ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6464 SENATE RESOURCES

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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.

LAW OFFICES
BIRCH, HORTON, BITTNER AND CHEROT A PROFESSIONAL CORPORATION
1155 CONNECTICUT AVENUE, N.W. • SUITE 1200 • WASHINGTON, D.C. 20036 • (202) 659-5800 • TELECOPIER (202) 659-1027

THOMAS ALBERT
LUANN F. BAILEY
J. GEOFFREY BENTLEY
RONALD G. BIRCH**
WILLIAM H. BITTNER**
KATHRYN A. BLACK
DOUGLAS BLANKENSHIP
PHILIP BLUMSTEIN
CORY R. BORGESON
WILLIAM BUMPERS*
JOHN J. BURNS
RODNEY B. CARMAN**
GERALDINE M. CARR
SUZANNE CHEROT**
JOSEPH M. CHOMSKI**
PATRICK B. COLE
PAUL L. DILLON
KIM DUNN
ERIC A. EISEN**
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PAUL EWERS
WILLIAM W. GARNER*
JOHN W. GRIGGS**
TRACEY A. HARPOLE
WILLIAM P. HORN*
HAL R. HORTON**
STEPHEN H. HUTCHINGS
MARC W. JUNE
MINDY R. KORNBERG**
GARY A. LETCHER**
STANLEY T. LEWIS
LESLIE C. LONDENBAUGH
JEFFREY S. LOWENFELS**
GREGORY A. MILLER
MICHAEL J. PARISE
TIMOTHY J. PETUMENOS
ELIZABETH A. PHILLIPS
STEVEN PRADELL
MICHAEL W. REUBINO
ELISABETH H. ROSS**
E. JUDD SIMPSON
STEPHEN F. SORENSEN
SHERICAN STRICKLAND**
JONATHAN K. TILLINGHAST
T. HENRY WILSON
OF COUNSEL
JAMES D. NORDALE
RON SAXTON

*D.C. BAR ONLY
**D.C. AND ALASKA BAR

127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 276-1550
TELECOPIER (907) 276-0822

KEY BANK BUILDING
100 CUSHMAN STREET, SUITE 311
FAIRBANKS, ALASKA 99701
(907) 452-1666
TELECOPIER (907) 456-8088

ONE SEALASKA PLAZA, SUITE 301
JUNEAU, ALASKA 99801
(907) 586-2690
TELECOPIER (907) 586-2814

MEMORANDUM

TO: Senator Bettye Fahrenkamp

FROM: William P. Horn WPH **VIA TELECOPY**

DATE: March 19, 1990

SUBJ: Comments on Drafts of New Article VIII, Section 19

Each of the drafts of a new Article VIII, Section 19 of the Alaska Constitution appears to be an effort to satisfy the requirements of Sections 803 and 804 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 16 U.S.C. §§ 3113, 3114. The first draft looks inadequate; the second and third drafts appear to set the stage for compliance with ANILCA. In addition, there are significant differences among the three iterations as discussed below.

DRAFT ONE

This would authorize the establishment of a preference system for subsistence uses in rural areas of Alaska. However, it is unlikely to enable the Legislature to satisfy ANILCA's requirements. The draft is deficient on at least three points.

First, it introduces the term "non-commercial uses" as part of the subsistence definition. Section 803 expressly provides for barter and sale of handicraft articles made from non-edible byproducts of subsistence resources and blanket restriction regarding commercial use may not comport with ANILCA.

Second, the "personal use" limitation is more strict than § 803. The Federal definition includes reference to "sharing" of subsistence resources. This draft may rule out such sharing. A factual hypothetical is as follows: Mr. A in a bush village

routinely brings in moose that are provided to others in the village. He personally uses one animal. A definition that rules out sharing would likely mean that the taking of the moose to be given to others would not qualify for the preference. This is inconsistent with § 803.

Third, the new section does not provide for a "second tier" allocation per § 804. ANILCA provides a generalized preference to "rural residents" -- this is the so-called "first tier." When resources are inadequate to provide for the first tier class of individuals, § 804 authorizes an allocation within this group. A subset of the first tier class gets an added priority based on (1) customary and direct dependence, (2) local residency, and (3) availability of alternative resources. Draft One does not provide for such a second tier allocation.

However, this may not be a fatal flaw as the Alaska Supreme Court has indicated that allocation based on these kind of criteria appears constitutional. To ensure satisfaction of ANILCA, subsequent implementing legislation or regulations should include a second tier arrangement per § 804.

DRAFT TWO

This version of a new Section 19 addresses in significant fashion the "non-commercial" and "personal use" issues raised above. It also expressly authorizes the creation of a second tier allocation system. The draft appears to empower the Legislature to pass a bill that can comply with ANILCA. Stylistically, it follows the form of Article VIII, Section 15 that set up the limited entry fishing program. That section uses the "does not restrict/does not prohibit" form rather than an affirmative authorization.

Obviously, the constitutional amendment by itself will not satisfy ANILCA. An appropriate State statute will have to be enacted to accompany or follow the amendment.

DRAFT THREE

This tracks ANILCA more closely than the other two versions. It would also enable the Legislature to act to comply with the Federal statute. It appears, however, that the second paragraph is an attempt to merge the first and second tier classes into one group. That is not authorized by ANILCA § 804. Indeed, the effort to limit the size of the first tier class has been slapped down by Ninth Circuit U.S. Court of Appeals in the Kenaitze case. Once the State manages to get by the newer McDowell hurdle, the Kenaitze matter still must be resolved.

Proposed New §19 of Art VIII

DRAFT ONE SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources are the non-wasteful non-commercial uses of locally available resources owned by the state taken and used by residents for personal use.

The legislature may grant a preference for subsistence uses of fish and wildlife and renewable resources in rural areas of the state.

DRAFT TWO SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources owned by the state are the customary and traditional, non-wasteful, non-commercial uses of those resources available in the area where a resident resides, taken and used by a resident for personal or family consumption or for customary trade.

Nothing in this Constitution prohibits the legislature from granting a preference for subsistence uses of fish and wildlife and renewable resources in rural areas of the state or from allocating subsistence resources among users.

DRAFT THREE SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources are the customary and traditional, non-wasteful, non-commercial uses of these resources, taken by a resident in the area where the resident resides for personal or family consumption, for barter or sharing for personal or family consumption, or for customary trade.

The legislature may accord a priority in rural areas for the taking of fish and wildlife and renewable natural resources for subsistence uses, and may provide for the allocation of that taking based upon local or community residence, or customary and direct dependence on the resource.

CONCLUSION

Drafts Two and Three appear to do the job of taking steps to satisfy ANILCA. I would suggest using the first paragraph of Draft Three and an altered version of the second paragraph of Draft Two:

> SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources are the customary and traditional, non-wasteful, non-commercial uses of these resources, taken by a resident in the area where the resident resides for personal or family consumption, for barter or sharing for personal or family consumption, or for customary trade.
>
> The legislature may grant a preference for subsistence uses of fish and wildlife and renewable resources in rural areas of the State and may allocate subsistence resources among users.

WPH:jap
WPH221H.ASR

Attachment

LAW OFFICES
BIRCH, HORTON, BITTNER AND CHEROT A PROFESSIONAL CORPORATION
1155 CONNECTICUT AVENUE, N.W. • SUITE 1200 • WASHINGTON, D.C. 20036 • (202) 659-5600 • TELECOPIER (202) 659-1027

THOMAS L. ALBERT[1][4]
J. GEOFFREY BENTLEY[2]
RONALD G. BIRCH[2]
WILLIAM H. BITTNER[2]
KATHRYN A. BLACK
DOUGLAS BLANKENSHIP
PHILIP BLUMSTEIN
CORY R. BORGESON
STEPHANIE R. BOSTON
MARGARET M. BRAUNT
WILLIAM BUMPERS[3]
JOHN J. BURNS
GERALDINE M. CARR[3]
SUZANNE CHEROT[2]
JOSEPH M. CHOMBAR[2]
KIM DUNN
ERIC A. EISEN[2][3]
RALPH M. ERTZ
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E. BUDD SIMPSON
STEPHEN P. SORENSEN
SHERIDAN STRICKLAND[2]
JONATHAN K. TILLINGHAST
MOLLY WARES
T. HENRY WILSON
OF COUNSEL
JAMES D. NORDALE

[1]D.C. BAR
[2]D.C. AND ALASKA BAR
[3]MARYLAND BAR
[4]VIRGINIA BAR
ALL OTHERS ALASKA BAR

337 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 276-1550
TELECOPIER (907) 276-2822

KEY BANK BUILDING
100 CUSHMAN STREET, SUITE 311
FAIRBANKS, ALASKA 99701
(907) 452-1688
TELECOPIER (907) 456-8055

ONE SEALASKA PLAZA, SUITE 301
JUNEAU, ALASKA 99801
(907) 586-2990
TELECOPIER (907) 586-8814

MEMORANDUM

TO: Senator Bettye Fahrenkamp

FROM: William P. Horn WPH

DATE: April 4, 1990

SUBJ: Proposed Section 19 Language

VIA TELECOPY

The proposed constitutional language (attached) authorizing a subsistence law consistent with valid, Federal laws appears to resolve the McDowell case problems. I am persuaded, however, that there are reasons why adoption of such language could be ill-advised.

First, the provision is vague regarding Federal law. I presume that conformance with Title VIII of ANILCA is the objective. However, it is not clear on its face what "valid federal laws" the provision seeks to address. Please note that ANILCA is not the only Federal law with some subsistence references or features. The Marine Mammal Protection Act has express references to Native-only subsistence taking (16 U.S.C. § 1371(b)). Other laws such as the Bald Eagle Protection Act have Native taking provisions and there is valid Federal caselaw about the religious rights of Native Americans to take protected species. The generic reference to valid Federal law in the draft section could impose this body of Federal law on Alaska.

Second, the Alaska Supreme Court may not determine that this general provision overcomes the express common use and equal protection requirements in sections 3, 15, and 17 of the Alaska Constitution. In legal construction, the express trumps the general. The general nature of this proposal may be its undoing.

Third, as a matter of policy, it may be inappropriate to establish a "blank" provision in the Alaska Constitution that the U.S. Congress can fill in. Not only does the section invite the Congress in, it lets Congress change the rules without regard to Alaska -- whatever Congress determines becomes constitutional in Alaska.

This is a quick review. Please let me know if you would like a more comprehensive response with appropriate statutory and case-law citations. I would be pleased to answer any questions you may have.

WPH:jap
WPH238M.ASR

Attachment

Section 19. RETENTION OF FISH AND WILDLIFE MANAGEMENT BY THE STATE. Nothing in this constitution prohibits the legislature from enacting laws relating to the allocation for subsistence uses of fish and wildlife and wild renewable natural resources which are consistent with valid federal laws in order to retain management authority over such resources by the State of Alaska.

I found these things at the table —
They are not part of the record, but had some interest value

SUBSISTENCE:

A Strategy for Our Future

Egan Convention Center - Lower Level
Anchorage, Alaska
April 10-11, 1990

Conference Guide & Agenda

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611

Open Letter to Alaska Native leaders:

On behalf of the Alaska Federation of Natives and its member organizations, I would like to extend a heart-felt welcome to you. Thank you for taking the time to attend this important two-day summit conference.

As you know, on December 22, 1989, the Alaska Supreme Court ruled the State subsistence law unconstitutional. Since January, in meetings across the state, Native people have been reviewing the legal situation and the range of possible solutions to the serious situation we now face.

Over the course of these next two days, we hope to review the best possible information on the consequences of the McDowell decision as it affects Native people and hunting and fishing rights. We believe that if Native people are informed about political and legal developments which affect them, they can more effectively protect and promote their own interests and the public interest.

Immediately following the two-day meeting, the House and Senate Resources Committees of the Alaska State Legislature will hold a joint hearing on subsistence. the hearing is scheduled for Wednesday, April 11, from 5:30-9:00PM. It will be held at the Egan Convention Center in the same room as this conference. AFN strongly urges you to plan on testifying. Many legislators do not understand why subsistence is critical to the cultural and economic survival of Native families. This is an opportunity for you to share your knowledge and your views on how the situation should be resolved.

Protecting subsistence hunting and fishing will continue to be a challenge to Alaska Natives for some time. We urge you to continue to stay involved. Thank you.

