

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6462 SENATE RESOURCES

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COMPTON, Justice, concurring.

I agree with Part A of the opinion, holding that this preferential scheme violates art. VIII, sections 3, 15 and 17 of the Alaska Constitution.

I express no opinion regarding Part B as it is superfluous to the decision.

MOORE, Justice, Concurring.

The court correctly concludes that chapter 52, SLA 1986 ("the Act") violates the Alaska Constitution. I write separately to explain my understanding of the court's holding in part B of the section entitled "The Article VIII Clauses - History and Analysis," which I join, and because I disagree with the court's analysis in part A.

Equal Protection

The Act is motivated by a compelling purpose, ensuring that persons who are dependent upon subsistence hunting and fishing have access to wildlife. However, the Act's geographical classification scheme is only loosely related to that purpose. This is an equal protection case, and an easy one at that.

Article I, section 1 of the Alaska Constitution provides that "all persons are . . . entitled to equal rights, opportunities, and protection under the law" We have decided many cases interpreting this provision, most recently, State v. Enserch Alaska Construction, Inc., ___ P.2d ___, Op. No. 3539, (Alaska, December 18, 1989). The Alaska Constitution has a similar clause specifically concerning natural resources. Article VIII, section 17, the uniform application clause, provides that "[l]aws and

regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

When applying the equal protection clause of article I, we determine the importance of the individual interest affected by the enactment. The importance of the individual interest determines the level of scrutiny we apply to both the state's interest in the enactment and the nexus between that interest and the enactment. Enserch, Op. No. 3539, at 22-24; Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984). Without explicitly acknowledging it, the court's opinion employs the same analysis under the uniform application clause of article VIII. See supra pp. 26-27. Since the principle of equality underlies both clauses, the use of our equal protection analysis in the uniform application context is proper.

I believe that the individual interest impaired by the Act, access to wildlife for subsistence purposes, is a species of the important right to engage in economic endeavor at issue in Enserch, Op. No. 3539, at 25-28. See also Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980). The challenged enactment

therefore should receive close scrutiny.¹ The Act then at least must be closely related to an important state interest. Enserch, Op. No. 3539, at 28.

The state's interest, ensuring that those who must engage in subsistence hunting and fishing are able to do so, is undoubtedly important. Indeed, I believe it is compelling. However, the Act's classification scheme for deciding who is entitled to engage in subsistence hunting and fishing and its implementing regulations are not closely related to the purpose of the Act. As the court's opinion describes, large numbers of residents of areas classified as urban under the Act are dependant upon subsistence hunting and fishing. Conversely, some of the state's larger cities, where many people are not dependent upon subsistence hunting and fishing, are classified as rural. Supra pp. 11-12. There is only a modest correlation between the set of people who reside in areas designated as rural under the Act and the set of people who are dependent upon subsistence hunting and fishing. The fit between the Act and the state's interest does not even approach that required to withstand

1. Enserch, Op. No. 3539, at 28; Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1379 (Alaska 1988). It may be that the enactment should receive even greater scrutiny under the uniform application clause; however, the court has not decided that question. Owsichuk v. State, 763 P.2d 488, 498 n.17 (Alaska 1988).

close scrutiny. Therefore, the Act violates the equal protection and uniform application clauses of the Alaska Constitution.

This is not to say that all subsistence preference laws would be unconstitutional. I simply believe that for such a law to pass constitutional muster, it must be closely related to its compelling purpose. A law providing for individual determinations of eligibility would in my view be sufficiently tailored to the state's interest to withstand a constitutional challenge.

Common Use and Exclusive Right of Fishery

The court's holding in Part A of the section entitled "The Article VIII Clauses - History and Analysis" is not altogether clear. I agree with the court to the extent that it holds that an intrastate geographical preference for the taking of wildlife violates sections 3 and 15 of article VIII of the Alaska Constitution. I reject any implication that all preferences, especially all subsistence preferences, would violate these sections. I do not believe that the court can find a violation of article VIII, section 17

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without a full equal protection analysis. I do not join part A of the court's opinion, but I concur in its result.²

Section 15 of article VIII provides that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Alaska Const., art. VIII, § 15 (emphasis added). Section 4 of article VIII provides that the use of resources shall be "subject to preferences among beneficial uses." On the surface, there appears to be some conflict between these provisions. To the greatest extent possible, we must interpret the provisions of Article VIII consistent with each other. See Abrams v. State, 534 P.2d 91, 95 (Alaska 1975).

Section 4 clearly authorizes some preferences based upon uses. The court recognized a parallel exception to section 15 in Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897 (Alaska 1981), where we wrote that section 15 "was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen." 628 P.2d at 904. The Act distinguishes subsistence uses from commercial and sport uses in name only. As discussed above, its classification

2. I would not, however, reach this question, because I believe that such geographical preferences violate the equal protection and uniform application clauses of the Alaska Constitution.

is in fact a fairly arbitrary one based upon residence." It is not the type of classification we have previously held permissible under section 15.

We are left with the question whether geographical preferences are permissible under section 15. For the reasons given in the court's opinion, see supra pp. 15-19, I believe that reliance upon Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), which interpreted the federal statute upon which section 15 was based, is appropriate. In Hynes, the Court invalidated regulations prohibiting fishing off the shores of the Karluk Reservation. While I do not believe that Hynes is determinative since it involved an exclusive right to fish in a particular area and not a mere preference, 337 U.S. at 92, section 15 proscribes "special privilege[s]" as well as exclusive rights. Like the court, I do not read Hynes as being based on the fact that the exclusive right was granted to Natives rather than some other group. Nor do I believe that Hynes can be distinguished by the ability of people to move to rural areas and thus qualify under the Act. See supra pp. 18-19 & n.12. For these reasons, I agree with the court that geographical preferences for the taking of fish are not permissible under section 15. The Act thus violates section 15. Although section 15 is facially applicable only to fishing, I would have no difficulty finding a corresponding

prohibition of geographical hunting preferences in the
common use clause of article VIII, section 3. See supra p.
23.

RABINOWITZ, Justice, dissenting.

I dissent from the court's holding that ch. 52 SLA 1986 is unconstitutional.⁷ In my view Alaska's subsistence laws are not violative of either section 3 ("common use"), section 15 ("no exclusive right of fisheries"), or section 17 ("equal application of laws") of article VIII of the Alaska Constitution.

Article VIII, section 4 explicitly provides for "preferences among beneficial uses." In Kenai Pen. Fisherman's Co-op Ass'n v. State, 628 P.2d 897, 904 (Alaska 1981), we said in part: "[w]hile section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fishermen." The subsistence laws at issue here do not exclude individuals from access to wildlife; rather, wildlife resources are allocated on a preferential basis. Nor do these laws create an exclusive right of fishery in any class. Rather, the effect of these laws is to provide for a subsistence preference among beneficial users of the resource. No exclusive, monopolistic, or otherwise closed classes of resource users are established.

I would further hold that ch. 52 SLA 1986 is not violative of the equal protection provisions of the Alaska

1. Hereinafter state subsistence laws.

Constitution (article I, section 1, article VIII, section 17). In my view adoption of the strict scrutiny and least restrictive alternative standards is inappropriate. Given the nature of the interest at stake I would apply a lesser standard for purposes of equal protection analysis. This subsistence legislation is substantially related to legitimate legislative goals. I conclude that the fit between the legislature's goal of furthering the health and welfare of subsistence users, and the subsistence preference system it devised to carry out this objective, is sufficiently close to withstand scrutiny under Alaska's equal protection provisions.

INTRODUCTION.

In response to the impact the state's population growth has had upon subsistence lifestyles, Congress in 1980 enacted the Alaska National Interest Lands Conservation Act (hereinafter ANILCA or federal subsistence law).² ANILCA was designed to protect subsistence hunting and fishing by giving such uses priority over commercial and sport uses in rural areas.³

2. Pub. L. No. 96-487, 94 Stat. 2371 (1980); 16 U.S.C. §§ 3101-3233 (West 1985). Congress prefaced Title VIII of ANILCA with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence" 16 U.S.C. § 3111(1).

3. Sae 16 U.S.C. §§ 3111-3126 (1982 & Supp. IV 1986).

The federal subsistence law specified that subsistence uses must be "customary and traditional uses by rural Alaska residents." ANILCA § 803; 16 U.S.C. § 3113 (emphasis added). Thus, under ANILCA, eligibility for subsistence permits was dependent in part upon one's geographic place of residence. ANILCA § 804; 16 U.S.C. § 3114.⁴

ANILCA authorized the state to continue managing fish and game inhabiting Alaska's federal lands and waters if the state established regulations maintaining the definition of and preference for subsistence uses articulated in the federal subsistence law. ANILCA § 805(d); 16 U.S.C. § 3115(d). The state legislature complied, and thereby retained managerial control over federal lands located within the state—by authorizing the Joint Boards of Fish and Game to promulgate regulations defining "rural" use.

In enacting ch. 52 SLA 1986 the Alaska House of Representatives adopted a letter of intent.⁵ The letter articulated the subsistence-rural preference of the act in the following terms:

4. "Rural" areas are those with sparse populations, and the term "rural" as used in ANILCA is not a term of art. Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1988), cert. denied, 105 L. Ed. 2d 695 (1989), (term "rural" is to be given its ordinary significance, meaning "sparsely populated").

5. 1985 House Journal 1246.

This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities in rural areas in Alaska is significantly dependent upon participation by the residents of the communities in the taking of fish stocks and game populations for personal and family consumption. Further, the legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.6/

The subsistence statutes challenged here define "rural area" 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 principal characteristic of the economy of the community or area." AS 16.05.940(25).

6. See also the House Committee on Interior and Insular Affairs Report issued in conjunction with the passage of ANILCA.

After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of federal, state, academic, and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. Reliable evidence was given to the Committee demonstrating that fifty percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40% of such families spend an average of 6 to 7 months of the year in subsistence activities. . . .

H.R. Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978).

Appellants' basic contention here is that "by excluding from eligibility as subsistence users all urban dwellers and by including all rural dwellers, it unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so, while needlessly including numerous rural residents who have not engaged in subsistence hunting and fishing." The linchpin of this dispute, then, is whether the challenged subsistence law constitutes an unconstitutionally imperfect attempt to fulfill the legislature's purpose of protecting subsistence uses.

I. DO ALASKA'S SUBSISTENCE LAWS VIOLATE ARTICLE VIII OF THE ALASKA CONSTITUTION?

Appellants challenge the constitutionality of the state subsistence laws under three clauses of article VIII of the Alaska Constitution, sections 3 ("common use"), 15 ("no exclusive right of fisheries"), and 17 ("equal application of laws").⁷ The court attributes a "shared meaning" to these three constitutional

7. Section 3 of article VIII provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural

(Footnote continued)

provisions: that "exclusive or special privileges to take fish and wildlife are prohibited." The court then concludes that the subsistence statute's preference for rural residents violates each of the aforementioned clauses and offends the shared meaning of article VIII. I disagree.

A. Section Three: The "Common Use" Clause.

Article VIII, section 3 (the "common use" clause) is derived from laws designed to guarantee the common citizen participation in wildlife harvest, and to divest the Crown of exclusive entitlement to those resources.⁸ It is said that this

(footnote continued)

waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

8. In Lewis v. State, 161 S.W. 154 (Ark. 1913), the court described the history of the common use principle in the following terms:

[A]lthough at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclu-

(footnote continued)

"public trust" doctrine⁹ "impose(s) upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." Owsichuk v. State, 763 P.2d 488, 495 (Alaska 1988) (citations omitted); see also Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), aff'd, 369 U.S. 45 (1962); Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1003 (Alaska 1977).

In State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), reh'g denied, 468 U.S. 1204 (1984), we accepted the view that the common use clause reflects "anti-exclusionist values." Id. at 1191. Thereafter, in Owsichuk v. State, 763 P.2d 488 (Alaska 1988), a case involving an exclusive right to conduct guided hunting in particular areas of wilderness, we reiterated this

(footnote continued)

sion of the people, it was restored to them by the Barons at Rynnymede in 1215, and was declared in the great charter which they wrested from King John.

These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to use from the laws of England and may be regarded as a common heritage of the English-speaking people.

Id. at 155 (citations omitted).

9. The public trust doctrine maintains that government holds untaken wildlife in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary. See Owsichuk v. State, 763 P.2d 488, 493-95 (Alaska 1988).

theme stating that section 3 is fundamentally "anti-monopoly" in its thrust. Id. at 493 ("Because an EGA [exclusive guide area] is clearly a type of monopoly . . . [legislative] history strongly suggests that the statutes at issue here are unconstitutional."). Critical to our holding that the guide licensing system at issue in Owsichuk was unconstitutional under the common use clause were the following characteristics of the scheme: it permitted a single guide permanently to exclude all other guides from leading hunts professionally on specific lands; it favored established guides at the expense of new entrants in the guiding market; it created a salable, property-like interest in the license; and it established exclusivity of an unlimited duration. Id. at 496.

In the case at bar the challenged subsistence laws exhibit none of these characteristics. The state subsistence laws establish a subsistence preference, not an exclusive, monopolistic, or otherwise closed class. Anyone may join subsistence users by moving to a sector of the state which has been designated as a "rural area." Further, these laws do not establish subsistence hunting and fishing as an exclusive use, even in rural areas, except during periods of extreme resource scarcity.¹⁰ In regard to this issue I think the court's reliance

10. Alaska Statute 16.05.258(c) authorizes complete
(footnote continued)

on Owsichak and Ostrosky is misplaced. Both Owsichak and Ostrosky emphasize that the primary thrust of article VIII is anti-exclusionist or anti-monopolistic, not anti-preferential.

