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Date

Jim,

The first file HB 288 should be on one (or more) file all by itself. The rest of these files - "subsistence" can be jacketed together one right after another. (We will be adding them to the microfiche you did 2 years ago)

Mary

(If you have any question on these 2 boxes - "Sen Resources" — please call me)

1985-86

HB

288

Alaska State Legislature

POUCH V
JUNEAU, ALASKA. 99811
(907) 465-4907

Senate
Committee on Resources

TO: Senator Arliss Sturgulewski March 27, 1986
Chairman, Senate Resource Committee

FROM: Senate Reso[illegible] Committee Staff

RE: Senate Committee Substitute for Committee Substitute for House Bill No.288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date."

When the subsistence bill came to the Senate Resources Committee, staff asked Legal Services to review the bill to see if all the provisions of the bill were encompassed in the bill title. Legal Services identified four provisions of the State Affairs Committee substitute that were "arguably not encompassed by the bill title". Two of these sections were removed by the Resources committee. It was felt that a case could be made for the other two sections being within the scope of the title.

These provisions are: page 1, section 2, lines 15 through 17, which state:

"(12) regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries."

and page 4, lines 6 through 9 which state:

"Sec. 16.05.259. ADMINISTRATIVE APPEALS. The Board of Fisheries and the Board of Game, acting jointly, may establish

by regulation an appeal procedure for persons aggrieved by the adoption or repeal of a regulation."

Since that opinion from Legal Services and, unfortunately, after the Resources Committee passed out SCS for CSHB 288 (Resources), three relevant events have occurred:

1) In subsequent discussions among Legal Services staff, the belief that the previously identified provisions do not fit within the bill's title has strengthened.

2) Legal Services has identified two additional provisions which cause its staff concern.

a) Some members of the Legal Services staff feel that page 2, section 4, lines 14 and 15, do not fit under the title. This section states:

"(10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game."

b) Legal Services has also identified Section 3 of the Resources CS as probably not complying with the bill's title. This is a longer section that deals with providing a reasonable opportunity for personal use, sport and commercial fishing. It was an amendment that was offered by Senator Fischer and adopted by the committee at its last meeting on subsistence.

3) Legal Services has just advised committee staff that the general severability provision contained in Title 1 does not apply to title questions. This means that if after a bill has become law, a court finds that any provision of the bill was not encompassed in the bill's title, not just that provision but the entire law would be invalidated.

It is this last revelation which is particularly serious. While the sections at issue are desirable and it is felt that

a reasonable argument can be made for their fitting under the bill's title, none of these sections are so crucial to the bill's purpose that they are worth risking the entire bill.

It is recommended that Senator Rodey be asked if he would agree for SCS for CSHB 288 (Resources) to be referred back to the Resources Committee for one meeting for us to correct this problem. Legal services is preparing a memo.

Hein ✓
3/4/86

Original sponsor: Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 288 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND 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. AS 16.05.251(a)(6) is amended to read:

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

* Sec. 2. AS 16.05.251(a) is amended by adding a new paragraph to read:

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

* Sec. 3. AS 16.05.255(a) is amended by adding a new paragraph to read:

(10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game.

* Sec. 4. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

(b) The boards shall determine

sustained yield; and

(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria:

(1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood;

(2) local residency; and

(3) availability of alternative resources.

(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.

may be taken only under nonsubsistence regulations.

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

Sec. 16.05.259. ADMINISTRATIVE APPEALS. The Board of Fisheries and the Board of Game, acting jointly, may establish by regulation an appeal procedure for persons aggrieved by the adoption or repeal of a regulation.

* Sec. 5. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.261. NO SUBSISTENCE DEFENSE. In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses.

* Sec. 6. AS 16.05.330 is amended by adding a new subsection to read:

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating and monitoring the subsistence harvest of fish and game. The boards shall adopt these regulations when the subsistence preference requires a reduction in the harvest of a fish stock or game population by nonsubsistence users.

* Sec. 7. AS 16.05.940(22) is amended to read:

(22) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources <u>by a resident domiciled in a rural area of the state</u> for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

and traditional 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, "family" means [ALL] persons related by blood, marriage, or adoption, and a [ANY] person living in [WITHIN] the household on a permanent basis;

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

(28) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

(29) "fish stock" means a species, subspecies, geographic grouping or other category of fish manageable as a unit;

(30) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(31) "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 means defined by the Board of Fisheries;

(32) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or

(33) "subsistence hunting" means the taking of, hunting for, or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game.

* Sec. 10. AS 16.05.251(b), 16.05.255(b), and 16.05.257 are repealed.

* Sec. 11. This Act takes effect June 1, 1986.

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

March 10, 1986

Ron Somerville
c/o Somerville for Governor
8800 Glacier Highway, Suite 250
Juneau, Alaska 99801

Dear Ron,

Thank you for your letter which I received Friday. As you are aware, though we have agreed on some aspects of the subsistence issue and disagreed on others, I have always valued your opinions.

I share your opinion that we all deeply desire a fair and workable subsistence law that will lay the subsistence issue to rest once and for all. The Senate State Affairs and Resources Committees have worked long and hard to make such a bill a reality. I appreciated your compliments on the improvements to the bill.