Sincerely,

Julie E. Kitka
President

AFN/2

AGENDA

Tuesday, April 10, 1990

8:00am WELCOME - Julie Kitka, AFN President
INVOCATION - Rev. Anna Frank, Episcopal Diocese of Alaska

8:40 INTRODUCTION & PURPOSES - Ralph Eluska, AFN
PRESENTATION - Walter Charley, Athabascan Elder

8:55 REVIEW OF AGENDA - Co-moderators Perry Eaton & Marlene Johnson

9:00 PANEL: **"CHALLENGES FACING ALASKA NATIVES - SUBSISTENCE"**
Panel Moderators: Perry Eaton & Marlene Johnson Julie Kitka, AFN
John Shively, NANA Bob Polasky, RurAL CAP Chris McNeil, SEALASKA

Resource people: Don Mitchell, AFN Counsel
Bill Caldwell, Alaska Legal Services
Alan Mintz, DC Counsel
QUESTIONS FROM THE FLOOR

10:30 Break

ISSUE #1: FEDERAL PRE-EMPTION & DUAL MANAGEMENT OF FISH & GAME

10:45 FEDERAL/STATE PANEL: **"HOW WOULD IT WORK?"**
Panel Moderator: Johnny Hawk
Glenn Elison, USF&S Steve Behnke, ADF&G
Tom Koester, Dept. of Law Stan Leaphardt, CACFA
QUESTIONS FROM THE FLOOR

11:30 PANEL: **"HOW WILL IT AFFECT US?"**
Panel Moderator: Chris McNeil, SEALASKA
Trefon Angasan, BBNC, **"Unanswered Questions & Continuing Litigation"**
Ken Johns, CRNA, **"Impacts on Villages Surrounded by State & Federal Land"**
Myron Naneng, AVCP, **"Impacts on the Y-K Delta"**
Clare Swan, Kenaitze Indian Tribe, **"Kenaitze Lawsuit"**
Ed Thomas, T&H, **"Co-Management under '638'"**
Walter Sampson, NANA, **"Living with Federal Management"**
QUESTIONS FROM THE FLOOR

12:30pm Break for lunch

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AGENDA

Tuesday, April 10, 1990

2:00pm REMARKS BY CO-MODERATORS (AGENDA/PRODEDURES)

ISSUE #2: CONGRESS & ANILCA

2:05 PANEL: **"OPENING ANILCA"**
Panel Moderator: Edgar Blatchford
David Eluska, RurAL CAP — Cheryl Sutton, KPFA — Willie Kasayulie, ANC
Robert Willard, SENSC — Mitch Demientieff, TCC — Emily Barnett, Sierra Club
Bud Burris, Alaska Outdoor Council — Wayne Anthony Ross, Alaska Outdoor Council
QUESTIONS FROM THE FLOOR

4:00 PRESENTATION BY SENATOR TED STEVENS VIA TAPE
Marie Matsunu Nash, Senator Stevens' Staff Representative

4:20 PANEL: **"CONGRESSIONAL STAFF QUESTIONS & ANSWERS"**
Panel Moderator: Tim Wallis
Greg Renkas, Chief of Staff, Senator Frank Murkowski
Greg Chapados, Chief of Staff, Senator Ted Stevens
Rick Agnew, Counsel, Congressman Don Young

CLOSING REMARKS, Eddie Hopson, Inupiat Elder

5:30 Recess

Wednesday, April 11, 1990

8:30am REMARKS BY CO-MODERATORS (AGENDA/PROCEDURES)

8:40 OPENING REMARKS, Rev. Billy Sheldon, Sr., Inupiat Elder

ISSUE #3: STATE CONSTITUTIONAL AMENDMENT

9:00 GOVERNOR STEVE COWPER

9:20 QUESTIONS & ANSWERS, Mike Irwin, Office of the Governor

9:45 CONGRESSMAN DON YOUNG

10:15 Break

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AGENDA

Wednesday, April 11, 1990

10:30am LEGISLATORS' PANEL: **"THE NEXT FOUR WEEKS - OPTIONS AVAILABLE TO THE ALASKA STATE LEGISLATURE"**

Panel Moderator: Nels A. Anderson, Jr.

Sen. Al Adams — Rep. Eileen MacLean — Rep. George Jacko

Rep. Kay Wallis — Sen. Jack Coghill — Rep. Lyman Hoffman

QUESTIONS FROM THE FLOOR — Sen. Zachoff — Rep. Foster

12:30pm Break for lunch

ISSUE #4: CONSTITUTIONAL AMENDMENT APPROACH

1:30 PANEL: **VILLAGE PERSPECTIVES**

Dolly Garza, Southeast — Tom Tilden, Bristol Bay — Gary Oskolkoff, Southcentral

Paul John, Western Alaska — Ronald Brower, Jr., North Slope — Will Mayo, Interior

2:20 PANEL: **REGIONAL PERSPECTIVES**

Myron Naneng, AVCP — Robert Willard, SENSC — Mitch Demientieff, TCC

Trefon Angasan, BBNA — Sam Demientieff, FNA

3:10 Break

3:30 PANEL: **"WHERE DO WE GO FROM HERE?"**

Ralph Eluska, AFN — Matthew Iya, RARA — Dewey Skan, Jr., RurAL CAP

Bart Garber, NARF — Byron Mallott, SEALASKA — Willie Kasayulie, ANC

4:45 CLOSING REMARKS Dr. Walter Soboleff, Tlingit Elder

5:00 BENEDICTION Bishop Jacob Nelson, Moravian Mission of Alaska, Bethel

CONFERENCE CLOSING

5:30pm-9:00pm JOINT HOUSE/SENATE RESOURCES HEARING

PLEASE TESTIFY: This joint House/Senate Resources Committee Hearing is an excellent opportunity for Native people from throughout the State to make clear how critically important subsistence activities are to our cultures, economies and lifestyles. Please take advantage of it and testify.

FEDERAL/STATE OPTIONS

The following is an outline of the major legal options which have been suggested to date for solving the current subsistence problem in Alaska, beginning with an historical review of how we got here.

I. CHRONOLOGY OF EVENTS LEADING TO McDOWELL v. STATE

1960 - The *Federal government* transferred authority for management of fish and game in Alaska to the new State government.

1971 - The *Alaska Native Claims Settlement Act (ANCSA)* extinguished aboriginal hunting and fishing rights. No law was enacted on protection of subsistence, but the Conference Report stated Native subsistence and subsistence lands would be protected by the State of Alaska and Department of Interior.

1978 - The *State subsistence law* created a priority for subsistence over all other fish and game uses. It did not define subsistence users (e.g., as "rural residents," "Natives," or other).

1980 - The *Alaska National Interest Lands Conservation Act (ANILCA)* required a subsistence priority for rural residents on Federal "public lands." It also said the State of Alaska could manage fish and game on all lands if it enacted a law granting a subsistence priority to rural residents, in compliance with ANILCA.

1982 - The Federal government said the State was in compliance with ANILCA, after the Boards of Fisheries and Game adopted regulations creating a rural subsistence priority.

1982 - *Ballot Proposition 7* to repeal the State's subsistence priority was rejected by voters.

1985 - The *Madison* decision was issued by the State Supreme Court which ruled that the 1978 State law did not specifically allow the Boards to grant a subsistence priority to rural residents.

1986 - The *State subsistence law* (1978) was amended by the Legislature to give a specific subsistence priority to rural residents.

1989 - The *Kenaitze decision* was issued by the Federal appeals court which said the State's definition of "rural" (the economic nature of the community) was not consistent with that of ANILCA (the population of the community).

II. McDOWELL v. STATE DECISION

On December 22, 1989, the State Supreme Court ruled that the State law (1978, amended in 1986) granting a subsistence priority based solely on residency is unconstitutional under the Alaska State Constitution.

The impact of this decision is clear: State law is now out of compliance with ANILCA. The former rules remain in effect until July 1, 1990, as a result of the Supreme Court's stay. After that, if there is no State and/or Federal solution, "dual management" will occur: the Federal government will take over management of fish and game on its "public lands" (more than 60 percent of lands in Alaska), while the State will retain management on State and private lands (including Native corporation lands). Over all, there are four kinds of choices: to amend the State Constitution, to amend ANILCA, to amend both the State Constitution *and* ANILCA, or to do nothing.

III. LEGAL AND POLITICAL OPTIONS FOR SOLUTION

A. AMEND THE STATE CONSTITUTION.

Process: The Alaska Legislature must pass an amendment resolution by 2/3 vote of both houses (at least 27 Representatives and 14 Senators). The amendment must then be approved by a majority of voters in the General Election on November 6.

Substance: At least two major options have been mentioned to date.

1. Amend the State Constitution to allow the Legislature to adopt a law giving a subsistence priority to rural residents, thus complying with ANILCA.

Advantage: This option would leave the current system in place. The State of Alaska could continue to manage fish and game on all lands. This option requires no amendment to ANILCA.

Disadvantage: This option still requires a definition of "rural" (Kenaitze decision). The definition chosen by the Federal District Court might exclude some Native communities from the subsistence priority (particularly the Kenai Peninsula, Southeast Alaska and perhaps some regional centers).

2. Amend the State Constitution to allow the State to retain fish and game management on all lands by permitting the Legislature to adopt laws consistent with valid Federal law (ANILCA).

Advantage: This option holds greater appeal for Alaska legislators and voters, stressing State management rather than allocation priorities. It also leaves the current system of management in place under the State, while requiring no amendment to ANILCA.

Disadvantage: This option still requires a definition of "rural."

B. AMEND THE STATE CONSTITUTION AND ANILCA TO AGREE.

Process: The Alaska Legislature must pass an amendment resolution by a 2/3 vote of both houses (at least 14 senators and 27 representatives). The amendment must then be approved by a majority of voters in the General Election on November 6. The U.S. Congress (both the House of Representatives and Senate) must then adopt an amendment to ANILCA, and this must be signed by the President.

Substance: At least three major options have been mentioned to date.

1. Amend the State Constitution and ANILCA to allow a subsistence priority for Alaska Natives.

Advantage: This option protects Natives' subsistence rights statewide and includes all Natives resident in Alaska. It does not require that "rural" be defined.

cont. on page 8

Disadvantage: This option excludes non-Native rural people who depend on subsistence (many of whom are members of Native families). This may be seen by legislators and voters as a racial distinction.

2. Amend the State Constitution and ANILCA to allow a subsistence priority for Natives and rural residents.

Advantage: This option protects both Native subsistence rights statewide and the interests of other rural residents who depend on subsistence.

Disadvantage: This option may be seen by legislators and voters as a partly racial distinction. It still requires a definition of "rural."

3. Amend the State Constitution and ANILCA to allow a subsistence priority for rural residents and members of identifiable groups with cultures and traditions of subsistence use.

Advantage: This option would probably protect both Native and non-Native rural subsistence rights.

Disadvantage: "Cultures and traditions" might be interpreted in ways which harm Native interests. This option may still be seen by legislators and voters as a de facto racial distinction. It still requires a definition of "rural."

C. AMEND ANILCA.

Process: The U.S. Congress (both the House and Senate) must adopt an amendment to ANILCA, and this must be signed by the President.

Substance: At least two major options have been mentioned to date.

1. Amend ANILCA to conform to the State Constitution, (e.g., permit system or other criteria). NOTE: This would require that a new State law implementing this system be adopted by the Legislature and signed by the Governor.

Advantage: Some urban subsistence users, such as urban Natives, might qualify.

Disadvantage: This option is not certain to satisfy the State Supreme Court's standards of constitutionality. It might also divide villages and Native families, according to the permit criteria chosen. It would be expensive, creating a large new bureaucracy and much paperwork.

2. Amend ANILCA to pre-empt State law, requiring a subsistence priority for particular groups (currently rural residents) on all lands in Alaska. (NOTE: This might be managed directly by Federal agencies or imposed by Congress on implementing State agencies.)

cont. on page 9

Advantage: This option unifies all fish and game management in Alaska under Federal law.

Disadvantage: Politically, it is very difficult to achieve, particularly without the agreement of the State and the Alaska Congressional Delegation.

D. DO NOTHING.

On July 1, 1990, the Federal government (Secretaries of Interior and Agriculture, with the U.S. Fish and Wildlife Service as lead) will take over management of fish and game on its "public lands," while the State of Alaska will have fish and game management on the remaining State and private lands.

UNRESOLVED ISSUES:

1. Will the Federal government manage fish and game on its "public lands" directly (through the Federal agencies) or indirectly (by imposing Federal subsistence priority for rural residents on State agencies)?

2. Will Federal jurisdiction include only federally-owned "public lands," or more than that? Will Federal jurisdiction reach out for migratory salmon in navigable waters or migrating animals on any lands, in order to avoid management chaos?

3. Will the State and Federal management systems have very different regulations, making it difficult for subsistence users to follow? Will confusion and uncertainty lead to community disruption and/or management chaos?

4. How will the Federal government define "rural," and how will this impact the Kenai Peninsula, Southeast and perhaps regional centers?

5. Will the accumulation of problems and resentments from a dual management system have further negative impact on statewide politics and ethnic group relations in Alaska? Will the increased problems and resents be focused on Alaska Natives and the U.S. Congress, and will they lead to a repeal or watering down of federal subsistence law?

NOTE: A fifth strategy (judicial) has already been tried, without success. Both the State of Alaska and AFN petitioned the State Supreme Court to rehear the McDowell case and to reconsider its decision. The petitions were rejected.

UNANSWERED QUESTIONS & CONTINUING LITIGATION

1. Assuming that on July 1, 1990, the State is not in compliance with Title VIII of ANILCA, how did Congress intend the Title VIII subsistence priority to be implemented?

There are two possibilities. The first possibility is that Congress intended the Title VIII subsistence priority to take the place of State law and intended the U.S. Fish and Wildlife Service and other federal agencies to take the place of the Alaska Board of Fisheries and Board of Game. The second possibility is that Congress intended the Title VIII subsistence to take the place of State law, but intended the Alaska board of Fisheries and Board of Game to implement priority (subject to federal oversight). The first possibility results in dual regulation of the same fish stocks and game populations. The second possibility allows regulation of the taking of fish stocks and game populations to be done by one regulator using two legal standards.

2. What is the jurisdiction of the Title VIII subsistence priority?

Section 804 of ANILCA establishes a federal subsistence priority for the taking of fish stocks and game populations on "public lands" in Alaska. 1) What stocks and populations did Congress intend the term "public lands" to include? 2) Does the section 804 priority apply fishing for fish stocks throughout their ranges (for example, to subsistence fishing for a Yukon River salmon stock up and down the entire Yukon River)? Or is the priority just limited to subsistence fishing that occurs on federal land (for example, fishing inside the boundaries of the Yukon Delta Wildlife Refuge)? 3) Similarly, does the section 804 priority apply to game animals only when they are hunted on federal land? Or does it apply to the hunting of game animals everywhere they roam?

3. Which hunters and fishermen did Congress intend the Title VIII subsistence priority to benefit?

Section 803 of ANILCA limits the subsistence priority to hunters and fishermen who are "rural Alaska residents." In 1986, the Alaska Legislature enacted a law that says that "rural Alaska residents" live in communities and areas in which hunting and fishing for food is a principal characteristic of the economy of the community or area. The Ninth Circuit Court of Appeals has held that Congress intended "rural Alaska residents" to be hunters and fishermen who live in locations that are "sparsely populated, where the economy centers on agriculture or ranching." According to the court: "rural is the antonym of urban and includes all areas in between cities and towns of a particular size." Because of the conflict between these definitions - if the Alaska Constitution is amended to give the Legislature authority to enact laws that comply with Title VIII of ANILCA - the State must deal with the question of "rural." Three policy choices have been identified to date:

1) amend the State definition of "rural area" to conform to the Ninth Circuit definition,

2) Congress must amend section 803 of ANILCA to conform to the State definition,

3) or Congress and the State must amend both federal and state law to enact a new, mutually agreed upon "rural" definition.

cont. on page 11

Unanswered questions (cont.)

