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species are "endangered" or "threatened." It then directs the Secretaries to take appropriate action to remedy the situation.

The Act, which pre-empts any inconsistent state law, contains a subsistence exception. Under this exception, Native as well as non-Native subsistence uses by rural Alaskan residents are not subject to the ESA. The exception permits takings primarily for subsistence purposes and includes a provision for the non-wasteful sale of authentic Native articles, handicrafts, or clothing.

3. The Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) was passed in 1972. Act of Dec. 28, 1973, 87 Stat. 885, Pub. L. No. 93-205, as amended (16 U.S.C.A. §§ 1531 *et seq.*). Although prohibiting the taking or importing of all marine mammals, the Act does contain a somewhat broad exception for Alaskan Native subsistence uses. As amended in 1981, the MMPA permits Alaskan Natives who dwell on the coast of the North Pacific Ocean or the Arctic Ocean to take marine mammals for non-wasteful subsistence purposes, including the creation of authentic Native handicrafts or clothing.

As amended in 1981, the Act also prohibits enforcement of all state laws relating to the taking of marine mammals but requires that the federal government transfer enforcement back to states meeting certain enforcement requirements. This exception specifically requires the State of Alaska to incorporate detailed marine mammal subsistence protections into its fish and game statutes and regulations as a prerequisite for return of jurisdiction over the regulation of the taking of marine mammals. Of some interest here is that the statute indicates that should the State of Alaska resume jurisdiction over marine mammals, the subsistence exception enforcement currently limited by federal law to Native Alaskans would be broadened to include all rural Alaska residents.

4. Title VIII of the Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act (ANILCA) is perhaps best known for its massive land withdrawals and the creation of an integrated set of national parks and wildlife refuges. Act of Dec. 2, 1980, 94 Stat. 2371, 2422. Less well known, but perhaps of more immediate importance to Alaskan Natives, is Title VIII of that Act. Pub. L. No. 96-487 (16 U.S.C.A. §§ 3111 *et seq.*). This title provides significant protections for the subsistence rights of rural Alaskan Natives. It also protects subsistence uses of non-Natives who live in rural areas.

By its terms, Title VIII is intended to carry out the subsistence-related policies and to fulfill the purposes of the Alaska Native Claims Settlement Act. It is in many senses a "settlement" of the Alaskan Native aboriginal hunting and fishing claims

which were extinguished by that Act. Yet, unlike many such settlements, Title VIII does not afford Alaskan Natives off-reservation or other exclusive rights to hunt and fish. In place of such exclusive rights, Title VIII establishes protections for subsistence uses for rural Alaska residents, Native and non-Native alike.

Title VIII is important for four major reasons. First, it establishes an absolute priority for subsistence uses over all other competing consumptive purposes. Second, it guarantees subsistence users access to fish and game on federal land which would otherwise be closed to hunting and fishing. Third, it requires federal land managers to incorporate subsistence uses in their land use decision process. Fourth, it establishes an administrative structure which could potentially serve to increase the representation of Alaskan Native interests in fish and game management.

Priority

The priority for subsistence uses can be found in Section 804 of Title VIII. 16 U.S.C. § 3114. That section states that "Subsistence uses shall be accorded priority over the taking on such lands [public lands] of fish and wildlife for other purposes." The preference, although absolute, has two important qualifications. It only applies to subsistence uses on federal "public lands" as that term is defined by ANILCA and it does not limit non-subsistence uses in the absence of some need to conserve or preserve the biological resource. *Id.* "Rural Alaska residents" are entitled to the priority when they engage in "customary and traditional" subsistence uses. 16 U.S.C. § 3113. Of course, the continued viability of fish stocks or game populations is of paramount importance under the federal law, and protection of those stocks or populations has in that sense a "priority" even over subsistence uses.

Access

The access guarantee of Title VIII is similarly straightforward. Section 809, 16 U.S.C. § 3119, requires that the United States provide "reasonable access" to resources used for subsistence purposes which are located on public lands. *Id.* This section permits Alaskan Natives to hunt and fish on lands which would otherwise be closed to these activities and may place some restraints on land use decisions by pertinent federal agencies.

Land Use

The provision requiring that land use decisions take into account subsistence uses can be found in Section 810 of ANILCA. 16 U.S.C. § 3120. The section consists of two parts: The first requires studies and evaluations of subsistence uses. The second requires detailed findings which incorporate subsistence uses in land use decisions if the federal agency finds that the land use decisions might "significantly restrict" subsistence uses. *Id.*

Structure

Section 805(a) of ANILCA, 16 U.S.C. § 3105, requires the Secretary of the Interior to establish six subsistence resource regions in the State of Alaska. The Act also specifies that each region must have a regional advisory council as well as subsidiary advisory committees. Under the Act, the councils have the power to review and evaluate the Interior Secretary's (or the State's) subsistence management proposals and to provide forums for interested people to express their opinions and recommendations on any matter related to subsistence.

The councils could play an important role in the management of subsistence resources in Alaska. The Secretary of the Interior is required to assign "adequate qualified staff" to the advisory councils. But more importantly, the Secretary (or the State) is required to accept any council management recommendation unless (1) it is not supported by substantial evidence; (2) it violates recognized principles of fish and wildlife conservation; or (3) it would be detrimental to subsistence needs. 16 U.S.C. § 3115(c).

In addition to these specific protections, Title VIII is also important insofar as it encourages the State of Alaska to incorporate similar values in its fish and wildlife management plans. The real purpose behind Title VIII was to encourage the State to incorporate meaningful local and regional participation in State fish and game board subsistence decisions. This purpose is effectuated by Section 805(d) of ANILCA, 16 U.S.C. § 3115(d). That section permits the State to assume management over fish and wildlife on federal lands if the State, through laws of general applicability, implements the ANILCA subsistence definition[1] and preference. The State accepted this invitation and adopted state laws and regulations of general applicability implementing the pertinent provisions of Title VIII. As a consequence, management of fish and game throughout the State of Alaska was generally placed in the hands of the State.

On December 22, 1989, the Alaska Supreme Court ruled that Art. VIII of the Alaska Constitution prohibits limiting the subsistence preference to residents of rural areas. *See McDowell v. Collinsworth*, *infra* at p. 23. The effect of the decision has been stayed until July 1, 1990, with respect to existing hunting and fishing regulations. Although the Alaska Legislature has not repealed its subsistence law, the Supreme Court's decision in *McDowell*, if carried out, will have the same legal effect. If that decision becomes final and operative, the State of Alaska will be out of compliance with the requirements of ANILCA and will no longer be entitled to

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[1] The State's definition of "subsistence uses," which incorporates a definition of "rural area," was ruled inconsistent with ANILCA by the Court of Appeals for the Ninth Circuit (*See* discussion of *Kenaitze Indian Tribe v. Alaska*, *infra* at p. 19).

manage fish and wildlife on public (federal) lands in Alaska. On April 13, 1990, the Secretary published in the Federal Register a notice of the federal government's intent, in view of *McDowell*, to assume subsistence management on federal lands in Alaska if the State is unable to come into compliance with Title VIII of ANILCA by July 1, 1990. 55 FED. REG. 13922.