I do not read the statutes in question as providing that eligibility to participate in subsistence uses is determined solely with reference to where an individual lives. That is not the case. The subsistence laws at issue here are implemented by multi-factoral regulations which focus not only on place of residence, but also upon particular stocks and populations of fish and game, and particular patterns of subsistence usage.¹¹ Moreover, individual characteristics are always considered under the state subsistence law during lean periods when it becomes necessary to restrict even certain subsistence uses. In those periods, the determination as to which individuals among those normally eligible for a subsistence permit may continue harvesting is made on the basis of an analysis of individuals' characteristics under the following criteria: (1) customary and

(footnote continued)

prohibition of non-subsistence uses during periods of famine when the state's total harvest is insufficient to support even normal subsistence uses.

11. Subsistence uses must be "customary and traditional" uses as determined by the separate Boards after evaluation of a particular fish or game stock in light of eight criteria. 5 AAC 99.010(b). These eight criteria include examination of individual populations' patterns of use, methods and efficiency of use, consistency of use, and methods of food storage, as well as the nexus between the asserted subsistence use and the maintenance of individuals' cultural heritage. Id.

direct dependence on the resource as the mainstay of livelihood; (2) local residence; and (3) availability of alternative resources. AS 16.05.258(c).

The court's interpretation of the common use clause would prohibit the legislature from making any differential allocation of natural resources whatsoever, an outcome precluded by our holding in Kenai Peninsula, 628 P.2d 897 (Alaska 1981) and the language of article VIII, section 4, which explicitly provides for "preferences among beneficial uses." In Kenai, we held that "[w]hile section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fisherman." 698 P.2d at 904 (emphasis added).

Moreover, it is axiomatic that the provisions of article VIII of the Alaska Constitution should be interpreted so as to avoid internal contradictions. Abrams v. State, 534 P.2d 91, 95 (Alaska 1975) ("It is an undisputed maxim of constitutional construction that the different provisions of the document shall be read so as to avoid conflict whenever possible"); Park v. State, 528 P.2d 785, 786-87 (Alaska 1974) ("It is a well accepted principle of judicial construction that, whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized."). In my view the court's reading of article VIII, section 3 as prohibiting preferences among beneficial uses

of Alaska's resources plainly conflicts with article VIII, section 4. That section provides, in full:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

(Emphasis added.) The intent of section 4 is that persons situated differently can be treated differently and that some users of a resource may legitimately be given preference over others.

In brief, the common use clause constitutionalized the doctrine that wild fish and game are held in trust by the state for the benefit of the public as a whole, rather than by the sovereign in exclusive possession. That principle is consistent with the view that the sovereign state may manage wildlife for the common good, including certain beneficial preferences. Thus I conclude that the challenged subsistence laws do not offend the anti-monopolistic, anti-exclusionist values underpinning the public trust and common use doctrines embodied in section 3 of article VIII of Alaska's constitution.

B. Section 15: the "No Exclusive Right" Clause.

I also disagree with the court's holding that the state subsistence law violates article VIII, section 15 (the "no exclusive right" clause).

The court relies for its interpretation of the no exclusive right clause upon Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), a case in which the United States Supreme Court interpreted the federal legislation which governed Alaska's fisheries before statehood, former 48 U.S.C. §§ 220-224 (1941) (hereinafter "The White Act"). The White Act did include language seemingly prohibitive of the kind of geographic distinction at issue here. Section 1 of the White Act provides, in relevant part:

[N]o exclusive or several right of fishery shall be granted . . . nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

Act of June 6, 1924, Ch. 272, § 1, 43 stat. 464 (emphasis added). On the other hand, I disagree with the court's view that insofar as the White Act was expressly anti-geographic, section 15 should be given a similar construction. For in my opinion Hynes is distinguishable in several important respects.

First, Hynes did not involve an allocation of fish and game on the basis of residence; rather, the exemption at issue there applied only to fish, and was predicated upon the users' status as Indians, not their place of residence. 337 U.S. at 89-97. Second, Hynes involved an exclusive right of access which had been made available only to a closed class of fishermen. At issue in Hynes was a regulation of the Secretary of the Interior completely prohibiting commercial salmon fishing in all waters.

within 3,000 feet of the shores of the Karluk reservation, but exempting Native fishermen from this otherwise comprehensive ban. Id. Therefore, Hynes, like Owsichuk, is distinguishable from the classification scheme at issue in the present case, since in the case at bar one may become eligible for subsistence permits by moving into a rural area. Finally, as noted previously, both article VIII, section 4 and Kenai Fishermen establish that section 15 cannot be read to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence users.

C. Section 17: the "Equal Application" Clause.

Although section 17 (the "equal application clause") is a component of article VIII, it is essentially, as the court states, a "'more stringent . . .' equal protection clause (for) . . . cases involving natural resources." I will address these issues together.

II. DO THE 1986 STATE SUBSISTENCE LAWS VIOLATE ARTICLE VIII, SECTION 17 OR THE EQUAL PROTECTION CLAUSE OF THE ALASKA CONSTITUTION (ARTICLE I, SECTION 1)?

The court holds the state subsistence laws unconstitutional on equal protection grounds.¹²

Although this court has not yet addressed the issue whether equal access to fish and game is a fundamental right, we have held that commercial fishing is not fundamental. Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). Other courts have concluded that recreational hunting is not a fundamental right. See, e.g., Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978) (alk hunting by non-residents not fundamental); Utah Public Employees Ass'n v. State, 610 P.2d 1272 (Utah 1980) (entry in big game permit drawing not fundamental). See also Herscher v. State, Department of Commerce, 568 P.2d 996, 1003, 1006 (Alaska 1977).

In my view, the interest at stake, i.e., the right to participate in subsistence hunting and fishing, is not a fundamental right. Maximum scrutiny is reserved for fundamental

12. The majority opinion employs article VIII section 17 and the concurring opinion of Justice Moore uses article I section 1. As Justice Moore points out, the method of analysis in either case is the same. Because Alaska's equal protection standards are more stringent than the federal constitutional standard, any statute which passes muster under Alaskan law will also survive the equal protection clause of the United States Constitution. Herrick's Aero-Aqua Repair v. Department of Transportation, 754 P.2d 1111, 1114 (Alaska 1988). Therefore, discussion of the federal standard is omitted.

rights and suspect classifications. Ostrosky, 667 P.2d at 1192. Given what I perceive to be the appropriate characterization of the interest involved, the state must demonstrate the existence of a substantial relationship between the means utilized by the legislation and the legitimate governmental ends sought to be achieved thereby.

Since I am of the view that strict scrutiny is inapplicable, I conclude that the questioned legislation does not violate the Alaska Constitution's equal protection clause. The challenged subsistence laws are fairly and substantially related to the important governmental goal of protecting the health and welfare of the state's subsistence users, a goal admittedly within the state's police powers to pursue.¹³

13. As mentioned previously, in enacting the state subsistence laws, the Alaska legislature explicitly found that "the general health and welfare of these citizens is significantly tied to their participation in [subsistence] activities." 1985 House Journal 1246. In a similar vein this court said in State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854, 859 n.18 (Alaska 1978):

. . . For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life. To this day, despite incursions by those of different cultures, many Alaska Eskimos, Indians and Aleuts eke out a livelihood by reliance on fish and game. . . . Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the cultural tradition of many of these people. . . .

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Implicit in my view that this legislation is not violative of equal protection is the further conclusion that the subsistence classification formulated to fulfill this concededly legitimate legislative purpose is not constitutionally infirm. As we said in Apokedak, 606 P.2d at 1267:

[I]ndividual cases will arise in which those barred may be able to show extreme hardship. The legislature in its wisdom could conceivably have better provided for such instances. But equal protection, even under Alaska's stricter standard, does not demand perfection in classification. If it did, there would be few laws establishing classifications that would sustain an equal protection challenge.

The subsistence legislation in question here effectively captures within its ambit the thousands of subsistence users residing in Alaska's numerous rural villages. In short, I would hold that the subsistence laws' fit satisfies the requirements of equal protection under both article I, section 1, and article VIII, section 17 of the Alaska Constitution.

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Appellant
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[Signature]

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STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

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January 16, 1990

The Honorable Bettye M. Fahrenkamp
Alaska State Legislature
P.O. Box V
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Dear Senator Fahrenkamp:

By now I am sure you are aware of the Alaska supreme court decision in McDowell v. State ruling that the rural residency requirement under the state's existing subsistence law violates the Alaska Constitution.

I am sure that you have been receiving numerous calls from constituents who are concerned about what this court decision actually means. For that reason, I am providing you a packet of information for your immediate use. The Department of Law is still reviewing the decision--it is rather lengthy and leaves open a number of questions regarding current and future management of our fish and wildlife resources. We have asked for a stay until July 1 with respect to existing hunting and fishing regulations to allow for an orderly transition in management. In any event, the case has been sent back to the state superior court for further action, and we will be working with the court to determine how best to proceed.

Of course, everyone is asking what this means for the actual subsistence priority law and the need to be consistent with federal law in order to retain state management of fish and game on federal lands. The administration will be consulting with attorneys, fish and wildlife managers, and other interested and affected parties around the state before making any final decision on what is the best course of action.

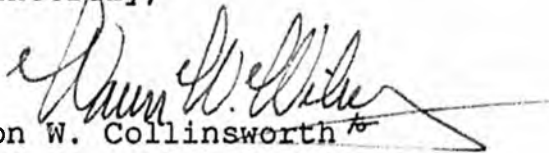
In the meantime, for your information I have enclosed:

- * A chronology of the state's subsistence law.
- * An information sheet detailing the results of the court's decision.

- * A copy of Title VIII of ANILCA.
- * A copy of the state's subsistence law.

We will be keeping the Legislature apprised of further developments on this issue. If you need further information, do not hesitate to contact Molly McCammon at 465-4100.

Sincerely,


Don W. Collinsworth¹⁰
Commissioner

Enclosures

CHRONOLOGY OF THE STATE'S SUBSISTENCE LAW

1978 STATE'S FIRST SUBSISTENCE LAW: The state passes its first subsistence law which, once sustained yield has been ensured, requires that subsistence uses be allowed, with a priority if necessary. The law defines subsistence uses as "customary and traditional uses" of fish and game for specific purposes such as food.

1980 ANILCA: Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves and wildlife refuges. Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982 CONSISTENCY: The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses, and the Department of Interior certifies the state's consistency with ANILCA.

1982 REPEAL INITIATIVE: A statewide effort to repeal the subsistence law fails by a large margin at the polls.

1983 SUBSISTENCE SUIT: Several Alaskans file suit against the state subsistence law. In McDowell v. State, they argue that the law denies subsistence privileges to some urban residents who have long depended on fish and wildlife resources, while granting those privileges to some rural residents who do not need it, and for that reason the law is unconstitutional.

1985 MADISON DECISION: The Alaska supreme court, in the Madison decision, rules that state regulations limiting subsistence to rural residents are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions of ANILCA and threatens takeover of fish and wildlife management on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986 NEW SUBSISTENCE LAW: The Alaska Legislature enacts a new law limiting subsistence to rural residents. In state superior court, the McDowell suit is amended to challenge the new subsistence law. The Kenaitze Indian Tribe also files a suit in federal court under ANILCA to protest the classification of the Kenai Peninsula as an urban area.

1987 **KENAITZES INITIALLY DENIED:** A federal judge rules against the Kenaitzes, saying the state subsistence law's definition of rural agrees with the use of the word "rural" in federal subsistence law.

1987 **MCDOWELL INITIALLY DENIED:** The state superior court holds that the 1986 subsistence law is constitutional.

1988 **KENAITZE DECISION REVERSED:** The ninth U.S. circuit court of appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA. The U.S. Supreme Court ultimately denies review.

1989 **KENAITZE NEGOTIATIONS:** Under direction by the federal district court in a preliminary injunction, the state and the Kenaitze tribe agree to a one-year educational fishery, for plaintiffs in that case only, until a permanent subsistence solution can be found. The state initially believes that a simple amendment to ANILCA, which changes the federal definition of rural to match the state definition, is the best solution. However, that effort failed, and negotiations begin toward reaching a consensus opinion.

1989 **MCDOWELL DECISION:** On December 22, the Alaska supreme court rules the 1986 state subsistence law is unconstitutional because it excludes urban residents from subsistence activities.

1990 **STAY GRANTED:** On January 5 the Alaska supreme court granted the state a stay in the McDowell decision until July 1 with regard to existing regulations. As a consequence, all existing regulations are in effect and are enforceable until that time.

RESULTS OF MCDOWELL V. STATE RULING ON SUBSISTENCE LAW

COURT DECISION: On December 22, 1989, the Alaska Supreme Court reversed a lower court, ruling that Article VIII of the Alaska Constitution prohibits limiting eligibility for subsistence uses to residents of rural areas (McDowell v. State).

This appears to make it constitutionally impossible for Alaska to enact a law consistent with ANILCA, raising the possibility of federal management on some of the lands in Alaska, unless there is a change to ANILCA to the Alaska Constitution.

