

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672

6465 SENATE RESOURCES

ularly probative of the ultimate issue under consideration here, as follows:

There is no argument that the State has the responsibility for regulating the taking of resident fish and wildlife on the immense acreage of "non-public" i.e., State and private lands. There is, however, a false assertion that the Federal Government, as the trustee of the public lands for all the American people, has no land ownership Constitutional rights governing fish and wildlife taking uses of its lands, as do all other landowners in the United States. [Id. at 544.]

The Dissenting Views rejected the state's argument that it should have sole authority for regulating harvests with no federal role at all even on federal lands, noting that this view was contrary to Supreme Court precedent. Id. at 545.

It is highly significant that, at a time when Congressman Udall was soliciting the support of his peers for the Udall version of the Alaska lands legislation, he asserted, in no uncertain terms, that the bill would have no impact whatsoever on the State's regulatory authority over State and private lands, to the point that he dismissed any concern about this as a fabricated "non-issue".

On the Senate side, the bill reported out by the Senate Committee contained provisions substantially the same as Sections 1314(a) and (b) of ANILCA as eventually enacted.^{12/} See S.Rep. No. 96-413 at 80. The Committee reported that this statutory language, adopted as a Committee amendment, "preserves the status

^{12/} There was no equivalent section in the House-passed bill.

quo with regard to the responsibility and authority of the State to manage fish and wildlife, and reconciles this authority with the Act, including the subsistence title." Id. at 308. The Committee further noted that the section confirmed the status quo with regard to the authority of federal officials to manage wildlife habitat on federal lands. Ibid.

When the Senate committee bill was brought to the floor for consideration, Senator Stevens introduced an amendment to Section 1314(a) of the bill. The purpose of this amendment, as explained by Senator Stevens, was "to refine the language of several provisions of the Alaska lands bill to further clarify policy decisions made by the Senate Energy and Natural Resources Committee with respect to fish and wildlife management." 126 Cong. Rec. S. 6000 (daily ed. May 30, 1980). Senator Stevens further explained that his amendatory provisions clarified that "except as specifically may be provided in Title VIII, nothing in the Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands." Ibid. The Stevens amendments became part of the bill passed by the Senate, which eventually became law.

In discussing the Senate bill which was eventually passed by the Senate (and eventually enacted), the minority manager of the legislation, Senator Hatfield, noted:

The subsistence management provisions represent a continuation of the careful balancing of the roles and responsibilities of the State and Federal governments. They reflect

a delicate balance between the traditional responsibility of the State of Alaska for the regulation of fish and wildlife populations within the State and the responsibility of the Federal government for the attainment of national interest goals, including the protection of the traditional lifestyle and culture of Alaska Natives. 126 Cong. Rec. S. 11199 (daily ed. Aug. 19, 1980).^{13/}

The one contrary indication in the legislative record regarding what was accomplished or meant to be accomplished concerning fish and wildlife jurisdiction over non-federal lands and waters appears in an "explanation" of the ANILCA legislation submitted to the Congressional Record by Congressman Udall. It is noteworthy that Congressman Udall submitted this off-the-floor "explanation" after capitulation by the House and agreement to pass the Senate version of the legislation.^{14/} The Udall "explanation" takes up some nineteen pages of fine type in the Congressional Record. See 126 Cong. Rec. H10532-50 (daily ed. Nov. 12,

^{13/} Despite power under the Property Clause to take control into its own hands, Congress has traditionally reserved to the states authority to manage wildlife on federal lands. E.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (BLM lands and national forests); Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528 (national forests); Conservation Programs on Government Lands, 16 U.S.C. § 670h(b) (BLM lands, national forests, military reservations, NASA and Department of Energy lands); Engle Act of 1958, 10 U.S.C. § 2671 (military reservations). And see Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1247-1250 (D.C. Cir. 1980) (authority of the Secretary of the Interior to intervene in state program to reduce wolf populations on BLM land in Alaska is limited and responsibility for wildlife management was reserved by Congress to the State).

^{14/} It is clear that the House leadership, particularly Congressman Udall, was most reluctant to accept the Senate bill, viewing it as falling short of the House bill. See, e.g., 126 Cong. Rec. H10527 (daily ed. Nov. 12, 1980).

1980). In his description of the subsistence title, Congressman Udall referred to 1977 testimony of Governor Hammond concerning the importance of a unified management system for fish and wildlife resources throughout their range. Congressman Udall then added:

This is particularly important with fishery resources. Consequently, it has always been our intent to apply the subsistence preference to all fish stocks in the waters of Alaska. This result enables the State of Alaska to continue its lead in fisheries management without unnecessary disruption. It also should be stressed that if for any reason the State should ever repeal its subsistence statute, this preemptive section would continue the subsistence preference for fish throughout the waters of Alaska. [Id. at H10547.]

This statement, asserting a federal preeminence on subsistence management regulation "throughout the waters of Alaska" is completely at odds with the Dissenting Views submitted by Congressman Udall and others in H.R. Rep. No. 96-97, 96th Cong., 1st Sess. (1979). There, Congressman Udall had asserted, without equivocation: "There is no argument that the State has the responsibility for regulating the taking of resident fish and wildlife on the immense acreage of "non-public" i.e. State and private lands." Id. at 544.^{15/}

We conclude, and submit, that the Udall "explanation" of November 12, 1980 was an exercise in legislative revisionism,

^{15/} It is to be recalled that Congressman Udall described the Dissenting Views as "a significant part of the legislative history of [ANILCA]." 126 Cong. Rec. H10548 (daily ed. Nov. 12, 1980).

an attempt to characterize congressional action in a manner not at all consistent with either the text of the statute or the legislative record. Indeed, Congressman Udall's attempt to "put his spin" on ANILCA was severely criticized by Senator Melcher on the Senate floor, as follows:

[T]he House was unable to muster the necessary support to amend the Senate compromise Alaska lands bill; certainly their attempts to amend it with fine print in the Record will not stand. [126 Cong. Rec. S14770 (daily ed. Nov. 20, 1980).]^{16/}

The conclusory language of the Udall "explanation" concerning the extension of the federal jurisdiction over non-federal lands, with its total absence of any articulation of source authority, must be viewed as an exercise in wishful thinking, rather than a reliable statement of the meaning of the legislation and the intent of Congress. There is no provision in ANILCA to support the assertion made by Congressman Udall, and no reference is made to any. These facts, coupled with Congressman Udall's earlier, unequivocal assertion that the State of Alaska's regulatory authority over non-federal lands was unquestioned, compel a conclusion that the Udall "explanation" is inaccurate and unreliable.

That said, we reiterate that all of the reliable and relevant legislative history of the ANILCA legislation supports

^{16/} In the interest of precision, it should be noted that Senator Melcher's criticism was addressed at another section of the Udall "explanation". Nonetheless, the same criticism is applicable to Congressman Udall's contrived version of what was enacted regarding subsistence.

the view that neither expressly nor implicitly did Congress delegate authority to the Secretary of the Interior or to any federal agency to manage fish and wildlife for subsistence purposes on non-federal lands and waters in Alaska.

CONCLUSION

Based on the decisional principles outlined by the federal courts in the Property Clause cases and an analysis of the text and legislative history of ANILCA, it is our conclusion that Congress in ANILCA did not exercise its Property Clause power so as to authorize federal management of fish and wildlife on non-federal lands and waters, even where the federal authorities have assumed administration of the subsistence management system.

A P P E N D I X

(Relevant ANILCA Sections)

Section 101(c):

(c) It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

Sections 102(1)-(3):

Sec. 102. As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

- (1) The term "land" means lands, waters, and interests therein.
- (2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.
- (3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—
 - (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
 - (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
 - (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Title VIII:

FINDINGS

Sec. 801. The Congress finds and declares that—

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

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

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

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

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

POLICY

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

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

Title VIII (Cont'd.)

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

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

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

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

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

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

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

PREFERENCE FOR SUBSISTENCE USES

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

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

(2) local residency; and

(3) the availability of alternative resources.

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LOCAL AND REGIONAL PARTICIPATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FEDERAL MONITORING

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

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

JUDICIAL ENFORCEMENT

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

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

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

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

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

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

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

COOPERATIVE AGREEMENTS

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

SUBSISTENCE AND LAND USE DECISIONS

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

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

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

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

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

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

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

ACCESS

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

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

RESEARCH

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

PERIODIC REPORTS

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

- (1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;
- (2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;
- (3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

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

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

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

(7) such other recommendations the Secretary deems appropriate.

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

REGULATIONS

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

LIMITATIONS, SAVINGS CLAUSES

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

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

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

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

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

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Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

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

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

Sections 1314(a) and (b):

TAKING OF FISH AND WILDLIFE

SEC. 1314. (a) Nothing in this Act is 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, or to amend the Alaska constitution.

(b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

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June 23, 1990

Re: Special Session -- Constitutional Amendment

Dear Legislator:

Governor Cowper has called you back into special session to consider passage of a resolution placing a Constitutional amendment on the November ballot. Unfortunately, Governor Cowper did not reveal his plan until late Friday, two days before the special session was to begin. He stated this was to avoid debate in the media. It is unfortunate that Governor Cowper has taken the position that there should be no public debate concerning an issue which affects each and every Alaskan and future Alaskans. A change to the State Constitution should not be taken lightly. It is something that should be debated by all those involved, namely the public. The debate should occur before an amendment is placed on the ballot to determine whether it is in the people's best interest to even place it before them.

We have written previous letters to you on June 4 and June 21, 1990, discussing the involved issues in detail. Now that Governor Cowper has belatedly released his "temporary Constitutional amendment" plan, at a point really too late for any meaningful public input or debate, we are writing to recommend that the Legislature do the following at the special session:

1. Do not place any constitutional amendment on the ballot.
2. Do not try to solve the problem through passage of legislation on this complicated subject in this short period of time.
3. Join the lawsuit presently filed to set aside the provisions of ANILCA which dictate to the State the manner in which the State should manage its resources, and return control of these resources to the State.
4. Urge our Congressional delegation to seek appropriate amendments to ANILCA. With their assistance, this is an easy solution. ANILCA itself has been amended nine times since its enactment and an amendment to Title VIII was recently filed at the request of the same people who argue no amendment can be requested.

This is the best solution, because:

1. A constitutional amendment is bad enough. However, a "temporary constitutional amendment" is a self-contradictory concept, and will create more problems than it solves.
2. The proposed federal subsistence regulations do not appear to be impossible to live with for a period of time, and they apply on federal and not on state land in any event.
3. The United States government has conceded that ANILCA has given it no authority over state waters and the fish resource, and is not attempting to regulate fisheries.
4. Most important, under the terms of ANILCA, if the legislature does nothing to comply with ANILCA, ANILCA will not allow aggrieved subsistence users to sue the State in Federal Court. Once the Legislature attempts to implement or interpret ANILCA, § 807 allows lawsuits in Federal Court against the State. This particular door must not be opened.

A "Temporary" Constitutional Amendment is improper

Because Governor Cowper has not been able to muster support for a constitutional amendment, at this time, he is proposing an amendment which includes a "sunset" provision. A constitutional amendment with the "sunset" provision is essentially a contradiction of the constitutional amendment process. A "sunset" provision implicitly seeks to achieve consensus on the ground that an amendment is temporary rather than that it is wise. It requires that the entire issue be revisited and thereby forestalls a resolution around which the opposing camps may begin to coalesce. Instead of closing the public division, a constitutional amendment with a "sunset" provision merely declares that the debate must continue.

Under a Constitutional amendment with a "sunset" provision, the provisional nature of a State regulatory program would color administrative decision making and judicial review of any State subsistence regulations. There is no law on what a "sunset" provision means. It is literally never used in the constitutional amendment process, except when a Constitution is first adopted. In other words, it will do more to create confusion, not only in the minds of those individuals who must live with the State regulations - the subsistence users themselves - but also the courts.

Nearly all those parties who are participating in this process

agree that something is wrong with the law passed by Congress in 1980, namely the Alaska National Interests Lands Conservation Act (ANILCA). It was and is and will continue to be a flawed law which was foisted on Alaska by Congress. Most importantly, a "sunset" provision does not address the real problems which have been created in this State by Title VIII of ANILCA. It does nothing to cure the vagueness of certain core federal legislative concepts, like "rural," "customary and traditional," and "barter," which must continue to be implemented under ANILCA.

Legal challenges will continue unabated with the Alaska Department of Fish and Game regulations accorded no presumption of correctness by the courts. In other words, the courts will be free to substitute their judgment for that of the State managers. Subsistence, and more importantly, fish and game management on State, private and Federal lands will continue to be at risk. The resource itself, as well as the resource users, will suffer.

To ask the citizens of Alaska to amend their Constitution to dismantle the common use, equal protection and uniform application provisions of their Constitution to comply with a flawed Federal law, while hoping that somehow someone will amend the Federal law to acceptably define its reach, is clearly unacceptable.

Even John Shively, with NANA Corporation, stated on June 18, 1990, at a meeting with the Resource Development Council in response to a question from Representative Mike Navarre, that he agreed with the assessment that a constitutional amendment with a "sunset" provision was bad. We agree. Amending the Constitution is nothing like changing State law.

The Department of Interior
has no authority under ANILCA
over subsistence uses on State lands.

The Alaska Outdoor Council recently hired Paul Lenzini, a partner in the Washington, D.C. law firm of Wilkinson, Barker, Knauer & Quinn, to review ANILCA and its legislative history to prepare a legal opinion on whether the Federal Government could extend its jurisdiction beyond the regulation of subsistence on Federal lands. Attached is a copy of his opinion.

For over 20 years, Mr. Lenzini has represented State fish and wildlife agency interests in Federal and State Courts throughout the United States, regarding State authority for the protection and management of fish and resident wildlife within State borders. In the Supreme Court, Mr. Lenzini successfully represented the State of Montana against a constitutional challenge to State authority to prefer residents in licensing requirements relating to recreational elk hunting. Baldwin v. Montana and Fish and Game Commission, 426

U.S. 371 (1978). He is clearly an expert in these matters.

In a nutshell, Mr. Lenzini's opinion is that based on constitutional law, judicial interpretation and on ANILCA and its legislative history, the Federal Government simply does not have authority to extend its jurisdiction beyond the Federal lands to State lands and waters. The federal government agrees, and has not attempted to regulate fisheries, or any other activities on State lands or waters.

Therefore as of July 1, 1990, the State of Alaska retains control over state waters, including commercial fishing, and state lands. For example, that would mean that the Kenaitze case would become a State issue and not Federal. Therefore, the urgency for a State constitutional amendment is gone.

ANILCA is presently being challenged as unconstitutional
in the Federal Courts

As you are probably aware, a group of more than two dozen individuals, including Native Alaskans, and organizations, including conservation organizations, have filed suit in Federal Court to directly challenge Title VIII of ANILCA. A copy of that Complaint is attached.

The State of Alaska should join that lawsuit. If the Governor is unwilling to join the lawsuit, the State legislature should join. There are a number of issues which are specific to the State's interest.

A major issue is its interest in ensuring that it cannot be sued in Federal Court. Section 807 of ANILCA gives aggrieved subsistence users the right to directly sue the State in Federal Court to enforce a hunt or set a season, but only if the State actually enacts a subsistence law. This violates the State's constitutional rights granted to it by the Eleventh Amendment to the United States Constitution. As stated in our earlier letters, the State really has nothing to lose in litigation with the Federal Government and should assert its rights.

Miscellaneous Authorities

We have attached a number of other items. Recently at the National Rifle Association of America Convention, the National Rifle Association overwhelmingly supported and passed a resolution, supporting the common use clause of the State Constitution. It also voted that ANILCA directly inhibited the State of Alaska's ability to properly manage its fish and wildlife resources or to encourage a sustained yield of those resources for all of its citizens. The National Rifle Association specifically supported

the legal challenge which has been filed in the Federal Court and has directed its Executive Vice President to use any appropriate resources at his disposal to assist in securing an appropriate legal ruling. Finally, it voted to encourage Congress to make the appropriate changes in ANILCA.

We have also included a copy of an opinion prepared by Ron Sommerville, formerly a director of ADFG, and now the Executive Director for the Wildlife Legislative Fund of America. We suggest that you read his subsistence analysis and comments. We wholeheartedly agree with those.

Conclusion

In summary, no one has argued that the Alaska Constitution does not allow the legislature to pass legislation to ensure that those persons most dependent on the renewable resources of our State can have continued access to them or a priority of access when those resources are scarce. The Alaska Constitution clearly allows the State legislature to enact legislation protecting those individuals.

However, just as clearly as the Alaska Constitution allows the enactment of such legislation, the Alaska Constitution does not allow it to enact legislation which is in conformity with ANILCA. It cannot allocate access to resources solely on the basis of residency, and this legislature should not pass a resolution placing an amendment on the State Constitution which would remove from the State Constitution the common use provision which has long protected Alaskans from arbitrary and capricious rulings.