It appears unlikely that the State will be able to bring itself back into compliance by July 1, 1990. Even if the Alaska Legislature succeeds in passing a Constitutional Amendment, the Amendment would have to be approved by the voters in November. Therefore, absent a further stay of the *McDowell* decision, the Secretary of the Interior will assume management authority over fish and wildlife on federal lands in Alaska effective July 1, 1990.

Judicial Enforcement

Section 807 of ANILCA, 16 U.S.C. § 3116, places the responsibility for enforcing the subsistence priority in the hands of subsistence users and the federal courts. Although earlier versions of Title VIII provided that the Secretary of the Interior would enforce the priority through an administrative process, the final version provided for purely private enforcement. Section 807 gives subsistence users a federal private right of action against the State.

Section 807 specifically empowers the federal courts to enjoin state enforcement of a regulatory scheme which fails to provide for the subsistence priority set forth in Section 804 of ANILCA. It also empowers the courts to direct the State to promulgate regulations consistent with the requirements of Section 804. Finally, the Act provides that, once approved by the federal courts, the regulations will be valid for the period of time which state law defines as normal for a regulation.

Enforcement of ANILCA's other provisions is subject to normal judicial review -- federal action is reviewable under the Administrative Procedure Act and state action under the state Administrative Procedure Act.

II. STATE REGULATION

The State regulates Native subsistence rights in the same way that it regulates all hunting and fishing. It has created a Board of Fisheries to regulate all fishing efforts over which it has management responsibility. It has created a Board of Game to regulate all takings of game in all areas over which it has a similar authority.

As indicated above, the State of Alaska accepted the invitation of Title VIII of ANILCA and in 1982 assumed primary responsibility for managing fish and wildlife on federal lands. In accordance with Title VIII's requirement that subsistence uses be given a priority over all other competing uses, the Alaska legislature requires that

subsistence uses be accorded a priority. This purpose is effectuated in AS 16.050.258. The statute requires that the Boards of Fisheries and Game shall accord subsistence fishing and hunting a priority over all other fishing and hunting efforts. As discussed above, the "rural preference" provisions of the 1986 state subsistence-priority law were held unconstitutional by the Alaska Supreme Court in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). On remand, the Superior Court must decide whether the rural preference provisions of the State's subsistence law are severable. If it determines that those provisions are severable, the State's resource managers would be required to accord priority to subsistence uses by Alaska residents on state lands without regard to their rural or urban status. If it determines that those provisions are not severable, subsistence uses would no longer be entitled to preference over other consumptive uses.

Since enactment of the 1986 subsistence law in May, 1986 (Ch. 52, SLA 1986), the Alaska Boards of Fisheries and Game have made a number of revisions to subsistence hunting and fishing regulations. Subsistence hunting regulations are established in separate sections, on a region-by-region basis and can be found at 5 AAC 78 through 5 AAC 88. Statewide provisions, including definitions relating to subsistence, are found in 5 AAC 92. Regulations regarding local fish and game advisory committees and regional councils are found at 5 AAC 96 and 97. Regulations governing development of subsistence regulations and identification of rural areas are found in 5 AAC 99.

RECENT DECISIONS AND ACTIVE CASES

1. ***Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989), *as amended on denial of rehearing, cert. denied*, 110 S. Ct. 204 (1989), *on remand*, No. A85-701 (D. Alaska) (von der Heydt)**

This case was initially filed in December 1985 and involved the interpretation of Section 810 of ANILCA. Its focus was on "when" the Secretary of the Interior had to comply with procedures designed to ensure that use and/or disposition of federal lands would not unnecessarily restrict subsistence uses. The district court held that Interior erred by undertaking such procedures only when the proposed use or disposition had a "probability" of significantly restricting subsistence uses. Citing *Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*), the Court held that the procedures had to be followed whenever such use "may" significantly restrict subsistence uses.

The district court's decision was affirmed on appeal. *Tribal Village of Akutan v. Hodel*, 792 F.2d 1376 (9th Cir. 1986) and the government and the oil companies petitioned for certiorari. Following the Supreme Court's decision in *Amoco Production Co. v. Village of Gambell*, 107 S. Ct. 1396 (1987) (*see* discussion *infra* at p.

14), the Supreme Court granted their petitions, reversed, and remanded for reconsideration in light of *Amoco*, 107 S. Ct. 1598 (1987).

On remand, the tribal villages amended their complaint to allege aboriginal hunting and fishing rights in the lease sale area. The parties then agreed to a stay of all proceedings on the aboriginal title claim pending a decision by the Ninth Circuit in the remand of *Amoco Production Co. v. Gambell.* Meanwhile, the State, the tribal villages, and various environmental organizations sought summary judgment on claims that the lease sale violated the Outer Continental Shelf Lands Act, the National Environmental Policy Act, and the Endangered Species Act. On January 22, 1988, the district court denied the State's claims under the OCSLA and on March 11, 1988 denied the NEPA and ESA claims.

On October 5, 1988, the Court of Appeals upheld the District Court's decision on all counts. It held that the Secretary properly decided not to accept the State's recommendations under OCSLA; that the Secretary could remedy any deficiencies in his Environmental Impact Statement at the exploratory or production stages of development; and that the Secretary's reasons for rejecting recommendations by the National Marine Fisheries Service to implement the ESA were not arbitrary or capricious. *Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989).

Plaintiffs moved for a rehearing, with a suggestion for rehearing *en banc*, together with a request that the sale be stayed pending rehearing. The motion for stay was denied as moot shortly after the lease sale was held in mid-October, 1988; the petition for rehearing was rejected on March 9, 1989, although the Court did modify its opinion in some minor respects on that date. The State of Alaska's petition for certiorari on the OCSLA issues was denied on October 2, 1989. 110 S. Ct. 204. Meanwhile, Congress imposed a one-year moratorium (until September 30, 1990) on exploratory activities pursuant to the leases and directed the Secretary of the Interior to investigate the possibility of buying back the leases.

The tribal villages' claim of aboriginal hunting and fishing rights remains to be decided by the district court.

2. *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkel*, 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988), *on remand*, No. J84-013 Civ. (D. Alaska) (von der Heydt)

This case was filed in the Spring of 1984 by the Alaska Fish and Wildlife Federation and Outdoor Council and the Alaska Fish and Wildlife Conservation Fund (Conservation Fund). The plaintiffs sought a declaration that two cooperative agreements (the Hooper Bay Agreement and the 1985 Goose Management Plan) entered into by the Fish & Wildlife Service, the ADF&G, AVCP and the California

Department of Fish and Game violate the Migratory Bird Treaty Act, the notice and comment provisions of the federal Administrative Procedure Act, the National Environmental Policy Act, and provisions of ANILCA, 16 U.S.C. § 668dd, which created the Yukon Delta Wildlife Refuge.

