme Court in Patsone v Pennsylvania (1914) 232 US 138, 58 L Ed 539, 34 S Ct 281, rejected the defendant's contention that the statute was contrary to the Fourteenth Amendment to the Federal Constitution because it unjustifiably deprived aliens of property and denied to them the equal protection of the laws. The court said that the legislative assumption that unnaturalized foreign-born residents were peculiarly a source of danger to wildlife, which the state sought to protect by the statute, was not so unwarranted as to invalidate the statute under the Fourteenth Amendment. The court explained that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably may be considered to define those from whom the evil mainly is to be feared, it may properly be singled out. In the court's view, the question was one of local experience on which the court should be very hesitant to declare that the state legislature was wrong.

☆ OBSERVATION: In declining to apply the rationale of the Patsone case to a case involving licensing requirements for shrimp fishing in coastal waters, the court in Toomer v Witsell (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, emphasized that in Patsone the theory of the case was that there was a substantial reason for the discrimination beyond the mere fact of alienage.

And in Anderson v Smith (1934, CA9 Alaska) 71 F2d 493, the court said that while states have no right to discriminate between their own citizens and those of other states in the transaction of business within the state's borders, they do have the right to exact higher license fees from nonresidents than from residents for the privilege of hunting game within the borders of the state, citing Geer v Connecticut (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600.

☆ OBSERVATION: The continued validity of the proposition stated in the above case is now somewhat doubtful, in view of later cases such as Toomer v Witsell (1949) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, although Toomer dealt with commercial fishing rather than hunting. It appears that somewhat higher fees may be justified for nonresidents in some circumstances, however; see § 5, supra.

LATER CASE SERVICE

Supplementing the Annotations

52 L Ed 2d 779–798

§ 1. Introduction

[b] Related matters

Implication of private right of action from provision of United States constitution—federal cases. 64 L Ed 2d 872.

Relief under Federal Civil Rights Acts to state prisoners complaining of interference with access to courts. 23 ALR Fed 6.

Authority of United States District Court, under 28 USCS § 1651(a), to enjoin, sua sponte, a party from filing further papers in support of frivolous claim, 53 ALR Fed 651.

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

§ 3. Prisoners' right of access to courts:

[a] Generally

State creates protected liberty interest for prisoner by placing substantive limitations on official discretion and inmate must show that particularized standard or criteria guides state's decisionmakers; if decisionmaker is not required to base his decision on objective and defined criteria but instead can deny requested relief for any constitutionally permissible reason or for no reason at all, state has not created constitutionally protected liberty interest. Olim v Wakinekona (1983, US) 75 L Ed 2d 813, 103 S Ct 1741.

[b] Due process basis

Transfer of prisoner from state prison in Hawaii to one in California does not implicate liberty interest within meaning of due process clause of Fourteenth Amendment, since (1) interstate prison transfer does not deprive inmate of any liberty interest protected by due process clause in and of itself, and (2) Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under due process clause where prison administrator's discretion to transfer inmate is completely unfettered under state law. Olim v Wakinekona (1983, US) 75 L Ed 2d 813, 103 S Ct 1741.

52 L Ed 2d 824–844

§ 1. Introduction

[b] Related matters

Federal pre-emption of state authority over domestic relations—federal cases. 70 L Ed 2d 895.

State regulation of land ownership by alien corporation. 21 ALR4th 1329.

Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations. 69 Calif L Rev 189, March, 1981.

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

§ 4. Constitutional bases for adjudication of claims of discrimination

For purposes of equal protection clause of Fourteenth Amendment, there is irrationality in differences state legislature draws in costs of its elk hunting licenses between resident and nonresident hunters, where legislative choice (1) is economic means not unreasonably related to preservation of finite resource and substantial regulatory interest of state, and (2) serves to limit number of hunter-days in state's elk country. Baldwin v Fish & Game Com., 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852.

See Hughes v Oklahoma, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727, on remand (Okla Crim) 595 P2d 1349, §§ 5, 7[b].

State statute attempting to deny nonresidents right to commercially harvest blue crabs in Virginia waters violated Privileges and Immunities Clause. Tangier Sound Watermen's Assoc. v Douglas (1982, ED Va) 541 F Supp 1287.

§ 5. Factors affecting validity of challenged legislation

With regard to challenges under the commerce clause of the United States Constitution (Art I, § 8, cl 3) to a state's statutory regulation of exports of natural resources, including wild animals and fish, the rule is that where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, the statute will be

upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits, and if a legitimate local purpose is found, the question becomes one of degree, the extent of the burden that will be tolerated being dependent on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Hughes v Oklahoma, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727, on remand (Okla Crim) 595 P2d 1349.

§ 7. Fishing laws; discrimination against nonresidents of state

[b] Law held invalid

A state law prohibiting the transporting or shipping for sale outside the state of minnows which are seined or procured within the state's waters violates the commerce clause of the United States Constitution (Art I, § 8, cl 3), since such law on its face discriminates against interstate commerce, and does not represent the least discriminatory alternative of the state to promote any legitimate local purpose in maintaining the ecological balance in state waters.