As you mention, the subsistence bill now has a number of important provisions that were lacking last year. Among these are:
- a requirement that the boards identify subsistence stocks and populations by area;
- an exclusion from subsistence harvest of stocks and populations which the boards do not identify as subject to subsistence uses. Examples would probably be bison, elk, and mountain goats, most populations of Dall sheep and some steelhead and trout stocks and brown bear populations;
- a requirement that subsistence users be given a reasonable opportunity to harvest;
- a provision that all takings of fish and game are subject to reasonable regulation of seasons, bag limits, and methods and means, including prohibitions on wanton waste;
- a prohibition against the use of the subsistence defense in violations of fish and game laws.

I believe we agree that all of these are important improvements to last year's bill. Unfortunately we seem to

disagree on the major principle of whether or not the legislature should pass a bill that complies with federal law. I believe passage of a bill that lacks that compliance would be a meaningless charade and a deception of the public. Lack of compliance will cause a federal takeover of management of our fish and game on all public lands on June 1, 1986. Management of our own resources was one of the driving forces in our becoming a state, and I am not going to be part of giving away that principle.

There may be many who would like to characterize the danger of federal takeover on June 1st as an empty threat or as federal bullying. Unfortunately, neither is true. The Department of Interior certainly wishes to avoid takeover and has neither the money nor manpower to do a decent job of management of our fish and game. Assistant Secretary Horn emphasized that point, but he also made it plain that this is an issue on which the department does not have discretion.

If the department tries to ignore the federal law, I believe we would immediately see the issue in court under Section 807, the Judicial Enforcement section of ANILCA. We would then be faced not only with a federal takeover of fish and game management, but with the very real risk of a federal judge deciding that he is going to personally supervise that management. Before anyone dismisses that risk, I would suggest that he or she look very carefully at what happened in Washington State with Judge Boldt.

I realize that there are persons, including some in the legislature, so strongly opposed to subsistence that they would welcome such a scenario, believing the results would be so onerous that out of the resulting political chaos a strong movement would develop to change the federal law. That approach is playing Russian roulette with our resources. The State Affairs and Resources committees have worked very hard with people on all sides of the issue to hammer out a subsistence bill that will work for all of us, rather than yielding to easy rhetoric based on how we wish things were.

I should point out that there are ongoing private court suits challenging the constitutionality of the federal subsistence law. Enactment of legislation will have no effect on the outcome of those suits. Such legal battles can take years, however, with very uncertain results. The same can be said for attempts to change the federal law. We need a fair and equitable law now, one that retains our own control of our resources, and is enforceable and constitutional. The Senate Resources Committee Substitute for House Bill 288 is such a bill.

In your letter you raise the issues of need and residence. As you well know, the use of a criterion based on individual economic need is clearly not in compliance with federal law.

Assistant Secretary Horn testified to that during his appearance before the Senate Resources Committee on March 5, 1986. The federal legislati e history on the subject states in part, "The policy also r ires that regulatory systems which employ income requi as may not be imposed on rural residents."

Also, as you well know, the federal law explicitly and repeatedly refers to "rural residents." A bill which ignores this fact would also clearly not comply. Again the federal legislative history is specific on this point. It states, "It also should be noted that customary and traditional subsistence uses must be evaluated on a community or area basis, rather than an individual basis." This leaves us a good degree of flexibility, however, in defining "rural area" for the purpose of this bill.

Your interpretation of which areas of the state would have subsistence use eliminated in them may have been correct for the bill as it was originally introduced by the governor. That interpretation is clearly incorrect, however, for the Senate Resources Committee substitute.

"Rural area" in the bill is defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a significant characteristic of the economy of the community or area." The bill's accompanying sectional analysis cites Congress's intent to protect subsistence uses where "...such uses have played a long established and important role in the economy and culture of the community...". The sectional further states, "It is expected that the boards ...would review areas as conditions change to assure a rural or nonrural classification is still appropriate."

Whether or not a community or area is classified as a "rural area" for the purposes of this bill will be a factual determination by the Boards of Fish and Game. Subsistence will exist in areas only after the boards have made a factual determination based on the economy of the particular area and then only on stocks and populations identified by the boards as subject to subsistence use. The result of limiting the subsistence preference to those who live in areas so identified will be to protect subsistence where it is really needed, but limit it to a small percentage of our population so conflicts will be dramatically reduced. All of this is in perfect compliance with federal law.

We realize that many Alaskans in every part of our state eat a great deal of fish and game. This bill is not intended to limit that in any way. What is intended, however, is to limit the number of people who have a preference over the rest of us when it comes times to harvest that food.

In closing, I feel the need to respond briefly to your last two paragraphs which left me more than a bit bemused. Your interpretation of the 1982 vote is one of the most interesting attempts at revisionist history I have ever come across. Since you spearheaded the move to repeal the existing law in 1982, I take it you felt differently then.

Your expressed concern for the lack of public hearing falls in a similar category. As this bill has made its way through the legislature, it has had as many public hearings as any piece of legislation I am aware of. There have been numerous statewide teleconferences as well as two-day public hearings in Fairbanks and Anchorage. These hearings culminated in a statewide teleconference by the Senate Resources Committee where we listened to every person who wished to testify.