The challenged cooperative agreements grew out of recognition by the federal and state governments that migratory birds represent an important part of the traditional Native diet on the Yukon-Kuskokwim Delta. Even though the Migratory Bird Treaty Act, through the 1978 Fish and Wildlife Improvement Act, permits the Secretary of the Interior to authorize hunting of migratory birds in the spring and summer, it requires that the hunting be consistent with the four migratory bird treaties to which the United States is a party. The 1916 U.S./Canada treaty prohibits harvest of migratory birds in the spring and summer. Even though the Fish and Wildlife Service had long assumed that all harvesting of migratory birds between March 10 and September 1 is prohibited, it adopted a written policy in 1975 stating that subsistence hunting in Alaska during the closed season would not be punished. This enforcement policy was adopted in part because the service recognized the importance of spring waterfowl to Alaska Natives and in part because of the practical problems of enforcing the game laws in the vast reaches of rural Alaska.

Because of the recent decline of four populations of migratory birds, the U.S. Fish and Wildlife Service, the Alaska Department of Fish and Game, the California Department of Fish and Game, and the Association of Village Council Presidents entered into a cooperative agreement under which the harvest of those four species would be minimized in the spring and summer. This plan, known as the Hooper Bay Agreement, prohibited sport hunting of cackling Canada geese and reduced the hunting of white-fronted geese and black brants during the 1985 season. Enforcement was to be a joint effort by the various governmental agencies and local village councils. During 1984, the parties complied with the terms of the agreement. In 1985, the Hooper Bay Agreement was replaced with the 1985 Goose Management Plan.

The Conservation Fund initially sought an injunction to prohibit the Fish and Wildlife Service from agreeing to the taking of migratory birds during the 1984 closed season. Shortly thereafter, the intervenors (AVCP) filed a cross-claim against the Fish and Wildlife Service alleging that the 1925 Alaska Game Law rather than the Migratory Bird Treaty Act governed the subsistence hunting of migratory game birds in Alaska and until the agency promulgated regulations under the 1978 Wildlife Improvement Act, Interior had no authority to enforce the Migratory Bird Treaty Act's closed seasons. The district court denied the preliminary injunction for the 1984 season. It subsequently ruled that the 1925 Alaska Game Law repealed the Migratory Bird Treaty Act insofar as it applied to Alaska. The court dismissed all of the other claims as moot. *Memorandum and Order* (Jan. 24, 1985).

On appeal, the Ninth Circuit reversed with respect to the 1925 Game Act, pointing out that the 1916 U.S./Canadian treaty did not provide for spring and summer hunting, and thus it could not be authorized under the 1978 Fish and Wildlife Improvement Act. The court remanded the case to the district court on all of the original challenges to the plan under the Migratory Bird Treaty Act, the migratory bird treaties, the federal Administrative Procedure Act, NEPA and the section of ANILCA creating the Yukon Delta National Wildlife Refuge. 829 F.2d 933 (9th Cir. 1987). The Supreme Court denied AVCP's petition for certiorari. 108 S. Ct. 1290 (1988).

On remand, the district court found that by agreeing to language in the Hooper Bay Agreements which indicated that subsistence hunting for certain species was "OK" during parts of the period closed to hunting by treaty, the U.S.F.W.S. adopted a "substantive rule" in violation of the notice and comment procedures mandated by the APA, 5 U.S.C. § 553. The Court also found that the failure of U.S.F.W.S. to prepare an environmental assessment of its "substantive rule" violated the requirements of NEPA. Finally, the Court found that by adopting a substantive rule authorizing hunting during a period closed to hunting by treaty, the Secretary acted beyond the scope of his authority and thus violated the Migratory Bird Treaty Act. *Memorandum and Order* (June 29, 1988).

Meanwhile, on April 22, 1988, the Regional Director for the Fish and Wildlife Service announced a new policy on migratory bird hunting in Alaska. The policy is intended to prevent hunting of cackling Canada or emperor geese at any time; hunting Pacific white-fronted geese or black brant when they are nesting, raising young, or are flightless; taking eggs from any of the above four species of geese; using private or charter aircraft for purposes of hunting migratory birds during closed seasons; hunting other waterfowl (ducks, geese, swans) when they are nesting, raising young or are flightless;, or taking eggs of other waterfowl. The policy states that *limited harvest of migratory birds for food in unforeseen emergency situations will not be prosecuted* and enforcement of the policy will concentrate on "violations that have the greatest impact on waterfowl resources." As an adjunct to this policy, the Service has announced that it continues to view the Yukon-Kuskokwim Delta Goose Management Plan as an important element in the conservation of the four species.

On April 29, 1988, the Yukon-Kuskokwim Delta Goose Management Plan for 1988, which corresponds with the Service's recently adopted policy on migratory bird hunting in Alaska, was signed by the Service and Native Groups in the Yukon-Kuskokwim Delta. The state fish and game departments from both Alaska and California also signed the plan. The plan lists priorities the signatories will observe to enforce the closed season on migratory birds in spring and summer. It calls for a cooperative effort in monitoring compliance. Reports of violations will be coordinated with local village governments, which will assist in investigations conducted by the

Service. The Service also agreed to make a "good faith effort to reach agreement with Canada" on an amendment to the Migratory Bird Treaty. As noted above, that treaty, signed in 1916, makes most hunting for migratory birds, even for subsistence, illegal.

3. *Bobby v. Alaska*, No. A84-544 Civ. (D. Alaska) (Holland)

This case was filed in November, 1984, by Wasilie Bobby, Sr., individually and on behalf of the people of Lime Village, a community of about 40 people. He alleged that the then-existing moose and caribou regulations applicable to the Lime Village area did not adequately accommodate subsistence uses. Since that time, the Board of Game modified the regulations in several steps. The regulations ultimately reviewed by the Court imposed two closed seasons on moose (spring through mid-summer, and in the late fall) and one closed season on caribou (spring through mid-summer). The bag limits for residents of Lime Village reviewed by the court were 2 moose and 5 caribou per person.

Plaintiff argued that individual bag limits are not necessary for any conservation or management purpose in the case of Lime Village and are not consistent with the village's historic hunting patterns. Plaintiff asserted that several good hunters may supply the entire community with meat over the course of the year, rather than each household hunting for itself. Plaintiff also argued that the then-existing closed seasons for moose and caribou harvest were not consistent with ANILCA. Plaintiff asserted that under ANILCA, there should be no closed season unless necessary to protect the resource. The State's position was that ANILCA requires it to provide a "reasonable opportunity" for subsistence uses, but not necessarily year-round seasons.