4. Should the Alaska Legislature pass, and should the voters adopt, a constitutional amendment that authorizes the Legislature to enact laws that comply with Title VIII of ANILCA?

In 1978, and again in 1986, the Alaska Legislature passed laws of general applicability that the Legislature thought established a subsistence priority in Title VIII of ANILCA. ANILCA requires the benefits of the subsistence priority to be limited to "rural Alaska residents." In McDowell v. State, the Alaska Supreme Court held that the Alaska Constitution does not grant the Legislature authority to limit the benefits of a subsistence priority to rural residents." To give the Legislature the authority that the Court has said it lacks, the Governor and several legislators have introduced bills to amend the Alaska Constitution to allow the Legislature to establish a "rural resident" subsistence priority. The important unanswered questions include:

1) Should such an amendment be adopted? If not, should an amendment be adopted that allows the subsistence priority to be limited to Natives, Natives and non-Natives who live in ANCSA villages, or some other group of hunters and fishermen?

2) If such an amendment should be adopted, what is the likelihood that the Alaska Legislature, by a 2/3 vote of each house, would agree to put such an amendment on the 1990 election ballot?

3) And if it were to appear on the 1990 election ballot, what is the likelihood that such an amendment would be approved by a majority of the voters?

COURT CASES

There are a number of cases in the federal and state courts in which subsistence users have challenged a variety of State restrictions on subsistence hunting and fishing practices. Some of the most important of these cases were described below. If the McDowell decision results in a dual management system after July 1, these cases will be affected in different ways.

THE "RURAL" RESTRICTION

Kenaitze Indian Tribe v. Alaska (federal court). In this case, the federal court of appeals threw out the State Legislature's 1986 definition of "rural area" (as a place where subsistence is "a principal characteristic of the economy"). This definition had been used to deny subsistence fishing rights to the Kenaitze Tribe and most other subsistence users on the Kenai Peninsula. The court of appeals ruled that the definition was inconsistent with ANILCA's use of the "rural" classification, and that "rural" must be given its ordinary meaning. The federal district court is now considering whether the entire Kenai Peninsula, or only parts of it, are rural for subsistence proposes.

Last summer, the Kenaitze Indian Tribe was permitted, by a preliminary injunction, to operate a single tribal subsistence fishing net. A similar preliminary injunction for the upcoming season is currently being negotiated between the Kenaitze Indian Tribe and the State. The issue of whether the State or the federal government will have jurisdiction over the Kenai fisheries after July 1 has not yet been raised in this case.

RESTRICTIONS ON "CUSTOMARY AND TRADITIONAL" USES

Kitka v. Alaska (federal court). This lawsuit was filed by residents of Sitka. Although the Joint Boards had determined that Sitka was a "rural area" under the State's definition, the Board of Fisheries, following an approach similar to the approach the Joint Boards follow in making the "rural area" determination, ruled that Sitka residents do not qualify for "customary and traditional" uses of any fish or shellfish species, except sockeye salmon and herring. The Board therefore refused to authorize any subsistence uses of shellfish, groundfish, four species of Pacific salmon, and all other finfish. The plaintiffs have challenged these restrictions as violations of ANILCA; they also allege that they are unconstitutional under the federal Constitution. On its own initiative, the federal court has indicated that it might find parts of the City and Borough of Sitka to be non-"rural."

Sumner Strait Advisory Committee v. Alaska (federal court). In this case a local advisory committee and non-Native residents of Port Protection and Port Baker (on the northwest tip of Prince of Wales Island) challenge the finding of the Board of Fisheries that local residents do not qualify for "customary and traditional" subsistence uses of any species of fish (even though the Board of Game has found that they are entitled to subsistence uses of deer). Plaintiffs allege that the Board's action violates ANILCA. They also allege that the Board illegally refused to follow the recommendation of the regional advisory council.

Bobby v. Alaska (federal court). This is the Lime Village case in which the federal court ruled unlawful the Board of Game's closed-season and individual-bag-limit restrictions on subsistence moose and caribou hunting. The court held that the closed seasons were inconsistent with traditional hunting seasons, and that individual bag limits were in conflict with the communal system of sharing game resources. In response to the court's order, the Board eliminated individual bag limit, replacing them with a community harvest-reporting system (but individual harvest tickets are still required). The Board also eliminated the closed season on caribou, but retained two closed moose seasons. Lime Village has objected to the closed moose seasons and the requirement for individual harvest tickets, and the Board of Game has agreed to reconsider those restrictions at its next subsistence meeting. The hunting grounds of Lime Village include both federal and non-federal lands.

John v. Alaska (federal court). In this case residents of Mentasta and Dot Lake, along with the Mentasta Village Council, have successfully argued that ANILCA requires the Board of Fisheries to allow a subsistence fishery at the historic site of Batzulnetas on the upper Copper River, which has been closed to subsistence fishing since 1964. The court ruled that in refusing to permit the subsistence fishery, the Board had not taken the steps and made the findings necessary under the State subsistence law and ANILCA. The court therefore directed the Board to adopt new regulations consistent with the law. A subsistence fishery was conducted at Batzulnetas last summer under a preliminary injunction, and a new preliminary injunction for this upcoming season is currently being negotiated.

Native Village of Dot Lake v. Alaska & Kluti Kaah Native Village of Copper Center v. Alaska (federal court). These cases were filed the first week of January this year when the Alaska Department of Fish and Game, after the McDowell decision came down, issued emergency orders closing the winter Dot Lake subsistence moose hunt and the winter Nelchina subsistence caribou hunt. The hunts were reinstated when the Alaska Supreme Court stayed the effect of its McDowell decision until July 1. The plaintiffs in both cases allege that existing restrictions on their subsistence hunting violate ANILCA; they also allege that they have a constitutional right to engage in subsistence hunting. The Dot Lake moose hunting grounds include mostly non-federal lands, whereas subsistence hunting of the Nelchina caribou herd takes place on both federal and non-federal lands.

Continuing Litigation

Morry and Kwethluk IRA Council v. State (State court at Barrow). In this case a resident of Anaktuvuk Pass and the Kwethluk Tribe challenge, under both ANILCA and the State subsistence law, the $25.00 tag fee and the hide and skull sealing requirements as applied to the subsistence hunting of grizzly bears. The bear hunting grounds of both villages include mostly federal lands.

CUSTOMARY TRADE

Tanana Fish and Game Association v. Alaska (federal court). In this case the people of Tanana challenge a Board of Fisheries regulation which prohibits them from selling the roe from Yukon River salmon lawfully taken for subsistence uses. The bulk of this incidental by-product is otherwise wasted. The Village fish and game association argues that limited exchanges of this incidental roe for cash qualifies as "customary trade" within ANILCA's definition of subsistence uses, and that the State therefore cannot lawfully prohibit this trade. The association has developed a program to regulate and limit the roe trade. The local advisory committee adopted the program, but the Board of Fisheries rejected it. the issue whether the Yukon River subsistence salmon fisheries should be managed by the State or the federal government has been raised in this case.

United States v. Sakurai (federal court). In this federal criminal prosecution under the Lacy Act for selling herring roe-on-kelp, the court dismissed the charges against two residents of Hydaburg, who had earned $7,000 to $9,000 for such sales during each of the previous two years. The court ruled that such sales were "customary trade" within the meaning of ANILCA, and that the amounts involved did not constitute a "significant commercial enterprise."

SUSTAINED YIELD

Kwethluk IRA Council v. Alaska (federal court). This case was filed after the Board of Game in March rejected an emergency petition from the Kwethluk Tribe for an immediate, limited subsistence hunt of the Kilbuck Mountains caribou herd. The Board attempted to base its decision on the sustained yield principle. Last week the federal court granted a preliminary injunction requiring the State to make available to the Tribe between April 5 and April 15 a subsistence hunt, with a quota of 50 caribou. The court rejected the Board's sustained yield determination because the State did not have a game management plan for the Kilbuck herd and the Board had not adopted "an articulated and evenly applicable definition of sustained yield." The court criticized the Board for acting "in an *ad hoc* fashion, as though it had unfettered discretion to decide what meaning it would attribute to the sustained yield issue in any particular case." The court found that a hunt of 50 animals would not adversely affect the herd, and that Kwethluk had demonstrated an urgent need for the meat.

Tlingit and Haida Central Council v. State (State court). In this recently filed case, individual Tlingit and Haida Indians and Tlingit and Haida Central Council challenge the State's management of sea cucumbers harvests in Southeast Alaska. They allege that the State is mismanaging this resource by allowing commercial harvests in violation of the sustained yield principle, to the detriment of long-established subsistence uses of sea cucumbers throughout the region.

THE FOLLOWING BILLS have been introduced by various legislators and the Governor in an attempt to provide a legislative solution to the current situation regarding subsistence. They are listed in order of when they were introduced. For more information on these proposals please contact the bill's sponsor.

SPONSORED BY REP. RAMONA BARNES

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 415
IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - SECOND SESSION
A BILL

For an Act entitled: "An Act relating to subsistence hunting and fishing." BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 16.05.258(a) is amended to read:

(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].

* Sec. 2. AS 16.05.258(c) is amended to read:

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a 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 on the basis of their [, 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 the

(3)] availability of alternative resources.

* Sec. 3. AS 16.05.258 is amended by adding a new subsection to read:

(g) Methods and means employed in the pursuit, capture, and transport of fish or game for subsistence use may not include

(1) motorized vehicles, including motorized boats, aircraft, snow machines, trucks, and automobiles;

(2) poison or a similar substance;

(3) explosive devices or charges that could affect more than one animal at a time;

(4) gill nets, seines, or long lines;

(5) traps or snares that the Board of Fisheries or Board of Game determines to be inhumane.

* Sec. 4. AS 16.05.940(29) is amended to read:

(29) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses with a dip net, spear [GILL NET, SEINE], fish wheel, [LONG LINE,] or other means defined by the Board of Fisheries;

* Sec. 5. AS 16.05.940(30) is amended to read:

(30) "subsistence hunting" means the taking of, hunting for, or possession of game [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses by means defined by the Board of Game;

* Sec. 6. AS 16.05.940(31) is amended to read:

(31) "subsistence uses" means the noncommercial, customary, and traditional uses of wild, renewable resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption living in the same household, and a person living in the household on a permanent basis;

* Sec. 7. AS 16.05.940(26) is repealed.

SPONSORED BY REP. GEORGE JACKO, REP. PETER GOLL

HOUSE JOINT RESOLUTION NO. 74

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to a preference for subsistence use of fish and wildlife and state-owned renewable natural resources.

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.

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

INTRODUCED BY GOVERNOR COWPER

HOUSE JOINT RESOLUTION NO. 88 IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife by rural residents.

BE IT ENACTED 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 USES OF FISH AND WILDLIFE. Nothing in this constitution prohibits the legislature from limiting the taking of fish and wildlife for subsistence uses to rural residents, and from providing for the allocation of that taking among rural residents on the basis of local or community residence, availability of alternative resources, and customary and direct dependence on a fish or wildlife population as the mainstay of livelihood.

* Sec. 2. The intent of the amendment proposed by this resolution is to validate, ratify, and reinstate any provisions of the new statutes and amendments enacted by ch. 52, SLA 1986, and of any regulations adopted under those statutes and amendments, which otherwise might have to be declared invalid under the Alaska Supreme Court's decision in McDowell v. State, 785 P.2d 1 (Alaska 1989), and to explicitly reverse the effect of the McDowell decision as to those provisions and regulations.

* Sec. 3 The amendment proposed by this resolution, and the intent of the amendment as set out in this resolution, shall be placed before the voters of the state as one ballot proposition at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the State.

SPONSORED BY REP. KAY WALLIS

HOUSE JOINT RESOLUTION NO. 90
IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of plants, fish, and wildlife by rural residents.

BE IT ENACTED 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 USES OF PLANTS, FISH, AND WILDLIFE. Nothing in this constitution prohibits the legislature from limiting the taking of plants, fish, and wildlife for subsistence uses by rural residents, and from providing for the allocation of that taking among rural residents on the basis of local or community residence, availability of alternative resources or cultural, traditional, and customary uses of plants, fish, or wildlife, or dependence on plants or fish or wildlife population as the mainstay of livelihood.

* Section 2. The amendment proposed by this resolution shall be placed before the voters of the State of Alaska 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.

REP. LYMAN HOFFMAN'S PROPOSED AMENDMENT TO HB88 - GOVERNOR COWPER'S PROPOSAL

Section 19. RETENTION OF FISH AND WILDLIFE MANAGEMENT BY THE STATE. Nothing in this constitution prohibits the legislature from enacting laws relating to the allocation for subsistence uses of fish and wildlife and wild renewable natural resources which are consistent with valid federal laws in order to retain management authority over such resources by the State of Alaska.