Hughes v Oklahoma, 441 US 332, 60 L Ed 2d 250, 99 S Ct 1727, on remand (Okla Crim) 595 P2d 1349.

Ordinance, which required one year of residency in town as condition to obtaining of shellfish license, had sufficient impact on right to travel to trigger strict scrutiny standard of equal protection review, and ordinance was unconstitutional where town's conservation interest, while important, was not sufficiently compelling to overcome strict scrutiny standard; court noted that, even if conservation interests were "compelling," durational residency requirement would still be unconstitutional if town could achieve its conservation goals by employing alternative measures that would cause little or no interference with constitutionally protected activity. Hassan v East Hampton (1980, ED NY) 500 F Supp 1034.

See Tangier Sound Watermen's Assoc. v Douglas (1982, ED Va) 541 F Supp 1287, § 4.

§ 9. Hunting laws; discrimination against nonresidents of state

[a] Law held valid

Neither statutory requirement of state that nonresident, but not resident hunters, purchase combination recreational hunting licenses in order to be able to obtain single elk, nor requirement that nonresident hunters pay much higher license fees violates equal protection, since state has no duty under Fourteenth Amendment to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to penny every cost differential it imposes in purely recreational, noncommercial, nonlivelihood setting; rationality is standard, and where constitutional requirements have been met, protection of wildlife of state is peculiarly within its police power, and state has great latitude in determining what means are appropriate for its protection. Baldwin v Fish & Game Com., 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852.

State's statutory provisions imposing higher hunting license fees for nonresidents than for residents do not violate privileges and immunities clause of Federal Constitution (Article IV, § 2, cl 1) or Fourteenth Amendment. Terk v Gordon, 436 US 850, 56 L Ed 2d 751, 98 S Ct 3063.

52 L Ed 2d 863–877

New Sections and Subsections Added:

§ 13. Parking restrictions

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§ 1. Introduction

[b] Related matters

Supreme court's views as to what constitutes "taking," within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation. 57 L Ed 2d 1254.

Validity of ordinance restricting number of unrelated persons who can live together in residential zone, 12 ALR4th 238.

Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents. 18 ALR4th 568.

Validity of statutory classifications based on population—zoning, building, and land use statutes. 98 ALR3d 679.

Halfway Houses: housing facilities for former patients of mental hospital as violating zoning restrictions. 100 ALR3d 876.

§ 3. General rule that zoning regulation is constitutional unless not substantially related to general welfare; Supreme Court's approval of comprehensive zoning

Neither free exercise clause of First Amendment nor due process clause of Fourteenth Amendment are violated by municipal zoning ordinance which prohibits construction of church buildings in virtually all residential districts in city, since ordinance neither pres-

Subsistence 5/7/85

IN THE SENATE BY V.FISCHE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the taking of fish and game for personal and family consumption and for subsistence uses; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that

(1) nonresidents visiting Alaska take fish and game primarily for commercial, trophy, and recreational purposes; state residents who take fish and game for noncommercial purposes use the stocks and populations for personal and family consumption;

(2) because of its importance to their health, safety and general well-being, the taking of fish and game by residents for personal and family consumption is a priority use of the state's fish and game resources;

(3) because of residents' proximity to fish stocks and game populations, their dependence on fish and game as a mainstay of livelihood, and the lack of alternative food resources, the taking of fish and game for personal and family consumption is essential to the health, safety, and general well-being of residents domiciled in communities and areas in which the taking of fish and game for personal and family consumption in a cost-effective manner constitutes a significant characteristic of the economy of the community or area;

(4) the taking of fish and game for commercial, recreational, and other uses by both residents and nonresidents is important to the economy of the state and particularly to the economies of communities

dependent on commercial fishing.

* Sec. 2. AS 16.05.251(a) is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.-62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish, <u>resident net-fish,</u> or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas and methods of

harvest for aquatic plants;

(11) establishing the times and dates during which t issuance of fishing licenses, permits and registrations and the tran fer of permits and registrations between registration areas allowed; however, this paragraph does not apply to permits issued transferred under AS 16.43;

(12) resident net, sport, and commercial fishing.

* Sec. 3. AS 16.05.251(b) is amended to read:

(b) The Board of Fisheries shall adopt regulations in accordan with the Administrative Procedure Act (AS 44.62) permitting the taki of fish for subsistence uses unless the board determines, in acco dance with the Administrative Procedure Act, that adoption of t regulations will jeopardize or interfere with the maintenance of fi stocks on a sustained-yield basis. Subsistence fishing authoriz under this subsection shall be subject to reasonable regulation seasons, harvest levels, and methods and means of taking. Whenever is necessary to restrict the taking of fish to assure the maintenan of fish stocks on a sustained-yield basis, or to assure the continu tion of subsistence uses of such resources, subsistence use shall the priority use. If further restriction is necessary, the boa shall establish restrictions and limitations on and priorities f these consumptive uses on the basis of the following criteria:

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

(2) local residency; and

(3) availability of alternative resources.