Another issue raised in this case was whether people can harvest game or fish outside the existing regulations and then successfully defend in a criminal case by asserting that the regulations did not adequately accommodate subsistence uses. This "subsistence defense" was originally created by the Alaska Court of Appeals in *State v. Eluska*, 698 P.2d 174 (Alaska App. 1985), but its use was prohibited by the Alaska Supreme Court in *State v. Eluska*, 724 P.2d 514 (Alaska 1986). The Supreme Court held that AS 16.05.920(a), which prohibits taking fish and game unless authorized, is controlling and is necessary in order to adhere to the constitutionally mandated sustained yield standard. The court's ruling followed, but did not refer to, the legislature's articulation in May 1986 of that same principle with respect to subsistence fishing and hunting in AS 16.05.261. The State's position was that neither the legislature nor the Alaska Supreme Court prevented people from requesting the Boards of Fish and Game to change regulations or prohibited people from challenging existing regulations in civil cases, based on a perceived lack of reasonable opportunity for subsistence.

The court ruled on pending motions for summary judgment on February 14, 1989, holding that seasons and bag limits are permissible under the State's subsistence law, but only when those seasons and bag limits are consistent with customary and traditional uses. The Judge indicated that he would normally defer to the Board of Game's determinations, but refused to do so in this instance, in part because the Board lacked the necessary data. Due to the constantly changing ground rules governing the Board of Game at that time, the Board did not perform the analysis required by the State's 1986 subsistence law with respect to moose and caribou subsistence uses in the Lime Village area. The Court also found that the Board's available data failed to support its conclusions. The seasons imposed by the regulations were inconsistent with a specific finding by the Board of Game that residents of Lime Village had historically harvested moose and caribou opportunistically throughout the year. The bag limits were not reconciled with the evidence in the record that the best hunters from Lime Village did most of the hunting and shared with the other villagers. The Judge also interpreted the State's "no subsistence defense" statute as only precluding a defendant in a criminal proceeding from claiming a subsistence right in gross, outside of and apart from validly enacted subsistence regulations.

Judge Holland declined to issue a preliminary injunction, but ordered the State to submit revised regulations by June 15, 1989. The Game Board met on April 27 to review the regulations. As a result of the meeting, the regulations were amended to: (1) lift the individual bag limits; (2) establish a quota of 100 caribou for the entire village, and allow year round season on caribou, except that cows and calves may not be taken in the spring or summer; and (3) not impose a moose quota, but retain closed moose seasons.

The parties agreed to a procedure whereby the plaintiffs could submit proposals to the Board of Game for consideration and decision at its spring 1990 meeting, for the purpose of providing the Board a further opportunity to review its regulatory decisions of April 27, 1989, and resolve plaintiffs' remaining objections to the Board's action. Because of the *McDowell* decision, the Board has deferred consideration of plaintiffs' proposals. The Court has retained jurisdiction over the matter until June 30, 1990.

4. *Didrickson v. United States Department of Interior,* No. A85-336 Civ. (D. Alaska) (Holland)

This case, formerly captioned in the name of the original plaintiff, Katelnikoff, was brought pursuant to the Marine Mammal Protection Act of 1972 (MMPA). Both Marina Katelnikoff and Didrickson sought the return of a number of articles they had fashioned out of sea otter pelts. The articles were confiscated by federal enforcement agents on the ground that they were not "authentic native articles of handicrafts and

clothing" within the meaning of the Native handicraft exemption to the MMPA, 16 U.S.C. § 1371(b), as defined by controlling federal regulations.

At stake is the proper interpretation of the Alaska Native exemption to the MMPA and its regulations. The MMPA, enacted in 1972, established a comprehensive moratorium on the taking of marine mammals but created an exception for the taking of marine mammals by Alaska Natives for subsistence purposes and for making "authentic native articles of handicrafts and clothing." 16 U.S.C. § 1371(b). The regulation implementing this exemption defines "authentic native articles of handicrafts and clothing" to include only those items which "were commonly produced on or before December 21, 1972." 50 C.F.R. § 18.3.

Plaintiffs argued that the limitation in the regulation was inconsistent with the MMPA in that it focuses on whether the final craft *item* produced was traditional rather than whether the production *technique* was traditional. Plaintiffs argued that an item can be "authentic" even if it was not commonly produced prior to 1972.

In July 1986, Judge Holland rejected these arguments and upheld the validity of the regulation largely based on deference to agency interpretation. Ms. Katelnikoff was subsequently dismissed from the lawsuit to pursue her administrative remedies. After (Ms. (Katelnikoff) Beck lost her administrative hearing as to all items crafted from sea otter pelts except hats, she moved to intervene in the federal court litigation.

Judge Holland's decision upholding the regulation as consistent with the MMPA led Didrickson to amend his complaint to allege that the regulation is unconstitutionally vague because no one, not even the enforcement agents, can determine what is permitted by the regulation. Sea otter use by Natives has been limited since the mid-1700's due to bans imposed by the Russians and then by the United States and also due to population declines caused by Russian overhunting, and it is difficult or impossible to determine exactly what use Natives made of sea otter at that time.

Didrickson moved for summary judgment on the constitutional claim, and the government moved to dismiss. In denying the government's motion to dismiss, Judge Holland indicated that problems with the regulation and its enforcement call for an administrative resolution. In response, the Fish and Wildlife Service instituted a formal rulemaking proceeding on November 11, 1988, 53 Fed. Reg. 45788, proposing to change its regulatory definition to totally prohibit Native use of sea otter for handicrafts and clothing based upon its conclusion that there had been no recent use of sea otters by Natives and no recent sales of sea otter items. Public hearings were held in several coastal villages in October, 1989, and the comment period was extended until November 30, 1989.

Despite over a thousand written comments opposing the proposed rule, the Fish & Wildlife Service issued an interim rule on April 20, 1990, amending 50 C.F.R. § 18.3 to prohibit the take of sea otters for the purpose of creating and selling handicrafts and clothing. 55 Fed. Reg. 14973. The Service has stated that it will initiate another rulemaking process for the purpose of replacing the interim rule with a final rule after a management plan for the northern sea otter has been completed. It projects completion of such a plan in 1992.

Meanwhile, Judge Holland has requested status reports from the parties by May 21, 1990.

5. *Gambell v. Lujan*, 869 F.2d 1273 (9th Cir. 1989), *petition for rehearing denied, on remand*, No. 85-184 (D. Alaska) (von der Heydt)

On March 4, 1983, the tribal villages of Gambell and Stebbins sued the Secretary of the Interior alleging that he had violated either their aboriginal hunting and fishing rights or Section 810 of ANILCA in holding Outer Continental Shelf Lease Sale 57. Oil companies interested in bidding on the sale intervened.