This is a very complicated area of the law. Any precipitous action taken by this legislature is likely to do more harm than good, and is likely to cause serious damage to both the right of the State to regulate its own resources and the stability of the resource itself. This on one of those cases where it is much better to do nothing, than to try to do something with virtually no public input and so little time for intelligent consideration and debate. This matter can, and should, await the results of the federal lawsuit, and can be considered between now and the next session of the legislature in any event.

This is precisely what happened after the Madison decision where the Alaska Supreme Court struck down the state regulations. The legislature wisely adjourned without a new law, continued to debate it and passed the 1986 law the next legislative session. Even though the State was threatened with federal take-over, the legislature did not precipitously act.

The State can live with present federal regulations, which

apply only to federal lands. Fishing, both sport and commercial, is not regulated under ANILCA. Any action by the State now will damage both sport and commercial fishing interests, by subjecting them to possible federal regulation.

The best solution at this point is to do nothing, and join the lawsuit or wait for the results of the lawsuit. Also, urge our congressional delegation to amend ANILCA.

ROSS, GINGRAS, BAILEY & MINER
A Professional Corporation

BY: Cheri C. Jacobus
CHERI C. JACOBUS

Enclosures

Lenzini Opinion
ANILCA lawsuit
NRA Resolution
Wildlife Legislative Fund of America Opinion

P.S.

Ahtna Land Closure

After this letter was completed, I received a call from Ms. Pagano of the Associated Press. She stated to me that Ahtna Corporation had just announced that it has closed its land to hunting by non-corporation shareholders. The Nelchina caribou herd grazes on Ahtna land. Ahtna's action demonstrates how dangerous it is to pass a constitutional amendment when each private landowner can close its land to hunting. While the land belongs to Ahtna, the game does not. The "common use" clause of the state constitution, the very clause the legislature is considering negating, requires that the game resource be available equally to everyone. While Ahtna, like any other private landowner, may restrict hunting on his or her property, the "common use" clause requires that hunting be prohibited equally to all people, including corporation members.

Ahtna's actions demonstrate how much more complex the issues are than what the legislature has been led to believe. They clearly demonstrate that it is improper for the legislature to act precipitously at this time, particularly by trying to amend the Alaska Constitution.



Alaska State Legislature

HOUSE RESOURCES COMMITTEE

16th Alaska Legislature
First Special Session

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

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-Letters (2) from Alaska's Attorney General to Rep.
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3. Alaska Statutes relating to subsistence

Title 16

SLA 1986 CH 52 [SCS CS HB288(Res)amS]

4. Court Cases

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10. General Information and Research on Subsistence:

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"Southeast Alaska Subsistence Fishing & Hunting Update"
(11/89)

"Alaska's New Subsistence Law--What It Does and How Does
It Work?" (1986)

Alaska Fish and Game Magazine, "Subsistence, Adapting
Ancient Ways to Modern Times," December 1989

House Research Report on Subsistence Laws in Alaska: 1960
to 1990

end

CHRONOLOGY OF THE STATE'S SUBSISTENCE LAW

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

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

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

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

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

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

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

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

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

1986 KENAITZE DECISION REVERSED: The ninth U.S. circuit court of appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA. The U.S. Supreme Court ultimately denies review.

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

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

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

RESULTS OF MCDOWELL V. STATE RULING ON SUBSISTENCE LAW

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

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

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

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

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

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

SUBSISTENCE CHRONOLOGY

- 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 the Interior.
- 1978 The State Subsistence law created a priority for subsistence over all other fish and game uses. It did not define subsistence users.
- 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 V. STATE 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 V. STATE decision was issued by the Federal Appeals Court which said the State's definition of "rural" (the economic nature of community) was not consistent with that of ANILCA (the population of the community).
- 1989 McDOWELL V. STATE decision issued by the State Supreme Court on December 22, 1989 ruled that the State law (1978, amended in 1986) granting a Subsistence priority based solely on residency is unconstitutional under the Alaska State Constitution.

APRIL 13, 1990: Notice of Intent to propose regulations was published in the federal register. Temporary regulations establish a Federal program that minimizes change to the State program consistent with meeting the Federal government's responsibilities under TITLE VIII.

JUNE 8, 1990: Temporary regulations for the federal program published in the Federal Register with a ten day public comment period.

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

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

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that—

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

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

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

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

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

43 USC 1601
note.

POLICY

16 USC 3112.

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

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

of protecting their suitability for
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PREFERENCE MANAGEMENT AND USE

FINDINGS

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POLICY

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 on rural residents who depend upon
 sources of such lands; consistent with
 wildlife in accordance with recognized

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

Ante. p. 2377.

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

(3) except as otherwise provided by this Act or other Federal
 laws, Federal land managing agencies, in managing subsistence
 activities on the public lands and in protecting the continued
 viability of all wild renewable resources in Alaska, shall cooper-
 ate 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 perman-
 ent 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. When-
 ever it is necessary to restrict the taking of populations of fish and
 wildlife on such lands for subsistence uses in order to protect the
 continued viability of such populations, or to continue such uses, such
 priority shall be implemented through appropriate limitations based
 on the application of the following criteria:

16 USC 3114.

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

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

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

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

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

Regional advisory council, authority.

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

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

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

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

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

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

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

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

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

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

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

Annual report to Secretary.

REGIONAL PARTICIPATION

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

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

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

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

FEDERAL MONITORING

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

Implementation.

Reimbursement
to States.Report to Con-
gress.Report to con-
gressional com-
mittees.

16 USC 3116.

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

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

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

Hearing.

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

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

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

Subsistence
hunting pro-
gram.

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

Notice and hearings.

12 USC 4332.

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

48 USC note prec. 21

43 USC 1601 note.

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

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

ACCESS

16 USC 3121.

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

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

RESEARCH

16 USC 3122.

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

PERIODIC REPORTS

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

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

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

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

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

A) such a significant restriction of subsistence consistent with sound management principles of the public lands, (B) the proposed minimal amount of public lands necessary for such use, occupancy, or other purposes of such use, or other reasonable steps will be taken to minimize subsistence uses and resources resulting

required to prepare an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969, and to provide the notice and hearing and include the action (a) as part of such environmental

shall be construed to prohibit or impair the ability of a Native Corporation to make land selections pursuant to the Alaska Statehood Act and the Alaska Native Settlement Act.

Notwithstanding the procedural requirements of this Act, the head of the appropriate Federal agency shall dispose of public lands under his primary jurisdiction in accordance with the uses or purposes authorized by this Act or

ACCESS

The Secretary shall ensure that rural residents who are dependent on the public lands shall have reasonable access to subsistence uses.

Nothing in this Act or other law shall be construed to prohibit or impair the use of the public lands appropriate use for recreation, automobiles, motorboats, and other means of transportation, or for purposes additionally employed for such purposes by the Secretary, subject to reasonable regulation.

RESEARCH

The Secretary, in cooperation with the State and other agencies, shall undertake research on fish and wildlife uses on the public lands; seek data from, and disseminate, the special knowledge of local residents and their families; and make the results of such research available to local and regional councils established by the Secretary pursuant to section 805, and other appropriate

PERIODIC REPORTS

Within one year after the date of enactment of this Act, and at regular intervals thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit to the President, the Senate and the Speaker of the House of Representatives a report on the implementation of this title. The report shall include

- (1) the results of the monitoring undertaken pursuant to section 806;
- (2) the status of fish and wildlife populations on public lands and the effects of subsistence uses;
- (3) the nature and extent of subsistence uses of fish and wildlife on the public lands;

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

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

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

(7) such other recommendations the Secretary deems appropriate.

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

Publication in Federal Register.

REGULATIONS

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

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

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

16 USC 3125.

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

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

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

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

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

16 USC 3126

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

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

Publication in
Federal Register.

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

SUBMERGED LANDS STATUTE OF LIMITATION

43 USC 1631.

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

43 USC 1601
note.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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May 6, 1990

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PHONE: (907) 465-3600

The Honorable Mike Navarre
Majority Leader, House of Representatives
16th Alaska Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Navarre:

At the House Majority caucus yesterday, you asked me to briefly assess whether the subsistence provisions in ANILCA can be successfully challenged in court. Those provisions require that the federal government take over management of fish and wildlife on federal land unless Alaska enacts a subsistence preference for rural residents, something which the Alaska Supreme Court held in McDowell v. State, 785 P.2d 1 (Alaska 1989), is not permitted by the Alaska Constitution. In my opinion, it is unlikely that the ANILCA subsistence provisions can be successfully challenged.

Two legal questions would be presented in any federal court challenge to ANILCA's subsistence provisions. (Since ANILCA is a federal statute, it would have to be challenged in federal court.) The first is whether the classification between rural residents and urban residents for subsistence purposes satisfies the equal protection guarantee in the United States Constitution. The second is whether, if the rural/urban classification satisfies the federal equal protection guarantee, the threatened federal takeover of fish and wildlife on federal land nonetheless is invalid as an unconstitutional violation of the state's right to manage fish and wildlife.

I. The rural/urban classification for subsistence in ANILCA probably does not violate the federal equal protection guarantee.

When a federal statute is challenged as violating the equal protection guarantee of the United States Constitution, the federal courts apply a very deferential test when no fundamental right (e.g., freedom from racial discrimination) is involved: "[W]e confine our consideration to whether the statutory classification 'is rationally related to a legitimate governmental interest.'" Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988) (citation

Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988) (citation omitted). (That is a substantially more deferential test than the Alaska Supreme Court applies to state legislation challenged under the equal protection guarantee in the Alaska Constitution.) Although the Lyng case involved monetary resources, the Court noted that "our review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to [allocate those finite resources] to improve the general welfare is lodged in Congress rather than the courts." Id. at 373 (citation omitted). This would appear equally applicable to finite nonmonetary resources, like fish and wildlife.

In section 801 of ANILCA, Congress made a number of findings with respect to the importance of subsistence to rural residents. Such findings are not reweighed by the courts, and the courts will not substitute their judgment for that of Congress. See Kleppe v. New Mexico, 426 U.S. 529, 541 n. 10 (1976). (The Kleppe case also is discussed in connection with the second legal question below.) The evidence before Congress, while some may perhaps dispute it, is that there is a difference between rural residents' reliance on fish and wildlife and urban residents' reliance on those resources. Congress' findings with respect to the importance of subsistence to rural residents would, I believe, be found by the federal courts to support the ANILCA subsistence preference for rural residents.

II. Congress probably has the constitutional authority to authorize a federal takeover of fish and wildlife management on federal land.

In Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976) (footnote omitted), a unanimous United States Supreme Court held that the Property Clause, art. IV, sec. 3, cl. 2, of the United States Constitution gives the United States Congress constitutional authority to regulate fish and wildlife on federal land: "In our view, the 'complete power' that Congress has over public lands [under the Property Clause] necessarily includes the power to regulate and protect the wildlife living there."

The Court also rejected New Mexico's argument that interpreting the Property Clause to give Congress the power to regulate fish and wildlife on federal land impermissibly intrudes on state sovereignty. In the Court's view, "when Congress so acts [under the Property Clause], the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const., Art. VI, cl.2." 426 U.S. at 543 (case citations omitted).

The rationale for this conclusion is that all states consent to the provisions of the United States Constitution, including the Property Clause and the Supremacy Clause, upon

Hon. Mike Navarre
Alaska House of Representatives

May 6, 1990
Page 3

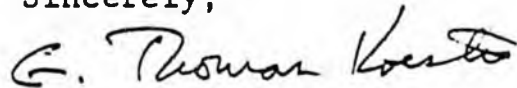
admission to the Union. In art. XII, sec. 13, of the Alaska Constitution, we consented to "[a]ll provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States." These clearly include the specific powers -- such as the Property Clause power over federal land -- which the United States Constitution grants to the national government.

The decision in the Kleppe case was by a unanimous Supreme Court only fourteen years ago. In any action seeking to prevent the federal government from taking over management of fish and wildlife on federal land, the lower federal courts will be bound by the Kleppe decision. They therefore would have to deny any injunction sought to prevent such a takeover unless and until the Supreme Court reverses Kleppe. Because it would take at least three to four years before the case could reach the Supreme Court (assuming it was willing to take it), we would be left with at least that much time during which the federal government would be managing fish and wildlife on federal land.

I have not reached this conclusion lightly. For years, I have been a strong proponent of the state's rights and strenuously resisted attempts by the federal government to diminish those rights. See, e.g., Watt v. Alaska, 451 U.S. 259 (1981) (successful defense of Alaska's entitlement to 90 percent of federal oil and gas leasing revenues from the Kenai National Moose Range); Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (author of amicus brief, in which 32 other states joined, in support of Utah's successful equal footing doctrine claim). If the Kleppe decision had not been decided in 1976, I could and would make very strong arguments that the federal government does not have constitutional authority to enact laws governing fish and wildlife in Alaska, even on federal land, with some substantial possibility of success. In light of the Kleppe decision, however, I believe such arguments will not succeed.

I hope this answers your questions. If I can be of further assistance, please contact me at your convenience.

Sincerely,



G. Thomas Koester
Assistant Attorney General

Challenging U.S. on game control futile, state told

By JOE HUNT
Times Writer

Alaska would lose if it challenged in court the imminent federal takeover of fish and wildlife management on federal lands in the state, a state Department of Law opinion says.

The state has no clear right to manage fish and wildlife on federal land despite the transfer of those duties to Alaska shortly after statehood, said Assistant Attorney General G. Thomas Koester in the opinion last week.

The U.S. Supreme Court in 1976 unanimously upheld the U.S. government's right to control fish and wildlife on its land. In that case, New Mexico unsuccessfully argued federal control violated state sovereignty, Koester wrote.

The high court concluded the Property Clause of the U.S. Constitution gives Congress complete power over public land, including regulation and protection

The U.S. Supreme Court in 1976 unanimously upheld the U.S. government's right to control fish and wildlife on its land.

of wildlife, Koester said.

The Property Clause is the overriding document in a tangled web of federal and state documents governing how subsistence will be managed in Alaska and, ultimately, by whom.

"The federal government has the right to say what the highest use of resources on federal land is and that's to provide hunting and fishing for subsistence

See Courts, back page

Courts

Continued from page A-1

users," Koester said.

Congress made that decision when it passed the Alaska National Interest Lands Conservation Act in 1980 which, among other things, guaranteed rural residents a priority to hunting and fishing in the state. Lawmakers directed the state to implement a rural priority system or lose the right to manage wildlife on federal lands.

The state tried, writing and rewriting a subsistence law to meet federal requirements. The Alaska Supreme Court, however, overturned the law last year when it declared the rural preference portion unconstitutional.

That put the subsistence issue back in federal hands, forcing the threatened July 1 takeover and prompting vows of lawsuits to fight for the state's rights. The Alaska Outdoor Council has urged Gov. Steve Cogswell to seek an injunction blocking the takeover and to seek a permanent remedy through the courts, said Rupe Andrews, a member of the group's board of directors.

"We've maintained all along that subsistence is not the issue here," Andrews said. "The big argument is it's a state rights issue. We feel the state should be managing this program."

Congress passed the Alaska Statehood

Act in 1966 which provided for the transfer of fish and wildlife management from federal to state hands. That has been interpreted by some Alaskans as a contract between the state and Congress, a pact recognizing the state has the right to manage and regulate wildlife within its borders.

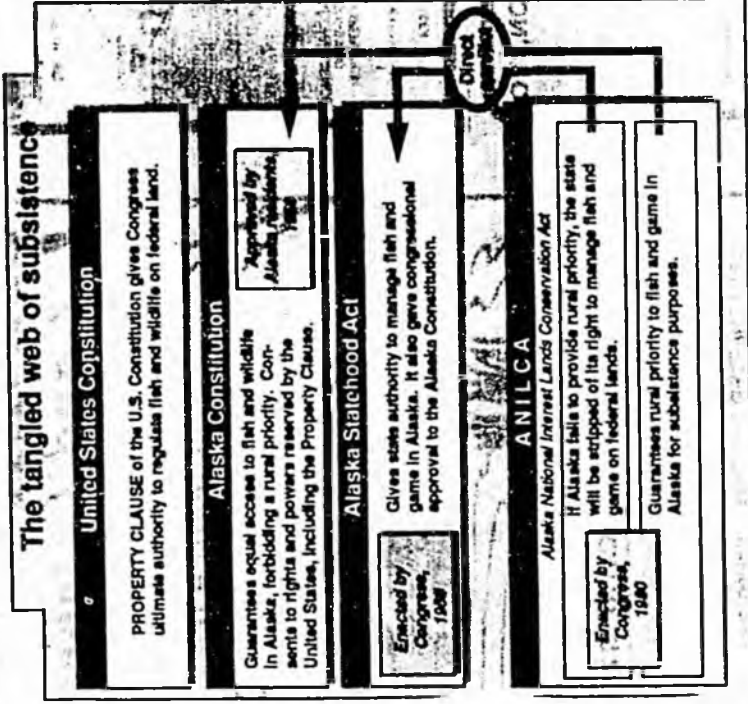
"The federal government accepted Alaska as a state under certain conditions and the federal government should be held to live up to those conditions," said attorney Wayne Anthony Ross, whose law firm successfully sued to have the state subsistence law overturned.