I am sorry you were not aware of the meeting, but I feel compelled to point out that it was thoroughly advertised, very well attended and included testimony by Roberta Booher who officially represented the Alaska Outdoor Council, the organization of which you are the former executive director.

I will present your letter to the Senate Resources Committee. I appreciate the depth of your feeling on this issue, and as I said in the beginning of this letter, though we disagree on some aspects, I always value your opinions.

Sincerely yours,

Arliss Sturgulewski

Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

cc: Senate Resource Committee Members

1336

R O N. S O M E R V I L L E

FOR

GOVERNOR OF ALASKA
8800 Glacier Hwy., Suite 250
JUNEAU, AK. 99801

March 5, 1986

Senate Resources Committee
State of Alaska
Senator Arliss Sturgulewski, Chairman
Pouch V
Juneau, AK. 99811

Dear Senators:

It is my understanding that your review of Senate CS for HB 288 (subsistence) is coming to an end and there may not be any further public testimony on this piece of legislation in your committee. Unfortunately, I was unaware of your one teleconference on the bill and thus was not able to testify. I do believe, however, that there are a few points that have not been stressed adequately and since it appears that I will not be able to present them personally, I am putting them in writing.

First, I want to stress that all Alaskans are praying that a fair and workable law will be forthcoming which will lay the subsistence controversy to rest, once and for all. We are also appreciative of the complexity of the problem and the seriousness of the issue as, in one way or the other, it affects the daily lives of most Alaskans.

I would like to compliment the State Affairs and Resource Committees attempts to improve on the simplistic legislation introduced by the Governor and narrowly passed by the House during the last session. There are definite improvements in the legislation.

The provisions which provide the authority to regulate subsistence taking, give the Boards authority to identify subsistence stocks, authorize issuance of subsistence permits, provide that subsistence users be given a reasonable opportunity to harvest and allow no subsistence defense for fish and wildlife harvested outside the regulations are all important and crucial additions to the original bills.

The major stumbling blocks of the subsistence law debates are, however, still left unattended. The committe chose to eliminate

a critical section of an early draft which allowed the Boards to apportion subsistence use among species, stocks and populations that are similar and reasonably available. The committee also chose to insert the word "rural" into the state law without providing a definition which would possibly narrow a subsistence priority down to the "true subsistence users" which most Alaskans would agree deserve some preferential treatment.

The committee has also chosen to ignore the overwhelming testimony of most Alaskans that any preferential allocation of our common property resources for subsistence should be based on need rather than residency. Alaskans have also strongly endorsed a revision of the existing policy to base subsistence on individual or family need rather than on a community basis where "need" is totally ignored.

We all fully realize that you are under pressure from the Federal government and subsistence advocates to adopt a state law precisely in line with their narrow interpretations of the existing Federal law. Unfortunately, most Alaskans are not going to endorse a law which descriminates based on where a person lives in Alaska.

One of the most volatile issues has been concerned with identifying "who" is a subsistence user. In your legislation, by complying with the Federal law and inserting the word rural, the only residents that are really eliminated from the priority use are those that live in Anchorage, Fairbanks, Juneau and Ketchikan. I fully realize that you have provided direction, through the letter of intent, for the Boards of Fisheries and Game to further delineate "subsistence uses" and "rural areas". In my opinion, by passing the buck to the regulatory boards, the legislature is neglecting its responsibilities. It is obvious that if each legislator is forced to define which area is or is not a subsistence area and thus which constituents are subsistence users, that it is going to be extremely difficult to draft legislation which will pass both houses.

I maintain that the boards are even less prepared to deal with the construction of socially descriminatory laws than is the legislature and further more it is not the function of an allocation board. It is clearly the function of the legislature to develop clear guidelines by which the boards would follow in implementing the laws. Most importantly, every Alaskan would be able to judge and comment personally on the legislation. It is critical that everyone be able to determine whether he or she is "in" or "out" directly from the proposed legislation.

I believe it is hypocritical for the legislature to consistently criticize the administrative agencies for developing broad regulatory authority and then pass a piece of legislation as poorly constucted as this legislation with almost unlimited regulatory options. It is clear that because the legislature cannot deal with the politics of this issue, they are pulling the pin and throwing the hand grenade to the Boards in hope that they

will develop the political guts to do what the legislature is apparently unable to do.

I personally feel you should craft a subsistence law which is acceptable to most Alaskans based on some criteria of need and lack of alternative resources and let the courts settle whether or not it is in compliance with the Federal law. I also strongly urge you to face up to your public responsibilities if you decide to descriminate against urban residents by giving a priority to rural residents by precisely defining what is rural. The public deserves that much consideration on this volatile issue.

I would like to point out in closing that despite recent testimony to the contrary, Alaskans voted in 1982 to retain the exisiting State law which clearly does not descriminate against urban users. For some reason, subsistence advocates have twisted the 1982 vote as an endorsement of the privilege for only rural residents.

It is also important to express my concern for your lack of consideration for public input into the constantly changing legislation. One poorly advertised teleconference can hardly be considered public participation.

Thank you for considering my comments.