IMMEDIATE IMPLICATIONS: The supreme court remanded the case back to the superior court to issue a declaratory judgment and to work with the state on further action. A judge has not been assigned yet at the lower court, and no date has been set for further action. Until the superior court rules and provides further direction and upon the advice of the Department of Law, ongoing or imminent winter subsistence hunts will be conducted under current Board of Game regulations. The supreme court has granted the state a stay of the decision until July 1 with respect to existing hunting and fishing regulations to allow for an orderly transition in management. As a consequence, existing subsistence regulations will remain valid and enforceable.

The Boards of Fisheries and Game will be continuing their annual regulatory meetings through January and running into April. Action on most subsistence related proposals will probably be deferred until the superior court takes action.

LONG-TERM ISSUES: Title VIII of the Alaska National Interest Lands Conservation ACT (ANILCA) requires federal land managing agencies to provide a preference for the subsistence uses of rural residents on federal public lands, unless the state provides for such subsistence uses and the public participation as required by ANILCA. It is unlikely that the state can continue to meet these requirements now that the state cannot constitutionally provide a rural preference.

OPTIONS: There are several options available to deal with this problem over the long term. These include possibly working out an agreement with federal agencies to allow cooperative decision-making for fishing and hunting regulations on federal lands, or seeking changes in ANILCA, state law, the state constitution, or some combination of all of these. No conclusions have been reached at this time as to which option will provide the best, long-term solution.

managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans; and

(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

43 USC 1601
note.

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

POLICY

16 USC 3112.

SEC. 802. It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized

scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

Ante. p. 2377.

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

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

DEFINITIONS

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

16 USC 3113.

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

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

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

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

PREFERENCE FOR SUBSISTENCE USES

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

16 USC 3114.

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

SEC. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported

Annual report to Secretary.

by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

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

Implementation.

(e)(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

Reimbursement to States.

(2) Total payments to the State under this subsection shall not exceed the sum of \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

Report to Congress.

FEDERAL MONITORING

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as

Report to congressional committees.
16 USC 3116.

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

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

Hearing.

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

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or

Subsistence
hunting pro-
gram.

investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

Program and
recommendation
implementation.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

COOPERATIVE AGREEMENTS

SEC. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.

16 USC 3119.

SUBSISTENCE AND LAND USE DECISIONS

SEC. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

16 USC 3120.

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

Hearing.

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Notice and hearings.

42 USC 1602.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

48 USC note prec. 21.

48 USC 1601 note.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

16 USC 3121.

SEC. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

16 USC 3122.

SEC. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

Submittal to Speaker of House and President of Senate.
16 USC 3123.

SEC. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

Publication in
Federal Register.

REGULATIONS

SEC. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title.

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

SEC. 815. Nothing in this title shall be construed as—

16 USC 3125.

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal

Aid in Fish Restoration Act (61 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

16 USC 3126

Sec. 816. (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

Publication in
Federal Register.

TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

SUBMERGED LANDS STATUTE OF LIMITATION

43 USC 1631.

43 USC 1601
note.

Sec. 901. (a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this

former subsection (b) held contrary to AS 16.05.920(a) mandate. — A "subsistence" defense created by the state court of appeals to "remedy" the Board of Game's failure to adopt separate subsistence regulations under former subsection (b) of this section contradicted the legislative mandate of AS 16.05.920(a). State v.

Eluska, Sup. Ct. Op. No. 3106 (File No. S-991), 724 P.2d 514 (1986).

Applied in *Gottardi v. State*, Sup. Ct. Op. No. 2154 (File No. 4436), 615 P.2d 626 (1980).

Quoted in *Jordan v. State*, Ct. App. Op. No. 360 (File No. 7782), 681 P.2d 346 (1984).

Sec. 16.05.256. Nonresident and nonresident alien permits. Whenever it is necessary to restrict the taking of big game so that the opportunity for Alaska residents to take big game can be reasonably satisfied in accordance with sustained yield principles, the Board of Game may, through a permit system, limit the taking of big game by nonresidents and nonresident aliens to accomplish that purpose. (§ 3 ch 74 SLA 1982)

Sec. 16.05.257. Subsistence hunting regulations. [Repealed, § 12 ch 52 SLA 1986.]

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

(1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested consistent with 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.

(e) Fish stocks and game populations, including bison, or portions of fish stocks and game populations, not 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. (§ 6 ch 52 SLA 1986)

NOTES TO DECISIONS

Regulations adopted under former AS 16.05.257 had to be in accordance with the Administrative Procedure Act (AS 44.62). *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

While former AS 16.05.257, which authorized the Board of Game to adopt regulations providing for subsistence hunting, did not specifically refer to the Administrative Procedure Act (AS 44.62), it appeared clear that it merely set forth an additional purpose for which regulations might be promulgated. *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Issuance of permits based on verbal

instructions to agents held improper. — Nothing in the Administrative Procedure Act (AS 44.62) authorizes the Board of Game to impose requirements not contained in written regulations by means of oral instructions to agents. Such verbal additions to regulations involving requirements of substance are unauthorized and unenforceable. *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Reasonable basis for Board of Game's quota of caribou to be killed under former AS 16.05.257. — See *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Sec. 16.05.259. 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. (§ 7 ch 52 SLA 1986)

Revisor's notes. — Formerly AS 16.05.261. Renumbered in 1987.

Sec. 16.05.260. Advisory committees. The Board of Fisheries and the Board of Game may adopt regulations they consider advisable in accordance with the Administrative Procedure Act (AS 44.62) establishing, at places in the state designated by the individual boards, advisory committees to be composed of persons well informed on the fish or game resources of the locality. The boards shall set the number and terms of each of the members of the advisory committees, shali

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AFN NEWSLETTER

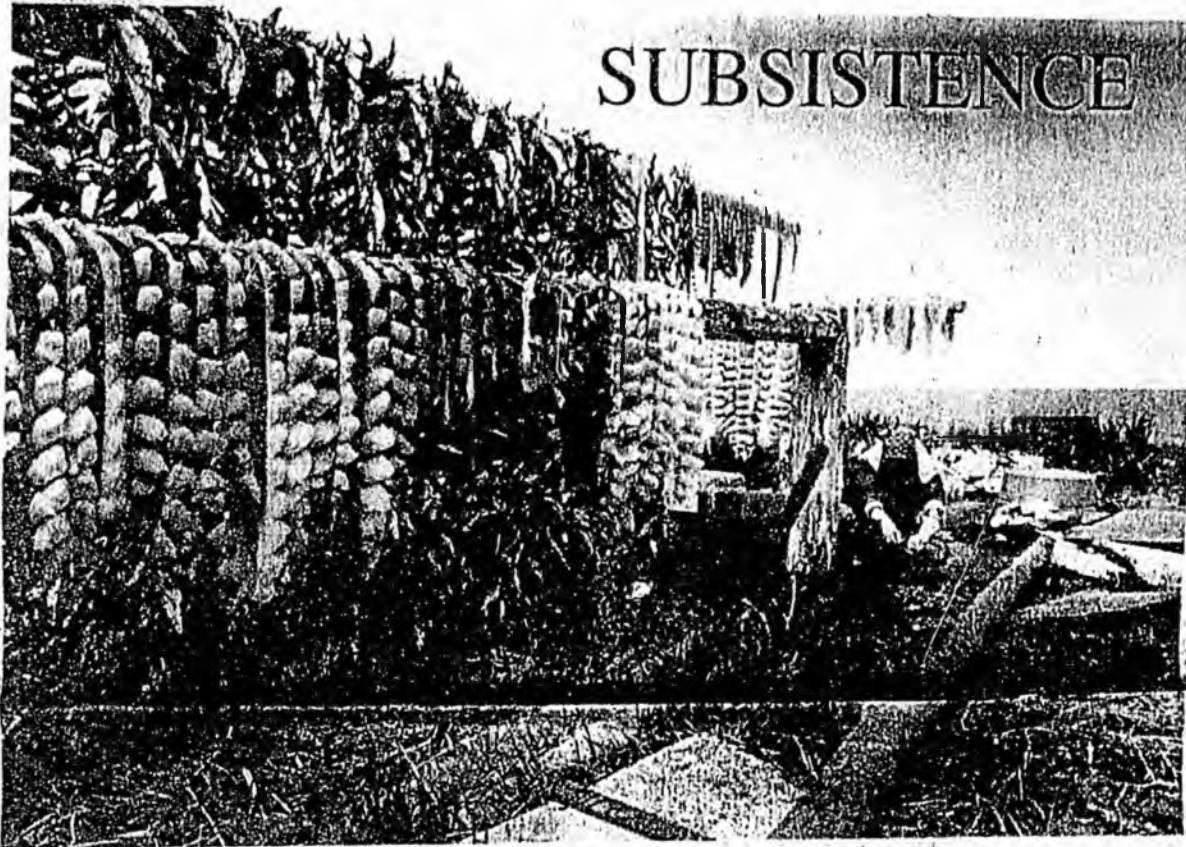
SPECIAL ISSUE



Volume VIII, Number 2

Alaska Federation of Natives

February 1990



THE CURRENT CRISIS: MCDOWELL V. STATE

THE SITUATION of federal and state laws governing subsistence in Alaska was abruptly upset on December 22, 1989, when the Alaska Supreme Court issued its opinion in *McDowell v. State*. At issue in this case was whether the existing Alaska subsistence law, which provided priority subsistence hunting and fishing opportunities to rural Alaska residents, was permitted by the Alaska State Constitution.

The case had been started in 1983 by several individuals who had strongly supported the 1982 Ballot Proposition 7 to repeal Alaska's subsistence priority. After Proposition 7 was defeated by the voters, the *McDowell* suit was filed, claiming that the state subsistence law, originally adopted in 1978 and amended in 1986, was unconstitutional and should be thrown out.

Although the people who brought the suit lost their case in the Superior Court in early 1988, they appealed the decision; and

December 22, 1989, reversed the decision of the lower court. The Supreme Court held that providing rural Alaskans special subsistence privileges violates Article VIII, Sections 3, 15 and 17 of the Alaska Constitution. Section 3 reserves fish and wildlife in their "natural state" to the people of Alaska for "common use." Section 15 prohibits the Legislature from creating a fishery allocation system that results in an "exclusive right or special privilege of fishery." Section 17 requires statutes governing hunting and fishing to "apply equally to all persons similarly situated."

At the State's request, Chief Justice Warren Matthews, the author of the *McDowell* decision, stayed the effect of the decision until July 1, 1990. Justice Matthews also granted the State and the AFN an extension of time to February 9, 1990 to file petitions for a rehearing of the *McDowell* case by the Supreme Court. AFN has filed its petition for rehearing, explaining to the court why it should reconsider the case. If rehearing is granted, the Supreme Court will take up the

case again. If rehearing is denied, the case will be sent back to the Superior Court to determine the practical consequences of this new rule of constitutional law.

One of the first things the Superior Court will have to decide is which part or parts of the Alaska subsistence law the Supreme Court struck down. Did the Supreme Court intend to invalidate the entire subsistence priority, or did it throw out only the rural resident limitation, leaving the subsistence priority intact?

In either case, state law is once again out of compliance with the rural subsistence priority in Title VIII of ANILCA. Again, the state finds itself in a position in which, if no remedy

can be found by July 1, the Secretary of the Interior has a legal responsibility under Title VIII of ANILCA to assume fish and game management (with the federal rural subsistence priority) on public lands and waters in Alaska. If this should happen, the geographical extent of the Secretary's jurisdiction and his various options for management systems remain to be decided.

Various remedies for this legal dilemma have been suggested in Alaska during the last several weeks. The substantive results and political processes of each are discussed, without comment or analysis, in the article on "options" on page 5 of this newsletter.

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HISTORY OF SUBSISTENCE

NATIVE HERITAGE

Subsistence hunting, fishing and gathering activities of Alaska Natives reach back thousands of years in history. Although the methods used to take fish and game have changed over the centuries, subsistence remains an absolute necessity for the economic survival of modern Native families. Moreover, it is the cultural nucleus of Native life.

NON-NATIVE LAW

The history of subsistence in twentieth century Alaska is the story of how federal laws made by the Congress in Washington, D.C., and Territorial and State laws made by the Legislature in Juneau, have tried to affect these age-old Native practices. Some laws have protected subsistence rights; others have diminished the freedom of Native people to take what they need.