"If we were beginning with a blank slate, I would be the first to say it's a good argument and we ought to dive into the fray and fight it in court," agreed Koester. The problem is that precedence already has been set and, getting the issue back in front of the Supreme Court would take years — if it could be done at all.

Precedence also ties the hands of the U.S. District Court, meaning a judge could not grant an injunction to halt the federal takeover, he said.

"If the Kleppe (vs. New Mexico) decision had not been decided in 1976, I could and would make very strong arguments that the federal government does not have constitutional authority to enact laws governing fish and wildlife in Alaska, even on federal land, with some substantial possibility of success," Koester said.

"In light of the Kleppe decision, however, I believe such arguments will not succeed," he concluded.



Times graphic

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

May 31, 1990

STEVE COWPER, GOVERNOR

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The Honorable Mike Navarre
Majority Leader
Alaska State Representative
16th Alaska Legislature
34832 Kalifonsky Beach Road
Soldotna, AK 99669

Dear Representative Navarre:

You asked for a short letter outlining what we view as the disadvantages of filing a lawsuit challenging the subsistence provisions in the Alaska National Interest Lands Conservation Act ("ANILCA").

The first disadvantage is that, in our opinion, such a case probably cannot be won.

That is a subject over which lawyers disagree, however, and that is not the only (or most important) reason such a suit should not be filed. There are a number of policy reasons which argue against the filing of such a lawsuit.

During the pendency of any lawsuit, the future management of fish and wildlife in Alaska will be uncertain. Because it is unlikely that a preliminary injunction can be obtained against a federal takeover of fish and wildlife management on federal land, it would be substantially more difficult for the state to regain management later since the federal government, as we all know, is very reluctant to transfer power to the state.

Such a lawsuit would also signal a dramatic reversal of the state's policy for the last ten years of supporting a subsistence preference for rural residents. That state position first emerged during the negotiations which led up to the passage of ANILCA, which embodied a compromise between the state, the oil companies, the Alaska Native community, and the commercial and sport hunting and fishing interests in the state. That policy was further embodied in regulations adopted by the joint Boards of Fish and Game in 1982, and in the 1986 subsistence law passed by the Alaska State Legislature. Recent public opinion polls show that it remains the policy favored by a large majority of Alaskans.

The Honorable Mike Navarre
Majority Leader, Alaska State Representative
16th Alaska State Legislature

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Moreover, challenging ANILCA's subsistence provisions could jeopardize the state's relationship with Congress in the future. Because ANILCA represented a compromise, Congress understandably expected that the state would live with its provisions and not challenge them. If the state were to challenge them now, the state's ability to negotiate meaningful compromises in future negotiations with Congress could be substantially diminished.

Finally, should the state succeed in challenging ANILCA's subsistence provisions, there is no guarantee that Congress would not enact something even more onerous and undesirable from the state's point of view. We have received a copy of a May 8, 1990, letter from Senator Daniel K. Inouye, Chairman of the United States Senate Select Committee on Indian Affairs, to Secretary of Interior Manuel Lujan. In that letter, Senator Inouye offers the following two observations:

First, because [ANILCA] is Indian legislation purposefully enacted to benefit Alaska Natives, to the extent Title VIII delegates the Secretary of Interior administrative discretion to determine how best to achieve the title's purpose, it is my view that Congress expects that such discretion will at all times be exercised to protect and benefit Alaska Natives. In other words, if reasonable minds may differ as to the intent of Congress embodied in a particular section of the text of Title VIII, Congress clearly intended the ambiguity to be resolved in favor of the policy choice that best advances the protection of Native subsistence hunting and fishing.

Secondly, because of its importance to thousands of Alaska Natives living in isolated villages located across the breadth of Alaska, I can assure you that the implementation of Title VIII is a matter of the utmost importance to the Select Committee on Indian Affairs. For that reason, I would request that the Committee be consulted on an ongoing basis and be kept fully informed of all Department of the Interior Title VIII implementation-related decisions and activities both prior to and during any implementation to be sure that the objectives of the Congress in securing Title VIII are fully achieved.

Recent polls continue to show strong public support for a subsistence preference for rural residents. Most Alaskans, however, believe that it would be inappropriate to provide a

The Honorable Mike Navarre
Majority Leader, Alaska State Representative
16th Alaska State Legislature

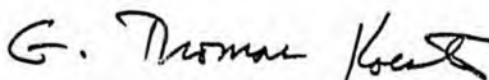
May 31, 1990
Page 3

subsistence preference only to a select group of Alaskans based on their ethnic heritage. While some might welcome that result, that has not been the state's position and, in my view, probably would be viewed by the majority of Alaskans as being a less desirable result than the current ANILCA subsistence preference for rural residents. If Senator Inouye's letter is any indication, such a result might be the direct consequence of a successful state challenge to ANILCA's rural preference.

Those are some of the policy reasons a lawsuit challenging ANILCA's subsistence preference for rural residents may not be appropriate. If I can answer further questions, please contact me at your convenience.

Sincerely yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
G. Thomas Koester
Assistant Attorney General

GTK:tg

cc: Norman Cohen, Deputy Commissioner
Department of Fish and Game

Denby Lloyd, Special Assistant
Office of the Governor

SECTIONS OF ALASKA STATUTE THAT RELATE TO
SUBSISTENCE

AS 16.05.090
.094
.251
.255
.258
.259
.330
.930
.940

AS 16.10.380
.750
.800

AS 16.20.090
.615
.625

AS 16.40.120

Sec. 14 56 030 State library duties. The department shall undertake state library functions that will benefit the state and its citizens, including

(1) coordinating library services of the state with other educational services and agencies to increase effectiveness and eliminate duplication;

(2) providing reference library service to state and other public officials;

(3) providing library services and administering state and other grants in aid to public libraries to supplement and improve their services, the grants to be paid from funds appropriated for that purpose, or from other funds available for that purpose;

(4) providing library service directly to areas in which there is not sufficient population or local revenue to support independent library units;

(5) distributing financial aid to public libraries for extension of library service to surrounding areas and to improve inadequate local library service under regulations adopted by the department;

(6) offering consultant service on library matters to state and municipal libraries, community libraries, school libraries, and libraries in unincorporated communities;

(7) serving as a depository for state and federal publications concerning Alaska;

(8) applying for, receiving, and spending, in accordance with AS 37 07 (the Executive Budget Act), federal, state, or private funds available for library purposes;

(9) recording and distributing the election pamphlet provided for by AS 15 58 to libraries throughout the state for use by blind voters;

(10) establishing and charging fees for reproduction or printing costs and for mailing and distributing state publications and research data;

(11) operating and maintaining the Alaska State Archives under AS 10 21 14 57 ch 98 SLA 1966; am § 1 ch 10 SLA 1975, am § 25 ch 138 SLA 1986; am E.O. No. 70 § 2 (1988)

Effect of amendments. The 1988 amendment, effective March 12, 1988, added paragraph (11).

Supplemental

Alaska Statutes

Title 16. Fish and Game.

Chapter

- 05 Fish and Game Code (§§ 16 05 050, 16 05 251, 16 05 310, 16 05 407, 16 05 710 — 16 05 723, 16 05 786, 16 05 787, 16 05 815, 16 05 925 — 16 05 940)
- 10 Fisheries and Fishing Regulations (§§ 16 10 265, 16 10 269, 16 10 310, 16 10 400, 16 10 410, 16 10 450, 16 10 480, 16 10 555, 16 10 600 — 16 10 620)
- 20 Conservation and Protection of Alaskan Wildlife (§§ 16 20 030, 16 20 031, 16 20 037, 16 20 610, 16 20 615)
- 40 Commercial Use of Fish and Game (§§ 16 40 100 — 16 40 199)
- 43 Regulation of Entry into Alaska (Commercial Fisheries) (§§ 16 43 150, 16 43 940)
- 61 Alaska Seafood Marketing Institute (§ 16 61 180)

Chapter 05. Fish and Game Code.

Article

- 1 The Department of Fish and Game (§ 16 05 050)
- 2 Boards of Fisheries and Game (§ 16 05 251)
- 3 Licensing of Sport Fishing and Hunting (§§ 16 05 310, 16 05 407)
- 4 Licensing of Commercial Fishing Crewmembers and Vessels (§§ 16 05 710, 16 05 723)
- 6 Miscellaneous Provisions (§§ 16 05 786, 16 05 787, 16 05 815)
- 7 General Provisions (§§ 16 05 925, 16 05 940)

Article 1. The Department of Fish and Game.

Section

- 50 Powers and duties of commissioner

Sec. 16 05 050. Powers and duties of commissioner. The commissioner has, but not by way of limitation, the following powers and duties:

(1) to assist the United States Fish and Wildlife Service in the enforcement of federal laws and regulations pertaining to fish and game;

(2) through the appropriate state agency and under the provisions of AS 36 30 (State Procurement Code), to acquire by gift, purchase, or lease, or other lawful means, land, buildings, water, rights of way, or other necessary or proper real or personal property when the acquisition is in the interest of furthering an objective or purpose of the department and the state;

Article 2. Boards of Fisheries and Game.

Section 251 Regulations of the Board of Fisheries

Sec. 16.05.221. Boards of Fisheries and Game.

NOTES TO DECISIONS

Regulation governing herring fishing as consistent with conservation and development purposes. See State v Herbert, 41 App Op No 748 (File A 1743), 1*2d (1967)

Salmon harvest allocation. The power of the Board of Fisheries to control fishery resource utilization allows it to allocate the salmon harvest between two competing subgroups of commercial users by a regulation requiring a salmon fisherman who wishes to transfer from one district to another in a bay to register in the new district at least 48 hours before trans-

fering, and to cease fishing in any district during the 48 hour period, which burdens mobile driftnetters more than stationary Meier v State, Bd of Fisheries, Sup Ct Op No 3195 (File No S 1704), 739 1*2d 172 (1967)

The duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users Meier v State, Bd of Fisheries, Sup Ct Op No 3195 (File No S 1704), 739 1*2d 172 (1967)

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44 62) for

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

(2) establishing open and closed seasons and areas for the taking of fish; if consistent with resource conservation and development goals, the board may adopt regulations establishing restricted seasons and areas necessary for persons 60 years of age and older to participate in sport, personal use, or subsistence fishing;

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

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

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

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

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

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

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

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

(11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed, however, this paragraph does not apply to permits issued or transferred under AS 16 43;

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

(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16 05 475(d), that are registered under the laws of the state, as defined in AS 16 05 475(c), after making a written determination that an on board observer program

(A) is the only practical data gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery;

(C) can be conducted at a reasonable cost; and

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

(14) establishing nonexclusive, exclusive and superexclusive regulation and use areas for regulating commercial fishing

(b) [Repealed, 4 12 ch 52 S.L.A. 1986]

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44 62 230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16 05 258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

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

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

- (3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;
- (4) the availability of alternative fisheries resources;
- (5) the importance of each fishery to the economy of the state;
- (6) the importance of each fishery to the economy of the region and local area in which the fishery is located;
- (7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

(b) Except as expressly provided in AS 16 40 120(e) and 16 40 130, the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16 40 100 or 16 40 120, the construction or operation of a farm or hatchery required to have a permit under AS 16 40 100, or a harvest with a permit issued under AS 16 40 120 (§ 3 ch 206 SIA 1976; am § 2 ch 218 SIA 1976; am § 4 ch 161 SIA 1978; am §§ 1, 2 ch 110 SIA 1980; am §§ 8, 9 ch 132 SIA 1984; am §§ 1 - 3, 12 ch 52 SIA 1986; am § 4 ch 76 SIA 1986; am § 1 ch 33 SIA 1987; am § 2 ch 93 SIA 1988; am § 7 ch 145 SIA 1988)

Historic notes. For 1988, a reference to "AS 16 40 120(d)" was deleted from (b) of this section to correct a manifest error in sec 7, ch 145, SIA 1988.

Cross references. For legislative findings in connection with the 1988 amendment to (a)(2) of this section, see sec 1, ch 81 SIA 1988 in the Temporary and Special Acts.

Effect of amendments. The first 1988 amendment, effective June 3, 1988,

in subsection (a), added all of the language at the end of paragraph (2) beginning with "if consistent" and made a series of minor punctuation changes throughout the rest of the subsection.

The second 1988 amendment, effective June 9, 1988, added subsection (b).

While neither amendment gave effect to the other, both have been given effect in this section as set out above.

NOTES TO DECISIONS

Regulation upheld. In promulgating a regulation governing commercial hunting fishing in Norton Sound, the board pursued a permissible objective (a) location of a fishery resource between resident and nonresident fishermen and employment means within its powers, and the

regulation itself was reasonable and nonarbitrary. *State v Hebert*, 61 App Op No. 718 (File A 1743), P 2d (1987).

Applied in *Meyer v State, Bd of Fisheries*, Sup Ct Op No. 3195 (File No. S 1704), 739 P 2d 172 (1987).

Article 3. Licensing of Sport Fishing and Hunting.

Section

370 Reports by licensees, tag holders, and transporters.

Section

407 Nonresident hunting big game animals must be accompanied.

Sec. 16.05.340. License and tag fees.

Cross references. For immaturity until July 1, 1990, and related provisions, see instance, for construction or operation of a commercial fishfarm, of a fishing license (a)(1) of this section or a collect-

ion permit under (b) of this section, see ch 70, SIA 1987, as amended by sec 21, ch 145, SIA 1988, in the Temporary and Special Acts.

Sec. 16.05.340. Permit applications.

Postponed repeal and reenactment. Section 2, ch 118, SIA 1984 which repealed and reenacted this section effective August 1, 1989, was repealed by sec

2, ch 149, SIA 1988 (consequently, the text of the note following the heading "Postponed repeal and reenactment" in the main pamphlet should be disregarded).

Sec. 16.05.370. Reports by licensees, tag holders, and transporters. (a) The commissioner of fish and game may require a report to be made by each licensee concerning the time, manner, and place of taking fish and game, the kinds and quantity taken, and other information helpful in administering the fish and game resources of the state.

(b) A person who sells big game tags shall give to each buyer a game report form provided by the department, to be completed and returned by the hunter after big game is taken. The department shall pay the cost of return postage for the report. The report must specify the location, amount, and kinds or species of game taken.

(c) A person who transports big game from the field for compensation shall, within seven days after providing the transportation, notify the department of the amount and kinds or species of game transported (§ 4 art 11 ch 94 SIA 1959; am § 4 ch 31 SIA 1963; am § 8 ch 160 SIA 1988).

Effect of amendments. The 1988 amendment, effective June 17, 1988, added subsections (b) and (c).

Sec. 16.05.407. Nonresident hunting big game animals must be accompanied. (a) It is unlawful for a nonresident to hunt, pursue or take brown bear, grizzly bear, polar bear, or sheep in this state, unless personally accompanied by

- (1) a person who is licensed as a master guide, registered guide, class A assistant guide or assistant guide by the Guide Board, or
- (2) a resident over 19 years of age who is
 - (A) the spouse of the nonresident; or
 - (B) is related to the nonresident, within and including the second degree of kindred, by marriage or blood.

(b) An applicant for a nonresident big game tag for the taking of an animal specified in (a) of this section shall first furnish to the state, on a form provided by the state, an affidavit showing that the applicant

Sec. 16 05 930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16 05 920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the department examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes.

(g) AS 16 05 330 -- 16 05 720 do not apply to an activity authorized by a permit issued under AS 16 40 100 or 16 40 120, or to a person or vessel employed in an activity authorized by a permit issued under AS 16 40 100 or 16 40 120 (5 28 art 1 ch 94 S.L.A. 1959; am § 1 ch 7 S.L.A. 1972; am § 2 ch 104 S.L.A. 1972; am § 4 ch 82 S.L.A. 1974; am §§ 16, 17 ch 206 S.L.A. 1975; am § 1 ch 20 S.L.A. 1976; am § 13 ch 151 S.L.A. 1978; am § 4 ch 23 S.L.A. 1983; am § 23 ch 132 S.L.A. 1981; am § 8 ch 145 S.L.A. 1988).

Effect of amendments. The 1988 amendment, effective June 9, 1988, added subsection (g).

Sec. 16 05 940. Definitions. In AS 16 05 -- AS 16 40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, 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;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish, but does not include processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of the vessel; in this paragraph "operate fishing gear" means to deploy or remove gear from state water, remove fish from gear during an open fishing season or period, or possess a gill net containing fish during an open fishing period;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

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

(10) "fish" means any species of aquatic finfish, invertebrate, or amphipod, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphipod.

(11) "fish derby" means a contest in which prizes are awarded for catching fish.

(12) "fishery" means a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource; in this paragraph "gear" and "type of gear" have the meanings given in AS 16 43 990;

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water that is completely enclosed by a generally escape-proof barrier; in this paragraph, "fish" does not include shellfish, as defined in AS 16 40 199.