Sincerely,

Ron Somerville

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March 10, 1986

Honorable Arliss Sturgulewski
Chairman, Senate Resources Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

re: Subsistence Bill;
SCS CSHB 288(SA)

Dear Senator Sturgulewski:

As you know I served as special counsel to the Senate State Affairs Committee for purposes of subsistence legislation. I have reviewed the Senate Resources Committee draft subsistence bill of March 4 and the sectional analysis. I am concerned that the current draft bill is too inflexible. The draft bill appears to be less flexible than ANILCA, less flexible than the Senate State Affairs bill, and less flexible than the governor's bill. Therefore, I will suggest some alternative language.

SUMMARY

Subsistence legislation must be flexible enough to allow the boards appropriate authority to allocate subsistence among, but not exclusively to, alternative stocks. Such flexibility is clearly consistent with ANILCA, so long as a preference is retained on all stocks that are customary and traditional subsistence stocks.

Flexibility is necessary for two reasons. First, it allows the boards to deal with impacts that subsistence may have on mixed stock fisheries, where subsistence targeted on one stock may have an incidental impact on a non-targeted stock. Second, flexibility is also necessary, and consistent with ANILCA, in situations when the stock of fish or game is of little significance to overall subsistence harvest, but for which a subsistence harvest could easily consume any harvestable surplus.

I will give examples, but first let me state the deficiencies of the Resouces Committee draft bill when compared to ANILCA, because identifying the deficiencies underlies my recommendations. The two greatest deficiencies are:

(1) The Resources Committee draft requires to boards to make allocation decisions solely in the context of each subsistence stock. It fails to provide authority, consistent with ANILCA, for the boards to

look at least somewhat broadly, and with some flexibility, at the overall subsistence picture in a given area when making allocation decisions. In limited situations the boards should be able to consider "alternative resources" when making allocation decisions and when determining customary and traditional subsistence use. ANILCA provides that authority in situations prior to Tier II, in which alternative resources are also considered.

(2) The Resources Committee draft bill fails to recognize ANILCA standards, that on federal lands subsistence must be consistent with "sound management principles" and "the conservation of healthy populations", and additionally that on National Park Service lands (including preserves open to sport hunting) subsistence must be consistent with the "conservation of healthy and natural populations". These standards provide flexibility, particularly in conjunction with authority to allocate among alternative stocks, because they let the board consider factors other than just the sustained yield of the target stock. These standards therefore would allow the boards to address mixed stock problems and impacts on non-significant subsistence stocks. See ANILCA, sections 802, 805, 808, 810, 815.

Based on both of these shortcomings in the Senate Resource Committee draft bill, I believe that ANILCA and its legislative history are legally, biologically, and administratively preferable to the Resource Committee bill from the sport perspective. ANILCA may end up being preferable from the environmental and non-consumptive perspectives as well. ANILCA is less restrictive of sport, commercial and nonconsumptive use than is the latest draft of the Resource Committee bill.

I hope that you won't mistake my intentions in saying that ANILCA is preferable to the Resource Committee draft from a sport perspective. I do not want a federal takeover. However, before focusing on the need for flexibility, I will touch briefly on what might happen if there is a "federal takeover."

DISCUSSION

A. Consequences of a "Federal Takeover".

In the event of federal implementation of the subsistence provisions of ANILCA, Department of the Interior is most likely to simply adopt state regulations for subsistence on federal uplands and the few federal waters that exist. (This is essentially what Assistant Secretary William Horn said before your committee.) The State's sport regulations are currently adopted by the Department in this manner under existing federal authority to adopt state regulations.

The consequences of this would be: (1) state sport and commercial regulations would remain pretty much intact, (2) Tier II hunts closed to sport on federal lands would open, by virtue of the fact that federal law restricts subsistence to rural residents, and (3) Tier II hunts closed to sport on state lands would remain a problem, unless the Office of the Attorney General changes, as it should, its advice that all Alaskans are qualified for subsistence under the Madison decision. What that advice ignored was the Board's Joint Policy on Subsistence, 5 AAC 99.010, listing criteria for determining whether a use is customary and traditional. Those criteria sensibly exclude almost all urban Alaskans without resort to the word "rural". The advice ignored common sense, for almost every urban Alaskan knows he or she is not a customary and traditional subsistence user. The consequences of a federal takeover could become more difficult over time if state and federal wildlife regulations pursued divergent paths so as to stain biologically against each other, or if the federal government eventually sought to expand its authority over nonfederal lands. But, those are more distant possibilities and in the near term they are unlikely.

B. ANILCA and Flexibility

Most people conversant with subsistence issues understand that at Tier II, under sec. 804 of ANILCA and AS 16.05.251(b), 16.05.255(b) of current state law, the boards are to consider the factors of dependency on the resource, local residency and availability of alternative resources in allocating subsistence use. These are the criteria upon which subsistence use is restricted when there is not enough of a resource to accommodate all subsistence demand. However, what is often not understood is that, under ANILCA, the boards also can and should apply those same factors, along with others, in determining what uses are "customary and traditional subsistence uses," even before the boards are faced with Tier I or Tier II situations. Thus, the three criteria play a dual role, and the ability to look to alternative resources is a key aspect of ANILCA's flexibility.