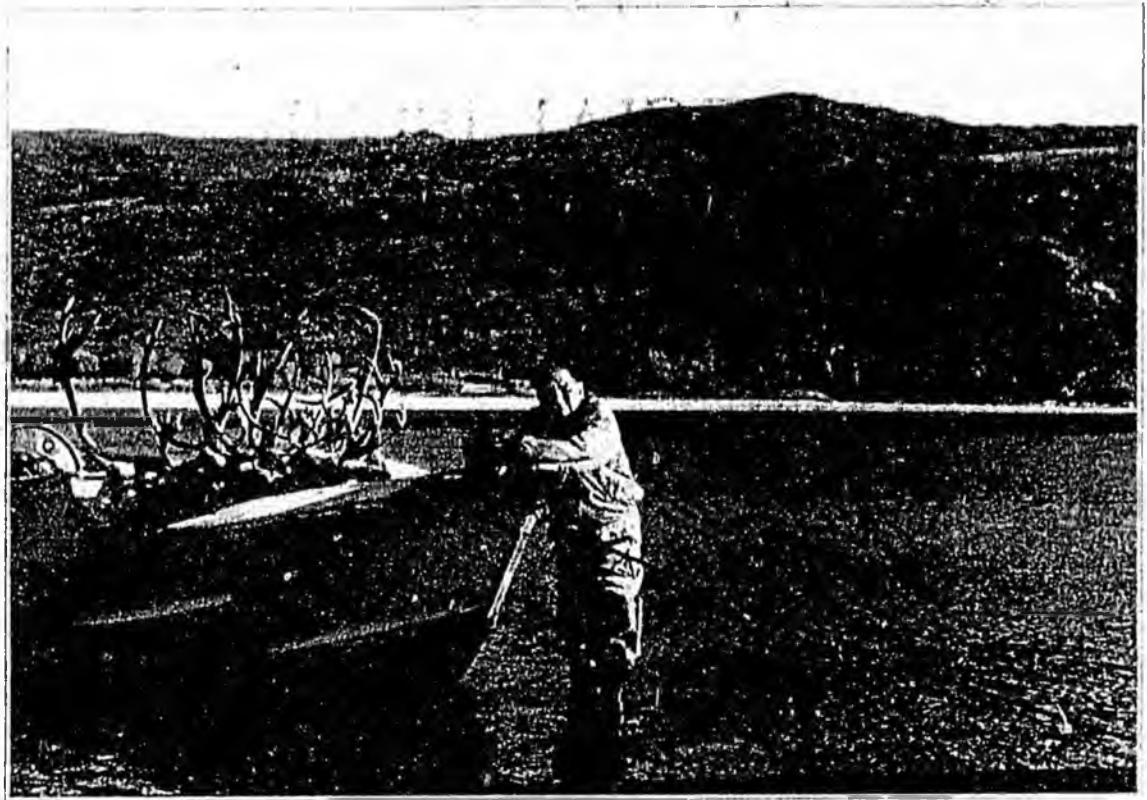
In general, it is the state government which has the legal power and responsibility for most fish and game management. But state action is often influenced - or even determined - by the encircling power of the federal government, which owns 60 percent of the land in Alaska and maintains a special obligation towards Native Americans. (Indeed, the active involvement of the U.S. Congress in subsistence goes back as far as 1902.) Public policy on subsistence is thus a constant back-and-forth power game between the United States and the State of Alaska - with the economy and cultures of Native people at stake.

PRIORITY USES VS. EQUAL ACCESS

The central issue of subsistence law since Statehood is simple to understand. There are too many people - Native and non-Native - who want to harvest Alaska's fish and game resources. There are not enough animals to let everyone take everything he or she wants. So, the power of state law must decide who gets to take:

- * which animals (species),
- * where (game units and fisheries),
- * when (seasons),
- * how (methods and means), and
- * for what purposes (uses).

To do this, the State Legislature must choose one of two alternatives. It can open up



any fish stock or game population to all Alaska residents, with no special preference for anyone ("first-come, first-served"), until all available surplus animals are taken; or it can allocate fish and game among defined groups of Alaskans, according to whatever public purposes it decides are most important - as long as it does not violate the Alaska Constitution in doing this.

Between 1960 and 1978, the State Legislature, through the Board of Fish and Game, managed hunting and fishing on the "first-come, first-served" basis. Everyone in Alaska could take these resources until the surpluses were exhausted each year. No one group had priority over another. This caused serious problems for many Native villages, which were impacted by urban, non-Native fishermen and hunters, particularly during the pipeline population boom of the late 1970's.

ANCSA: A FEDERAL STATEMENT OF CONCERN

As early as 1971, during its consideration of the Alaska Native Claims Settlement Act, Congress was aware that the State of Alaska was not protecting Native village hunters and fishermen. Although section 4(b) of ANCSA extinguished all "aboriginal hunting or fishing rights that may exist," various settlement bills which had been considered in

prior years had contained specific language to protect subsistence. One had proposed setting aside "subsistence use units" of public lands around Native villages, to be administered by the Department of the Interior. Another contained a policy declaration protecting "Native subsistence hunting, fishing, trapping and gathering rights." Neither was included in the final version adopted by the Congress.

In their place, language was inserted in the ANCSA Conference Report (an official document which accompanies a final bill to the floor of Congress, explaining its history, provisions and intent) which stated that Native subsistence interests and subsistence resource lands would be protected. It was assumed that the federal government, through the Department of the Interior, would guarantee this. But Congress expected the state to take similar responsibilities: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."

THE 1978 STATE LAW: A SUBSISTENCE PREFERENCE

The decade of the 1970's saw increasing non-Native, urban pressure on subsistence resources around Native communities. By 1978, the Alaska Legislature had come to

a point where it felt it must enact its own law giving a clear preference to subsistence over other uses of fish and game. In part, the Legislature did this in response to hearings and debates in the U.S. Congress over subsistence protections then being considered for inclusion in the Alaska National Interest Lands Conservation Act (which would finally be adopted by the Congress in 1980).

The 1978 state subsistence statute did not define subsistence users as "Natives." Nor did it limit subsistence to "rural Alaska residents," as did ANILCA two years later. What it did was to state that subsistence uses, reflecting the dependency of subsistence hunters and fishermen on limited resources, would have priority over commercial and sport uses. It was unclear about who or where the subsistence users were in Alaska.

ANILCA: THE CRITICAL FEDERAL LAW

At the same time, the U.S. Congress was involved in several years of policy debate over the Alaska National Interest Lands Conservation Act. This is the law which was to set the major outlines of federal land ownership and management over the 60 percent of Alaska lands which remain owned by the United States. In many ways, ANILCA was the second chapter of ANCSA, completing the legal

History of Subsistence cont.

its management incentive for state compliance, is the bedrock on which the system of subsistence law currently rests. **FIRST STATE COMPLIANCE WITH ANILCA, BY REGULATION**

The State of Alaska soon acted to come into compliance with the new federal law and to maintain a single system of management in its own hands. Its own subsistence preference law, previously adopted in 1978, had not specifically limited subsistence uses to "rural Alaska residents." Technically, the state was immediately out of compliance with ANILCA. Rather than amend the 1978 law in the Legislature, it was decided in 1982 that the Board of Fisheries and the Board of Game would jointly adopt a regulation which added the "rural Alaska resident" limitation to the state's definition of subsistence uses. When this was done, it was assumed that the state had complied with ANILCA.

A POLITICAL ASSAULT ON SUBSISTENCE

The passage of ANILCA and subsequent efforts of the state to comply with its mandated rural subsistence preference had the effect of bringing anti-subsistence interests together in the early 1980's. Since before statehood, various individuals and organizations - often involved in the political defense of sport hunting and fishing activities - had objected to the very idea of a subsistence preference, particularly one that

avored either rural residents or Alaska Natives.

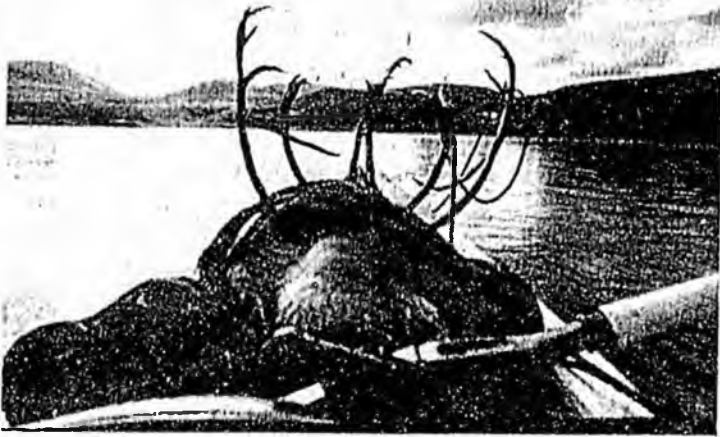
In 1982, a coalition of such groups succeeded in placing before the voters an initiative which, if adopted by a majority of those voting in the November general election, would have repealed the state subsistence preference. Organized as Alaskans for Equal Fish and Game Management, this coalition raised thousands of dollars for a media campaign designed to persuade the electorate to vote YES on Ballot Proposition 7.

The opposing group, composed of Native people and organizations, as well as many non-Natives sympathetic to rural subsistence needs, fought back under the banner of Alaskans for Sensible Fish and Game Management. These two groups competed for months - in speeches, debates, newspaper columns, TV ads and voter registration campaigns across Alaska.

In the end, the voters spoke - and resoundingly rejected Proposition 7, keeping

management in state hands by retaining the subsistence priority. If the vote had gone the other way, state law would again have been out of compliance with ANILCA's rural subsistence preference, requiring the Secretary of the Interior to assume fish and game management on public lands in Alaska. Rural residents had survived a powerful political

cont. on page 4



photos courtesy Tommy Ongtooguk/Maniilaq

structure of public land allocations, purposes and uses. But in addition to its land provisions, ANILCA showed that Congress was determined to adopt clear language protecting subsistence rights.

Here Congress chose to define subsistence users by geography, rather than race. The Senate Committee Report stated that "by its nature, a 'subsistence use' is something done only by Native and non-Native residents of 'rural' Alaska." The Committee included in its definition of rural areas such communities as Bethel, Nome, Kotzebue, Barrow, etc. However, it recognized that the rural nature of communities can change, leaving open the possibility that population growth, and economic development might move a community out of the rural category (with its subsistence preference) over time.

The text of ANILCA states that "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives on the public lands, and by Alaska Natives on Native lands, is essential to Native physical, economic, traditional and cultural existence and to non-Native physical, economic, traditional and social existence." It notes that rural Alaska residents are dependent on subsistence resources, having no practical, alternative, food supplies. It concludes, therefore, that "it is necessary for Congress

authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native residents."

Accordingly, "non-wasteful subsistence uses shall be given preference on the public lands over other consumptive uses . . ."

However, Congress also wanted Alaska's fish and game management to be done by one level of government in one unified, statewide system. It hoped to avoid a situation in which the Secretary of the Interior managed fish and game on federal lands and the Alaska Department of Fish and Game managed similar resources, but with different regulations, on state and private (mainly Native) lands. In order to encourage a unified system, ANILCA gave the State of Alaska one year in which to enact its own rural subsistence priority to conform with the new federal law. If it did so, the state would be allowed to manage fish and game on both federal and non-federal lands. This is an excellent example of how the power of federal law - in this case based on the general supremacy of the Congress, the federal ownership of more than half of Alaska and the congressional obligation to Natives - can require a state to take certain actions it might not otherwise have taken. The ANILCA rural subsistence



History of Subsistence cont.

assault on the foundation of their village economies and lifestyle. **SECOND STATE COMPLIANCE WITH ANILCA, BY STATUTE**

The "rural Alaska resident" regulation, which the Boards of Fisheries and Game adopted in 1982 to comply with the same standard in ANILCA, worked for three years, until the State Supreme Court decided the Madison v. Alaska Department of Fish and Game case. The court said that the Boards of Fisheries and Game had gone beyond their legal authority in making a regulation limiting subsistence to "rural Alaska residents" - because the Legislature had not specifically stated such preference in its 1978 law. The court threw out the regulation. Again, Alaska was out of compliance with the "rural Alaska resident" subsistence preference in ANILCA and faced the possibility that the Department of the Interior would have to come into Alaska

and set up a separate system of fish and game management on federal lands.

To solve this, in 1986 the State Legislature amended the 1978 state subsistence law, limiting subsistence use to hunters and fishermen residing in "rural areas." Now, for the time being, the State of Alaska was back in compliance with ANILCA and continued to manage fish and game statewide. **THE DEFINITION OF "RURAL"**

Although the 1986 amendment made state law conform to federal law, it also contained the seeds of another political controversy. It defined the term "rural area" as a "community or area of the state in which the non-commercial, 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." In other words, the state's definition of "rural" depended on the nature of the community - its culture and economy - rather

than on mere size of population.

Some people were not happy with this definition. In particular, residents of the Kenai Peninsula - one of the most heavily affected areas of competing fish and game uses - were categorized by this state definition as being non-rural, and there was no priority for subsistence in their area. The Kenaitze Indian Tribe filed suit in U.S. District Court, claiming that the state's definition of "rural," was not in compliance with ANILCA.

The Kenaitze Tribe lost its case in the District Court but won an appeal to the Ninth Circuit Court. The appellate court stated that the word "rural" in the ANILCA "subsistence uses" definition refers to "areas of the country that are sparsely populated, . . . more broadly, rural is the antonym of urban and includes all areas in between cities and towns of a particular size." As a result of this decision, thousands of residents of the Kenai Peninsula, may now be

considered "rural residents" and, therefore, subsistence users. This may result in future management difficulties, particularly in allocations of fish along the coasts and in the rivers of the Peninsula.

A temporary solution in 1989 was a negotiated agreement between the Kenaitze Tribe and the State of Alaska in which the Department of Fish and Game issued an "educational permit" enabling the Tribe to operate one subsistence set net in the Kenai River and to catch a limited number of salmon for subsistence uses. This is only a short-term arrangement and is already being challenged in federal court.

This was the situation of state and federal subsistence laws when, on December 22, 1989, the Alaska Supreme Court handed down its decision in the case of McDowell v. State. The implications of that case are discussed in the article on page one of this newsletter.