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

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bears or other categories considered essential for carrying out the intention and purposes of AS 16 05 - AS 16 40.

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

(19) "hunting" means the taking of game under AS 16 05 - AS 16 40 and the regulations adopted under those chapters.

(20) "nonresident" means a person who is not a resident of the state.

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States.

(22) "operator" means the individual by law made responsible for the operation of the vessel;

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

(24) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(25) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(26) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16 05 - AS 16 40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(27) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(28) "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 gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(29) "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.

(30) "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 handcraft articles out of inedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption, in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis.

(31) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(32) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(33) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(34) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft (§ 2 art 1 ch 95 S.L.A. 1959, am §§ 1 - 4 ch 131 S.L.A. 1960; am § 1 ch 21 S.L.A. 1961; am §§ 1, 2 ch 102 S.L.A. 1961; § 9 art III ch 94 S.L.A. 1959, am § 23 ch 131 S.L.A. 1960; am § 1 ch 160 S.L.A. 1962, am §§ 13, 14 ch 31 S.L.A. 1963, am § 2 ch 32 S.L.A. 1968; am § 3 ch 73 S.L.A. 1970, am § 1 ch 91 S.L.A. 1970, am § 4 ch 110 S.L.A. 1970, am § 1 ch 90 S.L.A. 1972, am § 5 ch 82 S.L.A. 1974, am §§ 26, 82 ch 127 S.L.A. 1974, am §§ 18 - 20 ch 206 S.L.A. 1975, am § 12 ch 105 S.L.A. 1977; am §§ 14, 15 ch 151 S.L.A. 1978, am § 1 ch 78 S.L.A. 1979, am § 1 ch 24 S.L.A. 1980, § 4 ch 74 S.L.A. 1982, am § 21 ch 132 S.L.A. 1984, am §§ 9 - 11 ch 52 S.L.A. 1986, am § 5 ch 76 S.L.A. 1986, am § 1 ch 114 S.L.A. 1988, am § 9 ch 145 S.L.A. 1988)

Effect of amendments. The first 1988 amendment substituted all of the language at the end of paragraph (6) beginning with "commercial fishermen include" for "and the term 'commercial fisherman' includes the crews of tenders or other floating craft used in transporting fish."

The second 1988 amendment, effective June 9, 1988, substituted that is completely enclosed by a generally escape-proof barrier in the paragraph. It does

not include shellfish as defined in AS 16.40.190 for which is completely enclosed by a generally escape-proof barrier in paragraph (14).

While neither amendment gave effect to the other, both have been given effect in this section as set out above.

Legislative history reports. For legislative history of intent in connection with the amendment to (3) of this section by § 1 ch 110, S.L.A. 1980 (SSS) 309 (last). See 1980 Senate Journal 2021.

Chapter 10. Fisheries and Fishing Regulations.

Article

- 6 Purchase of Fish (AS 16.10.265 - 16.10.269)
 7 Commercial Fishing Loan Act (AS 16.10.310)
 8 Salmon Hatcheries (AS 16.10.400 - 16.10.410, 16.10.450, 16.10.480)
 9 Fisheries Enhancement Loan Program (AS 16.10.555 - 16.10.600 - 16.10.620)

Article 6 Purchase of Fish.

Section

- 265 Purchase of fish from permit holders
 269 Limitations

Sec. 16.10.265. Purchase of fish from permit holders. (a) It is unlawful for an individual while acting as a fish processor or primary fish buyer, or as an agent, director, officer, member, or employee of a fish processor, of a primary fish buyer, or of a cooperative corporation organized under AS 16.15 to intentionally or knowingly make an original purchase of fish from a seller who, in violation of AS 16.43, does not hold a landing permit, an entry permit or an interim-use permit.

(b) An individual who violates (a) of this section is

(1) upon a first conviction, guilty of a class B misdemeanor and shall be sentenced to a fine of not less than \$1,000 nor more than \$5,000, and may be sentenced to a definite term of imprisonment of not more than 90 days;

(2) upon a second conviction, guilty of a class A misdemeanor and shall be sentenced to a fine of not less than \$5,000 nor more than \$10,000, and may be sentenced to a definite term of imprisonment of not more than one year;

(3) upon a third or subsequent conviction, guilty of a class A misdemeanor and shall be sentenced to a fine of not less than \$10,000 nor more than \$25,000, and may be sentenced to a definite term of imprisonment of not more than one year.

(c) The commissioner of revenue shall impose upon a fish processor, primary fish buyer, or cooperative corporation organized under AS 16.15, a civil fine equal to the value of fish purchased in violation of this section by

(1) the fish processor or primary fish buyer if the fish processor or primary fish buyer is not a corporation; or

(2) a director, officer, or employee in a policy making position of the fish processor, of the primary fish buyer, or of the cooperative corporation. Value is based on the average price paid to fishermen at the time of the violation.

(d) The commissioner of commerce and economic development may suspend or revoke a business license issued under AS 43.70.020 and the commissioner of revenue may suspend or revoke a license to engage in the business of processing or buying raw fish if the licensee or

and the legislature intends that the land retain its status as mental health trust land, notwithstanding its inclusion in the Dude Creek Critical Habitat Area (§ 1 ch 31 S.L.A. 1988)

Effective dates. Section 3, ch 31, S.L.A. 1988, makes this section effective May 13, 1988, in accordance with AS 01 10 07(h).

Editor's notes. Section 2, ch 31, S.L.A. 1988 provides that the commissioner of fish and game shall allow public use of the Dude Creek Critical Habitat Area

compatible with AS 16 20 610(a) until a management plan has been adopted under AS 16 20 610(e).

Legislative history reports. - For legislative letter of intent on ch 31, S.L.A. 1988, see the Senate letter of intent on CSSR 342 (Reel), 1988 Senate Journal 2691 2692.

Sec. 16.20.615. Tugidak Island critical habitat area. (a) The state land above the mean high tide line within the following described area is established as the Tugidak Island Critical Habitat Area:

- (1) Township 41 South, Ranges 33 - 34 West, Seward Meridian
- (2) Township 42 South, Range 33 West, Seward Meridian

Sections 1 - 11
Sections 14 - 33
Sections 25 - 26

- (3) Township 42 South, Ranges 34 - 35 West, Seward Meridian
- (4) Township 43 South, Ranges 34 - 35 West, Seward Meridian

(b) In addition to the area described in (a) of this section, the water and the land below the mean high tide line in the lagoon at the northeast end of Tugidak Island are included within the Tugidak Island Critical Habitat Area.

(c) The Tugidak Island Critical Habitat Area described in (a) and (b) of this section shall be managed under a management plan prepared by the department.

(d) The department shall permit existing claims to remain, subsistence and recreational uses to continue, and commercial uses such as seal hunting and placer mining to continue, if appropriate under the management plan adopted under (c) of this section to the extent that the activities are compatible with the establishment of the Tugidak Island Critical Habitat Area.

(e) The department shall permit entry within the Tugidak Island Critical Habitat Area for the exploration and development of oil and gas resources when compatible with the purposes for which the critical habitat area was established. An oil and gas lease of state land within the Tugidak Island Critical Habitat Area is valid and continues in full force according to its terms (§ 2 ch 116 S.L.A. 1988).

Reviser's notes. Enacted as AS 16 20 610. Renumbered in 1988.

Cross references. For statement of legislative purpose, see sec 1, ch 116, S.L.A. 1988, makes this section effective

June 7, 1988, in accordance with AS 01 10 07(h).

Editor's notes. Section 3, ch 116, S.L.A. 1988 provides "After completion of plans for the area including the Tugidak Island Critical Habitat Area as enacted in

sec 2 of this Art. the commissioner of natural resources and fish and game may recommend an adjustment in the bound area of the critical habitat area to the legislature."

Chapter 40. Commercial Use of Fish and Game.

Article
2 Aquatic Farming (H) 16 40 100 - 16 40 199

Article 1. Buffalo and Musk Oxen.

This article heading is set out to incorporate editorial changes made by the Reviser of Statutes.

Article 2. Aquatic Farming.

Section	Section
100 Aquatic farm and hatchery permits	140 Limitation on sale, transfer of stock, and products
105 Criteria for issuance of permits	150 Disease control and inspection
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Cross references. - For legislative findings and policy in connection with the enactment of AS 16 40 100 - 16 40 199, see sec 1, ch 145, S.L.A. 1988 in the Temporary and Special Acts, for applicability to persons operating an aquatic farm or related hatchery on June 9, 1988, see sec 18, ch 145, S.L.A. 1988 in the Temporary and Special Acts, for establishment and

duties of Alaska Finfish Farming Task Force, see sec 20, ch 145, S.L.A. 1988 in the Temporary and Special Acts. **Legislative history reports.** For legislative letter of intent for ch 145 S.L.A. 1988 (HCS CSSR 514(H)), which enacted AS 16 40 100 - 16 40 199, see 1988 House Journal 3718.

Sec. 16.40.100. Aquatic farm and hatchery permits. (a) A person may not, without a permit from the commissioner, construct or operate

- (1) an aquatic farm; or
- (2) a hatchery for the purpose of supplying aquatic plants or shell fish to an aquatic farm.

(b) A permit issued under this section authorizes the permittee, subject to the conditions of AS 03 05 and AS 16 40 100 - 16 40 199, to acquire, purchase, offer to purchase, transfer, possess, sell, and offer to

will stock and aquatic farm products that are used or reared at the hatchery or aquatic farm. A person who holds a permit under this section may sell or offer to sell shellfish stock to the department or to an aquatic farm or related hatchery outside of the state.

(c) The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources.

(d) Notwithstanding other provisions of law, the commissioner may not issue a permit under this section for the farming of, or hatchery operations involving, Atlantic salmon (§ 2 ch 145 S.L.A. 1988).

Sec. 16.40.105. Criteria for issuance of permits. The commissioner shall issue permits under AS 16 40 100 on the basis of the following criteria:

(1) the physical and biological characteristics of the proposed farm or hatchery location must be suitable for the farming or the shellfish or aquatic plant proposed;

(2) the proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources;

(3) the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner; and

(4) the proposed farm or hatchery plans and staffing plans must demonstrate technical and operational feasibility (§ 2 ch 145 S.L.A. 1988).

Sec. 16.40.110. Permit application, renewal, and transfer.

(a) An applicant for an aquatic farming or hatchery permit required under AS 16 40 100 shall apply on a form prescribed by the commissioner. An application for a permit must include a plan for the development and operation of the aquatic farm or hatchery, which must be approved by the commissioner before the permit is issued.

(b) An application for renewal or transfer of a permit must be accompanied by fees required by the commissioner, a report of the disease history of the farm or hatchery covered by the permit, and evidence that satisfies the commissioner that the applicant has complied with the development plan required under (a) of this section. The commissioner may require a health inspection of the farm or hatchery as a condition of renewal. The department may conduct the inspection or contract with a disease diagnostician to conduct the inspection.

(c) A person to whom a permit is transferred may use the permit only for the purposes for which the permit was authorized to be used by the transferor, and subject to the same conditions and limitations (§ 2 ch 145 S.L.A. 1988).

Sec. 16.40.120. Aquatic stock acquisition permits. (a) A person may not acquire aquatic plants or shellfish from wild stock in the state for the purpose of supplying stock to an aquatic farm or hatchery required to have a permit under AS 16 40 100 unless the person holds an acquisition permit from the commissioner.

(b) An acquisition permit authorizes the permit holder to acquire the species and quantities of wild stock in the state specified in the permit for the purposes of supplying stock to

(1) an aquatic farm or hatchery required to have a permit under AS 16 40 100;

(2) the department.

(c) The commissioner shall specify the expiration date of an acquisition permit and may attach conditions to an acquisition permit, including conditions relating to the time, place, and manner of harvest. Size, gear, place, time, licensing, and other limitations applicable to sport, commercial, or subsistence harvest of aquatic plants and shellfish do not apply to a harvest with a permit issued under this section. The commissioner of fish and game shall issue or deny a permit within 30 days after receiving an application.

(d) The commissioner shall deny or restrict a permit under this section upon finding that the proposed harvest will impair sustained yield of the species or will unreasonably disrupt established uses of the resources by commercial, sport, personal use, or subsistence users. The commissioner shall inform the Board of Fisheries of any action taken on permit applications for species that support commercial fisheries subject to limited entry under AS 16 43 and of any permits denied because of unreasonable disruption of an established use. A denial of the permit by the commissioner must contain the factual basis for the findings.

(e) The Board of Fisheries may adopt regulations for the conservation, maintenance, and management of species for which an acquisition permit is required.

(f) Except as provided in (d) of this section or in a regulation adopted under (e) of this section, the commissioner shall issue a permit if

(1) wild stock is necessary to meet the initial needs of farm or hatchery stock;

(2) there are technological limitations on the propagation of culture stock for the species sought;

(3) wild stock sought is not fully utilized by commercial, sport, personal use, or subsistence fisheries; or

(4) wild stock is needed to maintain the gene pool of a hatchery or aquatic farm.

(g) Aquatic plants and shellfish acquired under a permit issued under this section become the property of the permit holder and are no longer a public or common resource (§ 2 ch 145 S.L.A. 1988).

Title 16 -- Subsistence related
statutes
Alaska Statutes

Title 16. Fish and Game.

Chapter

- 05 Fish and Game Code (§§ 16 05 010 -- 16 05 950)
- 10 Fisheries and Fishing Regulations (§§ 16 10 010 -- 16 10 620)
- 20 Conservation and Protection of Alaskan Wildlife (§§ 16 20 010 -- 16 20 690)
- 25 Stocking of Public Land (§ 16 25 010)
- 30 Destruction of Big Game Animals and Wild Fowl (§§ 16 30 010 -- 16 30 030)
- 35 Predatory Animals (§§ 16 35 010 16 35 200)
- 40 Commercial Use of Fish and Game (§§ 16 40.010 -- 16 40 030)
- 43 Regulation of Entry into Alaska Commercial Fisheries (§§ 16 43 010 -- 16 43 990)
- 45 Pacific Marine Fisheries Compact (§§ 16 45 010 -- 16 45 040)
- 51 Alaska Seafood Marketing Institute (§§ 16 51 010 -- 16 51 180)
- 52 Fishery Industrial Technology Center (§§ 16 52 010 -- 16 52 070)
- 55 Shooting and Firearm Safety (§§ 16 55 010 -- 16 55 040)

Reviser's notes: The provisions of this title were redrafted in 1983 to remove personal pronouns pursuant to L 4 ch 68, SIA 1982 (Other minor word changes were made in this title in 1981, 1983, and 1987)

Collateral references: 35 Am Jur 2d, Fish and Game, § 29 et seq
36A C.J.S. Fish, §§ 9, 28, 38 C.J.S. Game, §§ 2, 18

Chapter 05. Fish and Game Code.

Article

- 1 The Department of Fish and Game (§§ 16 05 010 16 05 210)
- 2 Boards of Fisheries and Game (§§ 16 05 221 - 16 05 320)
- 3 Licensing of Sport Fishing and Hunting (§§ 16 05 330 - 16 05 430)
- 4 Licensing of Commercial Fishing Crewmembers and Vessels (§§ 16 05 440 16 05 720)
- 6 Miscellaneous Provisions (§§ 16 05 740 16 05 902)
- 7 General Provisions (§§ 16 05 906 16 05 950)

Collateral references: Entry on private lands in pursuit of wounded game or criminal trespass 41 Al R4th 806

is not subject to the Administrative Procedure Act (AS 44.62) (§ 12 art 1 ch 94 S.L.A. 1959, am § 1 ch 4 S.L.A. 1963)

NOTES TO DECISIONS

Effect of orders. Authorized by this section, emergency closure orders have the force and effect of law. *F/V Am Eagle, ADF&G No 39 v State, Sup Ct Op No 2227 (File Nos 3973, 3974, 4023), 620 P.2d 687 (1980), appeal dismissed, 454 U.S. 1130, 102 S.Ct. 945, 71 L.Ed.2d 284 (1982).*

Vagueness of order. — An emergency order closing a shellfish district was not in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, in violation of the due process rights of a fishing vessel's owners. *F/V Am Eagle, ADF&G No 39 v State, Sup Ct Op No 2227 (File Nos 3973, 3974, 4023), 620 P.2d 687 (1980), appeal dismissed, 454 U.S. 1130, 102 S.Ct. 945, 71 L.Ed.2d 284 (1982).*

Area closures. This section does not prohibit the closure of an entire statistical area of king crab stocks or district thereof. *F/V Am Eagle, ADF&G No 39 v State,*

Sup Ct Op No 2227 (File Nos 3973, 3974, 4023), 620 P.2d 687 (1980), appeal dismissed, 454 U.S. 1130, 102 S.Ct. 945, 71 L.Ed.2d 284 (1982).