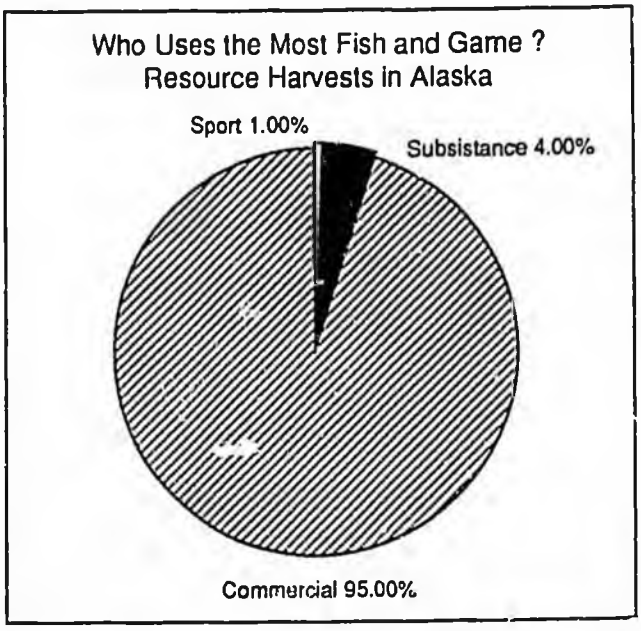
APPENDIX

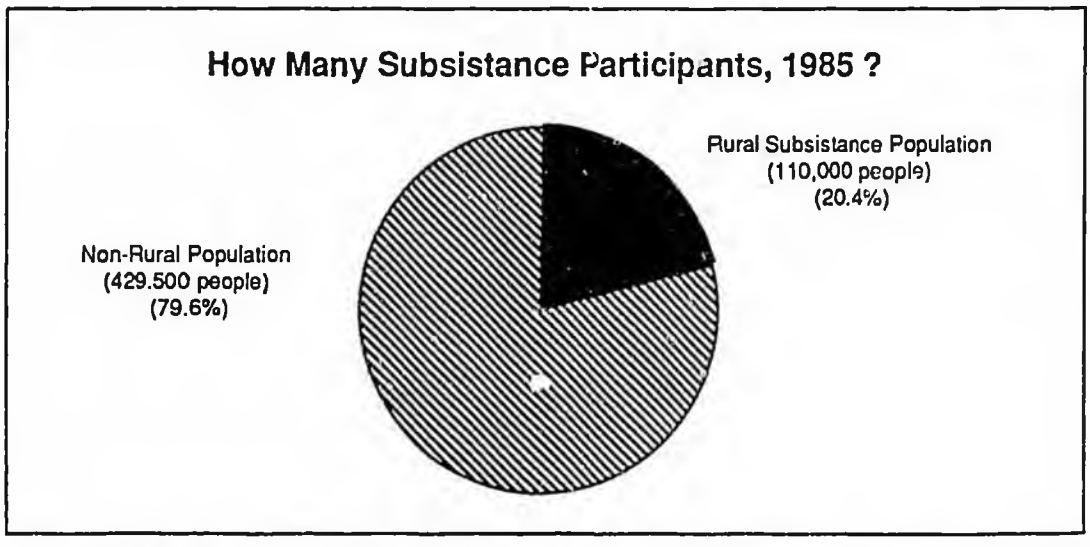
Does subsistence take most of Alaska's fish & game?

" As a general rule, no. Commercial fishing outstrips subsistence many times. In Alaska in 1986, commercial fisheries harvested about 908,500,000 pounds of salmon, halibut, herring and shellfish. This compares with a harvest of 40,305,449 pounds of subsistence foods and 7,072,046 of sport-caught fish and game. Thus, commercial fisheries took 95 percent, subsistence took 4 percent, and sport took 1 percent of the total statewide harvest. (This does not include commercial ground fish harvests, which totaled 2,995,200,000 pounds.)

Of course, the proportions vary by area. In the areas with roads, the sport harvest is usually larger than the subsistence harvest. In the areas without roads, the subsistence harvest is larger than the sport harvest. But commercial fishing is the clear leader in overall volume."

SOURCE: Alaska Fish & Game Magazine.



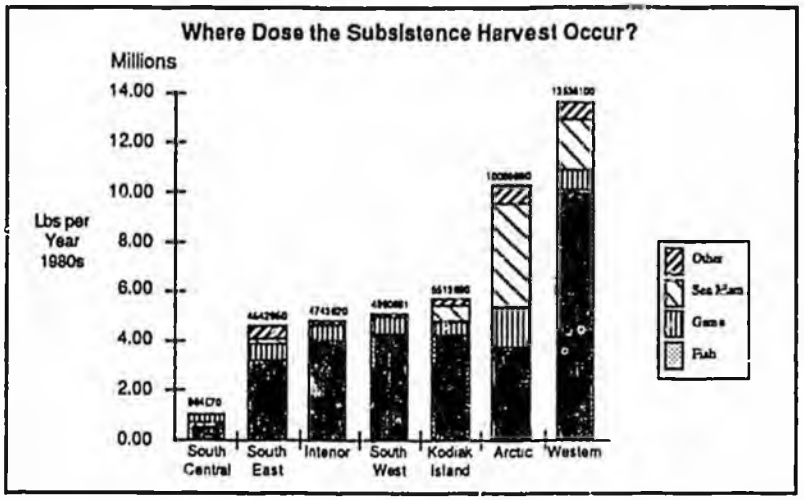


How many people participate in subsistence? " During the 1980s, our best estimate is that there were about 110,075 people in about 225 communities who participated in subsistence practices to some degree. Of these, about 50,000 were Alaska Native, and about 60,000 were not Alaska Native.

This represents the number of people living in rural areas having subsistence uses, as determined by the Boards of Fisheries and Game under the laws and regulations that existed during the 1980s. By comparison, there were about 429,500 non-rural residents, who could hunt and fish under sport, commercial, and personal use regulations, but not under subsistence regulations (Fig. 1). "

SOURCE: Subsistence in Alaska: A Summary, Division of Subsistence, Alaska Department of Fish & Game, February 26, 1990.

APPENDIX



Where does the subsistence harvest occur?" Subsistence uses occur in all regions of the state. The largest annual harvests occur in the Western Region (about 13.5 million pounds) and Arctic regions (about 10 million pounds). Other sizable non-commercial harvests occur on Kodiak Island (5.5 million pounds), Southwest Region (5.0 million pounds), the Interior Region (4.7 million pounds), and the Southeast Region (4.5 million pounds). The smallest harvest occurs in the Southcentral Region (.9 million pounds), primarily in the Copper River Basin, Tyonek, English Bay and Port Graham (Fig. 3)."

SOURCE: Subsistence in Alaska: A Summary. Division of Subsistence, Alaska Department of Fish and Game, February 26, 1990.

PUBLIC HEARING NOTICE: The Joint House and Senate Resources Committee of the Alaska State Legislature is holding a Public Hearing at the AFN Subsistence Conference, Wednesday, April 11 from 5:30 to 9:00PM (see conference agenda, page 5). The hearing will take place in the Summit Room of the Egan Convention Center, on the lower level.

Although we realize this is short notice, this hearing is of GREAT importance to Alaska Native people. The Joint Committee needs to hear your views and testimony on various bills, proposals and options being considered by the Legislature.

We strongly urge you to attend and to present your views. Depending on the number of participants, testimony may have to be limited to 3 minutes per person. However, WRITTEN TESTIMONY IS WELCOME. If you have had time to prepare written testimony, please mail it to the Alaska State Legislature, Joint House/Senate Resources Committee, P.O. Box V, Juneau, AK 99811.

INDIGENOUS RIGHTS, JURISDICTION AND COLONIAL INTRUSION IN ALASKA

A Brief Overview

Prepared by: Alaska Rights Consultants Tribal Organization
of Chickaloon Village
P.O. Box 1105
Chickaloon, AK 99674
(907) 745-0505

INDIGENOUS RIGHTS, JURISDICTION AND COLONIAL INTRUSION IN ALASKA: A brief historical overview

To begin to understand the rights of Alaska's Indigenous Peoples, the Athabascan, Tlingit, Haida, Aleut, Yupik, Inupiat[1] one most go as far back in history as possible, remembering that for ten's of thousands of years we existed as self-governing Sovereign Nations, living in harmony with the land and sea, upon which we depended for our very existence.

The impact of colonial intrusion began with the Russian occupation of the coastal areas of Alaska, and continued with the Treaties made between the United States and Russia.[2]

A crucial fact about these Treaties is that they were not, first and foremost, land transfer Treaties. Instead, they were mainly barter and trade agreements,[3] which eventually lead to the removal of all Russian occupation of the North American Continent. The Treaties made with Russia over their relinquishment of trading rights along the West coast of North America were first signed in the 1820's. At this time Russia was trading as far south as what is now

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1. Tsimpsian People are not referred to in the information because they are the only Indigenous people of the land that the United States recognizes as having an actual reservation and they came to Alaska around the 1930's.
2. The treaties of 1824, 1832, 1854, 1867, and 1868 effected Russia trade routes etc. along the West coast of Continental United States.
3. Ibid. Treaties with Russia compiled in the United States Statutes may be found at the State of Alaska Court House 303 "K" Street Anchorage, Alaska).

known as Mexico under the Russian American Trading Company.[4]

Most of Alaska Indigenous People's major problems began after the 1867 Treaty of Cession was signed by the two countries, giving rise to United States occupation of Alaska.

The Alaska Natives in the Treaty of Cession were referred to as "uncivilized" for the most part. There were some Natives, referred to as "civilized" in the Treaty, who were held as slaves or servants by the Russian American Trading Company mostly around the coastal trading posts [5].

The Treaty of Cession in reality was the purchase of the right to trade in Alaska by the United States for $ 7.2 million.[6] The Memorandum Descriptive "Marked AA" (Kostlivtzov Memorandum) of 1867 documents the prior status of Alaska Natives ownership (as Caretakers) of Alaska.[7] The Kostlivtzov Memorandum outlines the limits of the actual land purchased by the U.S., basically consisting of the land occupied by the fort at Sitka and the trading posts of the Russian American Trading Company, totalling approximately 550[8] acres.

At no time did Alaska Natives or any foreign power sign any Treaty and/or agreement giving the United States

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4. Which is alive and well today in bush villages under the name of the Alaska Commercial Company (AC Company).
5. 1950 Report titled "Russian Administration and the Status of Alaska Native"American Trading Company Charter
6. Russian American Company Charter 1844 and Treaty of Cession 1867.
7. This document has been concealed from the Alaska Natives during all the United States occupation of Alaska.
8. This figure was taken from the Kostlivtzov Memorandum. 117600 sq. ft. multiplied by 200 possible trading posts. 44000 sq.ft. equal 1 acre) (117600 / 44000 = 2.67 acres X 200 = 534.54 acres) approximately. total acres in Alacka 365 million

ownership or jurisdiction to the rest of more than three hundred million acres of land in Alaska.

Included in the 1867 Treaty was the obligation, which the United States accepted upon signing, to obtain the consent of the Natives in Alaska in regards to any future interactions with them or any appropriation of their lands.

After 1867, the U.S. claimed Alaska as its "territory", although there existed no legal basis for this claim. Shortly thereafter the U.S. government divided all of Alaska into twelve (12) geographical areas, assigning a different Christian denomination exclusive operating rights in each, in order to convert and colonize the Natives. Railroads and roadways were constructed by the federal government. Land appropriation and resource exploitation by the federal government and American settlers, miners, commercial fishermen, farmers, trappers, timber harvesters, etc. increased. Alaska became a major military base of operations for the U.S., as increasing numbers of military personell were imported.[9]

As a result of the influx of settlers, diseases killed large numbers of Natives (there is documentation that diseases have been and continue to be purposely introduced in some communities to this day). Large numbers of Native children were forcibly removed from their villages, and were sent to government or church-run boarding schools both within and outside of Alaska. The political, cultural and economic self-determination once enjoyed by our Peoples was seriously

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9. U.N. Charter Article 73e Transmition of information.

undermined during this "territory" phase of our history.

When United States became signatory to the United Nations Charter in 1945, it accepted the "sacred obligation" to bring the inhabitants of it's "non self governing territories", which included Alaska, Hawaii, Guam and others, up to self government.[10] Instead, in violation of this sacred agreement, the U.S. instituted statehood in Alaska, bringing us further away from, rather than closer to, the self-governing status to which we have always had a right.

In 1950, Mr. Felix Cohen[11] wrote a series of letters to the President of the United States, Secretary of the Interior, and the Alaska Native Brotherhood, asking for protection of remaining Native fisheries, timber, minerals, and homes from "white settlers". Instead, in 1958 the U.S. authorized the creation of the State of Alaksa, through which these settlers instituted a governmental apparatus run by themselves for their own advantage, and imposed it upon the Native traditional goverments. Great numbers of Alaska Natives were denied the right to vote in the Statehood referendum because of a law mandating english speaking as a prerequisite and criteria for voters.[12]

A strong turnout of settler voters was insured by allowing military personell to vote as residents anywhere else in the U.S.. With the discovery of major oil deposits in Alaska in 1968, the multi- national energy corporations,

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10. U.N. Charter, Article 73 Non Self-Governing Territories.
11. Author of the Handbook on Federal Indian Law.
12. Alaska Legislature House Joint Resolution 51, of 1970.

along with the State and federal governments, pushed for a means to "clear title" to Alaska's lands away from the traditional and still legal owners, the Indigenous Peoples. The result was the Alaska Native Claims Settlement Act (ANCSA), passed by the U.S. Congress on December 18, 1971. ANCSA was an act of Genocide[13] perpetrated against the Indigenous Peoples of the the North American Continent and institutionalized as federal law, once again without the consent of the vast majority of the Alaska Native Peoples. The State of Alaska, the Federal government and the multi-national energy corporations were the major beneficiaries of ANCSA, while the Indigenous Peoples lost more than 330,000,000 acres of our traditional land base, had profit-making state chartered corporations imposed upon us, and who were denied any land rights to all Native chilren born after 1971.

Although the text of ANCSA denies that it was "a jurisdiction act",[14] it nevertheless claimed to terminate traditional Native hunting and fishing rights, placing it in direct conflict with the inherant rights of Alaska Natives to exert jurisdiction over their own subsistence [illegible]s.

Many Alaska Native Villages (including Chickaloon) refuse to except the valididy of ANCSA because the vast majority of Alaska Natives never had the opportunity to vote or otherwise approve the Act. The persons who voted in favor

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13. Genocide as defined by the United Nation is "an intent to destroy in whole or in part, a national, ethnical, racial, or religious group."
14. Alaska Native Claims Settlement Act Public Law 92-203, Section 2f.

of accepting ANCSA at the Alaska Federation of Natives Convention in 1971 (used as the "proof" of Native acceptance of ANCSA by the U.S. government) did not legally represent the vast majority of Native Alaskan's. [15]

In 1991 the provisions of ANCSA will go into full effect, and many villages may lose what is left of their land base through taxation, sale of "Native corporation" stock to non-Natives, confiscation of lands for corporate debts, and other forms of so-called legal land theft provided for by ANCSA and its amendments. Transfer of "corporation" lands to tribal governments is the only protection for Alaska Natives, but this option is not being presented to the villages by governmental, corporate and/or state-chartered organization officials who claim to have our interests at heart.