The Tribes' principal claim was that ANCSA and Title VIII of ANILCA had to be consistently interpreted by the Secretary. ANCSA extinguished Native hunting and fishing rights "in Alaska." Title VIII applies to Native hunting and fishing rights "in Alaska." The Tribes argued that the two acts had the same geographic scope. If both acts applied only within the territorial boundaries of the State, then they retained their aboriginal hunting and fishing rights outside the territorial boundaries. Alternatively, if both acts applied outside the territorial boundaries of the State, then the Secretary had violated Section 810 in holding the sale.

Judge von der Heydt granted summary judgment to the government and the intervening oil companies and dismissed the suit. The Ninth Circuit reversed in part and affirmed in part. It held that ANCSA applies to the OCS and operated to extinguish aboriginal hunting and fishing rights in this area. It also held that ANILCA applied to the OCS and since the Secretary had not complied with Section 810 of ANILCA, the court reversed and remanded for a determination as to whether the sale should be voided. *Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*).

In April, 1985, a companion case, *Gambell v. Hodel*, was filed challenging OCS Lease Sale 83 in the Navarin Basin, alleging both that the Secretary had failed to comply with Section 810 of ANILCA in holding the sale as well as that the Secretary's decision to lease the area violated his trust responsibilities to protect subsistence uses and resources.

The plaintiffs in both cases moved the district court for a preliminary injunction against exploratory drilling pending the district court's determination on

the merits. The motions were consolidated. Although the district court found that the Department of the Interior did not comply with Title VIII of ANILCA in holding the lease sales, it ruled that a preliminary injunction was not warranted. The court reasoned that the nation's quest for new oil and gas resources and energy independence outweighed the harm that might result to subsistence users from continued exploratory activities on the leases.

On appeal the Ninth Circuit reversed the district court, finding that the tribal villages had a certainty of prevailing on the merits and ordered the oil companies to immediately cease all operations in the leased areas. Its ruling rested on the principle that under Section 810 the national interest in the subsistence lifestyle of Alaskan Natives outweighs the competing interest in the rapid development of OCS oil leasing in Alaska. *Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*).

The government and the oil companies petitioned for certiorari. The tribal villages cross-petitioned on the aboriginal title issue decided in *Gambell I*. The Supreme Court granted both petitions and reversed the lower court's holding that ANILCA applied to the OCS, vacated the ruling that ANCSA applied to the same area, and remanded the case for further proceedings on the aboriginal title claim. *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987).

On remand, the Court of Appeals reversed the district court's original judgment in *Gambell I*, holding that aboriginal subsistence rights of Alaska Natives in the OCS were not extinguished by ANCSA. It also rejected the Secretary's and the oil companies' arguments that (1) the federal government's paramount interests in the OCS extinguished aboriginal rights; (2) that the United States had not assumed sufficient control over the OCS so as to constitute sovereignty which requires recognition of aboriginal rights; and (3) that recognition of aboriginal rights would be inconsistent with principles of international law.

On remand, the district court must decide (1) whether the Villages possess aboriginal rights in the OCS; (2) if so, whether the drilling and other activities by the oil companies will interfere significantly with the Villages' exercise of those rights; and (3) whether the Outer Continental Shelf Lands Act extinguished aboriginal subsistence rights in the OCS. *Gambell v. Lujan*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*). Preliminary discovery is proceeding on these issues.

6. *Hanlon v. Barton*, No. J88-025 Civ. (D. Alaska) (von der Heydt)

This case was filed in July 1988 on behalf of six Native residents of Hoonah and one non-Native resident of Angoon, all of whom hunt near Hoonah. Two of the Hoonah-area Tlingit clans are represented in this action, one by its chief and the other by a senior clan member. All depend for their subsistence food needs on the resources,

particularly the deer, of the Tongass National Forest. Plaintiffs suit, which has proceeded in two phases, initially attacked a Forest Service decision to authorize four years of clearcut logging and roadbuilding on public lands near Hoonah without first holding the hearings and making the findings required by Section 810 of ANILCA, 16 U.S.C. § 3120. That statute requires Federal agencies to consider the effects of major land use decisions on subsistence. If a proposed action may impose significant restrictions on subsistence uses of the public lands, the Federal agency involved must make specific findings that the action is necessary consistent with sound management of public lands, that it involves the minimal amount of public lands, and that measures will be taken to minimize the adverse effects on subsistence resources and uses.

In July, 1988, plaintiffs filed a motion for preliminary injunction. The Alaska Pulp Corporation, the principal beneficiary of the logging program, intervened in the case. Plaintiffs argued that the Forest Service applied the wrong legal standard to determine whether the timber development in the Hoonah area may significantly restrict plaintiffs' subsistence uses. They also asserted that the agency failed to consider the impacts of related actions, and, on the basis of information available to it, was compelled to conclude that its logging program would result in significant restrictions to subsistence uses, thus invoking the findings requirements of ANILCA, Section 810(a)(1)(3). Plaintiffs also alleged violations of the National Environmental Policy Act, the National Historic Preservation Act, and the Administrative Procedure Act.

On November 14, 1988, the district court denied the plaintiffs' request for a preliminary injunction. Although the court ruled that plaintiffs were likely to prevail on the merits of four of six claims, it found insufficient proof of irreparable harm. The Court suggested comprise on the terms of an injunction pending Forest Service compliance with ANILCA and NEPA. Unable to reach agreement, the plaintiffs filed an appeal and moved the district court for an injunction pending appeal. Prior to the hearing on plaintiffs' motion, the parties agreed to the entry of an injunction.

The injunction required the Forest Service to hold subsistence hearings in Hoonah and to prepare a supplemental environmental impact statement. Pending the hearings and supplemental analysis, the injunction prohibited timber cutting, road building and the creation of a log dump in important subsistence areas near Hoonah. In August 1989, during the height of the Hoonah subsistence season, the agency held the subsistence hearings in Hoonah and other villages throughout northern, southeast Alaska.

In November 1989, the Forest Service issued its supplemental environmental analysis and decision. The agency's supplemental EIS documents that timber development activities around Hoonah may significantly restrict plaintiffs' subsistence uses of all species in one area near Hoonah and of deer, brown bear, and marten in

another area. The agency then found that its long-term timber contract with Alaska Pulp Corporation makes it necessary to continue intensive timber development in areas it agreed are important to meet plaintiffs' subsistence food needs. It also found that the development involved the minimal amount of public lands and that closure of new spur roads, pre-commercial thinning, and recommendations to the Alaska Board of Game to reduce the sport bag limits for deer were adequate mitigation measures. The decision also authorized APC to cut more timber during 1990 than it has ever cut in a single year since operations began under its contract in 1961.