Use to enforce resource management plan. If the Board of Fisheries properly adopted a plan for the management of state fishery resources, the Commissioner of the Department of Fish and Game could enforce that policy through the emergency order process. *Kenai Peninsula Fisherman's Coop Ass'n v State, Sup Ct Op No 2158 (File No 5072), 628 P.2d 897 (1981).*

Selective closures. The Commissioner of the Department of Fish and Game may use the emergency order process to close down one type of fishery and not another in order to implement a policy establishing priorities of use. *Kenai Peninsula Fisherman's Coop Ass'n v State, Sup Ct Op No 2158 (File No 5072), 628 P.2d 897 (1981).*

Sec. 16.05.065. Application extension. (a) The commissioner shall extend the time and dates during which application may be made for fish or game registration if the commissioner finds that

(1) the conservation and management of the fish or game resource will not be affected adversely; and

(2) the failure to timely apply is the result of excusable neglect.

(b) The fee for an extension granted under this section is \$45.

(c) As used in this section, "excusable neglect" does not include unfamiliarity with or ignorance of applicable laws and regulations. In order to show excusable neglect, a person must have demonstrated, before the registration deadline, an intent to harvest fish or game. (§ 2 ch 196 S.L.A. 1970, am § 1 ch 105 S.L.A. 1977)

Sec. 16.05.070. Regulations as evidence. Regulations of the boards of fisheries and game and of the commissioner, including emergency openings and closures, are admissible as evidence in the courts of the state in accordance with the Administrative Procedure Act (AS 44.62) (§ 13 art 1 ch 94 S.L.A. 1959, am § 1 ch 206 S.L.A. 1975)

Sec. 16.05.080. Limitation of power. Nothing in this chapter authorizes the department or the boards of fisheries and game to change the amount of fees or licenses (§ 14 art 1 ch 94 S.L.A. 1959, am § 2 ch 206 S.L.A. 1975)

Sec. 16.05.080. Organization of the department. (a) The commissioner may, with the approval of the governor, establish a departmental division of commercial fisheries, a departmental division of sport fisheries, a departmental division of game, and other departmental divisions as may be necessary.

(b) The commissioner shall establish a departmental division of fisheries rehabilitation, enhancement and development.

(c) There is established in the department a section of subsistence hunting and fishing (§ 15 art 1 ch 94 S.L.A. 1959; am § 1 ch 113 S.L.A. 1971, am § 2 ch 151 S.L.A. 1978)

Editor's notes. In a memorandum signed April 14, 1981, the governor approved the commissioner's proposal of full division status on the section of subsistence hunting and fishing.

NOTES TO DECISIONS

Cited in State v Elusko, Ct App Op No 456 (File No A 210), 698 P.2d 174 (1985).

Sec. 16.05.082. Duties of division of fisheries rehabilitation, enhancement and development. The division of fisheries rehabilitation, enhancement and development shall

(1) develop and continually maintain a comprehensive, coordinated state plan for the orderly present and long-range rehabilitation, enhancement and development of all aspects of the state's fisheries for the perpetual use, benefit and enjoyment of all citizens and revise and update this plan annually;

(2) encourage the investment by private enterprise in the technological development and economic utilization of the fisheries resources;

(3) through rehabilitation, enhancement and development programs do all things necessary to insure perpetual and increasing production and use of the food resources of Alaska waters and continental shelf areas;

(4) make a comprehensive annual report to the legislature, containing detailed information regarding its accomplishments under this section and proposals of plans and activities for the next fiscal year, not later than 20 days after the convening of each regular session (§ 2 ch 113 S.L.A. 1971)

Sec. 16.05.094. Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall

- (1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state.
- (2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing.
- (3) make information gathered available to the public, appropriate agencies, and other organized bodies.
- (4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence users, users, and methods.
- (5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;
- (6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing.
- (7) participate with other divisions in the preparation of statewide and regional management plans so that those plans recognize and incorporate the needs of subsistence users of fish and game (§ 3 ch 151 S.L.A. 1978)

Revisor's notes In 1987, "revog-nize" was substituted for "reorganize" in subsection (7), to correct a manifest error in the original enactment.
Cross references. For legislative intent, see § 1, ch 151, S.L.A. 1978, in the Temporary and Special Acts.
Editor's notes In a memorandum signed April 14, 1981, the governor ap-

proved the commissioner's conferral of full division status on the section of subsistence hunting and fishing.
Legislative history reports. For letter of intent of the House Special Committee on Subsistence in connection with ch 151, S.L.A. 1978 (HB 969), see 1978 House Journal, p. 1154.

NOTES TO DECISIONS

Cited in *State v. Fluka*, Ct. App. Op. No. 456 (file No. A 2100, 698 P.2d 174 (1985)).

Sec. 16.05.100. Fish and Game Fund established. There is created a revolving "Fish and Game Fund," which shall be used exclusively for the following

- (1) to carry out the purposes and provisions of this title, except AS 16.51 and AS 16.52, or other duties that may be delegated by the legislature to the commissioner or the department, and

(2) to carry out such purposes and objectives within the scope of this title except AS 16.51 and AS 16.52 as may be directed by the donor of any such funds (§ 17 art 1 ch 94 S.L.A. 1959, am § 3 ch 132 S.L.A. 1984)

Effect of amendments. The 1984 amendment inserted "for the following" near the beginning of the section and substituted references to "this title, except AS 16.51 and AS 16.52" for "this chapter" in item (1) and "this title except AS 16.51 and AS 16.52" for "the chapter" in item (2).

Opinions of attorney general. The dedication under this section was created subsequent to the date of the ratification of the Alaska Constitution, art. IX, § 7; hence, there was no protection for the

fund under the grandfather clause. However, the fund was protected by the fact that federal law requires dedication of fishing and hunting licenses 1960 (Op. Atty. Gen. No. 14).

The dedication of proceeds of fishing and hunting licenses to the operation of the Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by § 7, art. IX, of the state constitution November 30, 1963 (Op. Atty. Gen.

Sec. 16.06.110. Composition of fund. The fish and game fund shall be made up of the following money and other money the legislature appropriates, which shall be deposited and retained in the fund until expended:

- (1) money received from the sale of state sport fishing, hunting, and trapping licenses, special permits, and waterfowl conservation tags purchased by hunters;
- (2) proceeds received from the sale of furs, skins, and specimens taken by predator hunters and other employees;
- (3) money received in settlement of a claim or loss caused by damage to the fish and game resources of the state;
- (4) money received from federal, state, or other governmental unit, or from a private donor for fish and game purposes;
- (5) interest earned upon money in the fund;
- (6) money from any other source (§ 17 art 1 ch 94 S.L.A. 1959, am § 1 ch 41 S.L.A. 1979, am § 1 ch 71 S.L.A. 1984)

Effect of amendments. The 1984 amendment substituted "special permits, and waterfowl conservation tags purchased by hunters" for "and special permits" in paragraph (1).

Opinions of attorney general. For

discussion of constitutionality under § 7, art. IX of the state constitution of dedication of interest income to the Fish and Game Fund, see November 30, 1982 (Op. Atty. Gen.

Sec. 16.06.120. Disbursement of funds. Upon authorization of the commissioner, disbursements from the fish and game fund shall be paid by the proper state officer on presentation of vouchers signed by the commissioner or an authorized representative, and approved by the proper state officer (§ 17 art 1 ch 94 S.L.A. 1959)

(b) For purposes of the conservation and development of the game resources of the state, there is created a Board of Game composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state, and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Game, but shall be ex officio secretary (§ 3 ch 206 SLA 1976, am § 11H ch 218 SLA 1976).

NOTES TO DECISIONS

Liberal construction of fish and game laws. Conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

The terms "conserving" and "developing" as used in this section both embody concepts of utilization of resources. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

"Conservation" defined. "Conserving" as used in this section implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

"Development" defined. "Development" as used in this section connotes management of a resource to make it available for use. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. *Kenai*

Peninsula Fisherman's Coop Ass'n v State, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Differential treatment not prohibited. While Alaska Const., art VIII, § 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Establishment of use priorities. While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 -- 44.62.650. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Stated in State v Tanana Valley Sportsmen's Ass'n, Sup Ct Op No 1716 (File No 3433), 583 P 2d 864 (1978).

Sec 16.05.210 Term of office (Repealed, § 40 ch 206 SLA 1975)

Sec 16.05.210 Powers excluded (Repealed, § 40 ch 206 SLA 1975)

Sec. 16.05.241. Powers excluded. The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting or fiscal powers (§ 3 ch 206 SLA 1975).

NOTES TO DECISIONS

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Differential treatment not prohibited. While Alaska Const., art VIII, § 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op

No 2358 (File No 5072), 628 P 2d 897 (1981).

Establishment of use priorities. While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 -- 44.62.650. *Kenai Peninsula Fisherman's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Sec 16.05.250 Regulations (Repealed, § 40 ch 206 SLA 1975)

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for:

- (1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;
- (2) establishing open and closed seasons and areas for the taking of fish;
- (3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;
- (4) establishing the means and methods employed in the pursuit, capture and transport of fish;
- (5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;
- (6) classifying as commercial fish, sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes;
- (7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;
- (8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;
- (9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;
- (10) establishing seasons, areas, quotas and methods of harvest for aquatic plants;
- (11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed, however, this

paragraph does not apply to permits issued or transferred under AS 16 43.

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

(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16 05 476(d), that are registered under the laws of the state, as defined in AS 16 05 475(c), after making a written determination that an on board observer program

(A) is the only practical data-gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery,

(C) can be conducted at a reasonable cost, and

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

(14) establishing nonexclusive, exclusive, and superexclusive regulation and use areas for regulating commercial fishing

(b) *(Repealed, § 12 ch 52 S.L.A. 1986)*

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44 62 230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16 05 258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

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

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

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

(4) the availability of alternative fisheries resources;

(5) the importance of each fishery to the economy of the state;

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

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents (§ 3 ch 206 S.L.A. 1975; am § 2 ch 218 S.L.A. 1976, am § 4 ch 151 S.L.A. 1978, am §§ 1, 2 ch 110 S.L.A. 1980, am §§ 8, 9 ch 132 S.L.A. 1984, am §§ 1, 3, 12 ch 52 S.L.A. 1986, am § 4 ch 76 S.L.A. 1986, am § 1 ch 33 S.L.A. 1987)

Repealer's notes. Paragraph (a)(11) was enacted as (a)(12). Renumbered in 1986.

Cross references. For restriction on maximum area of land that may be closed to multiple uses without an act of the state legislature, see AS 38 06 300(a), for validity of regulations of former Board of Fish and Game, see § 41, ch 208, S.L.A. 1975 in the Temporary and Special Acts, for legislative findings in connection with the enactment of (a)(13) of this section, see § 1, ch 76, S.L.A. 1986, in the Temporary and Special Acts.

Effect of amendments. The 1984 amendment in subsection (a), substituted "bag limits, harvest levels, and sex and size limitations" for "and bag limits" in paragraph (3), deleted "engaging in biological research" from the beginning of paragraph (7), substituted "and management, conservation, protection, use, disposal, propagation and stocking of fish"

for "fish management, protection, propagation and stocking" in paragraph (7), repealed paragraph (9), and renumbered former paragraphs (10)(13) as present paragraphs (9)(11). The amendment also added subsection (c).

The first 1986 amendment in subsection (a) inserted "personal use fish, subsistence fish" in paragraph (6) and added paragraph (12), added subsections (d) and (e), and repealed subsection (b), concerning adoption of regulations.

The second 1986 amendment in subsection (a) added paragraph (13).

The 1987 amendment added subsection (a)(14).

Opinions of attorney general. — For discussion of compatibility of state subsistence use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 5116 et seq.), see 1981 (Sp. Att'y Gen. No. 11.

NOTES TO DECISIONS

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. *Kenai Peninsula Fishermen's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Authorization for regulations. In determining whether a regulation is authorized by statute the Court of Appeals of Alaska looks to four things. First, the scope of authority conferred by the authorizing statute, second, the extent to which the regulation is in accordance with "standards prescribed by other provisions of law", third, the extent to which the regulation is consistent with the authorizing statute, and fourth, the extent to which the regulation is reasonably necessary to carry out the purpose of the authorizing statute. *Beran v State*, Ct App (Op No 546 (File Nos A-635, A 629, A 630, A 679), 706 P 2d 1280 (1985)).

Differential treatment not prohibited. — While Alaska Const. art VIII, § 15, does prohibit granting municipality fishing rights, that section was not meant

to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. *Kenai Peninsula Fishermen's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Establishment of use priorities. While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing those priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44 62 016 — 44 62 050. *Kenai Peninsula Fishermen's Coop Ass'n v State*, Sup Ct Op No 2358 (File No 5072), 628 P 2d 897 (1981).

Regulation held invalid because inconsistent with statute. — Regulation developed by the Board of Fisheries to identify customary and traditional uses of Cook Inlet salmon qualifying for subsistence priority and codified as 5 AAC

(f) 597 was held invalid because it was inconsistent with former subsection (b) and AS 16 05 910 and contrary to the legislature's intent in enacting the 1978 substitute law, ch. 161 S.L.A. 1978. *Madison v. Alaska Dept. of Fish & Game*, Sup. Ct. Op. No. 2911 (file No. 1821 7181, 7410), 696 P.2d 168 (1985).

Cited in *Keynolds v. State*, Ct. App. Op. No. 182 (file No. 6432), 655 P.2d 1313 (1982); *Langwater v. State*, Ct. App. Op. No. 279 (file No. 7187), 668 P.2d 1359 (1983); *State v. Eluoka*, Ct. App. Op. No. 486 (file No. A 210), 698 P.2d 174 (1985).

Sec. 16.05.253. Operation of stationary fishing gear. (a) The Board of Fisheries may require a person who holds a limited entry permit or an interim-use permit under AS 16 43 to be physically present at a beach or riparian fishing site during the operation of net gear or other stationary fishing gear at the site, except when the permit holder is at or traveling to or from the location of

- (1) a sale of fish caught in the gear; or
- (2) other stationary gear of the permit holder.

(b) For purposes of this section, "fishing site" means fishing site as defined by the Board of Fisheries and includes any structure used for providing shelter in support of the operation of the net gear or other stationary fishing gear. (§ 1 ch 94 S.L.A. 1982, am § 1 ch 19 S.L.A. 1983)

Effect of amendments. - The 1983 amendment rewrote the existing language of this section and designated that language subsection (a) and added subsection (b).

Sec. 16.05.255. Regulations of the Board of Game. (a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44 62) for

- (1) setting apart game reserve areas, refuges and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;
- (2) establishing open and closed seasons and areas for the taking of game;
- (3) establishing the means and methods employed in the pursuit, capture and transport of game;
- (4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;
- (5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;
- (6) methods, means, and harvest levels necessary to control predation and competition among game in the state;
- (7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of game;
- (8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;
- (9) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits

and registrations between registration areas and game management units or subunits is allowed;

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

(b) *Repealed, § 12 ch 62 S.L.A. 1986*

(c) If the Board of Game denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44 62 230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section shall provide that, consistent with the provisions of AS 16 05 258, the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents (§ 3 ch 206 S.L.A. 1975; am § 5 ch 151 S.L.A. 1978, am §§ 10, 11 ch 132 S.L.A. 1984; am §§ 4, 5, 12 ch 52 S.L.A. 1986)

Cross references. - For validity of regulations of former Board of Fish and Game, see § 41, ch 206, S.L.A. 1975 in the *Temporary and Special Acts*.

Effect of amendments. - The 1984 amendment in subsection (a), substituted "water or on the land" for "waters or on the lands" in paragraph (1), substituted "bag limits, harvest levels, and sex, age, and size limitations" for "and bag limits" in paragraph (4), rewrote paragraph (5), deleted "engaging in biological research" from the beginning of paragraph (7), substituted "and management, conservation, protection, use, disposal, propagation and stocking of game" for "and game management, protection, propagation and stocking" in paragraph (7), repeated former paragraph (8), and renumbered former paragraphs (9) and (10) as present paragraphs (8) and (9). The amendment also added subsection (c).

The 1986 amendment added paragraph (10) of subsection (a), added subsection (d), and repealed former subsection (b), concerning the adoption of regulations.

Opinions of attorney general. - Neither the Board of Game nor the Department of Fish and Game has jurisdiction over domestic animals August 29, 1979 Op. Atty Gen.

Permitting authority over live game, that is, nonaquatic animals, rests with the Board of Game as implemented by the Department of Fish and Game August 29, 1979 Op. Atty Gen.

For discussion of compatibility of state subsistence use law with federal standards as set forth in Alaska National Interest Lands Conservation Act 116 U.S.C. § 3115 et seq., see 1981 Op. Atty Gen. No. 11.

NOTES TO DECISIONS

Establishment of quotas must be in accordance with the Administrative Procedure Act (AS 44 62). *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (file No. 3413), 581 P.2d 454 (1978).