The dual role for these criteria is clear from the legislative history of ANILCA. It says:

> "However, the phrase 'customary and traditional' is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources ~~...~~ in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation. The factors of local residency, economic dependence, and

areas

> availability of alternative resouces have been included in section 804 [the preference at Tier II] rather than the definition [of subsistence use]. Although a truly comprehensive definition of 'subsistence uses' must include a mix of those factors, the committee has determined that they should be incorporated through appropriate action by the State rulemaking authority [i.e. the boards] in conjuntion with recommendations of regional councils established pursuant to section 805 to implement the subsistence preference set forth in section 804. Sections 803-805 are intended to establish a dynamic process for the regulation of subsistence rasources and uses which will enable rural people to participate in the decisionmaking process of the State rulemaking authority in the inclusion of the local residency, economic dependence, and availability of alternative resources factors into the definition of "subsistence uses" on a case-by-case basis to meet the needs of a particular management situation in a particular area."

Sen. Rept. No. 96-413, 96th Cong., 1st Sess, at p. 269, emphasis added.

A fair analysis of this legislative history is that the boards, in conjunction with regional councils, are to determine customary and traditional subsistence use by considering: (1) whether the use is long established and important, (2) whether it is accompanied by customs and beliefs, (3) dependency on the resource, (4) local residency, and (5) availability of alternative resouces. As a matter of policy, three other considerations might be worth adding to this list, even though they are not required by ANILCA or its legislative history. Those are: (6) the season at which the resource in question is harvested since many subsistence harvests are important in an opportunistic and temporal context, (7) the relation the resource has to other subsistence resources that are also harvested, and (8) the cultural values associated with the resource. As I recall, Steve Benhke, the Director of the Subsistence Division, suggested these last three factors to me in our discussions. His suggestion is good.

The problem that now confronts your committee is (as it always has been throughout this issue) a drafting problem. It is not whether to hurt or help subsistence or nonsubsistence people. It is how to draft language that allows flexibility to address alternative stocks and flexibility to undertake sound management without having that language become a vehicle for the boards to deny satisfaction of subsistence use. However, as Don Mitchell, counsel for the Alaska Federation of Natives (AFN), correctly points out, the boards unfortunately do not have a perfect track

record on this matter. Therefore, I make the following suggestion.

C. Suggested Amendment

I assume, perhaps naively, that a successful law should foster trust between subsistence and nonsubsistence users and that generosity should prevail over avarice and fear. Therefore, section 16.05.258 in the draft bill, which involves identifications of customary and traditional subsistence stocks and determinations of how much of a harvest is needed to reasonably satisfy subsistence use, should be amended to involve advice from regional councils and to give the boards and the councils the flexibility to look to alternative stocks in allocating fish and game and in dealing with mixed stock problems, so long as subsistence needs are met and the preference is fulfilled. I suggest the following language:

> Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME.
>
> (a) The Board of Fisheries and the Board of Game, after consultion with the appropriate regional advisory councils, shall identify customary and traditional subsistence uses of fish stocks and game populations in each rural area identified by the boards.
>
> (b) Consistent with satisfaction of subsistence uses, sustained yield, sound management principles, the maintenance of healthy populations, and federal law, the boards shall determine after consultation with appropriate regional advisory councils:
>
> (1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested; and
>
> (2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses.
>
> (c) In making the decisions under (a) and (b) of this section, the boards may consider factors including but not limited to: (1) whether the harvest and use is long established and important, (2) whether the use incorporates custom, tradition and belief, (3) dependency on the resouce, (4) local residency, (5) avialability of alternative resources, (6) the season at which the resouce is harvested or used, (7) the relation the resource and its use have to other resources used for subsistence, and (8) cultural values associated with the resource.

I would thereafter reletter the existing subsections (a) through (g).

I understand that the Solicitor's Office of the Department of the Interior questions whether ANILCA allows the boards to look to the availability of alternative stocks prior to

Tier II situations. The Solicitor's Office is not as persuaded by the legislative history of ANILCA as I am. If the Department's concern continues to be a problem it could be cured by making subsection (c) in my suggested amendment applicable only to state lands and waters. In that case I would simply add the phrase "on state lands and waters" to subsection (c). Since subsection (c) is permissive language, rather than mandatory language, the authority could be used only when necessary and would allow desired, rather than undesired, differences between management on federal lands and management on state lands and waters.

Overall, the amendment I have suggested would recoup much of the flexibility that was in the Senate State Affairs bill but has been deleted from the Senate Resources bill.

The section-by-section analyses of both the Senate State Affairs bill and the Senate Resources draft bill recognize the role of the regional councils in identifying subsistence use and making allocation decisions. However, because the AFN has fought the notion of addressing alternative stocks in the context of identifying and allocating to subsistence use, I have therefore suggested these amended subsections in order to specifically involve the regional councils and assure satisfaction of subsistence uses. I hope this, in conjunction with the existing authority of the councils (5 AAC 96.610), would assure sensitivity on the part of the boards and the councils when they look to alternative stocks, are confronted with mixed stock problems, or seek to apportion use between similar, available stocks. I hope this would also reduce the perception on the part of some rural people that the boards are distant and insensitive.