Alaska National Interest Lands Conservation Act

Sections 801-804 of Title VIII of ANILCA, reprinted here, illustrate Congress' recognition of the importance of protecting subsistence uses of fish and game by rural residents of Alaska. Title VIII implements this important congressional policy by establishing a rural subsistence use hunting and fishing priority.

TITLE VIII — SUBSISTENCE MANAGEMENT AND USE

Findings

SEC. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purposes of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

Policy

Sec. 802. It is hereby declared to be the policy of Congress that

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

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

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers,

STATE AND FEDERAL OPTIONS: What can be done about the subsistence problem.

The following is an outline of the major legal options which have been mentioned, to date, as methods by which the current subsistence dilemma in Alaska might be remedied:

A. JUDICIAL REMEDY

The Alaska Supreme Court could reconsider and vacate its December 22, 1989 decision in McDowell v. State. The State of Alaska and AFN have both filed petitions for rehearing with the Alaska Supreme Court asking that the court do so.

Process: Court Action

* * * * *

B. LEGISLATIVE OR CONGRESSIONAL REMEDIES

1. Amend the Alaska Constitution to allow the Legislature greater flexibility to provide a subsistence priority. Two alternative models which have been suggested are:

a) a rural subsistence priority, which would protect customary and traditional uses of fish and game by Alaska Natives and other rural residents;

b) a Native subsistence priority, which would protect customary and traditional uses of fish and game by Alaska Natives in all locations in Alaska.

Process: The Alaska State Legislature must pass an amendment by a two-thirds (2/3) vote in both the Senate and the House of Representatives. The amendment must then be approved by a majority (50% plus 1) of the voters. Also, in the case of a constitutional amendment that provides a Native subsistence priority, the U.S. Congress would have to amend Title VIII of ANILCA to conform to the amendment and the Alaska Legislature would have to enact a state law to implement the amendment.

2. Amend Title VIII of ANILCA to conform to the Alaska Constitution as interpreted by the Alaska Supreme Court. Two alternative models which have been suggested are:

a) an individual test of income;

b) an individual test of dependency, availability of alternative resources, and traditional uses.

Process: The U.S. Congress would have to amend Title VIII of ANILCA, dropping the existing rural subsistence priority and allowing a different priority to be implemented by the state on public lands and waters in Alaska. In addition, the Alaska State Legislature would have to enact a subsistence law implementing such a priority.

3. Amend Title VIII of ANILCA to preempt totally the Alaska Constitution on all lands and waters in Alaska.

Process: The U.S. Congress would have to take action to amend Title VIII of ANILCA.

4. Amend ANILCA to repeal Title VIII.

Process: The U.S. Congress would have to take action to repeal Title VIII of ANILCA.

* * * * *

C. IF NO REMEDY IS POSSIBLE BY JULY 1, 1990

1. The Secretary of the Interior exercises his responsibilities under Title VIII of ANILCA.

a) The Secretary could directly regulate the taking of fish and game on public lands and waters, with the geographical extent of his jurisdiction still unclear.

b) The Secretary may have authority to contract fish and game management functions on public lands and waters to Native contractors, pursuant to the Indian Self-Determination Act.

c) The Secretary could require the State to regulate the taking of fish and game on public lands and waters, in conformity with the U.S. Congress' policy goals enacted in Title VIII of ANILCA.

2. The Secretary elects not to exercise his responsibilities under Title VIII of ANILCA.

Alaska Natives would be compelled to sue the Secretary, requesting the United States District Court to compel him to implement Title VIII.

ANILCA Title VIII cont.

including Native Corporations, appropriate State and Federal agencies, and other nations.

Definitions

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

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

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

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

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

Preference for Subsistence Uses

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

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

(2) local residency; and

(3) the availability of alternative resources.



THE SECRETARY OF THE INTERIOR
WASHINGTON

January 30, 1990

Ms. Julie Kitka,
President
Alaska Federation of Natives, Inc.
411 West 4th Avenue
Suite 301
Anchorage, Alaska 99501

Dear Julie:

Thank you very much for your letter of January 15, 1990, and your January 24th visit with me on your concerns involving the future of the State subsistence program in light of the State Supreme Court decision in McDowell v. State of Alaska.

As you know, this Department has previously certified the State's subsistence program under Title VIII of the Alaska National Interest Lands Conservation Act. It is my hope that, by July 1, 1990, the State will be able to devise a solution to the issues raised in the McDowell decision to permit it to continue to administer the subsistence program consistent with the Act. You may be certain that this Department would give its full consideration to any timely State effort to resolve this problem.

Again, thank you for your input on this most important issue for Alaska.

Sincerely,

cc: The Honorable Steve Cowper

Interior Secretary Lujan, AFN discuss federal management responsibilities.

Following the Alaska Supreme Court's decision in McDowell v. State (and the Court's stay of its decision until July 1, 1990), AFN asked Secretary of the Interior Manuel Lujan to describe the Department's plan for implementing Title VIII of ANILCA, if no legal solution to the conflict between Title VIII and the Supreme Court's decision is found prior to July 1.

On January 15, 1990, AFN President Julie Kitka wrote to Secretary Lujan, reviewing Title VIII's preemption of State fish and game regulation on public lands and waters. Ms. Kitka's letter noted that the State of Alaska's voluntary compliance with Title VIII has been effectively prohibited by the McDowell decision. The letter also noted that the Department of the Interior must begin implementing Title VIII no later than July 1, if no solution is found. The letter concluded by requesting a meeting with Secretary Lujan and his staff to discuss the issue in more detail.

On January 24, AFN representatives met with Secretary Lujan. Subsequent to the meeting, Secretary Lujan sent a letter to Ms. Kitka, reprinted here. In response, she wrote the Secretary on February 7, agreeing with his hope that the State would be able to develop an acceptable solution to the subsistence problem and reiterating AFN's commitment to work with Governor Cowper in that effort. She noted, however, that "if, despite our collective efforts, on July 1 the State cannot continue to implement Title VIII, the Title imposes a non-discretionary duty on the Department of the Interior to implement the policy in the State's stead." The letter adds that the Secretary's personal involvement in the development of the Department of the Interior's Title VIII implementation program will be critical to the program's success. The letter concludes with a request for a follow-up meeting with Secretary Lujan in late February or early March to discuss the State's effort to find a solution and the Department of the Interior's future plans.

In the months ahead, AFN will remain in constant contact with the Department of the Interior and the Alaska congressional delegation in Washington, D.C.

AFN'S POSITION ON SUBSISTENCE:

AS THEY have for generations, Alaska Natives continue to depend upon hunting and fishing and gathering to obtain food to feed their families.

Hunting, fishing and other subsistence activities remain the linchpin of traditional Alaska Native culture and Alaska Native spiritual values.

For almost a century, the United States Congress has consistently recognized the necessity to protect Alaska Native subsistence activities, the most recent expression of this important national policy being Title VIII of the ANILCA of 1980, which establishes hunting and fishing for subsistence uses by Alaska Natives and other residents of rural villages as the priority use of Alaska fish stocks and game populations.

For more than a decade, successive Alaska legislatures and administrations have enacted and administered legislation intended to implement Congress's subsistence policy.

In December 1989, in McDowell v. State the Alaska Supreme Court held that the legislature's attempt to implement Congress's subsistence policy violated Article VIII of the Alaska Constitution.

The McDowell v. State decision threatens the State's ability to continue to regulate the taking of fish and game on all lands and within all waters in Alaska.

Any solution to this situation must be consistent with the Congressional policy that Alaska Natives and other rural subsistence hunting and fishing activities are the priority use of Alaska's fish stocks and game populations.

We believe that if Alaskans are going to solve this problem:

- a) an amendment to the Alaska Constitution to enable the legislature to enact and the administration to implement a rural subsistence priority which protects customary and traditional use of fish and game by Alaska Natives and other rural residents is the preferred solution; and
- b) AFN is committed to working with the Governor and legislative leadership in considering other solutions which meet AFN's policy goals.

Approved and adopted by the Board of Directors; February 1, 1990.

State & Federal management responsibilities

STATE/FEDERAL ROLES

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) sets out the subsistence rights of rural Alaska residents. Title VIII ensures that the subsistence way of life will continue and that the customary and traditional harvest of fish and wildlife of village residents will change as little as possible.

Title VIII recognizes that rural Alaskans live a lifestyle different from that of Alaskans who live in urban areas such as Anchorage. Rural residents depend on fish, wildlife and plant resources on a daily basis to meet their nutritional needs. It was essential that they not be stopped from hunting, fishing and gathering on the lands and waters in their immediate areas.

If Native culture is to survive the intrusion of non-Native ways into village life, the opportunity for Alaska Natives and other rural residents to continue to hunt and fish must be protected.

Subsistence is also an important part of the economic life of rural communities, with the dollar-replacement value of the subsistence foods consumed by Native villages exceeding \$40 million per year.

SUBSISTENCE: The State's Traditional Role

Wildlife management:

Traditionally, each of the 50 states has been responsible for regulating hunting and fishing within its borders. Since statehood in 1959, hunting and fishing in Alaska have been regulated by the Alaska Department of Fish and Game according to policies set by the Board of Fisheries and Board of Game.

Exception: The federal government, rather than the state, regulates migratory bird hunting and marine mammal hunting.

Federal management authority:

In a case brought by the State of New Mexico, in 1972, the U.S. Supreme Court decided that the United States Constitution allows the federal government to manage wildlife on public lands. However, as a matter of federal policy, Congress has regarded fish and game management as a state responsibility.

Protection of subsistence uses:

In 1977, village residents told Congress that the State of Alaska was not regulating hunting and

fishing in a manner that adequately protected subsistence uses. In response, Congress included Title VIII in ANILCA to require subsistence uses to be the priority use of fish and wildlife resources on public lands and waters in Alaska.

State Advisory Councils:

Concerned that village residents were not being provided ample opportunity to participate in the development of State regulations that affect subsistence hunting and fishing, in Title VIII of ANILCA Congress required the State to establish advisory councils to advise the Board of Fisheries and Board of Game on hunting and fishing regulations.

To comply with Title VIII, the State divided Alaska into six geographical regions and established a regional council in each region to hear suggestions from local fish and game advisory committees. Unfortunately, the regional council system needs to be strengthened at the local level. One difficulty has been the lack of adequate staffing to provide technical and scientific information to

council and advisory committee members.

SUBSISTENCE: The Federal Role

Title VIII of ANILCA guarantees rural residents, when subsistence hunting and fishing on federal lands and waters, the right to use snowmobiles, motorboats and dog teams for transportation. Rural residents DO NOT need a permit to use snowmobiles, motorboats and dog teams while subsistence hunting and fishing.

Title VIII of ANILCA requires the federal government to monitor the Board of Fisheries' and Board of Game's development of hunting and fishing regulations. Title VIII requires the Secretaries of Interior and Agriculture to advise the State whether the Boards are effectively providing the priority for subsistence uses and to report annually to Congress.

Governor Steve Cowper on the subsistence issue:

Governor Steve Cowper and members of his administration met at length with the AFN Board of Directors in Juneau on February 1, 1990. Following productive discussions of various options to solve the current problem of subsistence law in Alaska, Governor Cowper stated:

"Subsistence is a way of life for thousands of Alaskans, not a weekend hobby, and we've got to do everything possible to protect that way of life. I'll be working with the Alaska Federation of Natives, other Native groups and the legislature to shape a solution to this latest problem that the Supreme Court has dropped in our laps. But to find an answer, we've first got to reach a concensus with the Native community about what will work best for those with a personal stake in subsistence."

Sen. Ted Stevens on the subsistence issue:

In an address to a Joint Session of the Sixteenth Alaska Legislature on January 17, 1990, U.S. Senator Ted Stevens emphasized the readiness of the Alaska Congressional Delegation to work with the State on remedies for the subsistence situation. He then responded to a question from the floor concerning the difficulties of Congressional action:

"My fear is that, if we are required, as Alaska's Congressional Delegation, to obtain enactment of legislation to deal with this, . . . we will face the necessity of getting a bill through. Added to that bill will be several subjects: the closure of ANWR, the transition of Tongass into a non-productive timber area. We will lose our conventional access to federal lands — particularly in parks and wildlife refuge areas — that we obtained under the 1980 Act . . . 80 percent of the goals we attained under the 1980 Act . . . are going to be disappearing if you have to go to Congress and, in effect, amend the 1980 Act to deal with this single issue.

"I think the subsistence question can be dealt with here at home, and it should be. In my judgement, it is possible that there is still the avenue that has not been pursued . . .

"I would urge you not to think that the federal solution is the one that is easiest — because we will lose more than we gain. Even the Native people would lose more than they gain, because many of those rights that would be curtailed are rights that are utilized intensively by people in rural areas."

PROPOSED LEGISLATIVE SOLUTIONS:

In the past month three bills have been introduced in the Alaska Legislature to deal with the conflict between the Alaska Constitution, the State subsistence law and Title VIII of ANILCA. **HOUSE RESOLUTION NO. 74**, sponsored by Rep. George Jacko of Pedro Bay, amends the Alaska Constitution to allow the Legislature to enact a subsistence priority that complies with Title VIII of ANILCA.

SENATE CONCURRENT RESOLUTION NO. 39, by Sen. Jay Kerttula of Palmer, establishes a Commission to review the legal situation and identify options available to the Senate to resolve the issue.