Former subsection (b) constituted former subsection (b), concerning adoption of regulations by the Board of Game permitting taking of game for subsistence

uses, merely established the priority of subsistence uses within the regulatory scheme, the state supreme court found no evidence of an intent to grant any personal right to take or possess game in the absence of such regulations. *State v. Eluoka*, Sup. Ct. Op. No. 3106 (file No. 5991), 724 P.2d 514 (1986).

"Subsistence" defense created where no regulations adopted under

former subsection (b) held contrary to AS 16.05.250(a) mandate. A "subsistence" defense created by the state court of appeals to "remedy" the Board of Game's failure to adopt separate subsistence regulations under former subsection (b) of this section contradicted the legislative mandate of AS 16.05.250(a). *State v*

Fishes, Sup Ct Op No 3108 (File No S 9311, 724 P 2d 816 (1986)).

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

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

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

Sec. 16.05.257. Subsistence hunting regulations [Repealed, § 12 ch 52 S.L.A. 1986]

Sec. 16.05.258. Subsistence use and allocation of fish and game. (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

(b) The boards shall determine

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

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

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

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

(2) local residency; and

(3) availability of alternative resources

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

(e) Fish stocks and game populations, including bionn, or portions of fish stocks and game populations, not identified under (a) of this section may be taken only, under nonsubsistence regulations

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30. (S 6 ch 52 S.L.A. 1986)

NOTES TO DECISIONS

Regulations adopted under former AS 16.05.257 had to be in accordance with the Administrative Procedure Act (AS 44.62). *State v Tanana Valley Sportsman's Ass'n*, Sup Ct Op No 1716 (File No 3433), 683 P 2d 854 (1978).

While former AS 16.05.257, which authorized the Board of Game to adopt regulations providing for subsistence hunting, did not specifically refer to the Administrative Procedure Act (AS 44.62), it appeared clear that it merely set forth an additional purpose for which regulations might be promulgated. *State v Tanana Valley Sportsman's Ass'n*, Sup Ct Op No 1716 (File No 3433), 683 P 2d 854 (1978).

Issuance of permits based on verbal

instructions to agents held improper. Nothing in the Administrative Procedure Act (AS 44.62) authorizes the Board of Game to impose requirements not contained in written regulations by means of oral instructions to agents. Such verbal additions to regulations involving requirements of subsistence are unauthorized and unenforceable. *State v Tanana Valley Sportsman's Ass'n*, Sup Ct Op No 1716 (File No 3433), 683 P 2d 854 (1978).

Reasonable basis for Board of Game's quota of caribou to be killed under former AS 16.05.267. - See *State v Tanana Valley Sportsman's Ass'n*, Sup Ct Op No 1716 (File No 3433), 683 P 2d 854 (1978).

Sec. 16.05.259. No subsistence defense. In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses. (S 7 ch 52 S.L.A. 1986)

Reviser's notes. Formerly AS 16.05.261. Renumbered in 1987.

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

Sec. 16 05 315. Joint board meetings. The Board of Fisheries and the Board of Game may hold a joint meeting upon the call of the commissioner or a board to resolve any conflicts in regulations of the boards and to consider matters, as determined by the commissioner or a board, which require the consideration of both boards (§ 10 ch 206 SLA 1975)

Sec. 16 05 320. Quorum. A majority of the members of a board constitutes a quorum for the transaction of business, for the performance of any duty, and for the exercise of any power. However, a majority of the full board membership is required to carry all motions, regulations and resolutions. A majority of the members of the boards of fisheries and game constitute a quorum for the transaction of business in a joint board meeting. A majority of the membership of the boards is required to carry all joint motions, regulations and resolutions of the boards (§ 10 art I ch 94 SLA 1959, am § 3 ch 71 SLA 1973, am § 11 ch 206 SLA 1975)

Article 3. Licensing of Sport Fishing and Hunting.

Section	Section
320 Licenses, tags, and subsistence permits	390 Fees and compensation for issuance of licenses and tags
331 Elk farming	400 Persons exempt from license requirement
336 Complimentary licenses	406 Taking game by proxy for the blind
340 License and tag fees	407 Nonresident hunting big game animals must be accompanied
341 Free license for disabled veterans	408 Nonresident alien hunter to be accompanied by guide
346 Permit applications	410 License forfeiture
350 Expiration of licenses and tags	420 Violations
360 Commissioner of revenue charged with license issuance	430 Penalties
370 Reports by licensees	
380 Commissioner of revenue may appoint agents	

Sec. 16.05.330. Licenses, tags, and subsistence permits.
 (a) Except as otherwise permitted in this chapter, a person may not engage in sport fishing, including the taking of razor clams; in hunting, trapping, or fur dealing; in the farming of fish, fur, or game, or in taxidermy, without having the appropriate license or tag in actual possession.

(b) When obtaining the appropriate license or tag in (a) of this section, an applicant who asserts residency in the state shall provide the license vendor with the proof of residence that the department requires by regulation.

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating and monitoring the subsistence harvest of

fish and game. The boards shall adopt these regulations when the subsistence preference requires a reduction in the harvest of a fish stock or game population by nonsubsistence users (§ 1 art II ch 94 SLA 1959, am § 1 ch 61 SLA 1962, am § 1 ch 42 SLA 1968, am § 1 ch 140 SLA 1968; am § 8 ch 62 SLA 1986)

Effect of amendments. The 1966 amendment added subsection (c).
Opinions of attorney general. Alaska's fish and game laws are applicable as federal law on military reservations 1964 (Op. Atty Gen No 2)

Hunting or fishing at a military reservation must be in accord with Alaska laws regulating seasons, bag limits, methods of taking, etc., but military personnel are not required to comply with licensing requirements while on reservation 1964 (Op. Atty Gen No 2)

Since AS 16 05 940141 does not grant

special resident privileges to military personnel, which is a requisite for requiring them to purchase licenses for use on military reservations under 10 USC 2671(a) (2), they cannot be required to do so 1964 (Op. Atty Gen No 2)

Constructing this section and AS 16 05 340 against federal law 10 USC § 2671(a), a member of the military who does not qualify as a resident under AS 16 05 94020 is not required to obtain an Alaska trapping license to trap on military lands 1977 (Op. Atty Gen No 2)

NOTES TO DECISIONS

Applied in *State v Grayhill* Sup Ct (Op. No 2906 (File No 8 172), 695 P 2d 725 (1985))

Collateral references. 35 Am Jur 2d, Fish & Game, § 45
 38 CJS, Game, § 15
Applicability of state fishing license laws or other public regulations to fishing in private lake or pond. 15 ALR2d 764

Right to bill game in defense of person or property. 93 ALR2d 1364
Public rights of recreational hunting, fishing, wading, or the like in inland stream the bed of which is privately owned. 6 ALR4th 1030

Sec. 16.05.331. Elk farming. (a) Elk may be raised and bred as domestic stock for commercial purposes, including the sale of meat, by a person who lawfully owns the elk and who holds a current valid game mammal farming license.

(b) The department may issue a game mammal farming license for the farming of elk to a person who applies on a form provided by the department, pays the fee established under AS 16 05 340, and who proves to the satisfaction of the department that the person

(1) intends to raise and breed elk; and
 (2) possesses facilities for maintaining the elk under positive control

(c) Notwithstanding other provisions of law, a license or permit from the department, other than a game mammal farming license, is not required in order to import, export, or possess elk for the purpose of elk farming. A live elk may not be captured from the wild or released into the wild without an appropriate license or permit from the department.

killed a deer in a closed area, had prior convictions for having a loaded gun within the city and reckless driving which resulted from his apparent efforts to run down a dog with his car, revealing an emotional nature warranting more than the minimum penalties. *Gottard v State*, Sup Ct Op No 2186 (File No 4636), 818 P 2d 626 (1990).

Applied in *Graybill v State*, Sup Ct Op No 1214 (File No 2388), 848 P 2d 629

(1976), *Jordan v State*, Ct App Op No 360 (File No 7782), 681 P 2d 366 (1984)

Noted in *Nelson v State*, Sup Ct Op No 180 (File No 363), 367 P 2d 933 (1964)

Cited in *Schnabel v State*, Ct App Op No 260 (File No 7273), 663 P 2d 860 (1983), *Brown v State*, Ct App Op No 431 (File No 7658, 7669), 693 P 2d 374 (1984)

Sec. 16.05.902. Personnel and equipment used in exploration work. Alaska residents and equipment shall be given preference in exploration work to be done by the department (§ 1 ch 98 S.L.A. 1969)

Sec. 16.05.903. Big game photography contest. [Repealed, § 29 ch 132 S.L.A. 1984]

Article 7. General Provisions.

Section	Section
905. Alien activities prohibited	930. Exempted activities
910. Penalty	940. Definitions
920. Certain acts made unlawful	960. Title of the chapter
925. Penalty for violations	

Sec. 16.05.905. Alien activities prohibited. Alien persons not lawfully admitted to the United States are prohibited from engaging in commercial fishing activities or taking marine mammals in the territorial waters of the State of Alaska as they presently exist or may be extended in the future. (§ 1 ch 85 S.L.A. 1964)

Collateral references. 35 Am Jur
2d, Fish & Game, §§ 34, 35
36A C.J.S., Fish, § 28

Sec. 16.05.910. Penalty. Any alien person who violates AS 16.05.905 is guilty of a misdemeanor, and upon conviction is punishable by a confiscation and forfeiture of the fishing vessel used in such violation, or by imprisonment of any such person for not more than one year, or by fine of not more than \$10,000, or by all or any two of the foregoing punishments. (§ 2 ch 85 S.L.A. 1964)

Sec. 16.05.920. Certain acts made unlawful. (a) Unless permitted by AS 16.05 - AS 16.40 or by regulation adopted under AS 16.05 - AS 16.40, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game

(b) A person may not knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this title except AS 16.51 and AS 16.52, or a poster or notice to the public concerning the provisions of this title except AS 16.51 and AS 16.52, or a regulation adopted under this title except AS 16.51 and AS 16.52, or a marker indicating the boundary of an area closed to hunting, trapping, fishing or other special use under this title except AS 16.51 and AS 16.52. A person may not knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this title except AS 16.51 and AS 16.52 or a regulation adopted under this title except AS 16.51 and AS 16.52.

(c) A person may not import, possess, transport or release in the state live venomous reptiles, live venomous reptile eggs, live venomous insects, or live venomous insect eggs, except in accordance with the terms of a permit issued under (d) of this section. This prohibition does not apply to bees as defined in AS 03.47.040. A person who violates this subsection is guilty of a misdemeanor and may be cited as set out in AS 16.05.165.

(d) A permit required under (c) of this section may be granted only if, in the determination of the commissioner, the applicant demonstrates a valid educational purpose for seeking the permit. A valid educational purpose includes display in educational institutions and in zoos (§ 28 art 1 ch 94 S.L.A. 1959, am § 3 ch 110 S.L.A. 1970, am §§ 20, 21 ch 132 S.L.A. 1984)

Effect of amendments. The 1984 amendment substituted "AS 16.05 - AS 16.40" for "this chapter" in two places in subsection (a) and "this title except AS 16.51 and AS 16.52" for "this chapter" throughout subsection (b) and added subsections (c) and (d). The amendment also made a minor punctuation insertion in subsection (a) and a minor word insertion in the first sentence of subsection (b).

Opinions of attorney general. Permitting authority over live game, that is, nondomestic animals, rests with the Board of Game as implemented by the Department of Fish and Game August 29, 1979 (Op. Atty Gen).

Neither the Board of Game nor the Department of Fish and Game has jurisdiction over domestic animals August 29, 1979 (Op. Atty Gen).

NOTES TO DECISIONS

"Subsistence" defense created where no regulations adopted under former AS 16.05.25(b) held contrary to mandate of subsection (a). A "subsistence" defense created by the state court of appeals to "remedy" the Board of Game's failure to adopt separate subsistence regulations under former AS 16.05.25(b) contradicted the legislative

subsection (a) of this section. *State v. Elniska*, Sup Ct Op No 3106 (File No S 991), 724 P 2d 514 (1986).

State may regulate extrajurisdictional fishing. Paramount rights in the seabed and subsoil beyond the three mile limit were vested in the federal government. However, that principle of federal exclusivity does not preclude state regula-

tion of fishery resources in the waters over that seabed. *State v. Seeminski*, Sup Ct Op No 1339 (File No 2544), 556 P 2d 929 (1976).

Enforcement of the state's regulatory scheme in a case involving wallop fishing activities in extraterritorial waters was within the sphere of the state's prerogative to regulate extraterritorial fishing. *State v. Seeminski*, Sup Ct Op No 1339 (File No 2544), 556 P 2d 929 (1976).

As to constraints on state regulation of extraterritorial fishing efforts, see *State v. Seeminski*, Sup Ct Op No 1339 (File No 2544), 556 P 2d 929 (1976).

Changing this section to an infraction instead of former AS 16.05.920 was not reversible error. — See *Thompson v. State*, Sup Ct Op No 306 (File No 1601), 407 P 2d 102 (1965), cert denied, 384 U.S.

951, 86 S Ct 1570, 16 L Ed 2d 647 (1966).

Applied in *Hille v. State*, Sup Ct Op No 87 (File No 152), 371 P 2d 811 (1962); *Graybill v. State*, Sup Ct Op No 1046 (File No 1919), 822 P 2d 639 (1976); *State v. Bundant*, Sup Ct Op No 1232 (File Nos 2298, 2438, 2444), 840 P 2d 850 (Alaska), 647 P 2d 838 (Alaska 1976); *Graybill v. State*, Sup Ct Op No 1234 (File No 2386), 545 P 2d 829 (1976); *Schuster v. State*, Sup Ct Op No 1305 (File No 2911), 563 P 2d 925 (1976); *Matheson v. State*, Sup Ct Op No 1310 (File No 2641), 564 P 2d 468 (1976).

Cited in *United States v. Sylvester*, 608 F 2d 474 (9th Cir 1979); *Wamsor v. State*, Sup Ct Op No 1953 (File No 3643), 600 P 2d 1359 (1978); *Gundry v. State*, Sup Ct Op No 2741 (File No 6362), 671 P 2d 1277 (1983).

Collateral references. — Possession of prima facie evidence of violation, 81 game, or of specified hunting equipment, ALRS2d 1087.

Sec. 16.05.925. Penalty for violations. Except as provided in AS 16.05.430, 16.05.720, 16.05.831, and 16.05.860, a person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor (§ 22 ch 132 S.L.A. 1984; am § 30 ch 14 S.L.A. 1987).

Effect of amendments. The 1987 amendment substituted "Except as provided in AS 16.05.430, 16.05.720, 16.05.831, and 16.05.860, a" for "A" at the beginning of the section and deleted the last sentence which read "However, a person who violates a regulation adopted under this chapter for the regulation of commercial fisheries is subject to the penalties set out in AS 16.05.720."

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the department examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox fur for fur farming purposes. (§ 28 art 1 ch 94 S.L.A. 1959; am § 1 ch 7 S.L.A. 1972; am § 2 ch 104 S.L.A. 1972; am § 4 ch 82 S.L.A. 1974; am §§ 16, 17 ch 206 S.L.A. 1975; am § 1 ch 20 S.L.A. 1976; am § 13 ch 151 S.L.A. 1978; am § 4 ch 23 S.L.A. 1983; am § 23 ch 132 S.L.A. 1984).

Cross references. For legislative intent in connection with the enactment of (a) of this section, see § 1, ch 151, S.L.A. 1978, in the Temporary and Special Acts.

Effect of amendments. The 1983 amendment added subsection (f). The 1984 amendment in subsection (c) made a word correction in the first sentence and added the second sentence.

Legislative history reports. For letter of intent of the House Special Committee on Subsistence in connection with ch 151, S.L.A. 1978 (HH 960), see 1978 House Journal p 1154.

NOTES TO DECISIONS

Quoted in *State v. Seeminski*, Ct App Op No 107 (File No 6384), 608 P 2d 114 (1982).

Sec. 16.05.940. Definitions. In AS 16.05 -- AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, 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;

(3) "a board" means either the Board of Fisheries or the Board of Game.

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employer or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking, and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish.

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels, the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned.

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

(10) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian.

(11) "fish derby" means a contest in which prizes are awarded for catching fish.

(12) "fishery" means a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear, however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource, in this paragraph "gear" and "type of gear" have the meanings given in AS 16 43 990.

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit

under this chapter, but does not include an organization formed or operated for gaming or gambling purposes.

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape proof barrier.

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

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16 05 -- AS 16 40;

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

(19) "hunting" means the taking of game under AS 16 05 -- AS 16 40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state.

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States.

(22) "operator" means the individual by law made responsible for the operation of the vessel.

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

(24) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state, however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the

state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph.

(25) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area.

(26) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 - AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state.

(27) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries.

(28) "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 gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries.

(29) "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.

(30) "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 handcrafted articles out of nonedible by products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption, in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis.

(31) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game.

(32) "tandering" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes.