I think that if you made this suggested change you would have a bill that would be acceptable to the sport community. I understand that McKie Campbell of your staff believes it would be more convenient to address these matters in legislative history. That will not work well under the current Resource Committee draft bill, given the proposed AS 16.05.258(a) and (b), their interplay with recent court decisions in Eluska and Skuse, and the deletion of apportioning authority. Changes in the legislative history of the current Resource Committee draft would be legally meaningless in the face of the plain language of the draft to the contrary. It is important to understand that Eluska and Skuse stand for two propositions: (1) the "subsistence defense," and (2) a requirement that the boards adopt subsistence regulations for all subsistence stocks. The Senate State Affairs bill dealt with both aspects of these cases. The Senate Resources draft deals only with the defense.

I will now turn to demonstrating why this alternative language is necessary, rather than just an abstract point.

D. Why Flexibility is Necessary

Don Michell has long spoken of an error by the Board of Fisheries several years ago that demonstrates erroneous shifting of Tyonek subsistence to an alternative stock. I have always agreed with him that the boards should not be allowed to shift any portion of a subsistence harvest to alternative resources when doing so is in any significant way to the detriment of subsistence use. However, the rule on alternative resources should not be so hard and fast as to deny the boards flexibility when it is reasonable. I hope that four examples will flesh out the problem, and I recommend that you utilize them in the section-by-section analysis to facilitate understanding of how alternative resources might be looked to without detriment to subsistence needs. I will stick mostly to fishery examples, because I am a dabbling dilettante in fisheries management and ignorant in game. However, the priciples suggested by these examples may apply to both fish and game.

Example #1: Tyonek King Salmon.

The Tyonek situation demonstrates when shifting, either partially or fully, to another stock should not occur. The first fresh meat on the beaches at Tyonek is the Susitna bound king salmon. Several years ago the Board of Fisheries did not allow subsistence harvest of these fish when they were migrating past the Tyonek beaches but did allow sport harvest of these fish when they reached the Susitna tributaries. The subsistence take is and would have been small in relation to the size of the run. The board's decision was legally improper because it forced Tyonek people to stand and wait for later and less accessible stocks -- chum, sockeye and silver salmon -- while urban sport people, less in need, fished. Therefore, the Board of Fisheries should not be allowed to shift Tyonek subsistence from king salmon to a later, less available stock of salmon. Subseqent litigation overturned the board's decision of allowing sport and disallowing subsistence in this case, and few who try to deal fairly with subsistence argue that the court should have decided otherwise. Dependency on the resource and lack of alternatives were demonstrable. "No shifting" ought to be the rule in the Tyonek case. Therefore, when AFN gives the Tyonek case as an example of why alternative resources should not be considered, AFN is putting forward a "straw man" argument. No sensible person would suggest any shifting in the Tyonek situation, and no legislation has ever been drafted to allow that sort of a shift.

Example #2: Late Kenai River Coho.

The late Kenai River coho demonstrates that any rule on alternative stocks should be flexible and fair. This fish runs along the east beaches of Cook Inlet in late August and through September. It is a small run that is highly valued by sport anglers. Non-commercial harvests (at various times called "subsistence" harvests) have harvested upwards of 13,000 of these

fish annually. Although runs for the past two years have been much larger than the recent average, this level of harvest has led in some recent years to closing the sport fishery in the river. I would have no objection to this closing, but for the fact that from late June till early August the same beaches are packed with hundreds of thousands to millions of sockeye salmon that are catchable with the same gear and are recognized by the market and the public generally as more desirable fish. The Board of Fisheries has at various times sought to fully or partially shift the noncommercial fishery for late Kenai cohos to the more abundant sockeye running a few weeks earlier. The Senate State Affairs bill would allow a shift, at least in part. The Senate Resources draft bill does not to allow it.

Example 3: Mixed Stocks

Mixed stocks also demonstrate that any rule on alternative stocks should be flexible and fair. On the same east beaches of Cook Inlet there are several mixed stock fisheries conducted by gill nets. Kenai king salmon run contemporaneously with sockeye. Several coho stocks are contemporaneous with sockeye, pinks, chum and even some of the second Kenai king run. These mixed stock fisheries have produced substantial conflicts between sport and commerial fishermen. If portions of the Kenai Peninsula qualify for subsistence, then a rigid state subsistence law that does not allow the Board of Fisheries the flexibility to allocate subsistence between stocks or to focus it on some stocks in a reasonable manner will simply add to these conflicts. Acceptance of the subsistence law by the sport community would inevitably be less than it has been to date. This problem could be compounded by subsistence nets displacing some commercial set nets to a limited extent, because the beaches would have to accommodate additional nets and subsistence could be entitled to the best sites. The Senate State Affairs bill could deal with this, by giving the boards some flexibility to apportion use between stocks and to focus on some stocks more than others. The only flexibility in the Senate Resource draft bill is found in the words "reasonable opportunity". That is a frail hook upon which to hang a heavy hat.

Example 4: Non-target, Minimal Target, and Incidental Target Stocks.