* Sec. 4. AS 16.05.251 is amended by adding new subsections to read:

(d) Regulations adopted under (a) of this section shall provid that, consistent with the provisions of (b) of this section, residen

net, sport, and commercial fishermen are provided a fair and reasonable opportunity to participate in the harvest of fish. The regulations shall provide that, regardless of the type of gear used in each fishery, the taking of fish by residents for personal and family consumption is a priority use of fish.

(e) In allocating access to fish among persons engaged in resident net, sport, and commercial fishing, the Board of Fisheries shall consider the following factors:

(1) the history of each personal use, sport, and commercial fishery;

(2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;

(3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;

(4) the availability of alternative fisheries resources;

(5) the importance of each fishery to the economy of the State of Alaska;

(6) the importance of each fishery to the economy of the local area in which the fishery is located;

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

* Sec. 5. AS 16.05.255(b) is repealed and reenacted to read:

(b) Whenever it is necessary to restrict the taking of a game population to assure the maintenance of the population on a sustained-yield basis, the taking of game from the population by residents for personal and family consumption shall be the priority use of the harvestable surplus of the population and the Board of Game shall

adopt regulations authorizing the taking in accordance with the Admin
istrative Procedure Act (AS 44.62).

* Sec. 6. AS 16.05.255 is amended by adding a new subsection to read:

(d) If the harvestable surplus of a game population is not larg
enough to provide a reasonable opportunity for the taking of game fro
the population by residents in accordance with regulations adopte
under (a) and (b) of this section, the Board of Game shall adop
regulations in accordance with the Administrative Procedure Ac
(AS 44.62) that create a priority for the taking of game from th
population for subsistence uses over other consumptive uses of th
population. Takings authorized under this subsection shall be subjec
to reasonable regulation of seasons, bag limits, and methods an
means. If the harvestable surplus of the population is not larg
enough to provide a reasonable opportunity for the taking of game fro
the population for subsistence uses, the board shall adopt regulation
that establish restrictions and limitations on the taking of game fro
the population for subsistence uses on the basis of the followin
criteria:

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

(2) local residency; and

(3) availability of alternative game resources.

* Sec. 7. AS 16.05.940(21) is amended to read:

(21) "sport fishing" means the taking of or attempting t
take for personal use or for personal or family consumption, and no
for sale or barter, any fresh water, marine, or anadromous fish b
hook and line held in the hand, or by hook and line with the lin
attached to a pole or rod which is held in the hand or closely attend

* Sec. 8. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the customary and traditional noncommercial uses [IN ALASKA] of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in [FOR THE PURPOSES OF] this paragraph [,]

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

(B) "rural area" means a community or area of the state in which the taking of fish or wildlife for personal or family consumption is a significant characteristic of the economy of the community or area;

* Sec. 9. AS 16.05.940 is amended by adding a new paragraph to read:

(28) "resident net fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by a resident for personal or family consumption and not for sale or barter, with gillnet, dipnet, seine, fish wheel, longline, or other similar means defined by the Board of Fisheries.

* Sec. 10. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Introduced: 3/13/85
Referred: State Affairs, Resources, Judiciary and Finance

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 231

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that

(1) the taking of fish stocks and game populations for personal and family consumption and related uses is essential to the health, safety, and general welfare of Alaskans domiciled in rural communities or rural areas in which the taking of fish and game for such uses is a significant part of the economy of the community or area; and

(2) the taking of fish stocks and game populations for personal, sport, and commercial uses is also of economic and recreational importance to Alaskans who reside anywhere in the state.

* Sec. 2. AS 16.05.251(a) is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.-62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas, bag limits, harvest levels, and sex and

clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

* Sec. 4. AS 16.05.940 is amended by adding a new paragraph to read:

(28) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other similar means defined by the Board of Fisheries.

* Sec. 5. This Act takes effect immediately in accordance with AS 01.-10.070(c).

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Introduced: 3/13/85
Referred: State Affairs, Resources, Judiciary and Finance

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

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(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas, bag limits, harvest levels, and sex and

size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish, personal use fish, or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43;

(12) personal use fishing.

* Sec. 3. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the customary and traditional uses by rural [IN] Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel,

clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

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(28) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other similar means defined by the Board of Fisheries.

* Sec. 5. This Act takes effect immediately in accordance with AS 01.-10.070(c).

APPENDIX A

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

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

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

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

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

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

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

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

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

DATED: 6 June 1985

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

BY: Bill Caldwell

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APPENDIX B

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

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

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

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

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

DATED: 5 June 1985

Respectfully submitted,

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

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

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

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

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

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

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

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

(2) a use pattern recurring in seasonal cycles;

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

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

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

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

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

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

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

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

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

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

(1) Subsistence Villages. The Commissioner shall

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

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

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

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

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

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

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

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

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

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

(1) He will adopt regulations that permit the