(33) "trapping" means the taking of mammals declared by regulation to be fur bearers.

(34) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, loading, or taking fish

within the jurisdiction of the state, but does not include aircraft (4 2 art 1 ch 95 SLA 1959, am §§ 1 - 4 ch 131 SLA 1960, am § 1 ch 21 SLA 1961, am §§ 1, 2 ch 102 SLA 1961, § 9 art III ch 94 SLA 1969, am § 23 ch 131 SLA 1960, am § 1 ch 160 SLA 1962, am §§ 13, 14 ch 31 SLA 1963, am § 2 ch 32 SLA 1968, am § 3 ch 73 SLA 1970, am § 1 ch 91 SLA 1970, am § 4 ch 110 SLA 1970, am § 1 ch 90 SLA 1972, am § 5 ch 82 SLA 1974, am §§ 26, 82 ch 127 SLA 1974; am §§ 18 - 20 ch 206 SLA 1975, am § 12 ch 105 SLA 1977, am §§ 14, 16 ch 161 SLA 1978, am § 1 ch 78 SLA 1979, am § 1 ch 24 SLA 1980, § 4 ch 74 SLA 1982, am § 24 ch 132 SLA 1984, am §§ 9 - 11 ch 62 SLA 1986, am § 5 ch 76 SLA 1986)

Revisor's notes Reorganized in 1981 and 1984 to alphabetize the defined terms.

Paragraph (28) Renumbered in 1986

Effect of amendments - The 1984 amendment substituted "AS 16.05 - AS 16.40" for "this chapter" in the introductory language and paragraphs (14), (16) and (20), in paragraph (9), substituted "invertebrates, or amphibians" for "invertebrates and amphibians" and "it" for "their" preceding "life cycle" and added the language beginning "and includes any part of such aquatic finfish", reworded the contents of paragraph (13), inserted "repeat" near the beginning of paragraph (14), substituted "these chapters" for "it" in paragraph (16), substituted "this paragraph" for "this chapter" in three places in paragraph (19), inserted "of" following "taking" in paragraph (22), deleted "for the purposes of this chapter" preceding "does not include aircraft" in paragraph (27), and repeated paragraph (28), defining "vessel".

The first 1986 amendment in paragraph (28) inserted "by a resident domiciled in a rural area of the state," in paragraph (30) inserted "noncommercial" preceding "customary," deleted "in Alaska" preceding "of wild, renewable," inserted "by a resident domiciled in a rural area of the state," substituted "in" for "for the purposes of" preceding "this paragraph," deleted "all" preceding "persons related," substituted "a" for "any" preceding "person living," and substituted "in" for "within" preceding "the household," and added paragraphs (9), (16), (18), (23), (26), and (29).

The second 1986 amendment added paragraph (12):

Legislative history reports - For report on ch 32, SLA 1968 (HCSSSB 60 am), see 1968 House Journal, p 166 For report on ch 127, SLA 1974 (SCHIR 817 am 2), see 1974 House Journal, p 657

Opinions of attorney general. Paragraph (14) does not grant special resident privileges to military personnel 1964 (Op Atty Gen No 2)

Term "customary trade" as used in definition of "subsistence uses" allows for limited exchanges for each other than for purely personal or family consumption 1981 (Op Atty Gen No 11)

Definition of "subsistence uses" in terms of "customary and traditional uses" of wild, renewable resources reflects the equating of "subsistence use" with use by rural residents 1981 (Op Atty Gen No 11)

NOTES TO DECISIONS

For construction of "commercial fisherman" under former law, see *Martinson's Mullany*, 12 Alaska 455, 85 F Supp 76 (1) Alaska 1949.

Regulation held invalid because in consistent statutory law. See *Mud v. Alaska Dept of Fish & Game*, Sup

Ct Op No 2911 (File Nos 6824 7181 7410), 626 P2d 168 (1985)

Cited in *Starry v Horace Mann Ins Co*, Sup Ct Op No 2548 (File No 6472), 649 P2d 917 (1982), *State v Eluaka Ct App* Op No 456 (File No A 210), 638 P2d 174 (1985)

Sec. 16.05.950. Title of the chapter. This chapter may be cited as the Fish and Game Code (§ 1 art 1 ch 94 S.L.A. 1959)

NOTES TO DECISIONS

Chapter supercedes federal law. -- When the various articles of the state law providing for the administration, management and conservation of fish and wildlife became effective, acts of Congress on the same subject were no longer of any force. *Mellaballa Indian Community, Annette Island Reserve v Egan, Sup Ct Op No 42 (File Nos 21 - 23), 362 P 2d 801 (1961)*, vacated and remanded on other grounds, 369 US 45, 82 S Ct 552, 7 L Ed 2d 562 (1962).

There is no intimation in the Alaska Statehood Act of an intent that any United States administration under the commercial fishery laws be carried out after the state had been certified as capable of its own management. *Mellaballa Indian Community, Annette Island Reserve v Egan, Sup Ct Op No 42 (File Nos 21 - 23), 362 P 2d 801 (1961)*, vacated and remanded on other grounds, 369 US 45, 82 S Ct 552, 7 L Ed 2d 562 (1962).

Upon Alaska's admission on January 3, 1959, the Alaska game laws and acts regulating commercial fisheries as "territo-

rial laws," continued in force, but were modified by Ordinance No 3 of the state constitution prohibiting the use of fish traps for the taking of salmon for commercial purposes and by the Alaska Constitution, art VIII, § 15, providing that "no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state." They were further modified by the enactment by the first state legislature of a law making it unlawful to erect, move or maintain fish traps (S.L.A. 1949, ch 17), and by a later enactment (S.L.A. 1959, ch 96) making it unlawful to operate fish traps and prescribing penalties therefor. (See AH 16 10 070 - 16 10 110) *Mellaballa Indian Community, Annette Island Reserve v Egan, Sup Ct Op No 42 (File Nos 21 - 23), 362 P 2d 801 (1961)*, vacated and remanded on other grounds, 369 US 45, 82 S Ct 552, 7 L Ed 2d 562 (1962).

Cited in *White v Alaska Com. Fisher (re Entry Comm'n, Sup Ct Op No 2793 (File No 6296), 67A P 2d 1319 (1964)*

Chapter 10. Fisheries and Fishing Regulations.

Article

- 1 Interference with Streams and Waters (§§ 16 10 010 - 16 10 055)
- 2 Fish Traps and Other Illegal Fishing Devices (§§ 16 10 070 - 16 10 100)
- 3 Herring Spawn (§§ 16 10 172 - 16 10 175)
- 4 Migratory Fish and Shellfish (§§ 16 10 180 - 16 10 230)
- 5 Transportation of Fish and Shellfish (§§ 16 10 240 - 16 10 250)
- 6 Purchase of Fish (§§ 16 10 265 - 16 10 290)
- 7 Commercial Fishing Loan Act (§§ 16 10 300 - 16 10 370)
- 8 Salmon Hatcheries (§§ 16 10 375 - 16 10 475)
- 9 Fisheries Enhancement Loan Program (§§ 16 10 500 - 16 10 620)

NOTES TO DECISIONS

Cited in State, N.S.E. Regional Aquaculture Ass'n v Ala. Sup Ct Op No 2488 (File Nos 5065, 5086, 5142), 646 P 2d 203 (1982)

Collateral references 36A C.J.S., Fish, § 13 et seq

Article 1. Interference with Streams and Waters.

Section	Section
10 Interference with salmon spawning streams and waters	40 Disposition of money received for fines and penalties
20 Grounds for permit or license	50 Construction of AS 16 10 010
30 Violation of AS 16 10 010	16 10 060
16 10 055	55 Interference with commercial fishing gear

Sec. 16.10.010. Interference with salmon spawning streams and waters. A person may not

(1) obstruct, divert or pollute waters of the state, either fresh or salt, utilized by salmon in the propagation of the species, by felling trees or timber in those waters, cutting, passing, throwing or dumping any tree limbs or foliage, underbrush, stumps, rubbish, earth, stones, rock or other debris, or passing or dumping sawdust, planer shavings, or other waste or refuse of any kind in those waters;

(2) erect a dam, barricade or obstruction to retard, conserve, impound or divert these waters to prevent, retard or interfere with the free ingress or egress of salmon into these waters in the natural spawning or propagation process;

(3) render the waters inaccessible or uninhabitable for salmon for that purpose without first applying for and obtaining a permit or license from the Department of Environmental Conservation. The application shall set out the name and title of the person or concern, describe the waters and location, and state in particular the plans, purpose and intention for which the application is made. (§ 39 2-31 A.C.L.A. 1949, am § 12 ch 117 S.L.A. 1949; am § 6 ch 104 S.L.A. 1971; am § 12 ch 208 S.L.A. 1975)

Opinions of attorney general. (Collateral references. 36 Am Jur There is no conflict between AS 16 05 870 and this section March 4, 1982 (Op Atty Gen 36A C.J.S., Fish, § 6-46 Gen)

Sec. 16.10.020. Grounds for permit or license. If in the judgment of the Department of Environmental Conservation, the purpose of the applicant for the permit or license is to develop power, obtain water for civic, domestic, irrigation, manufacturing, mining or other purposes tending to develop the natural resources of the state, the department may grant the permit or license and may require the applicant to construct and maintain adequate fish ladders, fishways or other means by which fish may pass over, around or through the dam, obstruction or diversion in the pursuit of the propagation or spawning process (§ 39 2-32 A.C.L.A. 1949, am § 12 ch 117 S.L.A. 1949, am § 6 ch 101 S.L.A. 1971; am § 5 ch 21 S.L.A. 1985)

Sec. 16.10.342. Special account established. (n) There is established as a special account within the commercial fishing revolving loan fund the foreclosure expense account

(b) [Repealed, § 72 ch 113 S.L.A. 1982]

(c) The commissioner may expend money credited to the foreclosure expense account when necessary to protect the state's security interest in collateral on loans granted under AS 16.10.300 - 16.10.370 or to defray expenses incurred during foreclosure proceedings after a default by an obligor (§ 4 ch 83 S.L.A. 1978, am § 72 ch 113 S.L.A. 1982)

Sec. 16.10.350. Administration of fund. The commissioner shall administer the loan fund. (§ 1 ch 134 S.L.A. 1972)

Sec. 16.10.355. Disposal of property acquired by default or foreclosure. The department shall dispose of property acquired through default or foreclosure of a loan made under AS 16.10.300 - 16.10.370 or former AS 16.10.650 - 16.10.720 Disposal shall be made in a manner that serves the best interests of the state, and may include the amortization of payments over a period of years, but may not be by lease (§ 11 ch 79 S.L.A. 1985)

Sec. 16.10.360. Definitions. In AS 16.10.300 - 16.10.370

(1) "commission" means the Alaska Commercial Fisheries Entry Commission;

(2) "commissioner" means the commissioner of commerce and economic development;

(3) "debtor" means an individual commercial fisherman who either initially contracts for a loan under AS 16.10.313 - 16.10.337 or assumes a loan as provided in those sections;

(4) "department" means the Department of Commerce and Economic Development (§ 1 ch 134 S.L.A. 1972; am § 5 ch 83 S.L.A. 1978)

Revisor's notes Reorganized in Cross references. For further definitions, see AS 16.05.940
1983 to alphabetize the defined terms

Sec. 16.10.370. Short title. AS 16.10.300 - 16.10.370 may be cited as the Commercial Fishing Loan Act (§ 1 ch 134 S.L.A. 1972)

Article 8. Salmon Hatcheries.

Section	Section
375 Regional salmon plan	443 Department assistance and cooperation
380 Regional associations	
400 Permits for salmon hatcheries	445 Egg sources
410 Hearings before permit issuance	450 Sale of salmon and salmon eggs by hatchery
420 Conditions of a permit	460 Inspection of hatchery
420 Alteration suspension or revocation of permit	470 Annual report
410 Regulation	

Cross references For legislative findings and purpose of AS 16.10.375 16.10.620 see 1, ch 59 S.L.A. 1979 in the 1979 Temporary and Special Acts and Resolves

Sec. 16.10.375. Regional salmon plan. The commissioner shall designate regions of the state for the purpose of salmon production and have developed and amend as necessary a comprehensive salmon plan for each region, including provisions for both public and private nonprofit hatchery systems Subject to plan approval by the commissioner, comprehensive salmon plans shall be developed by regional planning teams consisting of department personnel and representatives of the appropriate qualified regional associations formed under AS 16.10.380. (§ 2 ch 161 S.L.A. 1976; am § 2 ch 154 S.L.A. 1977)

Sec. 16.10.380. Regional associations. (a) The commissioner shall assist in and encourage the formation of qualified regional associations for the purpose of enhancing salmon production. A regional association is qualified if the commissioner determines that

(1) it is comprised of associations representative of commercial fishermen in the region;

(2) it includes representative of other user groups interested in fisheries within the region who wish to belong; and

(3) it possesses a board of directors which includes no less than one representative of each user group that belongs to the association

(b) In this section "user group" includes, but is not limited to, sport fishermen, processors, commercial fishermen, subsistence fishermen, and representatives of local communities

(c) A qualified regional association, when it becomes a nonprofit corporation under AS 10.20, is established as a service area in the unorganized borough under AS 29.03.020 for the purpose of providing salmon enhancement services (§ 2 ch 161 S.L.A. 1976; am § 2 ch 59 S.L.A. 1979)

NOTES TO DECISIONS

Cited in State, NSE Regional Aquaculture Ass'n v. Alaska, Sup. Ct. Op. No. 2488 (File No. 5065, 5086, 5142), 540 P.2d 201 (1982)

Sec. 16.10.400. Permits for salmon hatcheries. (a) The commissioner or a designee may issue a permit, subject to the restrictions imposed by statute or regulation under AS 16.10.400 - 16.10.470, to a nonprofit corporation organized under AS 10.20, after the permit application has been reviewed by the regional planning team, for the construction and operation of a salmon hatchery

the association has, by resolution, declared there is a need for the authority to function, given it the authority to function and appointed persons to serve as the board of commissioners of the authority. The number of members of the board of commissioners, their terms of office and the filling of vacancies in office shall be determined by resolution of the governing body of the association.

(c) The regional salmon enhancement authority has jurisdiction to operate in all or part of the operating area of the individual association as determined by resolution of the governing body of the association (§ 17 ch 154 S.L.A. 1977).

Sec. 16.10.610. Tax exemption. (a) A salmon enhancement authority is exempt from payment of taxes or assessments for a period of 20 years from June 24, 1977 on property owned by the authority which is used for salmon enhancement purposes.

(b) All obligations or liabilities of a regional salmon enhancement authority remain its own and are not obligations or liabilities of the state (§ 17 ch 154 S.L.A. 1977).

Sec. 16.10.620. Powers of the authority. A salmon enhancement authority has the general power to

- (1) adopt, alter and use a corporate seal;
- (2) prescribe, adopt, amend and repeal bylaws;
- (3) sue and be sued in its own name;

(4) appoint officers, agents and employees and vest them with powers and duties and to fix, change and pay compensation for their services as the authority may determine;

(5) borrow money, make and issue notes and other evidences of indebtedness of the authority for any of its corporate purposes and to secure payment of its obligations by pledge of or lien on all or any of its assets, contracts, revenue and income;

(6) make and execute agreements, contracts and other instruments necessary or convenient in the exercise of its powers and functions, including contracts with any person, firm, corporation, government agency or other entity;

(7) receive, administer and comply with the conditions and requirements of an appropriation, gift, grant or donation of property or money;

(8) invest or reinvest money or funds held by the authority in obligations or other securities or investments in which banks or trust companies in the state may legally invest funds held in reserves or sinking funds or funds not required for immediate disbursement, and in certificates of deposits or time deposits;

(9) acquire, hold, use, lease, sell or otherwise dispose of property of any kind, real, personal or mixed or any interest in it.

(10) do all acts and things necessary, convenient or desirable to carry out the powers granted or implied in AS 16.10.600 — 16.10.620;

(11) adopt, amend and repeal regulations necessary (§ 17 ch 154 S.L.A. 1977).

See 16.10.650 — 16.10.720 Fishermen's mortgage and note program. (Repealed, § 72 ch 113 S.L.A. 1982)

Chapter 16. Fisheries Experimental Laboratory.

(Repealed, § 79 ch 132 S.L.A. 1984)

Chapter 20. Conservation and Protection of Alaskan Wildlife.

Article

1 State Game Refuge (§§ 16.20.010 — 16.20.080)	
2 Walrus Islands State Game Sanctuary (§§ 16.20.090 — 16.20.140)	
3 McNeil River State Game Sanctuary (§§ 16.20.160 — 16.20.170)	
4 Endangered Species (§§ 16.20.180 — 16.20.210)	
5 State Range Areas (§§ 16.20.340 — 16.20.360)	
6 Fish and Game Critical Habitat Areas (§§ 16.20.540 — 16.20.680)	

Article 1. State Game Refuge.