HOUSE BILL NO. 415, sponsored by Rep. Ramona Barnes of Anchorage, amends the Alaska subsistence law to change the definition of which hunters and fisherman qualify

for the subsistence priority from "rural residents" to "subsistence users." The bill then bases the identification of "subsistence users" on two criteria: 1) local residency, 2) direct dependency on subsistence resources an annual income below the national poverty level (\$10,000 or less a year).

All three bills are currently in various committees of the Legislature for review.

HJRNO. 74 - Introduced by Rep. Jacko

This is an example of what a constitutional amendment might look like. As AFN continues its work with Governor Steve Cowper and the Legislature leadership technical language for a constitutional amendment will probably change.

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

* Section 1. Article VIII,

Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 19. SUBSISTENCE USE OF RENEWABLE NATURAL RESOURCES.

The legislature may grant a preference for subsistence use of fish and wildlife and State-owned renewable natural resources. This constitution does not restrict the power of the legislature to allocate access among residents to fish and wildlife and State-owned renewable natural resources for subsistence uses on the basis of local residency, customary or traditional use, or dependence on the resources for food and other purposes.

* Section 2. The amendment proposed by this resolution shall be place before the voters of the state at the next general election in conformity with article XIII, Section 1, Constitution of the State of Alaska, and the election laws of the State.



RESOURCE PEOPLE WHO CAN HELP YOU UNDERSTAND WHAT IS GOING ON:

- * Your regional non-profit association
- * Alaska Federation of Natives (274-3611)
- * Rural Community Action Program - Subsistence Division - Bob Polasky or Eric Smith (279-2511)
- * Alaska Legal Services (276-6282)
- * Bureau of Indian Affairs - Agency offices or the Juneau Area Office (586-7177)
- * Alaska Department of Fish & Game, Subsistence Division - Steve Behnke or Ethel Lund (465-4147)
- * Alaska Department of Fish & Game, Commission Office - Norman Cohen (465-4101)

CORRECTION

**THIS DOCUMENT
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TO ASSURE LEGIBILITY**

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- * Alaska Department of Fish & Game, Commissioner's Office - Norman Cohen (465-4101)

House: JT hearings 12-18 H/Fin.
SENATE RESOURCES COMMITTEE

BILL NUMBER:

SPONSOR:

BILL TITLE: Subject: Subsistence

DATE REFERRED: posted 1/11, hearing 1/18/90

HEARING SCHEDULED:

FISCAL NOTE(S):

SPONSOR CONTACTED:

COMMITTEE SUBSTITUTE PREPARED:

INTERESTED PARTIES CONTACTED:

PACKET ITEMS:

Speakers: Norm Cohen, Fin. &
Tom Koester, DOC

Senate records to do the taping
House " transcribing

Subsistence Briefing

2-1-90

Alaska State Legislature

Senate Resources Committee

Senator Bettye Fahrenkamp, Chairman
Senator Jay Kerttula, Vice Chairman
Senator Dick Ellason
Senator Steve Frank
Senator Rick Halford
Senator Ailiss Sturgulewski
Senator Fred Zharoff



P.O. Box V
Juneau, Alaska 99811
(907) 465-4907

To: Senate Resources Committee members
From: Senator Bettye Fahrenkamp
Date: January 31, 1990
Re: Senate Resources Committee meeting

On Thursday, February 1, 1990, Ric Davidge will brief the Senate Resources Committee on the development of the draft Federal Subsistence Management Program. The meeting will be held in the Butrovich Room from 1:30 p.m. to 3:30 p.m.

In September, 1985, the U.S. Department of the Interior notified the State of Alaska that it was no longer in full compliance with the requirements of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). In preparation for assuming administration of subsistence uses, the federal government created the Federal Subsistence Resource Management Board consisting of officials from the Bureau of Indian Affairs, U. S. Forest Service and U.S. Fish and Wildlife Service. Ric Davidge served as Chairman of this Board and I think that his comments on the development of the draft federal regulations will serve as useful background as we grapple for a solution to this important, and sometimes volatile issue facing us.

I urge you to attend and welcome your participation.

Dr Gibbons, ~~USFW~~ U.S. Forest Service
586-7918

State of Alaska
CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS
250 Cushman Street, Suite 4H
Fairbanks, Alaska 99701
(907) 456-2012

F A X T R A N S M I T T A L M E M O

TO: Nancy Peterson
FROM: Stan Leaphart *lf*
DATE: January 30, 1990

TO: NANCY PETERSON - SEN. FAHRENKAMP
DEPT: _____ FAX #: 463-4867
FROM: S. LEAPHART PHONE: 456-2012
CO: CACFA FAX #: 456-2039
Post-It® brand fax transmittal memo 7871

NO. OF PAGES
12

RE: Federal Subsistence Resource Management Program

In September, 1985 the U.S. Department of the Interior notified the State of Alaska that it was no longer in full compliance with the requirements of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). This determination of non-compliance was based on the interpretation given by the Alaska Supreme Court to the Alaska subsistence statute in the Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985). In the same notification, the State was informed that the Department of the Interior would be forced to take over administration of subsistence use on public lands (federal lands) if the State program was not brought back into compliance with ANILCA by June 1, 1986. Passage of the State's 1986 subsistence statute prevented a federal take-over at that time.

In preparation for assuming administration of subsistence uses, the federal government created the Federal Subsistence Resource Management Board consisting of officials from the Bureau of Land Management, National Park Service, Bureau of Indian Affairs, Forest Service and U.S. Fish and Wildlife Service. These federal agencies also drafted regulations defining the operation of the Federal Subsistence Resource Management Program to manage subsistence activities within Alaska. These regulations were never released for public review and were shelved when the State subsistence statute was passed.

It is my understanding that these same federal agencies are now taking ~~another~~ look at this program because of the recent Alaska Supreme Court decision in the McDowell v. State of Alaska case, which overturned the current State subsistence statute. It appears, that if the federal government assumes management of subsistence activities on federal lands, this or a similar program would be utilized. It would be beneficial for our legislators to be aware of this proposal and to understand some of its ramifications.

The purpose of this memo is to briefly outline some of the key points of the draft proposal and to give you some idea about how the federal agency would manage subsistence activities under a federal program. I have also attached some additional material which should help clarify a number of the points in the draft proposal. You also have Ric Davidge's letter to Walter Stieglitz which discusses development of the program.

Subpart A- General Provisions

§30.1 through §30.3- These sections outline the Federal governments authority to manage subsistence under Title VIII of ANILCA. The language is derived directly from Title VIII.

§30.4- Definitions. The definition of "rural Alaska residents" in §30.4(a)(1) is essentially the same definition contained in the 1986 state subsistence statute. As you know, the courts ruled in the Kenaitze decision that this definition was inconsistent with the definition of "rural" as used in ANILCA, Title VIII. It would appear that this definition would require revision if the federal program is implemented. (See attachment #1 for an explanation of the process used for identification of rural Alaskan residents)

Both ANILCA and its legislative history provide little useful guidance on the definition of "rural". In fact, the legislative history generally only mentions a number of communities that Congress considered to be non-rural and several that they believed may be considered rural. Davidge explains this more fully in his letter to Stieglitz.

In determining whether or not subsistence uses of a community or area are "customary and traditional", the federal program would utilize the same eight criteria developed by the State Boards of Fisheries and Game. (See attachment #2, under A(2) for additional information)

Another important point to be considered (see: §30.4(b)(2)) is the application of this program to those lands, not federally owned, but within the exterior boundaries of a conservation system unit (national parks, monuments, preserves, national wildlife refuges, Forest Service wilderness areas, wild & scenic river corridors, national conservation areas, and national recreation areas). This means that subsistence activities on millions of acres of State and Native owned lands within these federal conservation system units would be under federal management. I would question the legal authority of the federal government to regulate hunting and fishing activities on State owned land, even if that land is within the exterior boundaries of a federal conservation system unit.

§30.5- Policy. This general policy is derived from Sections 802 & 804 of ANILCA which established the federal governments policy on subsistence and the preference for subsistence uses.

Subpart B- Program Structure

§30.10- Program diagram. I have attached an organizational chart for the subsistence resource management program. (See attachment #3)

§30.11- Use of State entities. The federal program would utilize the existing State system of local fish and game advisory committees, regional fish and game councils, the Board of Fisheries, and the Board of Game.

§30.12- Local fish and game advisory committees. This section of the proposal authorizes the Secretary of the Interior to establish advisory committees in addition to those established by the State, if he determines that the establishment of such committees are necessary to satisfy the requirements of ANILCA Section 805.

§§30.12 & 30.13 also outline the functions and responsibilities of the local fish and game advisory committees and the regional fish and game councils. I am not familiar enough with their current functions and responsibilities to determine how they might differ under a federal program. You may want to consult the Division of Boards in the Department of Fish & Game for additional analysis on this point.

§30.14- State Boards of Fisheries and Game. Under the current system, the Boards of Fisheries and Game set subsistence seasons and bag limits and make determinations of customary and traditional use of subsistence resources for communities and areas of the State. In the proposed federal program, it appears that the Boards would only fulfill an advisory role with respect to subsistence activities on federal lands. §30.14(b) of the proposal states, in part:

"With respect to the program, these State Boards may perform the following functions:

(3) Make recommendations to Federal agencies and the Federal Board concerning the program."

§30.14(c) further points to the strictly advisory role of the Boards in the federal program:

"Restrictions or other limitations established by the Boards of Fisheries and Game to govern the taking of fish and wildlife on lands under their jurisdiction, including but not limited to seasons, permit and license requirements, and quantity limits, may be adopted by the Secretary to regulate subsistence activities, to the extent that such measures are not in conflict with ANILCA or other applicable Federal laws or regulations."

Federal Subsistence Resource Management Program

Page 4

While it does appear that under a federal subsistence management program the Boards of Fisheries and Game will have only an advisory role with respect to subsistence activities on federal lands in Alaska, it is not clear whether they would still be able to establish regulations for sport fishing, sport hunting or commercial fishing activities on those same federal lands.

§30.16 Federal monitoring. Section 806 of ANILCA requires that federal agencies, on behalf of the Secretary of the Interior, monitor the functions of the local advisory committees and regional councils in providing for a preference for subsistence activities. The federal agencies would also monitor the actions of the State Boards of Fisheries and Game with respect to subsistence uses.

30.17 Park and park monument subsistence resource commissions. These commissions have already been established for seven park and park monument areas, as required by Section 808 of ANILCA. The proposal defines their responsibilities under a federal management program. Those responsibilities would remain essentially the same as they are under the current system.

One very important point that needs to be brought out is the fact that these subsistence resource commissions for the park units have been severely mismanaged by the National Park Service over the last six years. The agency has provided very little in the way of technical or administrative support which has served to delay the commission's development and implementation of subsistence hunting plans. Many of the commissions have submitted recommendations on subsistence activities to the Secretary of the Interior and with very few exceptions those recommendations have been rejected. The only recommendations that have been accepted are those which could actually result in a decrease in the number of people who could engage in subsistence activities in a given park unit.

The Secretary of the Interior has the responsibility to appoint 3 members to each of the subsistence resource commissions. In several cases these appointments have not been made for up to two years, again hindering the functioning of the commissions. In addition, the agency often dictates what items the commissions can place on their agendas for discussion and, in at least one instance, has failed to forward a recommendation to the secretary for consideration. In short, I have grave concerns about the future of subsistence activities within national park units if the federal government, in this case the National Park Service, assumes management.

§30.18 Federal land management agencies. This section of the proposal authorizes federal agencies to develop "(s)uch agency-specific regulations as are required to carry out agency responsibilities under the Program." Depending upon agency policies, programs and statutes other than ANILCA, this may also result in significant change in the current system. This may be one of the

most critical aspects of this proposed program. (See Attachment #2, page 3, Item E.)

§30.19 Federal Subsistence Resource Management Board. This is the entity that will govern the federal subsistence program if the federal government assumes control of subsistence activities on the federal lands in Alaska. The Board will consist of: the regional director for the U.S. Fish & Wildlife Service (chair and lead official for developing and implementing the program), the area director of the Bureau of Indian Affairs, the state director of the Bureau of Land Management, the regional director of the National Park Service, and the regional forester for the U.S. Forest Service.

The board will coordinate interagency implementation of the program, review recommendations of other entities in the program, develop policies and procedures necessary to operate the program and recommend to the Secretary of the Interior such regulations as are necessary to carry out the functions of the board and discharge the Secretary's responsibilities under Title VIII of ANILCA.

§30.20 Federal regulations. This section states that in the event that the Secretary of the Interior assumes control of subsistence activities, the regulations establishing the federal board and program will be supplemented by such additional regulations as are found to be necessary to implement federal control of these activities.

Subpart C- General Requirements

§30.31 Rural residents. This section clearly states that subsistence activities are limited to rural Alaska residents, as previously defined (§30.4(b)) and in accordance with supplementary criteria established by the board. (Again, see Attachments #1 & #2 for the supplementary criteria that would likely be used.)

§30.32 Aircraft Use. This section prohibits, except in extraordinary cases, any use of aircraft of any type for access to or from public lands for subsistence activities. This represents a significant departure from the current situation. Currently the only categorical prohibition of aircraft use for subsistence activities applies to national parks and park monuments. This proposal apparently would apply to all federal public lands, regardless of their designation.