Similarly, great numbers of these same government officals and corporate representatives are currently invovled in presenting "options" to Native communities regarding the preservation of our Subsistence rights. The proposal of a State constitutional ammendement as a solution is another example of a campaign of misinformation, and would result in placing Native communities more directly under the thumbs of the those who claim the right to impose their authority over us while they continue to approprate our resources as they see fit.

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15. Under Freedom of Information Act we learned the U. S. Dept. of Interior violated many Federal Statutes by not having provided a vote in each and every village to relinquish lands or jurisdiction to the U.S.A. or the State Of Alaska.

The fact is that, upon its formation, the State of Alaska disclaimed any jurisdiction over Indian lands, including fishing rights. This "disclaimer clause" is written into the State of Alaska Constitution as follows: "The State of Alaska and its people shall disclaim any and all Lands owned, occupied, and/or claimed by Natives of Alaska, including fishing rights FOREVER)". [16] Meanwhile harassment, and arrests of Native hunters and fishers by State Fish and Game continues, in violation of the State's own constitution.

Amending the Constitution to authorize more State control over our way of life would result in a further denial of our right to self-determination and self-government.

This is the one option not being presented by the State, federal and corporate representatives currently debating the issue of our Subsistence rights -- our basic and fundamental right to assert our sovereignty and self-determination in the area of subsistence as well as in all areas of our lives. This is a right we have never given up or relinquished, just as we have never given up or sold our lands to any government.

The Federal Government recognizes at least some of our Traditional Governments (Chickaloon is one example), [17] but the State of Alaska continues to contest every assertion of sovereignty by the Traditional Tribal Governments. Although the State of Alaska is Public Law 280 State, and uses this law to justify its jurisdiction over Natives (in direct

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16. State of Alaska Constitution, Article XII, Section 12.
17. See Federal Register Vol. 51, No. 132, July 10, 1986.

contradiction to its own Constitution), it continues to fail to comply with the terms of the Indian Civil Rights Act of 1968 which and mandates that PL 280 states obtain the consent of the enrolled adult members of each tribe, band, group, village, etc, before any decision can be made affecting Indian lands, jurisdictional rights, etc.[18]

It can be clearly seen that at the heart of the problems of our Native Peoples in Alaska is this crucial historical reality: the United States Government has not fulfilled its sacred obligation towards the inhabitants of Alaska,[19] nor has it or the State of Alaska ever obtained the consent of Alaska Natives to appropriate our lands, assume jurisdiction over us, or to otherwise intrude into our way of life.

This brief overview is not intended as a detailed legal or historical analysis but rather as an introduction to certain trends and perpectives which continue to effect our lives as Native Peoples and Nations in Alaska. In closing, we have included the following chronology of the laws, acts and other significant events which have had a profound effect on the lives of Alaska's Indigenous Peoples since the beginning of colonial intrusion. Reference materials and historical documents are available to those wishing to learn more about this chain of events and its effects upon our Peoples.

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18. See 25 CFR 1.4 State and local regulations of use, and 30 CFR 229.105, Evidence of Consent, 30 CFR 229.106 withdrawl of consent
19. Ibid at 10.

1867 Treaty Of Cession
1871 U.S.A. Ending of Treaty Making with Indigenous Nations
1884 Alaska was divided up by the "Missionary Christian Churches"(See Eskimo Administration by Diamond Jennings)
1884 District Organic Act
1906 Native Allotment Act
1924 Indian Citizenship Act
1936 Indian Re-organization Act was extended to Alaska (IRA)
1945 United States Signed United Nations Charter (Art. 73)
1953 Public Law 280 1958 Alaska Statehood Act sec. 4.
1959 Alaska became the 49th State of the United States
1968 Indian Civil Rights Act amending PL 280 (ICRA)
1968 Oil was Discovered on the North Slope at Prudoe Bay
1970 State of Alaska removed the english speaking Prequiste to vote in Alaska.
1971 Alaska Native Claims Settlement Act (ANCSA)
1975 Indian Self-Determination and Educational Assistance Act
1976 Federal Land Policy and Management Act (FLPMA)
1978 Indian Child Welfare Act (ICWA)
1980 Alaska National Interest Lands Conservation Act (ANILCA)
1982 Indian Tribal Governmental Tax Status Act (ITGTSA)
1982 Alaska Railroad Transfer Act
1984 Indian Tribal Governmental Tax Status Act (amendments)
1986 Recodification of United States Code title 25 "Indians"
1988 ANCSA "1991 Amendments"
1988 Genocide Act (Proxmire Act) ratified by U.S. Congress
1989 Investigation of the Alaska Offices of the Department of Interior by the Senate Select Committee on Indian Affairs.

SUBSISTENCE

By Lincoln Tritt

As money is important to the dominion society, so too is subsistence which defined in our term is the foundation on which the existence of the native is based, it is the essence of our moral, personal, social and economic values.

The material values, brought on by the Land Claims and by the pipeline are not understood by the native people. For this reason, it has already damaged our society through alcohol, drugs and suicides etc.. If we lose our subsistence rights, it will only enhance the problems of an already disrupted native society.

Even now, the concept of subsistence is used in alcohol and drug programs in the interior with more sucess than other programs. Subsistence is not only the right to hunt and fish, but more for the existence of natives as people.

Most issues are dealt with in the arena of the dominion society, so the issues are generally one-sided and the depth of our concerns are not understood. The State Constitution in its present form has the potential to destroy our people.

Native leadership in urban settings have more recognition than rural. Since such groups have adopted the life of urban structure they can afford to give concessions that rural natives cannot afford to give.

Following procedures and policies of the dominion society are also foreign to the native understanding of the situations.

In closing, I wanted to request that these important facts are taken into consideration when dealing with the subsistence issues.

SUBSISTENCE SUMMIT CONFERENCE
Alaska FEDERATION OF NATIVES
RESOLUTION NO. 90-1
APRIL 11, 1990

ENTITLED: Alaska NATIVE SUBSISTENCE RIGHTS:
AN AFFIRMATION AND A STRATEGY

WHEREAS, the Alaska Federation of Natives, constituted of Regional Corporations, Regional non-profit organizations and other affiliated groups from throughout Alaska, represents those entities and communities in advancing their subsistence rights and interests; and

WHEREAS, approximately four percent (4%) of all fish and wildlife harvested in Alaska is taken by subsistence users; and

WHEREAS, less than one percent (1%) of salmon harvested in the State is taken by subsistence users; and

WHEREAS, in the 1980s, 50,000 Natives and 60,000 non-Natives were subsistence users; and

WHEREAS, approximately 40,000 urban Natives are deprived of their subsistence rights; and

WHEREAS, under ANILCA, the determination of priority subsistence rights among resource users is made only when it is necessary to restrict the taking of populations of fish and wildlife in order to protect the continued viability of such populations; and

WHEREAS, Congress declares that the continuation of 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; and

WHEREAS, as identified in Alaska Native Health Service studies, Alaska Natives may be adversely affected by the unavailability or scarcity of traditional foods and changes in Native lifestyle; and

WHEREAS, Title VIII of ANILCA was enacted in part to fulfill the unmet subsistence oriented requirements and purposes of ANCSA and to essentially protect the cultural and traditional Alaska Native lifestyle;

NOW THEREFORE BE IT RESOLVED that the Alaska Federation of Natives is directed by the delegates herein assembled at the Subsistence Summit Conference to adopt as its principal direction and recommends to all appropriate Native organizations the following:

-- Act to continue to support the inherent Native rights to subsistence resources and uses.

-- Act to gain approval of an amendment to the Constitution of the State of Alaska that allows the State to exercise management jurisdiction over all fish, wildlife, plant and other renewable natural resources within its boundaries and provides that the State shall exercise management of subsistence resources therein in accordance with applicable federal law.

-- Act prior to July 1, 1990, to have the State of Alaska review and revise as necessary all State subsistence statutes, policies, regulations, programs and practices in every area of State jurisdiction in order to establish an overall subsistence management regime that is responsive to the true subsistence needs of affected Alaskans. Such review and revision shall include representation from Native organizations that represent those Alaskans directly affected. This review shall seek to establish a definition of "rural" which includes as many Alaska Native people as possible and that the State administration adopt a subsistence system for individuals not in "rural" areas who can demonstrate traditional and customary utilization of natural resources. Such review and revision shall be undertaken with the fundamental intent to allow those Alaskans who by custom, tradition, location, and circumstance have practiced subsistence use of Alaska's resources up to the present and will in the future, to do so in an appropriately responsive, sensitive, comprehensive, timely and continuing manner.

-- Act immediately to request and to take action to involve affected Native organizations directly and fully in development, promulgation and implementation of any federal subsistence management regime developed for federal lands in the event State management is terminated. Native organizations shall resist, with all possible

force, any attempt by the State of Alaska to contract with the federal government for any role in managing federal lands for subsistence uses. Tribal contracting for management of federal lands for subsistence uses will be strongly supported.

-- Act to initiate a vigorous campaign to educate and familiarize public officials and legislators with all aspects of subsistence resources and uses.

-- Act to initiate a vigorous registration campaign across the State of Alaska.

BE IT FURTHER RESOLVED that all Native entities and organizations shall withdraw after July 1, 1990, their support for State subsistence management on federal lands and for a State constitutional amendment if there is not a satisfactory resolution pursuant to the review and revision of State subsistence management requested herein; and

BE IT FINALLY RESOLVED that in the event of the above withdrawal of Native support, all affected Native organizations shall pursue with all appropriate resources any and all legal and Congressional actions to secure their rights to Alaska's subsistence resources and uses.

Passed and approved this 11th day of April, 1990, by delegates to the AFN Subsistence Summit Conference.

Julie E. Kitka
President

SUBSISTENCE SUMMIT CONFERENCE
ALASKA FEDERATION OF NATIVES
RESOLUTION NO. 90-2
APRIL 11, 1990

ENTITLED: ALASKA NATIVE SUBSISTENCE RIGHTS: A PRIORITY FOR ALASKA NATIVE TRIBAL MEMBERS

WHEREAS, Alaska Native tribes have managed fish and game in their traditional areas since before anyone can remember, and both the Native people and the animals benefited from tribal management; and

WHEREAS, members of Alaska Native tribes today, and in the future, rely on the right to harvest subsistence resources to nourish their bodies, and for the survival of their culture; and

WHEREAS, the only way to guarantee subsistence rights for members of the Alaska Native tribes is for tribal members to be given a priority to harvest subsistence resources on all lands in Alaska that they have traditionally and customarily used;

NOW THEREFORE BE IT RESOLVED that Native tribes and organizations will work in the long-term to gain a subsistence priority for Alaska Native tribal members, and to affirm the power of Alaska Native tribes to manage and regulate subsistence uses by their members.

Passed and approved unanimously by the delegates to the AFN Subsistence Summit Conference this 11th day of April, 1990.

Julie E. Kitka
President

SUBSISTENCE SUMMIT CONFERENCE
ALASKA FEDERATION OF NATIVES
RESOLUTION NO. 90-3
APRIL 11, 1990

ENTITLED:

WHEREAS, the McDowell v. State decision by the Alaska Supreme Court puts the State out of compliance with the federal subsistence preference found in Title VIII of ANILCA and will lead to a federal assumption of fish and game management authority on federal lands in the State after July 1, 1990, unless the law is changed; and

WHEREAS, there is a substantial doubt that the law can be changed in time to avoid federal takeover of fish and game management on federal lands; and

WHEREAS, joint State and federal planning for implementing a dual fish and game management system in the State after July 1, 1990, has taken place without participation or over consultation with the Alaska Federation of Natives or other Native organizations; and

WHEREAS, the sound management of Alaska's fish and game resources is inseparable from Native culture and tradition and must be protected by all possible means; and

WHEREAS, Representative Lyman Hoffman has proposed a State constitutional amendment which would allow the State to manage subsistence resources in accordance with federal law and retain fish and game management authority on federal lands.

NOW THEREFORE BE IT RESOLVED that the body assembled herein directs the Alaska Federation of Natives to work towards amending the State constitution to allow the State to manage subsistence resources consistently with federal laws and retain fish and game management authority on federal lands.

Passed and approved unanimously by the delegates to the AFN Subsistence Summit Conference this 11th day of April, 1990.

Julie E. Kitka
President

1990

Constitution Convention

Memorandum of Record

In view of the ANILCA threat of Federal "take over," the over whelming need for this new constitution is self-evident.

Supporters, of Rep. Lyman Hoffman's HR? which spawned the new Declaration of Wrongs "Say it would give Legislators flexibility in responding to federal laws, while also preserving state management rights." Rep. Curt Menard said "It's the best I've seen that would be close to acceptable in my district,"

Compliments of a: Anti Supreme Court/McDowell Constituency

THE NEW REVISED EDITION

of the complete

ALASKA

Declaration of Independence

and

State Constitution

1990

Take with a grain of salt - smile - and see your Legislator in the morning.

11 April 1990

Joint House of Senate Committee of
Resource Hearing on Subsistance

For the past 10 year I have been wrong. The full power and resources of the US and State of Alaska has been used to prove and keep me wrong. Millions of dollars have been spent to make me wrong by passing laws, regulations and policy and then lobbying for their revision as soon as they were contested and or found invalid. The full use of propaganda in news releases, advertizements department memos and studies, supression of facts, misuse of public funds and out right lies, was the political pressure for such expenditures. Complete public Advisory Boards and a Commissioner of Fish and Game were fired, enforcement officers were transferred, government aids were censured, legislators lost elections, agency employees were harassed into early retirement and violators were selectively prosecuted or released to uphold the intent of

prioritized discrimination, secret law suit negotiations, federal and State policy and regulations used with selectively applied threats and were all the norm. They used State and federal attorneys, legislators, congressional delegations, agency personal socialigist, biologist and expert experts. They unilaterally determined the valueless ness of my customs, traditions, ancestory, origin, lifestyle, family membership, dependency, residency, uses, methods, means and all known and unknown characteristics of my culture. I like every individual person have these human characteristics in a variation of diversities. But I found out that all of my character was wrong. Each part counted for nilch and the sum total was absolute zero, not because of what I could or should do, and in no way by the past, present and future would my considered personal individual character ever be right.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

1990
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PREAMBLE

we the people of Alaska, grateful to God and those who fathered this simple document; to secure and transmit a diversity of preference, priority, privilege, prejudice and transmit to all succeeding generations a heritage of a more divided class society; and in order to once again secure full (Federal) control of our own destiny, do ordain and establish this constitution for the State of Alaska.