Section

10 Legislative recognition
20 Purpose
30 Refuge established
32 Palmer Hay Flats State Game Refuge
34 Mendenhall Wetlands State Game Refuge
36 Swain Flats State Game Refuge
38 Trading Bay State Game Refuge

Section

39 Cremer's Field Migratory Waterfowl Refuge
40 Regulations
60 Multiple land use
60 Submission of plans and specifications
70 Relationship to other laws
80 Definitions

Opinions of attorney general. For a discussion of the authority of the Department of Natural Resources and the Department of Fish and Game, see November 8, 1985 Op. Atty Gen.

Sec. 16.20.010. Legislative recognition. The legislature recognizes that

(1) the state has jurisdiction over all fish and game in the state except in those areas where it has assented to federal control;

(2) the state has not assented to federal control of fish and game in those areas which were set apart as National Bird and Wildlife Refuges while the state was a United States territory;

Sec. 16.20.090. Legislative findings. The legislature recognizes that

(1) the Walrus Islands are the sole remaining place in the state where walrus haul out on land and all similar "hauling grounds" in the state which were formerly utilized have been abandoned by walrus due to excessive molestation and slaughter;

(2) the Walrus Islands are uninhabited, and the walrus frequenting them are not required by the state for subsistence utilization;

(3) the Walrus Islands have great importance as a retreat for the Pacific walrus from the standpoints of conservation, scientific value, and tourist interest;

(4) the Department of Natural Resources has taken appropriate action to achieve transfer of title in the Walrus Islands to the state (§ 1 ch 115 S.L.A. 1960)

Sec. 16.20.100. Purpose. The purpose of AS 16 20 090 -- 16 20 140 is to protect the walrus and other game on the Walrus Islands (§ 1 ch 115 S.L.A. 1960)

Sec. 16.20.110. Sanctuary established. The following land areas in Bristol Bay and adjacent state waters are established as a state game sanctuary to be known as the Walrus Islands State Game Sanctuary:

- (1) Round Island,
- (2) Crooked Island,
- (3) High Island,
- (4) Summit Island,
- (5) The Twins;
- (6) Black Rock (§ 2 ch 115 S.L.A. 1960)

Sec. 16.20.120. Authority to administer. The boards may adopt regulations governing entry, development, construction, hunting, fishing, and all other uses or activities not in conflict with AS 16 20 130 and 16 20 140 for the purpose of preserving the natural habitat and the fish and game of the Walrus Islands State Game Sanctuary (§ 3 ch 115 S.L.A. 1960, am § 26 ch 206 S.L.A. 1975)

Sec. 16.20.130. Multiple use. Oil and mineral exploration and development is permitted on the Walrus Islands State Game Sanctuary in accordance with state or federal laws and regulations, subject to the limitations of AS 16 20 140 and to additional limitations jointly determined by the commissioner of natural resources and the commissioner of fish and game to assure compatible multiple land use practices. (§ 4 ch 115 S.L.A. 1960)

Sec. 16.20.140. Sale and lease. Land in the Walrus Islands State Game Sanctuary may not be sold. It may be leased only as mineral land as authorized in regulations of the Department of Natural Resources (§ 5 ch 115 S.L.A. 1960)

Article 3. McNeil River State Game Sanctuary.

Section

160 Sanctuary established

170 Applicability of other laws

Sec. 16.20.160. Sanctuary established. The following described area and adjacent state waters are established as a state game sanctuary to be known as the McNeil River State Game Sanctuary:

Beginning at the NE corner of Section 13, T 12 S R 30 W, 8 M, westerly along the section lines to the NW corner of Section 18, T 12 S R 30 W, 8 M, thence southerly along the township boundary to the SW corner of T 12 S R 30 W, 8 M, thence westerly along the north boundary of T 13 S R 31 W, 8 M, to the NW corner of T 13 S R 31 W, 8 M, thence westerly along the north boundary of T 13 S R 32 W, 8 M, to the NW corner of T 13 S R 32 W, 8 M, thence southerly along the west boundary of T 13 S R 32 W, 8 M, to the SW corner of T 13 S R 32 W, 8 M, thence southerly along the west boundary of T 14 S R 32 W, 8 M, to the SW corner of Section 30, T 14 S R 32 W, 8 M, thence easterly along the section lines to the SE corner of Section 27, T 14 S R 32 W, 8 M, thence northerly along the section lines to the NE corner of Section 15, T 14 S R 32 W, 8 M, thence easterly along the section lines to the east boundary of T 14 S R 32 W, 8 M, thence northerly along the east boundary of T 14 S R 32 W, 8 M, to the NE corner of T 14 S R 32 W, 8 M, thence easterly along the south boundary of T 13 S R 31 W, 8 M, to the SE corner of T 13 S R 31 W, 8 M, thence northerly along the east boundary of T 13 S R 31 W, 8 M, to the NE corner of Section 24, T 13 S R 31 W, 8 M, thence easterly along the section lines to the SE corner of Section 16, T 13 S R 30 W, 8 M, thence northerly along the section lines to the NE corner of Section 4, T 13 S R 30 W, 8 M, thence easterly along the south boundary of T 12 S R 30 W, 8 M, to the SE corner of T 12 S R 30 W, 8 M, thence easterly along the south boundary of T 12 S R 29 W, 8 M, to the shoreline of Horae-shine Cove located in Section 32, T 12 S R 29 W, 8 M, thence northerly, westerly, and northerly along the line of mean high tide to the point of beginning. (§ 2 ch 108 S.L.A. 1967; am § 15 ch 71 S.L.A. 1972)

Editor's note. - Section 1, ch 108, S.L.A. 1967, provides "PURPOSE. The legislature intends in this Act to provide for the permanent protection of brown bear and other wildlife population and their vital habitat in the area of the McNeil River

so that these resources may be preserved for scientific, esthetic and educational purposes"

Legislative history reports. For report on ch 71, S.L.A. 1972 (H.S.S.U. JAG am 11), see 1972 House Journal, p. 808

Chapter 35. Predatory Animals.

Section
200 Use of poison by departments and other state agencies

Secs 16 35 010 - 16 35 180 Employment of hunters and trappers to suppress predatory animals, bounties on wolverines, wolves, coyotes, and hair seals (Repealed, § 29 ch 132 SIA 1984)

Sec. 16 35 200. Use of poison by departments and other state agencies. A department, other state agency or person may not use poison to kill predatory animals without first obtaining the written consent of the appropriate board (§ 1 ch 19 SIA 1968, am § 29 ch 206 SIA 1975)

Chapter 40. Commercial Use of Fish and Game.

Section	Section
10 Disposition of surplus buffalo and musk oxen	20 Sale of meat
	30 Information required

Cross references For definitions applicable to this chapter, see AS 16 05 940

Sec. 16 40 010. Disposition of surplus buffalo and musk oxen. Whenever it is determined by the department that a surplus exists in the herds of buffalo and musk oxen under its control, the department may, under regulations adopted by it, grant the surplus or portions of it to persons, groups, associations, partnerships, or corporations for the purpose of raising and breeding the animals as domestic stock for commercial purposes, or for scientific and educational purposes. A person, group, association, partnership, or corporation may receive animals only after proving to the satisfaction of the department

- (1) intent to raise and breed the animals, and
- (2) possession of facilities for maintaining the animals under positive control (§ 1 ch 15 SIA 1962)

Collateral references 35 Am Jur 2d, Fish and Game, § 50

Sec. 16 40 020. Sale of meat. The sale of buffalo or musk oxen meat resulting from the slaughter of animals obtained under AS 16 40 010, or their offspring is authorized. (§ 2 ch 16 SIA 1962)

Sec. 16 40 030. Information required. The recipient of animals obtained under AS 16 40 010 shall furnish the department the information the department requests regarding the status of the animals or their offspring (§ 3 ch 16 SIA 1982)

Collateral references 36 C.J.S. Fish, § 13 et seq

Chapter 43. Regulation of Entry into Alaska Commercial Fisheries.

- Article
- 1 Alaska Commercial Fisheries Entry Commission (§§ 16 43 010 - 16 43 120)
 - 2 Entry Permit System (§§ 16 43 140 - 16 43 182)
 - 3 Initial Issuance of Entry Permits (§§ 16 43 200 - 16 43 270)
 - 4 Reduction to Optimum Number of Entry Permits (§§ 16 43 290 - 16 43 330)
 - 5 Educational Entry Permits (§§ 16 43 340 - 16 43 380)
 - 6 Special Harvest Area Entry Permits (§§ 16 43 400 - 16 43 460)
 - 7 General Provisions (§§ 16 43 560 - 16 43 600)

Legislative history reports. For House Resources Committee report in connection with ch 70, SIA 1973 (SRS CSIB 126 am S), see 1973 House Journal, p 603, for Senate Special Committee on Fisheries letter of intent, see 1973 Senate Journal Supplement at 18

NOTES TO DECISIONS

Constitutionality. The entry restriction of the Limited Entry Act violates neither § 3, art VIII, nor § 1, art I, of the state constitution *State v Ustrinsky*, Sup Ct (Op No 2702 (File Nos 6336, 6373), 667 P 2d 1184 (1983), appeal dismissed, 467 U.S. 1201, 104 S Ct 2379, 81 L Ed 2d 339 (1984))

Adjudicatory responsibility of commission decisions. - Correction of administrative errors cannot be construed to allow an adjudicatory reviewing of a commercial fisheries entry commission decision after the time limit for reconsideration, which is a reevaluation of the merits of an

adjudicatory decision by the same agency, has expired in the absence of a finding of inadvertent mistake or other special circumstance *Muore v State, Com Fisheries Entry Comm'n*, Sup Ct Op No 2879 (File No 7836), 688 P 2d 682 (1984)

Cited in State, N.S.P., National Aquaculture Ass'n v Alas, Sup Ct Op No 2488 (File Nos 8065, 8086, 8142), 646 P 2d 203 (1982); *Koss v Commercial Fisheries Entry Comm'n*, Sup Ct Op No 2818 (File No 8361), 647 P 2d 154 (1982); *Johns v Commercial Fisheries Entry Comm'n*, Sup Ct Op No 2834 (File No 139), 699 P 2d 334 (1985)

Collateral references 36A C.J.S. Fish, § 13 et seq

AN ACT

Relating to the taking of fish and game for subsistence and personal use; and providing for an effective date.

* Section 1. AS 16.05.251(a)(6) is amended to read:

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

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

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

* Sec. 3. AS 16.05.251 is amended by adding new subsections to read:

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

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

(2) the number of residents and nonresidents who have

Chapter 52

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

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

6 (4) the availability of alternative fisheries resources;

7 (5) the importance of each fishery to the economy of the
8 state;

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

11 (7) the importance of each fishery in providing recreation-
12 al opportunities for residents and nonresidents.

13 * Sec. 4. AS 16.05.255(a) is amended by adding a new paragraph to read:

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

16 * Sec. 5. AS 16.05.255 is amended by adding a new subsection to read:

17 (d) Regulations adopted under (a) of this section shall provide
18 that, consistent with the provisions of AS 16.05.258, the taking of
19 moose, deer, elk, and caribou by residents for personal or family
20 consumption has preference over taking by nonresidents.

21 * Sec. 6. AS 16.05 is amended by adding new sections to read:

22 Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME.

23 (a) The Board of Fisheries and the Board of Game shall identify the
24 fish stocks and game populations, or portions of stocks and popu-
25 lations, that are customarily and traditionally used for subsistence
26 in each rural area identified by the boards.

27 (b) The boards shall determine

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

sustained yield; and

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

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

- (1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood;
- (2) local residency; and
- (3) availability of alternative resources.

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

(e) Fish stocks and game populations, including bison, or portions of fish stocks and game populations, not identified under (a)

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of this section may be taken only under nonsubsistence regulations.

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

* Sec. 7. AS 16.05 is amended by adding a new section to read:

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

* Sec. 8. AS 16.05.330 is amended by adding a new subsection to read:

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

* Sec. 9. AS 16.05.940(22) is amended to read:

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

* Sec. 10. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the noncommercial, customary and traditional uses (IN ALASKA) of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of

nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in [FOR THE PURPOSES OF] this paragraph, "family" means (ALL) persons related by blood, marriage, or adoption, and a [ANY] person living in [WITHIN] the household on a permanent basis;

* Sec. 11. AS 16.05.940 is amended by adding new paragraphs to read:

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

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

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

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

(32) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

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

* Sec. 12. AS 16.05.251(b), 16.05.255(b), and 16.05.257 are repealed.

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* Sec. 13. This Act takes effect June 1, 1986.

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ALASKA NATIVE LAW SECTION

1990 SUBSISTENCE UPDATE

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THE LEGAL CONTEXT

I. FEDERAL REGULATION OF NATIVE HUNTING AND FISHING RIGHTS

Federal efforts to regulate Alaska Native hunting and fishing rights can be placed in one of two categories: international treaties governing wildlife resources; and preemptive statutory regulations governing those resources.

A. International Treaties

The United States has adopted a number of treaties whose purposes are to protect migratory wildlife. Some of these enactments have provisions which control the hunting and fishing rights of Alaska Natives. The most important are as follows:

1. Migratory Bird Treaties

The United States government is presently signatory to four migratory bird treaties. Those are the British/Canadian Treaty (Art. II, Treaty of December 7, 1916, 39 Stat. 1702, TS 628); the Mexican Treaty (Art. II(c) and (d), Treaty of March 15, 1937, 50 Stat. 1311, TS 912); the Japanese Treaty (Art. III (1)(3), Treaty of Sept. 19, 1974, 25 UST 3329, TIAS 7990); and the Soviet Treaty (Art. III(c), Treaty of Oct. 13, 1978, 29 UST 4647, TIAS 9073). Because of rapid and substantial policy changes, the treaties are often inconsistent with respect to the provisions relating to the hunting and fishing rights of Alaskan Natives. Generally speaking, the British/Canadian and Mexican treaties prohibit Alaskan Natives from hunting migratory game birds; the Japanese treaty permits Eskimos and Indians to hunt for their own food and clothing; and the Soviet treaty, the most liberal of all, permits Alaskan Natives to hunt for their own nutritional and essential needs. *Id.*

2. The Fur Seal Convention

This convention, signed in 1957 by the United States, Japan, the Soviet Union, and Canada, prohibits open-sea hunting of North Pacific fur seals and establishes a harvesting and profit-sharing arrangement between the four nations. Interim Convention on Conservation of North Pacific Fur Seals, Oct. 14, 1957. This "interim" treaty, repeatedly extended, has received notoriety because it is the source of the government's involvement in the Pribilof Island seal harvest.

3. International Whaling Convention

The convention establishes the International Whaling Commission (IWC) and empowers it to regulate the taking of whales. Convention for the Regulation of

Whaling, entered into force November 10, 1948 (62 Stat. 1716; TIAS 1849); amended effective May 4, 1959 (10 UST 952; TIAS 4228). In 1977, the IWC placed an absolute ban on the taking of bowhead whales, an endangered species. Responding to the ban, Inupiat Eskimos managed, through litigation and political maneuvering, to convince the IWC to replace the 1977 ban with a limited bowhead harvest quota for Alaskan Natives.

Pursuant to the revised regulation, whaling by Alaskan Natives is now governed by the Alaska Eskimo Whaling Commission. This body was formed with the support of the North Slope Borough and represents each of the nine affected whaling villages -- Wales, Kivalina, Point Hope, Wainwright, Barrow, Nuiqsut, Kaktovik, Gambell, and Savoonga.

4. The Polar Bear Convention

The Polar Bear Convention was signed by the United States, Canada, Denmark, Norway, and the Soviet Union. Convention for the Conservation of Polar Bears, entered into force Nov. 1, 1976 (27 UST 3918; TIAS 8409). It generally prohibits the taking of polar bears but permits Alaskan Natives to take some of the animals for limited purposes.

B. Pre-emptive Statutes

A second major set of federal statutes are those which pre-empt the State of Alaska from regulating specific species of fish and wildlife. Four major statutes fit this category: the Reindeer Industry Act of 1937; the Marine Mammal Protection Act of 1972; the Endangered Species Act of 1973; and the Alaska National Interest Lands Conservation Act (ANILCA) of 1980.

1. The Reindeer Industry Act

The Reindeer Industry Act, passed in 1937, directed the Secretary of the Interior to acquire non-Native-owned deer, to distribute them to Natives, and to prevent future alienation of deer to non-Natives. Act of September 1, 1937, 50 Stat. 900 (25 U.S.C.A. §§ 500 *et seq.*). It also established a revolving loan fund to finance the reindeer business and permitted the Secretary of the Interior to delegate the running of the program to Native organizations. The purpose of the statute was to establish a reindeer herding industry under Native control.

2. The Endangered Species Act

The Endangered Species Act (ESA) was enacted in 1973. Act of Oct. 21, 1972, 86 Stat. 1027, Pub. L. No. 92-522, as amended (16 U.S.C.A. §§ 1531 *et seq.*). It directs the Secretaries of Interior, Commerce, and Agriculture to determine what