Subpart D - Subsistence Hunting and Trapping

Subpart E- Subsistence Fishing

These sections contain specific guidelines on means and methods of harvest as well as area specific regulations. Again, I do not have sufficient knowledge of the current State regulations to determine if significant changes are proposed under a federal program. These

proposals are also subject to change on an annual basis, if the board determines changes are necessary.

Subpart F-Procedures for Issuance of Annual Regulations. This section provides guidance for the issuance of annual regulations and directs the board to develop regulations in consideration of the following:

- 1) The policies established by ANILCA to provide for a preference for subsistence uses of fish and wildlife,
- 2) Public input, scientific information, and recommendations received from the general public and from agencies and bodies such as local advisory committees, park and park monument subsistence resource commissions, regional councils, the State Boards of Fisheries and Game, the Alaska Department of Fish and Game, and federal land management agencies, and
- 3) Applicable non-conflicting State and federal laws and regulations.

§§30.101 & 30.102 provide for annual seasons and bag limits on hunting and fishing activities and for annual seasons and taking and possession limits for aquatic plants and finfish.

Conclusion

In developing this plan, the federal agency have proposed adoption of many of the existing definitions, guidelines and advisory mechanisms in the State's program. The obvious, most important change, is the fact that the federal government, not the State, would be setting policy and establishing regulations for subsistence activities on all federal lands in Alaska. The State would be relegated to an advisory role in the decisions made regarding subsistence activities on some 218 million acres of land.

Promulgation of federal regulations requires a nation-wide review before implementation. This, in my opinion, increases the risk that the federal agencies will be subjected to considerable public pressure to develop increasingly more restrictive regulations. An example that comes to mind is the national park units in Alaska. There are a considerable number of people who view consumptive uses in national parks as inappropriate, regardless of what ANILCA says. In fact, as a hunter yourself, you must be aware of the growing opposition to hunting anywhere! There is already pressure to limit the levels of subsistence activities that occur in the park units. Federal management, I believe would ultimately result in the elimination of much, if not all, subsistence hunting and fishing in the Alaskan park units.

Finally, a dual system of fish and game management in Alaska would be very complicated and confusing. The complicated land ownership patterns virtually ensure conflict between State hunting and

fishing regulations and those developed by the federal agencies for the lands under their control. I simply believe that a federal takeover of subsistence activities on federal lands would not be in the best interest of Alaskans.



IN REPLY REFER TO.

DRAFT

ATTACHMENT #1

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1011 E. TUDOR RD.
ANCHORAGE, ALASKA 99503

PRIORITY

May 7, 1986

Process for Identification of Rural Alaska Residents

"Rural Alaska residents" are defined as those persons whose principal residence is in a community or area of Alaska in which a significant portion of the economy and culture is dependent on uses of fish or wildlife characterized by the following criteria:

1. a long-term consistent pattern of use of fish or wildlife populations, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions
2. use patterns that usually recur in specific seasons of each year
3. use patterns consisting of methods and means of harvest that are characterized by efficiency and economy of effort and cost, conditioned by local circumstances
4. the consistent harvest and use of fish or wildlife near, or at locations reasonably accessible to, the residence of the persons taking such fish or wildlife
5. the handling, preparing, preserving and storing of such fish and wildlife in a manner that has traditionally been used by past generations, but not excluding recent technological advances in appropriate instances
6. use patterns that include the handing down of knowledge of fishing, trapping, or hunting skills and values from generation to generation
7. use patterns in which the products derived from such fish or wildlife are distributed or shared among others within a definable community of persons, including customary trade (excluding significant commercial enterprises) barter, sharing, gift-giving.
8. use patterns that include reliance upon the wide diversity of fish and wildlife populations of an area for personal and family consumption and that provide substantial benefits to the economic, cultural, social, and nutritional well-being of persons who take or consume fish and wildlife for their sustenance.

The Federal Subsistence Resource Management Board shall periodically review communities and areas of Alaska to determine whether they comply with these eight criteria. In the absence of adequate evidence documenting conformance with these criteria, the Federal Board shall determine whether or not a community or area is rural according to the definition of "rural" employed by the U.S. Bureau of Census. Those communities or areas with populations less than 2,500, as determined by the most recent certified State or Federal census, will be considered rural, and those communities or areas with populations greater than 2,500 will be considered non-rural until information related to the aforementioned eight criteria is presented to the Board to indicate otherwise.

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IN REPLY REFER TO:

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1011 E. TUDOR RD.
ANCHORAGE, ALASKA 99503

PRIORITY

FEDERAL SUBSISTENCE RESOURCE MANAGEMENT BOARD
SUBSISTENCE POLICY

I. SUBSISTENCE USES

MAY 7 1986

The Federal Subsistence Resource Management Board (Board) will implement the Federal Subsistence Resource Management Program (Program) to ensure the conservation of the fish and wildlife resources on federal lands in Alaska pursuant to existing federal laws and policies. The program will be consistent with the purposes of the conservation system units as defined by ANILCA.

A. The Program will be implemented as follows:

(1) The board will assess the biological status of fish and wildlife resources and determine whether a portion of a fish or wildlife population may be harvested during a regulatory year consistent with the conservation, protection and utilization of healthy populations of these resources as required by ANILCA.

(2) The board will identify subsistence uses of fish and wildlife resources, recognizing the customary and traditional subsistence uses by rural Alaska residents of renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. Subsistence uses shall be considered to be customary and traditional for a community or area conforming to the following criteria:

- a. a long-term consistent pattern of use of fish or wildlife populations excluding interruption by circumstances beyond the user's control such as regulatory prohibitions
- b. use patterns that usually recur in specific seasons of each year
- c. use patterns consisting of methods and means of harvest that are characterized by efficiency and economy of effort and cost, conditioned by local circumstances
- d. the consistent harvest and use of fish or wildlife near, or at locations reasonably accessible to, the residence of the persons taking such fish or wildlife
- e. the handling, preparing, preserving, and storing of such fish and wildlife in a manner that has traditionally been used by past generations, but not excluding recent technological advances in appropriate instances

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f. use patterns that include the handing down of knowledge of fishing, trapping, or hunting skills and values from generation to generation

g. use patterns in which the products derived from such fish or wildlife are distributed or shared among others within a definable community of persons, including customary trade (excluding significant commercial enterprises), barter, sharing, gift-giving

h. use patterns that include reliance upon the wide diversity of fish and wildlife populations of an area for personal and family consumption and that provide substantial benefits to the economic, cultural, social, and nutritional well-being of persons who take or consume fish and wildlife for their sustenance.

(3) After identifying subsistence uses based upon the criteria as set out in A.(1) & (2) of this section and in accordance with section 905 of ANILCA, the board will determine the amount of fish and wildlife necessary to provide for reasonable opportunities to engage in these customary and traditional uses.

(4) The board will recommend to the Secretary of the Interior regulations that provide an opportunity for the subsistence taking of fish and wildlife resources in amounts sufficient to provide for the customary and traditional uses identified in A (2) of this section, while being consistent with sound conservation and management principles and the laws, regulations and policies governing the management of the conservation system units and other Federal Lands. In no instance will the level of subsistence uses of fish and wildlife within a conservation system unit be inconsistent with the conservation of healthy populations.

(5) When circumstances such as increased numbers of user, weather, predation, or loss of habitat may jeopardize fish or wildlife populations, the board will exercise all practical options for restricting non-subsistence harvest before subsistence uses are restricted. If all available restrictions for non-subsistence uses have been implemented and further restrictions are needed, the board will reduce the take for subsistence by giving maximum protection to subsistence users who:

- (1) live closest to the resources;
- (2) have fewest available alternative resources; and
- (3) have the greatest customary and direct dependence upon the resource.

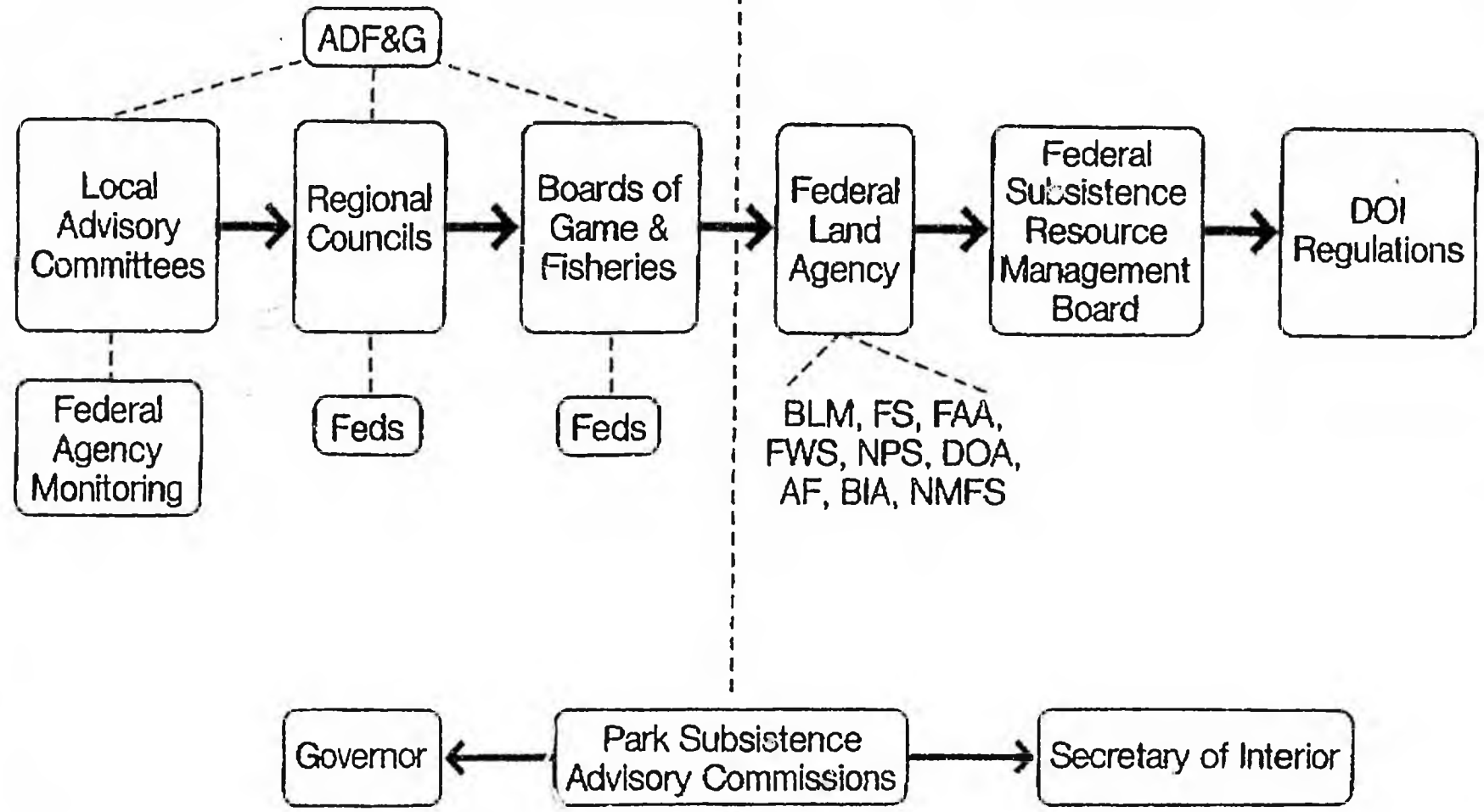
B. The board may, in cooperation with the State of Alaska, recommend to the Secretary of the Interior regulations that provide an opportunity for non-subsistence uses of the resource, to the extent that the non-subsistence uses do not jeopardize or interfere with the conservation of healthy populations or fish or wildlife resources or with the opportunity for taking these resources for customary and traditional subsistence uses as provided in A (4) of this section.

C. Except in extraordinary situations, aircraft shall not be used for access to fish and wildlife populations for subsistence purposes. Section 811 of ANILCA authorizes the use of snowmachines, and motor boats for subsistence purposes and also allows for the use of other means of surface transportation that have been traditionally used for subsistence.

D. In its discussions regarding implementation of the Program with regard to lands within the National Park System and the National Wildlife Refuge System, the Board shall, in conformance with the requirements of ANILCA, limit subsistence activities to use by local rural residents.

E. The Board shall, in making decisions or recommendations concerning the Program, consider and ensure compliance with specific statutory requirements regarding the management of resources on each type of conservation system unit or other type of Federal land, recognizing that the management policies applicable to some units may entail methods of resource and habitat management different from methods appropriate for other units.

FEDERAL SUBSISTENCE RESOURCE MANAGEMENT PROGRAM



Existing State System

ATTACHMENT #3

PRIORITY
DRAFT

WA/4532g

PART #30 - FEDERAL SUBSISTENCE RESOURCE MANAGEMENT PROGRAM

Subpart A - General Provisions

30.1 Purpose

The regulations in this part are intended to define the operation of the Federal Subsistence Resource Management Program as established by the Secretary of the Interior to manage subsistence activities within the State of Alaska.

30.2 Authority

The regulations in this part are issued pursuant to the Secretary of the Interior's authority in Section 814 of the Alaska National Interest Lands Conservation Act (94 Stat. 2371, Pub. L. 96-487) to prescribe such regulations as are necessary and appropriate to carry out his responsibilities to provide for subsistence uses by rural Alaska residents of wild, renewable resources of public lands.