A potential problem of non-target, minimal target and incidental target stocks also demonstrates the need for flexibility to address alternative stocks. If we have a rigid bill we may end up with the boards having little ability to minimize impacts on rainbow trout and steelhead trout stocks, or other highly sensitive stocks, in several situations around the state.

Numerous Federal and State reports (eg., USDOI, FWS, Subsistence Management and Use, 1985; USDOI, FWS, Kodiak Refuge Comprehensive Management Plan, 1986; USDOI, FWS & BLM, Burger, et

al, 1983, on Copper River steelhead; USDOI, BIA, Worl, 1982, "Synopsis of Alaska Native Subsistence Economies and Projection of Research Needs: Subsistence Data Base Phase II"; ADF&G, Subs. Div., Stanek, 1982, Report No. 32; ADF&G, Subs. Div., Fall, Report No. 74) document subsistence harvest of rainbow and steelhead trout. I have had no problem with this because I do not know of many demonstrable impacts. However, the Attorney General and the Board of Fisheries might have a problem because current state regulations, 5 AAC 01.010, prohibit subsistence harvest of rainbow trout and steelhead. I have always wondered whether that regulation would survive a subsistence challenge. Eluska and Skuse indicate the regulation would fall, based on the court's requirement that the boards adopt subsistence regulations for every subsistence stock. Whether the regulation would stand or fall is, I believe, an important question to the sport community because the regulation helps sustain a strong recreational interest and a multi-million dollar sport, guide and lodge industry that are focusing increasingly on catch and release of older age, world class trophy rainbows and steelhead.

Based on State estimates in the Bristol Bay Regional Plan and the Kenai River studies, the sport fishing industry in the Bristol Bay drainages, in which world class rainbows play a significant role, is far more important economically than the Kenai River guide industry. If low levels of subsistence targeted on rainbow or subsistence targeted primarily on other stocks significantly impact over time the prevalence of the relatively scarce older age fish, then we will suffer a loss of international interest to anglers. Perhaps we should risk that loss, but I don't think the law does or should require it. There are only three world class rainbow fisheries in the world. Alaska, primarily in the Bristol Bay drainages, is the best, and the other two are in Patagonia and New Zealand.

Several sport regulations, involving special management regimes for rainbow trout, could eventually loose much of their effectiveness in providing quality sport fisheries if the boards are without flexibility in providing for subsistence. Talchalitna River rainbows are managed for catch and release. Bristol Bay drainage rainbows are managed primarily for trophy. Kenai River rainbows are managed for trophy. The draft Southcentral Rainbow Trout Management Plan proposes increasing the number of trophy and catch and release streams and prohibiting the taking of rainbows through the ice on several west side Susitna River tributaries. These decisions are currently or will be based fully or partly on "sound management principles" involving social allocations of older age fish, rather than biological considerations under "sustained yield." I doubt that the present sport size limitations, bag limits, and methods and means restrictions could legally be applied to subsistence. The best alternative is flexibility in targeting and apportioning subsistence use among stocks.

E. Hypothetical Court Cases

I will close with a brief discussion of how five hypothetical law suits would fare under the suggested amendment and the current Senate Resources draft. I do so in order to further demonstrate the need for flexibility. For the most part all five hypotheticals involve issues or situations that have confronted the State. The fifth hypothetical demonstrates that the Resource Committee draft will not be in compliance with ANILCA if challenged by a well put together set of facts and legal arguments. My hypothetical plaintiffs are thinly disguised, so as to imply interests but not actual intentions of any group.

Case #1:

My first hypothetical suit involves that fountain of controversy: Wolf Control!

Suppose the Alaska Wolf Alliance alleges and proves that wolf control programs involve subsistence use of moose and are based on "sound management principles," reflecting attempts to create and allocate more moose, rather than on "sustained yield principles." To prove that, the Wolf Alliance could prove the following three points: (1) that wolf control, aerial trapping, and trapper education programs are designed to temporarily reduce wolf populations in order to increase moose popuations (Board of Game records will prove this), and (2) that depressed moose populations have resulted in part from subsistence harvest of cows often contrary to regulations (deposition of present and former Game Board members and ADF&G officials I believe would prove this), and (3) that none of the moose populations are below sustained yield if unhunted or if hunted only for subsistence (easily provable). The Wolf Alliance would then argue that wolf control programs are essentially ways of avoiding implementing the Tier I and Tier II subsistence priority, that nonsubsistence harvest must cease, and that wolf control programs must cease because they are based on social allocation considerations underlying "sound management", rather than the biological considerations of "sustained yield."

Under the suggested amendment, the Wolf Alliance loses, because "sound management principles" are recognized. Therefore, the flyboys fly, the subsistence and sport hunters hunt, and the trappers trap. However, under the Resouces Committee draft, the Wolf Alliance wins. The flyboys, the hunters, and the trappers take a walk. The irony is that rural subsistence and urban sport hunters have both supported wolf control programs. Therefore, both interests are hurt by the Resource Committee draft. To compound the irony, though, the nonconsuptive interests of the Wolf Alliance are also hurt by the failure of the Resource Committee draft to afford flexibility and recognize wildlife viewing interests through the social allocation underpinning of "sound management principles." Thus, the Wolf Alliance wins on

wolves and loses on other matters under the Resource Committee draft.