ARTICLE I

Declaration of ~~Rights~~ Wrongs

SECTION 1. There is nothing in this State constitution that prohibits the Legislature from passing any laws as long as they comply with Federal law.

11 April 1990

Joint House of Senate Committee of
Resource Hearing on Subsistance

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prioritized discrimination, secret law suit negotiations, federal and State policy and regulations used with selectively applied threats and were all the norm. They used State and federal attorneys, legislators, congressional delegations, agency personal sociologist, biologist and expert experts. They unilaterally determined the valueless ness of my customs, traditions, ancestory, origin, lifestyle, family membership, dependency, residency, uses, methods, means and all known and unknown characteristics of my culture. I like every individual person have these human characteristics in a variation of diversities. But I found out that all of my character was wrong. Each part counted for nilch and the sum total was absolute zero, not because of what I could or should do, and in no way by the past, present and future would my considered personal individual character ever be right.

I moved from being wrong as a resident of Anchorage, that Federal cited largest population urban community and continued to be just as wrong as a resident of the Kenai Peninsula, that State cited largest area urban community of Alaska. And then when this urbanized classification was found to be illegal, it was legally made the largest land base educational fishery in the world. But I was denied the educational opportunity because of a weighted ethnic identity. Even the mixture of my indigenous identities in the human race were all wrong.

As you may have heard, in the real world, some are said to be "more equal" than others, but in Alaska some people have more equal" personal cultural characteristics than others. To some this may not sound so bad, but it makes me wrong by law and I can never change to be equally right

But wait, after 10 years I am right, not wrong but now I am Constitutionally legally right. Full blown, legally certified, court ordered, unbelievably right. Not better, not worse; but equally, yes equally right. My gosh I even expected the Governor to call me in, put his arm around my shoulder and say, you are right and this State is now committing its resources to defend your rights and those who have sucessfuly wished to keep you wrong must now spend their own private resources to try to again invalidate you rights. But where my past, of 10 years of being unchangably wrong, was a night mare; my present expectation of being equally right is only a dream.

And now again All Federal and State resources, are to be used to foster the Federal take over threat; to justify those demands

to remove the Constitution's protection of common use equality for All Alaskans by making them invalid by amendment. Again my individual cultural character will be wrong wrong wrong and can no longer be made legally equally rights.

Who am I, I am the majority of Alaskans, I am the 25% who live in the wrong place, have the wrong culture, the wrong tradition, the wrong ancestory, the wrong individual and group character diversities. And again we can not justify, to the elders of our past, our peoples of the present or the children of the future the desire for equality for all. But others can again because of their elders of the past, their cultural qualified diferrences of the present and the cultural inheritances of their descendents they justify demanded self-interest priorities

and preferences.

I may never gain the equality I seek for all people, but I will never be the passive lackey of the legacy of continued injustic. Those who demand this Constitutional amendment are the bequester of such a legacy of qualified priorities and a classified society.

In closing I propose that the sociologist, of the Subsistence Section make another objective study; this one of the lemming type exit of the thousands of residents, from the ANILCA cited urban Anchorage, in their annual migration to the Russian River fisheries. I would hope the study could explain, to the kids, their lowest class priority importance in the extended family principle. The study should be couched to the youth in the difficult attempt to explain the lack of any urban cultural importance of

such fish and wild life experiences; and how it would be more productive to seek legalized priorities in the fast growing urban customs and traditions of street gangs, vidio game parlors, street cruising and drug related activities. Thus the legislators would be alerted to the possible importance of a federal ANILCA mandated type urban and or local urban resident priority preferrences and a companion Constitutional amendment to invalidate the problems of the equal rights of common use.

Then the perpetuation of their "urban" lifestyle could also be ensured. Asinine isn't it, just as asinine as is the priority right and the elimination of equal common use based on selective culture, customs, tradition, ancestory resendency etc; ~~then~~ 30 the prepetuation of the "rural" lifestyle could also be ensured.

since the begining of time each and all individuals have selectively chose their preferences of available characteristics of existing societies. Some will demand priority others will seek equality. The resulting ever changing diversity of cultures can not be stoped by the laws of men.

Dale Bondurant
Box 527
Cooperlanding Ak
99572

Phone 595-1316

GLENNALLEN OFFICE
P.O. BOX 649
GLENNALLEN, AK 99588
PHONE: (907) 822-3476
FAX: (907) 822-3495

ANCHORAGE OFFICE
406 W. FIREWEED LANE, NO. 101
ANCHORAGE, AK 99503
PHONE: (907) 274-7662
FAX: (907) 274-6614

My name is Ken Johns, and I am representing Ahtna, Incorporated; which is a Native Regional Corporation established under ANSCA. I would like to thank the House/Senate Resource Committee for the opportunity to speak to you on behalf of the Ahtna people on this issue which profoundly affects our families and traditional lifestyles.

We would like to thank Representative Wallis for her efforts on behalf of the Alaskan Natives, but realizing the political reality of the situation, Governor Cowper's bill seems to be the most realistic at this time.

We have followed the caribou herds and moose. We have depended on fish and small game for survival and now have to compete for our very way of life!

We are from an economically depressed region and must compete with the more economically advantaged urban residents of Anchorage and Fairbanks.

The Ahtna Region is a land that is covered by three major road systems of the State! We are governed by the State and Federal laws. Yet, we are people who have survived by subsistence for years.

Aside from this we have had major developments that has impacted our region such as the Alyeska Pipeline and the Anchorage-Fairbanks Intertie. Most of the people hired to work on these projects are from outside our region.

We are constantly hampered by outside controls. We have Game Board and Fish Boards and advisory boards. In other words there is a whole range of boards we must go through just to get a moose or to fish!

There is something wrong with this process. It needs to be re-evaluated with our participation!

We strongly recommend and support:

(1) Governor Cowper's bill <u>without</u> amendments.

(2) Re-evaluation of current management policies with emphasis on Fish & Game subsistence allocations.

(3) We strongly feel that we are the <u>MOST</u> affected with regard to the year round road systems. Year round access of snowmachines, ATVs, dogsleds, boats, etc., which all bring in large numbers of urban hunters and fishermen. Therefore, we feel there is a mandatory justification for placing an Ahtna representative on both boards of Fish and Game and strong participation on advisory boards.

(4) We need adequate funding to offset the ever increasing trespass violators on Ahtna land.

Thank you again for this timely opportunity to express our concerns.

For any further questions you may contact Nick Jackson who handles our subsistence issues at (907) 822-3476 or (907) 274-7662.

Hello: My name is Robert Larson.

I'm from the KVIK Traditional Council, located in the Bristol Bay Area, and all I want to say about this subsistence issue, is that I hope my kids are able to participate in it if they need or want, and the kids they have can do the same in the future.

So let's preserve it for all that have a need for it. [redacted]

Thank you.

NOME ESKIMO COMMUNITY
P.O. BOX 401
NOME, ALASKA 99762

RESOLUTION 90-04

A RESOLUTION outlining the basic position of Nome Eskimo Community regarding proposed action to be taken on settlement of the subsistence issue.

WHEREAS, the Nome Eskimo Community sponsored a potlatch to address the subsistence issue; and

WHEREAS, a substantial representation of Nome Eskimo Community Membership was in attendance; and

WHEREAS, a motion passed unanimously to recommend that we do not amend ANILCA (Alaska National Interst Lands Conservation Act); and

WHEREAS, a motion passed unanimously to seek an Alaska Constitutional Amendment to bring the Alaska State Constitution into compliance with ANILCA; and

WHEREAS, a motion passed unanimously to seek an amendment of the Alaska Constitution to allow for a rural subsistence priority, which would protect customary and traditional uses of fish and game; and

WHEREAS, the Nome Eskimo Community Council Members, representing 2000 members, fully endorses the positions taken by the membership;

NOW THEREFORE BE IT RESOLVED THAT: Nome Eskimo Community directs its representative to the AFN Subsistence Meeting and staff to deliver the message on the positions we take on the Subsistence issue.

PASSED and APPROVED this 30th day of March, 1990 by the NOME ESKIMO COMMUNITY I.R.A. COUNCIL unanimously.

Andrew Miller, Jr., Vice-President
Nome Eskimo Community
I.R.A. Council

Karen M. Sherman, Secretary/Treasurer
Nome Eskimo Community
I.R.A. Council

Mike Mathers/News-Miner

WELCOME—Tana Fairbanks eats fry bread as she sits with her grandmother, Maye Edwin, at the Eagles Hall Tuesday evening. The two attended the Alaska Natives' welcome ceremony for delegates to the mid-year conference of the National Congress of American Indians.

Indian issues similar in Lower 48

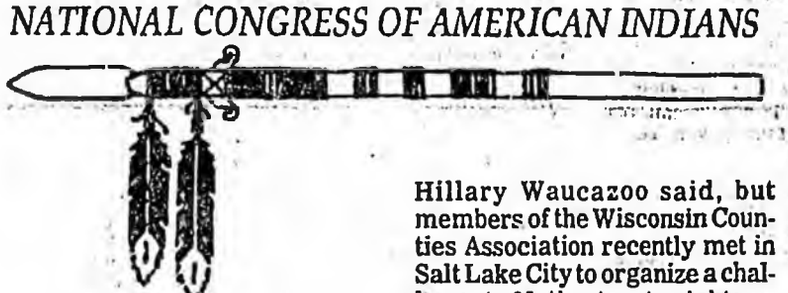
By BRIAN O'DONOGHUE
Staff Writer

The struggle for subsistence rights and tribal sovereignty in Alaska mirrors treaty disputes in the Lower 48, according to delegates at American Indian convention here.

"Alaska has a whole bunch of problems similar to problems in the Lower 48," said Wayne Ducheneaux, president of the National Congress of American Indians. "We've already been through some of the turmoil you're going through. A lot of the problems just now breaking in Alaska are going to affect us down south. This conference gives us a chance to be better informed and able to help you folks."

Ducheneaux and over 100 delegates, including about 40 from the Lower 48, are in Fairbanks this week for the mid-year convention of NCAI, the nation's oldest American Indian rights group. Alaska-area Congress vice president Will Mayo, of the Tanana Chiefs Conference, served as emcee during Tuesday's opening day of session.

NATIONAL CONGRESS OF AMERICAN INDIANS



Banners from TCC's 43 villages provided a colorful backdrop to the proceedings in Eagles Hall.

Loretta Metoxen compared the mounting discord over Alaska subsistence rights to a conflict over tribal fishing privileges in Wisconsin.

The dispute arose after a court upheld claims filed by six Indian tribes to a major share of fishing rights in Lake Superior. It has cost the state of Wisconsin $2 million a year to protect Indians from harassment from residents infuriated by the usage of old treaty rights, Metoxen said.

Not only are Native fishermen being pelted with ball bearings hurled by Wrist Rocket slingshots, Wisconsin Indian leader Hillary Waucazoo said, but members of the Wisconsin Counties Association recently met in Salt Lake City to organize a challenge to Native treaty rights.

"Many times my heart is crying as I read news releases of what's happening there," Waucazoo said.

In her greeting to convention delegates, Fairbanks North Star Borough Mayor Juanita Helms said she shared Native concerns about the Legislature's refusal to place a constitutional amendment on the ballot to let the voters resolve the subsistence debate.

"It's an immediate issue we have to deal with," Helms said, "because I can't see at any time any benefit to the federal gov-

(See INDIANS, Back Page)

Northwest tribes more developed in business

By TIM KLASS
Associated Press Writer

SEATTLE—Indians in the Pacific Northwest are more advanced in business than their counterparts in much of the rest of the country and thus need more sophisticated help, a federal official said Tuesday.

"The Northwest tribes seemingly have a high level of sophistication in economic development," said William T.

(See TRIBES, Back Page)

INDIANS: Issues similar in Lower 48

NATIONAL CONGRESS OF AMERICAN INDIANS

(Continued from page 1)

ernment taking control."

The Alaska Supreme Court recently struck down the rural preference in the state's subsistence law as unconstitutional. Because a rural subsistence priority is mandated by the U.S. Congress, on July 1 federal officials will assume control of fish and game management on federal land in Alaska unless the state takes action to resolve the constitutional conflict. Gov. Steve Cowper proposed amending the state Constitution to allow enactment of a rural subsistence priority law, but the Legislature declined to put it on the ballot. Delegates at the convention were repeatedly urged to lobby for a special session to consider a subsistence amendment.

Morris Thompson, president of Doyon Ltd., the Interior Native corporation, reminded delegates of the vital role the Indian Congress played during the 1960s struggle for the Alaska Native land claims settlement. At the time, he recalled, the Alaska Federation of Natives was broke. An appeal to the Indian Congress resulted in a $250,000 loan from the Yakima Tribe in Washington.

"That seed money was critical to the organization," he said. "It was critical to determining what rights Alaska Natives had to land ownership."

More recently, Thompson said, Alaska Native groups spent $490,000 en route to victory in 1982 referendum on subsistence. "This time I predict it's going to take $700,000-$800,000 to win the battle."

The big difference between the status of Native groups here and their Lower 48 counterparts is the state's reluctance to admit that tribes exist in Alaska, said Mike Irwin, a representative from Gov. Steve Cowper's office.

"We really never get to the substantive questions," Irwin said. "When there's a problem, the line of attack is to question whether that group is really a tribe."

Citing a recent state brief filed in a case involving the village of Noatak, Irwin said support is growing within the administration for village self-determination.

"I think that before the end of the Cowper administration we will see state policy recognize the existence of tribes in Alaska," Irwin said, "and that the majority of the villages are such tribes."

Apeshnahkwat, a Wisconsin-area Indian attired in a business suit and long gray braids, urged delegates to place Indian rights issues before the World Court in Europe.

"Treaties are still important," he said, "but I don't think you go to the wolf watching the chicken coop and ask him for slack. You go to the bear watching the wolf. It's time we call on the leadership to start looking at some of the international avenues available to us."