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uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter or sharing for personal or family consumption; and for customary trade. For the purposes of this paragraph;

(1) The term "rural Alaska residents" shall mean those persons domiciled in a community or area of the State of Alaska in which the customary and traditional use of fish, wildlife, or other renewable resources for personal or family consumption is a principal characteristic of the economy of the community or area.

(2) The term "family" shall mean all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis;

(3) The term "barter" shall mean the exchange of fish or wildlife or their parts taken for subsistence uses:

(i) For other fish, wildlife or their parts; or

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

(b) The term "subsistence activities": shall mean the taking, for subsistence uses as defined in paragraph (a) of this section, of fish or

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crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(h) The terms "take" or "taking", as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

(i) The term "Secretary" shall mean the Secretary of the Interior or any official designated to act for the Secretary in carrying out his responsibilities under ANILCA.

30.5 Policy

(a) Consistent with sound management principles and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural Alaska residents who depend upon subsistence uses of the resources of such lands.

(b) Consistent with the management of fish and wildlife in accordance with recognized scientific principles, rural Alaska residents engaged in a subsistence way of life shall be provided an opportunity to do so, pursuant to applicable State and Federal law.

(c) Nonwasteful subsistence uses of fish, wildlife, and other wild renewable resources by rural Alaska residents shall be the priority

CORRECTION

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

PRIORITY
DRAFT

WA/4532g

PART #30 - FEDERAL SUBSISTENCE RESOURCE MANAGEMENT PROGRAM

Subpart A - General Provisions

30.1 Purpose

The regulations in this part are intended to define the operation of the Federal Subsistence Resource Management Program as established by the Secretary of the Interior to manage subsistence activities within the State of Alaska.

30.2 Authority

The regulations in this part are issued pursuant to the Secretary of the Interior's authority in Section 814 of the Alaska National Interest Lands Conservation Act (94 Stat. 2371, Pub. L. 96-487) to prescribe such regulations as are necessary and appropriate to carry out his responsibilities to provide for subsistence uses by rural Alaska residents of wild, renewable resources of public lands.

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30.3 Applicability and scope

(a) The regulations in this part apply to all actions taken by Federal agencies, including agencies other than those within the Department of the Interior, with regard to managing subsistence activities.

(b) As provided in Title VIII of ANILCA, the management of subsistence activities shall be carried out by the State, as long as the program operated by the State is in compliance with ANILCA. Active management of subsistence activities by Federal agencies shall not take place unless the Secretary determines that:

(1) The State program is not in compliance with ANILCA; and

(2) The proper discharge of the Secretary's responsibilities under ANILCA requires that Federal agencies assume control over subsistence activities.

30.4 Definitions

The following definitions shall apply to all regulations contained in this part:

(a) The term "subsistence uses" shall mean the customary and traditional

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uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter or sharing for personal or family consumption; and for customary trade. For the purposes of this paragraph;

(1) The term "rural Alaska residents" shall mean those persons domiciled in a community or area of the State of Alaska in which the customary and traditional use of fish, wildlife, or other renewable resources for personal or family consumption is a principal characteristic of the economy of the community or area.

(2) The term "family" shall mean all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis;

(3) The term "barter" shall mean the exchange of fish or wildlife or their parts taken for subsistence uses:

(i) For other fish, wildlife or their parts; or

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

(b) The term "subsistence activities": shall mean the taking, for subsistence uses as defined in paragraph (a) of this section, of fish or

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wildlife resources of:

(1) Federally owned lands; and

(2) Lands not federally owned, but within the exterior boundaries of a conservation system unit, national recreation area, national conservation area, new national forest, or forest addition, as established by ANILCA.

(c) The term "Program" shall mean the Federal Subsistence Resource Management Program, as described in this part and established by the Secretary of the Interior to manage the taking of fish and wildlife resources of the public lands for subsistence uses.

(d) The term "ANILCA" shall mean the Alaska National Interest Lands Conservation Act (94 Stat. 2371, Pub. L. 96-487).

(e) The term "Federal Board" shall mean the Federal Subsistence Resource Management Board, as established by this part.

(f) The term "park monument" shall mean those national monuments under the management of the National Park Service.

(g) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk,

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crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(h) The terms "take" or "taking", as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

(i) The term "Secretary" shall mean the Secretary of the Interior or any official designated to act for the Secretary in carrying out his responsibilities under ANILCA.

30.5 Policy

(a) Consistent with sound management principles and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural Alaska residents who depend upon subsistence uses of the resources of such lands.

(b) Consistent with the management of fish and wildlife in accordance with recognized scientific principles, rural Alaska residents engaged in a subsistence way of life shall be provided an opportunity to do so, pursuant to applicable State and Federal law.

(c) Nonwasteful subsistence uses of fish, wildlife, and other wild renewable resources by rural Alaska residents shall be the priority

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consumptive uses of such resources over other consumptive uses permitted on public lands pursuant to applicable State and Federal law.

(d) Whenever it is necessary to restrict subsistence activities in order to assure the continued viability of fish or wildlife populations, priority for subsistence uses shall be implemented through appropriate limitations based on the following criteria:

(1) Customary and direct dependence upon the resource as the mainstay of livelihood;

(2) Local residency; and

(3) Availability of alternative resources.

(e) Except as otherwise provided by Federal law, Federal agencies responsible for managing subsistence activities and for protecting the continued viability of all wild, renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

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Subpart B - Program Structure

30.10 Program diagram.

The figure printed below is a diagrammatic representation of the structure of the Program, showing its component parts and the flow of information, recommendations, and decisions.

(Diagram to be inserted at this point)

30.11 Use of State entities.

The Program shall utilize the existing State system of local fish and game advisory committees, regional fish and game councils, the Board of Fisheries, and the Board of Game. When appropriate, these State entities will coordinate with the individual Federal agencies responsible for the management of subsistence activities and with the Federal Board.

30.12 Local fish and game advisory committees.

(a) The regulations in this section shall define the establishment,

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responsibilities, and functions of local fish and game advisory committees with respect to their position in the Program. The committees may also perform functions not relating to the Program, as provided by State laws and regulations.

(b) Local fish and game advisory committees shall be established and administered in accordance with applicable State laws and regulations. In the event that the Secretary determine that, in order to fulfill the requirements of Section 805 of ANILCA, advisory committees in addition to those established by the State are required, the Secretary shall establish and administer such necessary committees in the same manner as prescribed in State laws and regulations.

(c) A local fish and game advisory committee may perform the following:

- (1) Develop regulatory proposals for submission to the appropriate Board of Fisheries or Game.
- (2) Evaluate regulatory proposals submitted to it and make recommendations to the appropriate Board.
- (3) Provide a local forum for fish and wildlife conservation and use.
- (4) Advise the appropriate regional council regarding the conservation, development, and use of fish and wildlife resources.
- (5) Work with the appropriate regional council to develop

substance management plans and harvest strategy proposals.

(6) Cooperate and consult with interested persons and organizations, including government agencies, to accomplish (1) - (5) of this paragraph.

30.13 Regional Fish and Game Councils.

(a) The regulations in this section shall define the establishment, responsibilities, and functions of the regional fish and game councils with respect to their position in the Program. The councils may also perform functions not relating to the Program, as provided by State laws and regulations.

(b) Regional fish and game councils shall be established and administered in accordance with applicable State laws and regulations.

(c) Each regional fish and game council is authorized to perform the following:

(1) Hold public meetings on fish and wildlife matters.

(2) Elect officers.

(3) In consultation with the local fish and game advisory committees in its region and with the Alaska Department of Fish and Game, review,

evaluate, and make recommendations to the Boards of Fisheries and Game on any existing or proposed regulation, policy, management plan, or any other matter relating to the use of fish and wildlife within its region.

(4) Submit to the Boards of Fisheries and Game and the Secretary, by November 15 of each year, an annual report, containing:

(i) An identification of current and anticipated subsistence uses of fish and wildlife populations within the region.

(ii) An evaluation of current and anticipated subsistence needs for use of fish and wildlife populations within the region.

(iii) A recommended strategy for the management of fish and wildlife populations within the region to accommodate the identified fish and wildlife uses and needs.

(iv) Recommendations concerning policies, standards, guidelines, and regulations to implement the strategy.

(d) A council shall provide a forum for, and assist its local fish and game advisory committees in obtaining the opinions and recommendations of people interested in fish and wildlife matters so as to achieve the greatest possible local participation in the decision-making process. If differences of opinion exist among the committees, the council shall attempt to develop areas of compromise and to reach a regional consensus on matters of

controversy.

(e) A council will, in its discretion, present recommendations concerning the conservation, regulation, management, and use of fish and wildlife resources within its region, along with the evidence upon which the recommendations are based, to the appropriate Board.

(f) A council will, in its discretion, make recommendations to the Boards of Fisheries and Game on the creation, consolidation, distribution, or operation of the committee system.

30.14 State Boards of Fisheries and Game.

(a) In compliance with State laws and regulations, the State Boards of Fisheries and Game promulgate regulations for the conservation, development and utilization of Alaska's fish and wildlife resources.

(b) With respect to the Program, these State Boards may perform the following functions:

(1) Review, comment upon, and take action on the recommendations of local fish and game advisory committees, regional fish and game advisory councils, and Federal agencies.

(2) Request input from the public, local committees, regional

councils, and Federal agencies concerning subsistence uses of fish and wildlife,

(3) Make recommendations to Federal agencies and the Federal Board concerning the Program.

(c) Restrictions or other limitations established by the Boards of Fisheries and Game to govern the taking of fish and wildlife on lands under their jurisdiction, including but not limited to seasons, permit and license requirements, and quantity limits, may be adopted by the Secretary to regulate subsistence activities, to the extent that such measures are not in conflict with ANILCA or other applicable Federal laws and regulations.

30.15 Alaska Department of Fish and Game.

The Alaska Department of Fish and Game conducts research and provides information relative to fish and wildlife resources and subsistence uses of these resources to the State Boards of Fisheries and Game, the regional councils, local committees, and Federal agencies. With regard to the Program this information will supplement that which is available from Federal and other sources.

30.16 Federal monitoring.

As required by Section 806 of ANILCA, Federal agencies, on behalf of the

Secretary, shall monitor the functions of the local advisory committees and regional councils in providing for a preference for subsistence activities. The actions of the State Boards of Fisheries and Game with respect to subsistence uses shall also be monitored by the Federal agencies. Such monitoring shall include active participation in the hearings, meetings, and other public participation activities of the committees, councils, and boards and the submission of recommendations to these bodies relevant to subsistence activities.

30.17 Park and park monument subsistence resource commissions.

(a) The regulations in this section shall define the establishment, responsibilities, and functions of park and park monument subsistence resource commissions with respect to their position in the Federal Subsistence Resource Management Program.

(b) In accordance with the procedures defined in paragraph (c), a subsistence resource commission shall be established for each of the following areas of the National Park System:

Aniakchak National Monument

Cape Krusenstern National Monument

Denali National Park

Gates of the Arctic National Park

Kobuk Valley National Park

Lake Clark National Park

Wrangell-St. Elias National Park.

(c) Each commission shall be composed of the following:

(1) Three members to be appointed by the Secretary.

(2) Three members to be appointed by the Governor of the State of Alaska.

(3) Three members to be appointed by the regional fish and game advisory council for the region in which the park or park monument is located. Each such member shall be a member of either the regional advisory council or of one of the local fish and game advisory committees within the region, and shall also be engaged in subsistence uses within the park or park monument.

(d) A subsistence resource commission shall annually:

(1) Consult with local committees and the regional council concerning subsistence hunting within the park or park monument.

(2) Conduct, in the vicinity of the park or park monument, one or more public hearings concerning subsistence hunting.

(3) Make recommendations to the Secretary for changes in the

subsistence hunting program for the park or park monument.

30.18 Federal Land Management Agencies.

In accordance with ANILCA, other applicable Federal laws, and the regulations in this part, each Federal agency having a responsibility for the management of public lands shall:

- (a) Monitor the operation of the Program as it pertains to the fish and wildlife resources of the lands for which it is responsible.
- (b) Manage subsistence activities on lands under its administration, if the Secretary assumes control of these activities in accordance with Section 30.3 (b) of this part.
- (c) Develop such agency-specific regulations as are required to carry out agency responsibilities under the Program.

30.19 Federal Subsistence Resource Management Board.

- (a) The Federal Board shall be composed of the following officials:
 - (1) Regional Director, Fish and Wildlife Service. Chair and Lead Official for development and implementation of the Program.

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- (2) Area Director, Bureau of Indian Affairs.
- (3) State Director, Bureau of Land Management.
- (4) Regional Director, National Park Service.
- (5) Regional Forester, Forest Service.

(b) The responsibilities of the Federal Board shall be to coordinate interagency implementation of the Program, to review recommendations of other entities within the Program, to develop policies and procedures necessary to provide for operation of the Program, and to recommend to the Secretary such regulations as are necessary to carry out the functions of the Federal Board and discharge the Secretary's responsibilities under Title VIII of ANILCA.

30.20 Federal Regulations

(a) The regulations contained in Subparts A, B, and C of this part define the program as it will operate under conditions in which the State manages subsistence activities.

(b) In the event that, in accordance with Section 30.3 (b) of this part, the Secretary assumes control of subsistence activities, the regulations in this part shall be supplemented by such additional regulations as he finds are