On March 2, 1990, plaintiffs filed a motion for a preliminary injunction. They allege that the Forest Service's necessity and mitigation findings fail to comply with ANILCA, Section 810(a)(1)-(3). They request that the court enjoin all activities in areas close to Hoonah until the agency makes the proper findings and requires uniform 100 foot buffer strips on most anadramous fish streams. The court consolidated this case with *Tenakee Springs v. Clough* (*see p. 32 infra*), and ordered the parties to negotiate. They were unable to reach agreement. In mid-April, plaintiffs moved for a temporary restraining order. On April 26, 1990, the court heard oral argument on the requests for a preliminary injunction and temporary restraining order. Following oral argument, the court denied the request for a T.R.O., but stated its intention to issue a decision on the consolidated requests for preliminary injunction in the near future.

7. *John v. Alaska*, No. A85-698 Civ. (D. Alaska) (Holland)

This case was filed in December, 1985, by Katie John, Doris Charles, and the Mentasta Village Council. Since 1964, the State limited subsistence fishing in the Copper River Basin to that portion of the Copper River below its confluence with the Slana River. In 1984, Katie John and Doris Charles, residents of Mentasta and Dot Lake, respectively, requested the Board of Fisheries to open a subsistence fishery at the old village site of Batzulnetas, where the proponents have pending and patented (respectively) Native allotments. The board rejected the proposal, voicing concerns about fishing on stocks of fish at or near their spawning grounds ("terminal fisheries"). This lawsuit followed.

Plaintiffs claim that the Batzulnetas site is a customary and traditional subsistence salmon fishing site and that closure of this area is not required to protect sustained yield. The case involves a complex river system (the Copper River, in which there are at least 124 separate sockeye salmon stocks).

Questions are raised regarding what constitutes a "reasonable opportunity" to obtain subsistence salmon and whether this is the applicable standard under ANILCA, what steps the State must take to determine whether a fishery can be conducted without jeopardizing sustained yield, and what standard of review the federal court

should apply in reviewing State subsistence regulations, among others. There is also a question of whether the State of Alaska has jurisdiction to regulate fish uses on a Native allotment.

After completion of extensive discovery and filing by plaintiffs of a motion for summary judgment, the parties entered into a stipulation in 1987 to stay the case pending the Board of Fisheries' review of a new proposal from plaintiffs for a subsistence fishery. The State agreed to allow plaintiffs a carefully structured interim subsistence fishery for the 1987 season.

In its winter 1987-88 meeting, the board acted on plaintiffs' proposal and found that the existing subsistence fishery for the Copper River provided a "reasonable opportunity" for plaintiffs to meet their subsistence uses; however, the board also found that a subsistence fishery in excess of "reasonable opportunity" could be authorized at Batzulnetas without jeopardizing sustained yield. The board adopted a regulation establishing a subsistence fishery at Batzulnetas and setting the season, methods of take, and scope of this new fishery.

Plaintiffs filed a motion for a preliminary injunction seeking more fishing opportunities for the summer of 1989 than the 2-3 1/2 days provided for in the regulations. On June 6, 1989, Judge Holland granted the plaintiffs' request for a preliminary injunction by enjoining the enforcement of the existing regulations and in lieu thereof, ordered that plaintiffs could take salmon from June 1 through September 1 or until 1,000 sockeye salmon were taken, whichever occurred first. The State was further ordered to undertake studies of the subsistence fishery at Tanada Creek and plaintiffs' subsistence use of salmon so as to be in a position to perform the subsistence fisheries analysis required by AS 16.05.258 with respect to the Tanada Creek/Batzulnetas fishery.

Cross motions for summary judgment were also filed on whether the new regulations are adequate under ANILCA. On January 19, 1990, the Court ruled that in refusing to permit the subsistence fishery, the Board of Fisheries had not taken the steps and made the findings necessary under the State Subsistence law and ANILCA. The Court therefore directed the Board to adopt new regulations consistent with state law. The State took the position that because of *McDowell*, the Board of Fisheries could not adopt new regulations and suggested that the parties agree to another preliminary injunction for the 1990 fishing season. When the parties were unable to reach agreement on the terms of an injunction, the plaintiffs moved for a preliminary injunction. The motion is still pending.

8. ***Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3187 (1989), *on remand*, No. A86-367 Civ. (D. Alaska) (Holland).**

This case was filed on July 15, 1986, under § 807 of ANILCA by the Kenaitze Indian Tribe. The plaintiff members consist of the descendants of aboriginal inhabitants of the Cook Inlet area. The Tribe alleged that the State's definition of "rural area" in its 1986 subsistence law, Ch. 52, SLA 1986, was inconsistent with the meaning of the term "rural" in Title VIII of ANILCA. Sections 803 and 804 of ANILCA provide an absolute hunting and fishing priority for rural Alaska residents. The State's definition of "rural area" extended the priority only to those who live in "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." Plaintiff claimed that the term "rural" had to be given its ordinary meaning -- that of a geographic area with a small population -- and that it could not be defined so as to restrict the priority to only those who live in an area where subsistence activities are a principal component of the economy. It was their position that tribal members living on the Kenai Peninsula are rural residents and their customary and traditional harvests of fish and game for subsistence uses are entitled to preference over competing non-subsistence uses.

Plaintiff filed a motion for preliminary injunction in July 1986. On August 14, 1986, the State of Alaska filed a motion to dismiss, arguing that Section 807 of ANILCA does not confer jurisdiction upon the federal court to hear a challenge to the State's "laws of general applicability" (i.e., statutory provisions that comply with Section 805 and allow the State to have management jurisdiction over subsistence uses on federal lands). The State argued that § 807 only grants jurisdiction to challenge the State's implementing regulations. The court denied the State's motion to dismiss. *Memorandum of Decision*, February 13, 1987.

In the meantime, the Tribe filed a motion for partial summary judgment and the State filed a cross motion for summary judgment on the underlying question of whether the state statutory definition of "rural area" complied with ANILCA. On July 9, 1987, Judge Holland denied the Tribe's request for a preliminary injunction and granted the State's motion for partial summary judgment. Essentially deferring to the State's interpretation of the term "rural" (and the Department of the Interior's "approval" of the State's 1986 subsistence law), the court found that the State's definition of "rural area" was not inconsistent with Section 804 of ANILCA.

On October 24, 1988, the Court of Appeals reversed the lower court's denial of the Tribe's request for a preliminary injunction. The court first concluded that it owed no deference to the interpretation adopted by the Department of the Interior or the State of Alaska. Interpreting the statute's meaning *de novo*, it found that Congress

used the term "rural" in its plain and ordinary sense to refer to areas of Alaska that are "sparsely populated." It noted that adopting the State's "contorted definition" of rural would "materially change the sweep of the statute . . . and lead to an inconsistency within the statute." Relying on *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987), the court refused to resort to the legislative history of ANILCA in search of a contrary meaning. Concluding that the State's definition of rural was inconsistent with ANILCA, the court reversed and remanded the case to the district court for entry of a preliminary injunction.