Many of the delegates contrasted the U.S. government's support for freedom overseas with the Interior department's resistance to tribal sovereignty.

"The federal government seems to be more concerned about self determination in the eastern bloc countries," said Willie Kasayulie, a Native leader from the Yukon-Kuskokwim Delta area. "They need to open their eyes and look closer to home."

Despite the serious nature of the issues, a generally optimistic mood prevailed among delegates Tuesday.

"We don't see the walls that stand before us," Mayo said at one point. "We only see the goals we want to reach."

The convention will continue through Friday at the Eagles Hall.

TRIBES

(Continued from page 1)

Richardson Jr., deputy assistant secretary of the interior for Indian economic development.

"They're talking calculus while a lot of the others are talking arithmetic," he said.

The attendance of about 150 tribal leaders from Washington, Oregon, Idaho, Montana, Alaska and California at the two-day Northwest Economic Development Conference also "shows that there is a high level of interest," Richardson said.

Stan Speaks, director of the Bureau of Indian Affairs area office in Portland, Ore., said attendance would have been even better had it not been for this week's National Conference of American Indian Chiefs meeting in Fairbanks.

The meeting which concluded Tuesday was the fourth in a series of regional gatherings with Indian leaders, mostly to gather information for use in drafting a budget for the agency for fiscal 1992. Two more are planned.

"We're going to make a request for more money," said Richardson, a former Choctaw tribal business leader from Mississippi, "There's never enough money with the federal cutbacks as they are now."

He said tribal needs for economic development as expressed at the conference centered on access to capital—"probably the biggest"—and help with marketing and technical assistance.

More to story

6/6/90

May 29, 1990
402 Iditarod Ave.
Fairbanks, AK 99701

To the editor:

Brian O'Donoghue's May 23 article covering the National Congress of American Indians recent meeting in Fairbanks again demonstrates the Daily News-Miner's incredible capacity for insightless, superficial, and sensationalistic reporting while missing the point of the real news. His description of the similarities of tribal sovereignty and "subsistence" issues between Alaska and Lower 48 Native groups was accurate as far as it went, yet it failed to report upon or identify underlying issues of utmost importance to Alaskans.

A Lower 48 Native participant in the conference drew a parallel between "the mounting discord over Alaska subsistence rights to a conflict over tribal fishing privileges in Wisconsin," and decried "the harassment from residents infuriated by the usage of old treaty rights." What the DNM failed to ask was: "What was infuriating the residents?" Could it have been the fact that Natives were harvesting walleye pike on their spawning beds at night with the aid of spears and halogen lights to be sold *commercially*, in the name of "subsistence"?

Or could it have been the fact that Natives, in the name of "subsistence," have so depleted the fishing resources that entire fishing resorts and communities have virtually died resulting in the unemployment of hundreds of persons including Natives? Or could it have possibly been the fact that the Natives in some areas have so fouled and depleted their own nest that they return again and again to court with the aid of the taxpayers dollars to expand their sphere of destruction?

Yes, Brian, there are parallels: some frighteningly imminent, but ones we all, Native and non-Native alike, would wish to avoid. It's regrettable that you missed the point and the opportunity to assist Alaskans with a very difficult issue.

Sincerely yours,
Jack G. McCombs

Subsistence Packet, 6-25-90

(Special Session)

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
CHAIRMAN, RESOURCES COMMITTEE
119 N. CUSHMAN STREET, SUITE 201
FAIRBANKS, ALASKA 99701
OFFICE (907) 452-4882
HOME (907) 456-2899

Senate

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
CAPITOL, ROOM 125
OFFICE (907) 465-3834
HOME (907) 780-6027

MEMORANDUM

TO: All Senators

FROM: Senator Bettye Fahrenkamp
Chair, Senate Resources Committee

DATE: June 25, 1990

SUBJECT: Subsistence

Enclosed is a packet of information about subsistence. I have included for your information two opinions on different sides of the issue. I hope this will be helpful to you.

WILKINSON, BARKER, KNAUER & QUINN

M E M O R A N D U M

TO: Oliver Burris, President
ALASKA FISH AND WILDLIFE FEDERATION AND
OUTDOOR COUNCIL, INC.

FROM: Paul A. Lenzini
Pierre J. LaForce

WILKINSON, BARKER, KNAUER & QUINN
Washington, D.C.

RE: ANILCA and the Property Clause -- Extension of Federal Wildlife Jurisdiction Over Non-Federal Lands

EXECUTIVE SUMMARY

ISSUE: May the Federal Government exercise regulatory authority over management of fish and wildlife on State and private lands and waters upon implementation of a subsistence program under Title VIII of ANILCA?

APPLICABLE LEGAL AUTHORITIES: Property Clause of the United States Constitution (Art. IV, Section 3); ANILCA.

DISCUSSION: Under the Property Clause of the United States Constitution, Congress is empowered to extend federal regulatory authority over federally-owned lands and activities thereon, to the exclusion of state law. The Property Clause power has been interpreted liberally by the federal courts, and it has been held to extend to management of wildlife on federal lands. The Property Clause power is vested in the Congress, which must act affirmatively, through legislation, to exercise the power.

In ANILCA, Congress, in exercise of the Property Clause power, established a subsistence management system for federal lands in Alaska. While it was anticipated that the State would manage for subsistence consistent with the substantive and procedural provisions of ANILCA, provision was made for a federal takeover of subsistence management if the State failed to do so. ANILCA makes no provision for extension of federal regulatory power over non-federal lands and waters, nor does it contain legislative findings or purpose supporting or

mandating federal regulatory control over fish and wildlife management of non-federal lands and waters in furtherance of the ANILCA subsistence management system on federal lands.

We conclude that Congress has not exerted its Property Clause power in ANILCA so as to authorize an extension of federal management of fish and wildlife to State and private lands and waters in Alaska, even after the Federal Government assumes administration of the ANILCA subsistence management system.

* * * * *

MEMORANDUM CONCERNING AUTHORITY OF THE FEDERAL GOVERNMENT PURSUANT TO ANILCA TO MANAGE FISH AND WILDLIFE ON NON-FEDERAL LANDS AND WATERS IN IMPLEMENTATION OF THE TITLE VIII SUBSISTENCE PRIORITY

INTRODUCTION

This memorandum addresses the issue whether, pursuant to the Alaska National Interest Lands Conservation Act ("ANILCA"), the Federal Government may exercise regulatory authority over management of fish and wildlife on non-federal (State and private) lands and waters in Alaska, upon assumption by federal officials of administration of the subsistence management system. Subsumed in this question is whether the Property Clause of the U. S. Constitution permits the Federal Government to exercise police power over non-federal lands and waters and activities thereon.

We conclude, ultimately, that, in our opinion, ANILCA does not constitute or contain a grant of regulatory authority permitting federal management of fish and wildlife on non-federal

lands and waters in Alaska. In reaching that conclusion, we have considered (a) the nature of the Property Clause and the scope of congressional power granted thereby, as explained by the Supreme Court and other federal courts, and (b) the text and legislative history of ANILCA insofar as these bear on the issue of federal involvement in the management of fish and wildlife in Alaska. The analysis set forth herein follows that order, i.e., first, a discussion of the Property Clause implications, and, second, an analysis of ANILCA and its legislative history.

I. The Property Clause

Article IV, Section 3, Clause 2 of the U. S. Constitution provides, in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ....

This language has been interpreted by the Supreme Court to confer plenary authority on Congress to exercise legislative authority over federal lands and matters affecting those lands. Kleppe v. New Mexico, 426 U.S. 529 (1976). It is also clear that the Property Clause is not self-executing; Congress itself must determine whether to exercise this power. Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122, 1124 (10th Cir. 1982). See also California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (even where power exists to act under the Property Clause, inquiry must be made whether Congress has exercised that power).

Recent federal cases, considering the implications of Property Clause authority, have confirmed that Congress' power over federal lands is without limitation, and that, in exercise of such power, congressional enactments may impact on non-federal lands and activities thereon. The most prominent of these cases was Kleppe v. New Mexico, 426 U.S. 529 (1976). There, the Supreme Court considered the constitutionality of a federal statute designed to protect wild horses and burros on federal lands. In that enactment, Congress' stated purpose was to protect wild horses and burros on public lands from capture, harassment and death. Congress had also committed these animals to the jurisdiction of federal officials, who were directed to protect the animals as components of the public lands. Further, the statute found that these animals are an integral part of the natural system of public lands, and the legislative history of the statute contained findings that management of these animals was necessary for the achievement of ecological balance on the public lands.

Considering this congeries of legislative determinations and findings, the Supreme Court concluded that the constitutional challenge was without merit. In doing so, the Court noted that determinations under the Property Clause were entrusted primarily to the judgment of Congress (id. at 536) and that courts had accorded that congressional power an expansive reading. Id. at 539. The Court then noted that its precedents

had established "that the power granted by the Property Clause is broad enough to reach beyond territorial limits." Id. at 538.[1/]

In further explanation of the scope of congressional authority, the Court in Kleppe stated:

> [T]he Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands.... And while the furthest reaches of the power granted by the Property Clause have not been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations. [Id. at 539.]

The Court then described the nature of the power conferred upon the Congress by the Property Clause as follows:

> In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.... Although the Property Clause does not authorize "an exercise of a general control over public policy in a State", it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it."... In our view, the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there. [Id. at 540-41.]

The Court finally held that, upon exercise of Property Clause power, any conflicting state regulation must succumb.

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains power to enact legislation respecting those lands pursuant to the Property Clause.... And when Congress so acts, the federal legislation necessarily overrides

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1/ See, e.g., United States v. Alford, 274 U.S. 264, 267 (1926) where the Court observed: "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."

> conflicting State laws under the Supremacy Clause. [Id. at 543.]

The Supreme Court in Kleppe reserved the question of the reach of federal power under the Property Clause to non-federal lands and activities thereon:

> While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control,...we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands.... [Id. at 546.]

The question left unanswered by the Supreme Court has been addressed by lower federal courts, and uniformly resolved in favor of the exercise of congressional power. In Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) the court considered the constitutionality of certain provisions of the Boundary Waters Canoe Area Wilderness Act as applied to certain non-federal lands and waters. Specifically, that statute prohibited motorized transportation within the Boundary Waters Canoe Area Wilderness. The State of Minnesota contended that Congress had no power to impose those prohibitions on non-federal lands and waters within the Wilderness. (The United States owned some 90 percent of the land within the Wilderness; the State owned most of the remainder and all of the beds of lakes and rivers within the Wilderness.[2/])

2/ The United States had title to 920,000 acres of land, while the State owned 121,000 acres of land and 161,000 acres of lake and river beds.

The Eighth Circuit first noted that it was called upon to decide the question left open in Kleppe, viz., "the scope of Congress' Property Clause power as applied to activity occurring off federal land." Id. at 1248. The court then noted that the Property Clause was to be accorded a liberal construction:

> The Court in Kleppe, however, rejected any narrow construction of the Property Clause, holding that Congress possessed full legislative/police power over activities occurring on federal property. In other words, any conduct taking place on United States land may be subject to congressional authority, regardless of its relationship to that land. [Id. at 1248 n.16.]

The court observed that the Supreme Court had acknowledged in Kleppe that regulation under the Property Clause may have some effect on non-federal lands:

> Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. [Id. at 1249.]

In that vein, the court held that Congress had the power to dedicate federal lands for particular purposes, and, as a necessary incident to that power, must have the ability to insure that lands be protected against interference with the intended purposes of those lands. Id. at 1249.

Finally, the court in the Boundary Waters case noted that, in order for Property Clause authority validly to extend to non-federal lands and activities, there must be a demonstrated showing that these non-federal activities will or may impact on the federal lands.

> Congress has no plenary authority over conduct on non-federal land,...rather, Congress must demonstrate a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property. [Id. at 1249 n.18.]

Another Eighth Circuit ruling, United States v. Brown, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977), involved review of a conviction for violation of a National Park Service regulation prohibiting firearms and hunting in a national park. The defendant had been arrested in non-federal waters within the park. The court first found that a congressional intent to exercise regulatory jurisdiction over the waters within the park was clearly demonstrated in the statute. Id. at 820. The court also found that hunting on waters within the park could significantly interfere with the use of the park and the purpose for which it was established. It concluded that because hunting occurred in close proximity to adjacent park lands, the potential danger of unwarranted intrusion on public lands, injury to park users and disruption of wildlife migration patterns could adversely impact the federal lands. It was also noted that the federal park lands adjacent to non-federal waters could be exposed to uses proscribed on park lands.

The court in Brown also noted that it was presented with the question left unanswered in Kleppe, viz., "whether the Property Clause empowers the United States to enact regulatory legislation protecting federal lands from interference occurring on non-federal public lands...." Id. at 822. Relying on the

recognition in Kleppe that the Property Clause was broad enough to have extra-territorial effect, it was held:

> The crucial question is whether federal regulation can be deemed "needful" prescriptions "respecting" the public lands. This determination is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause.... In light of these general standards, we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands. [Id. at 822.]

Finally, in Free Enterprise Canoe Renters Ass'n v. Watt, 549 F.Supp. 252 (E.D.Mo 1982), aff'd, 711 F.2d 852 (8th Cir. 1983), the court considered the validity of a federal regulation prohibiting canoe rental activities without a permit within the boundaries of the Ozark National Scenic Riverways, insofar as that regulation applied to activities on non-federal lands within the Riverways. The Park Service regulation had been adopted after a study showed a need for the Federal Government to exert greater control over canoe rental operations within the Riverways. The district court held that issuance of the regulation and application thereof to activities on non-federal lands constituted an appropriate exercise of the Property Clause. The district court relied on the "expansive reading" of the Property Clause given by the Supreme Court. 549 F.Supp. at 262. The court also found that the regulation was reasonably related to the statutory purposes of the Riverways and was, therefore, valid. On appeal, it was held, in pertinent part:

> It is undisputed that the United States acted within its constitutional authority in attempting to regulate the business activities of the members of the association as they affect the ONSR, even though the members themselves may never enter federally-owned property, but strictly keep to state or county roads and rights-of-way within the ONSR. [711 F.2d at 855-56.]