Case #2:

Suppose the following happens. The Alaska Union of Natives sues to stop sport hunting of moose on lands east and west of Fairbanks, where moose populations are depressed, and in the Nushagak drainage. The Union alleges and proves that subsistence hunters are having to hunt vastly larger areas to get moose. (The Bristol Bay Regional Plan and depositions of ADF&G officials might prove this.) The Union asks that the preference be implemented.

How this hypothetical case would fare under the suggested amendment and the Senate Resources draft is difficult to say. I have assumed too few facts about how much more difficult it is to get subsistence moose. However, if the increase in difficulty were only marginal, then the State would have a better chance of prevailing under the suggested amendment than under the Resources draft, because the flexibility in the suggested amendment allows the Board to reasonablly apportion subsistence use of red meat between moose and caribou so long as the preference is retained on both.

Case #3:

Suppose the following happens. George is apprehended for gill netting rainbow trout in Lower Talarik Creek 25 miles west of his home in Iliamna. The State prosecutes George for violation of the statewide subsistence ban on rainbow trout. George challenges the validity of the regulation.

As discussed previously, the regulation falls under the Senate Resource Committee draft. Under the suggested amendment, the regulation might prevail if the board has been reasonable in not depriving George of satisfying his subsistence needs for fish and perhaps trout. Flexibility and reasonableness are the key. However, the breadth of regulation makes it vulnerable under any bill.

Case #4:

Suppose Cooper Landing on the Kenai Peninsula qualifies as rural for subsistence purposes. Helen of Cooper Landing puts her motor boat in either the permanent non-motorized zone downstream from Russian River or the seasonal non-motorized zone downstream from Skilak Lake. Both zones are established by the the Department of Natural Resources. Helen engages in subsistence fishing for rainbow trout and is apprehended for using a motor. She alleges that the Kenai River rainbow trout stock is most prevalent in the non-motorized zones and that the non-motorized regulation is invalid with respect to subsistence use.

Under the Resources Committee draft bill, Helen wins, subsistence boats motor, nonsubsistence boats don't motor, state troopers are perplexed by the enforcement problem of having to figure out who qualifies for a motor. Under the suggested amendment, the Department of Natural Resources wins if the Board of Fisheries has provided reasonable alternative trout or other fish stocks in the Cooper Landing area.

Case #5:

Suppose the Board of Game authorizes subsistence hunting of moose in the ANILCA additions to Denali National Park and authorizes sport and subsistence hunting in the Denali National Park/Preserve, and that the board does so based on "sustained yield." Suppose further that the American Professional Hunting Association, Denali Tours (a hypothetical association of Denali tourist hotel, guide and service companies), and Defenders of Moose jointly sue the board on the following grounds: (1) American Professional Hunting and Denali Tours acknowledge that there should be a preference on moose in the Preserve for subsistence, but that the board's allocation of moose in the Preserve between sport and subsistence hunters violates federal law because the board failed to look to alternative stocks (eg. caribou) and "sound management principles," to more appropriately fulfill consumptive interests in making the allocation and in implementing the subsistence preference, (2) Denali Tours and Defenders of Moose allege that the level of subsistence moose hunting allowed by the board in the ANILCA additions to Denali National Park violates "sound management principles" and the "conservation of natural and healthy populations," which protect nonconsumptive interests, and (3) American Professional Hunting, Denali Tours and Defenders of Moose all allege that the State subsistence law therefore is not in compliance with sections 802, 803, 804, and 815 of ANILCA as they relate to alternative stocks, identification of subsistence use, allocation between sport, subsistence and nonconsumptive interests, the subsistence preference, sound management principles, and conservation of natural and healthy populations.

The State is likely to lose under the Senate Resources bill. The State subsistence law will fall. Alaska will be out of compliance. We will be where we are now. Under the suggested amendment, the board would presumablly have reached different allocation decisions initially, and if those decisions were reasonable, then these issues would not even arise under the State Affairs bill.

I hope these five hypothetical cases demonstrate the differences between the bills. I am not trying to be for or against wolf control, subsistence, sport use, commercial use, nonconsumptive use, or even rainbow trout. I am only concerned with getting a good bill. When I started working on this issue last October, I believed then as I do now, that there are two measures of a good bill. First, it should change the nature of

the public debate from the present unproductive, conceptual debate over generalities to factually oriented debates before the boards over whether particular stocks are subsistence stocks, whether particular areas or communities qualify, and how much of a stock is necessary to satisfy subsistence. Such factual questions are always worth pursuing. Second, the legislature will have succeeded if no one can say in the coming elections that he or she "did this for you on subsistence" or he or she "did this to you on subsistence." Such statements will be a sign of failure, because one side of the issue will have prevailed more than it should. It will mean that the generalized, devisive, and unproductive debate will still be with us.

A good subsistence bill will make the generalized subsistence debate go away. The Resource Committee draft can do that if something like the amendments I have suggested is adopted. They stay close to and do not wander from ANILCA. They provide needed flexibility and fairness.

I wish you the best in dealing with these matters.

Sincerely,

Geoffrey Y. Parker

cc:
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