On denial of the State's petition for rehearing, the Court of Appeals amended its decision on January 4, 1989, to specifically address the State's argument that article IV, § 4 of the U.S. Constitution and the Tenth Amendment preclude a federal court from ordering a state to amend its laws to make them consistent with ANILCA. The Court noted that this proposition had no application since the court did not purport to be directing the state to amend its laws: "it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA." The Supreme Court denied the State's petition for certiorari on June 19, 1989. 109 S. Ct. 3187 (1989).

Following remand of the case, Judge Holland entered a preliminary injunction ordering the State "to elect, on or before May 15, 1989, whether it will or will not afford plaintiff on an interim basis priority over all other consumptive uses for the subsistence use of hooligan and all species of salmon on the Kenai Peninsula." *Preliminary Injunction*, April 26, 1989, at 10. Assuming it elected to continue to comply with ANILCA, the court ordered the State to afford the Kenaitze a priority over all other consumptive uses, for the subsistence use of hooligan and all species of salmon. To that end, the Board of Fisheries was directed to adopt emergency regulations to effect such priority. The court gave the parties the alternative of entering into a consent preliminary injunction to the same general effect.

On May 31, 1989, Judge Holland approved a "Consent Preliminary Injunction" which allowed members of the Tribe domiciled on the Kenai Peninsula to fish with a single net for all species of salmon between June 15 and September 15, 1989, and for hooligan between October 1, 1989 and November 30, 1989. The fishery was confined to the Kenai River 1/4 mile upstream from the Warren Ames Bridge, including Birch Island, downstream to the mouth, and including those waters normally closed to commercial salmon fishing adjacent to the mouth of the river. The Tribe was given a quota of 5,000 salmon, not to include more than 600 chinook. Judge Holland subsequently rejected two challenges to the consent preliminary injunction. *Alaska Fish and Wildlife Conservation Fund and Alaska Fish and Wildlife Federation and Outdoor Council v. State of Alaska*, No. J89-008 Civ. (D. Alaska) and *Mills v. Kenaitze IRA Council*, No. A89-268 Civ. (D. Alaska).

In the meantime, the Governor sought an amendment to ANILCA which would have inserted the State's definition of "rural" into ANILCA. The House Interior and Insular Affairs Committee was scheduled to consider the merits of the legislation on May 24, 1989, but opposition from the Native community caused Congressman Young to pull the bill before any action could be taken. Discussions between representatives from the Governor's office and Native leaders on a possible legislative solution were halted when the Supreme Court of Alaska rendered its decision in *McDowell*.

On April 27, 1990, Judge Holland approved another preliminary injunction allowing the Kenaitze to operate a single tribal subsistence fishing net during the 1990 fishing season. In a separate order, he found that the Court of Appeals did not hold that the entire Kenai Peninsula is rural as a matter of law, but rather provided its definition of the term "rural" as employed by Congress in ANILCA. Judge Holland concluded that it was up to the court and the Alaska fisheries regulators to apply that definition. As between the Board of Fisheries (or Joint Boards) and the court, Judge Holland held that it was the job of the Boards and not the court to determine what portions of the Kenai Peninsula are rural in accordance with the interpretation of the term "rural" by the court of appeals.

With respect to whether the Kenaitze have customary and traditional uses of salmon on the Kenai Peninsula, Judge Holland found that the Board of Fisheries had never accomplished the analysis of specific Kenai Peninsula salmon stocks required by AS 16.05.258. He concluded that should the matter be referred back to the Board of Fisheries for enactment of appropriate regulations, the Board would be ordered "to effect the analysis required by AS 16.05.258 for those portions ot the Kenai Peninsula which are determined to be rural in accordance with the then-operative definition of 'rural'." *Order*, April 17, 1990, at 10-11. All further proceedings in the case have been stayed until July 1, 1990.

9. *Kitka v. State of Alaska*, No. A89-276 Civ. (D. Alaska) (Holland)

In January, February and March, 1989, the Board of Fisheries found that Sitka residents had not engaged in customary and traditional uses of fish and shellfish species, other than sockeye salmon and herring, including herring roe and promulgated regulations which deny priority for subsistence uses of shellfish, ground fish (including halibut), the remaining 4 species of Pacific salmon and all varieties of other finfish. On June 30, 1989, a class composed of all residents of the unified City and Borough of Sitka, Alaska, filed suit challenging the regulations as arbitrary, capricious and unreasonable and violative of Section 804 of ANILCA. They also allege that these restrictions are unconstitutional under the federal Constitution.

In denying the plaintiffs' motion for class certification, the Court -- on its own initiative -- indicated that it might find parts of the City and Borough of Sitka to be non-"rural." Subsequently, again on its own initiative, the Court issued an order stating that in view of the *McDowell* decision it would take no further action in this case until July 1, 1990.

10. *Kwethluk IRA Council v. State of Alaska*, No. A90-107 (D. Alaska) (Holland)

This case was filed after the Board of Game in March, 1990, rejected an emergency petition form the Kwethluk Tribe for an immediate, limited subsistence hunt of the Kilbuck Mountain caribou herd. The Board attempted to base its decision on the sustained yield principle. On April 4, 1990, the federal court granted a preliminary injunction requiring the State to make available to the Tribe, between April 5 and April 15, a subsistence hunt, with a quota of 50 caribou.

The Court rejected the Board's sustained yield determination because the State did not have a game management plan for the Kilbuck herd and the Board had not adopted "an articulated and evenly applicable definition of sustained yield." The court criticized the Board for acting "in an *ad hoc* fashion, as though it had unfettered discretion to decide what meaning it would attribute to the sustained yield issue in any particular case." The court found that a hunt of 50 animals would not adversely affect the herd, and that Kwethluk had demonstrated an urgent need for the meat.

11. *Morry v. State & Wilson*, No. 2BA-87-83 (Superior Court) (Jeffery) (jury trial demanded)

This civil rights action was filed on July 9, 1987 in Superior Court at Barrow, seeking declaratory relief and damages for abuse of process, malicious prosecution, breach of duty under the federal and state subsistence laws, racial discrimination, and denial of due process. Plaintiff, a resident of Anaktuvuk Pass, alleges that Wilson, a state game warden, wrongfully filed a criminal complaint against plaintiff charging him with four technical game violations related to his taking of a grizzly bear for subsistence uses. A state prosecutor declined to prosecute the case and dismissed the charges. Plaintiff also challenged, under both ANILCA and the State Subsistence law, the $25 tag fee and the hide and skull sealing requirements as applied to the subsistence hunting of grizzly bears.