The following decisional principles are apparent from the foregoing cases:

1. The Property Clause confers broad power on Congress to exercise regulatory authority over federal lands and activities thereon;

2. The Property Clause power is not self-executing; congressional action, in the form of legislation, is necessary for exercise of that power;

3. Decisional discretion under the Property Clause is conferred on the Congress, and reviewing courts give considerable deference to that discretion;

4. The Supreme Court has not fully articulated the reach of the Property Clause power over non-federal lands and activities, albeit it has held that the Property Clause may have extra-territorial effect; and

5. The lower federal courts have construed the Supreme Court's decisions to permit the extension of federal regulatory power over non-federal lands where there is a "nexus" between activities on the non-federal lands and impacts on the federal lands.

II. ANILCA and Its Legislative History

Of relevance to the question whether Congress has exercised its Property Clause power in ANILCA to authorize federal management of fish and wildlife on non-federal lands and waters are the following provisions of ANILCA:

(i) Section 101(c), which recites that one of the purposes of ANILCA is "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."

(ii) Sections 102(1)-(3), which together set forth the definition of "public lands".

(iii) Title VIII, dealing with the subsistence preference and related matters.

(iv) Sections 1314(a)-(b), stating Congress' intent regarding the wildlife management authorities of the State of Alaska and the Federal Government.[3/]

A. The Statute

ANILCA is a massive statute in sheer size, coverage and implications. However, only a small portion thereof is relevant to subsistence generally, or, even more narrowly, subsistence management by the Federal Government of non-federal lands and waters.

3/ To facilitate review, we have appended hereto the full text of the foregoing statutory provisions.

Generally, ANILCA contains legislative findings that the "public lands"[4/] in Alaska must be managed to assure and encourage subsistence use thereof by rural residents of Alaska. To that end, Congress included a subsistence title (Title VIII) in ANILCA which, inter alia, provides for a subsistence priority system on public lands in Alaska. Title VIII defines subsistence and identifies those individuals entitled to the subsistence priority. The subsistence title also establishes a subsistence management system governing the public lands, which system is to be administered by the State or, in the absence of State involvement, by the Federal Government. The subsistence title also contains provisions authorizing federal officials to enter into cooperative agreements "to effectuate the purposes and policies of this title" and providing for the issuance of "such regulations as are necessary and appropriate to carry out [the federal officials'] responsibilities under this title."

Finally, in Section 1314(a), Congress articulated that nothing in ANILCA was intended "to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in Title VIII of this Act". Similarly, in Section 1314(b), Congress stated that, except as specifically provided in ANILCA, nothing therein "is intended to enlarge or diminish the responsi-

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4/ By definition, "public lands" are lands, waters or interests therein the title to which is in the United States.

bility and authority of the [federal officials] over the management of the public lands."

It is significant that ANILCA contains no express authority for a federal takeover of fish and wildlife management on non-federal lands and waters should the State decline to manage the subsistence priority system on public lands. Similarly, there is no express finding that the management of non-federal lands and waters or the activities thereon will have an impact on the federal lands or the subsistence priority system adopted by the Congress for those lands. Nor is there an express finding that the exercise of federal regulatory power over non-federal lands is "needful" for the protection of those lands and Congress' plans therefor.

In fact, analysis of the operative provisions of the subsistence title demonstrates that ANILCA confers regulatory authority over the subsistence management of public lands in only a specific and limited fashion. Based on its legislative findings (§ 801) regarding the importance of maintaining a continued opportunity for subsistence uses by rural Alaska residents and the protection of same, Congress declared, as a matter of policy, that the public lands be utilized so as to preserve a continuing subsistence use of those lands, and further declared non-wasteful subsistence use to be the priority consumptive use of fish and wildlife resources on the public lands (§ 802).[5/]

5/ It is noteworthy that Congress also declared, as a matter of policy, that federal officials, "in protecting the continued (continued...)

In Section 803 of ANILCA, Congress defined "subsistence uses" and related terms, and, in Section 804, established a priority for non-wasteful subsistence uses on the public lands, including criteria for establishing this priority.

Sections 805-807 of ANILCA deal with the subsistence management system established to carry out the subsistence policy adopted by Congress for the public lands. Section 805 provides for the establishment of subsistence resource regions encompassing all the public lands in Alaska and for the establishment of local and regional advisory bodies to make recommendations concerning the subsistence management of public lands. Subsistence management of the public lands is to be administered by federal officials or by the State, should the State enact and implement laws consistent with the subsistence priority and management system set out in the subsistence title of ANILCA. State administration of the subsistence management system is to continue only while state statutes conforming to the ANILCA subsistence standards and requirements are maintained. (§ 805(d).)

Under Section 806, the Secretary of the Interior is directed to monitor the State's administration of its subsistence management system to assure compliance with the mandates and purposes of ANILCA. Section 807 of ANILCA provides a private

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5/(...continued)
viability of all wild renewable resources in Alaska" shall cooperate with adjacent landowners and land managers, including Native Corporations, and appropriate State and Federal agencies. § 802(3).

right of action for parties aggrieved by the failure of the State or the Federal Government to provide for the subsistence use priority.

Federal officials are authorized under Section 809 to enter into cooperative agreements to effectuate the purposes and policies of the subsistence title. Finally, Section 816(b) preserves the authority of federal officials to close the public lands to subsistence uses.

Of direct relevance to an assessment of the reach of subsistence management authority granted federal officials by Title VIII of ANILCA are the provisions subsections (a) and (b) of Section 1314. In the former subsection, it is expressly provided that nothing in ANILCA is to be deemed to enlarge or diminish the State's authority to manage fish and wildlife on the public lands "except as may be provided in Title VIII of this Act." Conversely, Section 1314(b) recites that, except as otherwise specifically provided, nothing in ANILCA is intended to enlarge or diminish the responsibility and authority of federal officials over the management of the public lands.

The plain meaning of these provisions is that the extant authority of the State relating to fish and wildlife management on public lands is to remain the same unless provided otherwise in the subsistence title. Similarly, federal authority over the management of public lands is to remain the same except

as specifically provided otherwise by ANILCA.[6/] It would therefore seem clear that no diminution of state authority or expansion of federal regulation was intended except as might be specifically provided in the subsistence title. The only specific provision in the subsistence title regarding state management of fish and wildlife on federal lands is the requirement that the State adopt a subsistence management system consonant with the subsistence policy promulgated in Title VIII, in the absence of which federal officials are to undertake subsistence management on the public lands.

Section 1314(b) is explicit that federal regulatory authority over the management of public lands cannot be expanded without a specific provision therefor in the Act. Again, other than the provision in Section 805 for establishment of a subsistence management system for the public lands, federal monitoring of that system as authorized by Section 806 and the limited judicial enforcement procedures set out in Section 807, the subsistence title creates or confers no new regulatory authority on federal officials regarding management of the public lands.

6/ In determining whether Congress has preempted a regulatory area traditionally occupied by the states, the Supreme Court insists upon a showing that such a result was the clear and manifest purpose of Congress. E.g., DeCanas v. Bica, 424 U.S. 351, 356 (1976) (preemption requires that "Congress has unmistakably so ordained"); New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 414 (1973) (preemption requires "direct and unambiguous language"); International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958) (preemption requires "a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.")

As noted earlier, there is no express declaration by the Congress that a unified wildlife management system is necessary for the protection of subsistence uses on the public lands.[7/] Likewise, there is no express grant to federal officials of regulatory authority over subsistence management on non-federal lands and waters in the event state administration of the subsistence management system is terminated. Absent such provisions or similar authorizations,[8/] the plain language of the statute does not allow a conclusion that Congress, by the enactment of ANILCA, delegated authority to regulate fish and wildlife on non-federal lands and waters in Alaska to accompany federal administration of the subsistence management system of Title VIII.

One last matter. It has been asserted that Congress intended the definition of "public lands" to include all Alaska waters because the definition of "land" in Section 102(1) of ANILCA means "lands, waters and interests therein" and the navigational servitude of the United States is said to be "an inter-

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7/ The several provisions and findings in Title VIII regarding "cooperative agreements" among federal land managers and their State and private counterparts can certainly be regarded as Congress' prescribed mode for achieving unified management.

8/ Given the provisions of Sections 1314(a) and (b), viz., that State and Federal management authority are not deemed to have been enlarged or diminished except by express provision of ANILCA, a contention of implied delegated authority would appear unsupportable. Further, absent federal legislation on the subject, a state has exclusive power to protect and manage fish and wildlife within its borders. Cary v. South Dakota, 250 U.S. 118, 120 (1917).

est in water title to which is in the United States." This argument was rejected explicitly by the Ninth Circuit in City of Angoon v. Hodel, 803 F.2d 1016, 1027-1028 N. 6 (9th Cir. 1986), cert denied, 484 U.S. 870 (1987), and in any event does not withstand scrutiny. The navigational servitude of the United States is described as "an exercise of the Government's power to regulate navigational uses." United States v. Cherokee Nation, 107 S.Ct. 1487, 1490 (1987). As Justice Douglas stated for the Court in United States v. Twin City Power Co., 350 U.S. 222, 224 (1956), "That clause speaks in terms of power, not of property." Even where there has been disagreement as to its applicabilitry, there has been unanimity that the servitude is a matter of power, not of property. E.g., Kaiser Aetna v. United States, 444 U.S. 164, 177, 187 (1979); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 375-376 (1977). The Ninth Circuit was clearly correct in City of Angoon when it stated that "the United States does not hold title to the navigational servitude [and thus] the servitude is not 'public land' within the meaning of ANILCA." 803 F.2d at 1027-1028, n. 6.

B. Legislative History[9/]

Our review of the legislative history indicates that, with one exception, the legislative record confirms that Congress

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9/ We note, at this point, our view that the statutory language is clear and unambiguous on the geographic reach of federal authority to manage fish and wildlife for subsistence purposes, and that a reviewing court would have no need or cause to refer to the legislative history of ANILCA. Nonetheless, that history supports our conclusions.

intended no federal takeover of fish and wildlife management on non-federal lands and waters in the event the Federal Government were to assume administrative responsibility for the subsistence management system on public lands.[10/] To the contrary, the legislative record demonstrates that the Congress affirmatively resisted any such bold expansion of federal authority.

A brief chronological history of the enactment of ANILCA is helpful in understanding the implications of the several statements made concerning subsistence management and wildlife regulation. Consideration of the ANILCA legislation extended over several years, and involved numerous bills. In 1979, the House Committee on Interior and Insular Affairs reported out an Alaska Lands bill. See H.R. No. 96-97, Pt. I, 96th Cong. 1st Sess. (1979). This bill did not meet with the approval of the Committee chairman, Congressman Udall, who along with others of his persuasion, filed extensive Dissenting Views on the bill. See H.R. Rep. No. 96-97 at 380-611. These Dissenting Views included a section on subsistence. Id. at 537-47.[11/] At the same time the House Committee on Merchant Marine and Fisheries reported out another Alaska Lands bill. See H.R. Rep. No. 96-97, Pt. II, 96th Cong., 1st Sess. (1979). On the House floor, the

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10/ As demonstrated herein at pp. 25-27 infra, this one aberration was not a true or accurate recital of congressional intent and action regarding subsistence management authority.

11/ Subsequently, Congressman Udall stated that the Dissenting Views "constitute a significant part of the legislative history of the Alaska National Interest Lands Conservation Act." 126 Cong. Rec. H10548 (daily ed. Nov. 12, 1980).

Udall forces prevailed, and the House passed still another version of the Alaska Lands legislation, this one sponsored by Congressman Udall and others.

The House-passed bill was thereafter sent to the Senate, where it was referred to the Committee on Energy and Natural Resources. That committee reported out its own version of an Alaska Lands bill for consideration by the Senate. See S.Rep. No. 96-413, 96th Cong., 1st Sess. (1979). The Senate committee bill underwent further amendment on the Senate floor before passage by the Senate on August 19, 1980.

At first, the Senate bill was unacceptable to the House leadership, including Congressman Udall. See, e.g., 126 Cong. Rec. H10350, H10374-75 (daily ed. Oct. 2, 1980). Subsequently, however, the House leadership capitulated and recommended that the House agree to the Senate version of the legislation in full, at the same time noting that, in their view, the Senate bill "falls far short of the kind of bill we wanted". 126 Cong. Rec. at H10527 (daily ed. Nov. 12, 1980).

The matter of regulatory jurisdiction over federal lands and the Property Clause authority of the Congress were issues that Congress addressed directly during the ANILCA legislative debate. In 1978, the House Committee on Interior and Insular Affairs reported out an Alaska Lands bill. See H.R. Rep. No. 95-1045, Pt. I, 95th Cong., 2nd Sess. (1978). Therein, the Committee, relying on the Kleppe case, expressed its view "that it would be well within the powers of the Federal Government to

assume exclusive jurisdiction over the regulation of the taking of fish and wildlife on the public lands for subsistence use." Id. at 184. The Committee further noted that, while several arguments had been made for direct federal responsibility, the Committee had concluded that it was appropriate that the State have responsibility for day-to-day wildlife management for subsistence uses. Ibid.

The Committee was persuaded that the Property Clause permitted federal preeminence in the management of federal lands:

> However, it is clear that, pursuant to the Property Clause of the U.S. Constitution, the Federal Government, including the Executive Branch, has the authority and responsibility to control entry and use of the public lands, including such uses as the taking of fish and wildlife. In addition, the Executive may make rules and regulations for the control and management of fish and wildlife species on lands within conservation system units even though these regulations may be more restrictive than the laws of the State. This principle, based on the Property Clause, has been upheld by several Supreme Court decisions, the most recent being Kleppe v. New Mexico, 426 U.S. 529 (1976). [Id. at 218.]

Congressman Udall reasserted the supremacy of congressional power over federal lands in his Dissenting Views to the 1979 Report of the House Interior and Insular Affairs Committee. See H.R. Rep. No. 96-97, Pt. I at 540. These Dissenting Views also characterized the issue of "states rights" in managing fish and wildlife as a "non-issue". Instead, the Dissenting Views argued, the real issue was a dispute as to who is to regulate the taking of "resident" fish and wildlife on the public lands in Alaska. The Dissenting Views then concluded, in language partic-