Defendants filed a motion to change venue from Barrow to Fairbanks, on the ground that a Fairbanks trial would be less expensive and more convenient. Plaintiff opposed the motion, arguing that he had a right to trial before a jury drawn from his general community. By memorandum decision of March 14, 1988, Judge Jeffery denied the motion for change of venue. Among other things, he held that "the

presence of Anaktuvuk Pass in the Second Judicial District expresses long-standing cultural and political realities" and was not, as defendants suggested, merely the "flick of some cartographer's pen." The judge concluded that Barrow "include[s] significant elements of the community of Anaktuvuk Pass because of the large number of Inupiat Eskimo subsistence hunters in Barrow. A jury drawn from the Fairbanks community would not meet this standard."

Plaintiff has filed a motion for partial summary judgment on the validity of the grizzly bear regulations. On October 6, 1989, the Kwethluk IRA moved to intervene with respect to the challenge to the tag and sealing requirements.

12. ***McDowell v. Collinsworth*, 785 P.2d 1 (Alaska 1989), *on remand*, No. 3AN-83-1592 Civ. (Alaska Superior Court) (Carlson)**

On December 22, 1989, the Alaska Supreme Court ruled that Article VIII of the Alaska Constitution prohibits limiting eligibility for subsistence uses to residents of rural areas. Specifically, the Court held that providing rural Alaska residents special subsistence privileges violates Article VIII, §§ 3, 15, and 17 of the Alaska Constitution. Section 3 reserves fish and wildlife in their "natural state" to the people of Alaska for "common use." Section 15 prohibits the Legislature from creating a fishery allocation system that results in an "exclusive right or special privilege of fishery." Section 17 requires statutes governing hunting and fishing to "apply equally to all persons similarly situated." The case was remanded to the Superior Court "with instructions to issue a declaratory judgment that the rural preference of ch. 52 SLA 1986 is unconstitutional and to take such further action as may be appropriate." 785 P.2d at 12.

The Supreme Court stayed the effect of its decision until July 1, 1990, with respect to existing hunting and fishing regulations. It subsequently denied AFN's and the State's petitions for rehearing.

On remand, the State of Alaska has asked the Superior Court to decide whether the Supreme Court intended to invalidate the entire subsistence priority or only the rural residency limitation. Both the State and the plaintiffs have taken the position that the "rural preference" provisions of the 1986 law are not severable, and that the Supreme Court invalidated the entire subsistence law. Plaintiffs in various cases pending in federal district court have moved to file an amicus brief on the severability issue, arguing that the "rural preference" provisions of the State's Subsistence law are severable, and that the law continues to have legal effect, i.e., that the State's resource managers are required to accord priority to subsistence uses by Alaska residents without regard to their rural or urban status The Court has been urged to resolve this issue no later than mid-May since in February the Board of Game deferred approximately 100 subsistence proposals from its scheduled March meeting

to be taken up in May or June, depending on the Court's ruling on the severability issue.

The effect of the Supreme Court's decision is to place state law out of compliance with the rural subsistence priority mandated by Title VIII of ANILCA. If no remedy is found by July 1, 1990, the Secretary of the Interior will assume fish and game management on all federal public lands and waters in Alaska. The geographical extent of the Secretary's jurisdiction and the details of his management system remain to be decided.

13. ***Native Village of Dot Lake v. State of Alaska*, No. 4FA-89-997 (Superior Court) (Steinkruger)**

In April, 1989, the plaintiff submitted a petition to the Board of Game asking that its members be allowed to take 3 moose between then and September to meet their subsistence needs. On April 27, 1989, at a meeting in Anchorage previously scheduled to comply with the federal court order in *Bobby v. Alaska*, No. A84-544 Civ. (D. Alaska, Feb. 14, 1989), the Board of Game discussed plaintiff's petition and received testimony from plaintiff's president, but refused to consider the petition on the merits. The petition was rejected on the grounds that it did not qualify as an "emergency" under 5 AAC 96.625(f).

Plaintiff filed suit on June 15, 1989, challenging the Board's anti-petition policy on two grounds. First, plaintiff argues that the policy conflicts with the Administrative Procedure Act, AS 44.62.220 and -.230, which gives plaintiff and any other "interested persons" the right to petition the Board for the adoption or repeal of a regulation at any time, regardless of the existence of an emergency. Second, plaintiff argues that the regulation is inconsistent with the Board's statutory duty to accord priority to subsistence uses, and especially to respond to subsistence-deprivation emergencies. In addition to the anti-petition policy, plaintiff has challenged the validity of the regulations which govern the subsistence needs of plaintiff's members with regard to the taking of moose. Those regulations impose seasons and bag limits for subsistence hunters which are identical to those governing sport/trophy hunters.

On September 19, 1989, the plaintiff moved for summary judgment, asking the court to issue a declaratory judgment invalidating 5 AAC 96.625(f) (the anti-petition policy) and 5 AAC 88.045(3) (season and bag-limit restrictions on subsistence moose hunting by Dot Lake residents in Game Management Unit 20(D).

14. ***Native Village of Dot Lake v. Alaska*, No. A90-001 Civ. (D. Alaska) and *Kluti Haah Native Village of Copper Center v. Alaska*, No. A90-004 Civ. (D. Alaska) (Holland)**

These cases were filed the first week of January, 1990, when the Alaska Department of Fish and Game, after the *McDowell* decision, issued emergency orders closing the winter Dot Lake subsistence moose hunt and the winter Nelchina subsistence caribou hunt. The hunts were reinstated when the Alaska Supreme Court stayed the effect of its *McDowell* decision until July 1, 1990. The plaintiffs in both cases allege that existing restrictions on their subsistence hunting violate ANILCA; they also allege that they have a constitutional right to engage in subsistence hunting.

15. ***Native Village of Tanana v. Cowper*, No. F83-034 Civ., and *Tanana Chiefs Conference, Inc. v. Cowper*, No. F83-402 Civ. (D. Alaska) (Kleinfeld)**

These cases were filed in 1983 and present the issue of whether the State's prosecution of five residents of Tanana and two residents of Ruby for taking a moose during closed season violates Section 804 of ANILCA. The cases were consolidated by the court, and both parties filed summary judgment motions. The motions focused on whether the areas involved were Indian country; whether there were exemptions from State authority over fish and game for Native activities sponsored by a Native council; whether P.L. No. 280 precludes State regulation of Native fishing and hunting; and whether there was any interference with subsistence rights under ANILCA or with First Amendment rights.

On November 6, 1987, the court ruled as follows:

1) That ANILCA'S subsistence protections are limited to direct personal or family consumption or barter or customary trade; and plaintiffs presented no evidence that the taking was for one of these reasons. Judge Kleinfeld also found that there was no evidence that the takings took place on the lands to which ANILCA applies.

2) The court declined to rule on whether Tanana or Louden are Indian country because plaintiff failed to present any evidence about where the takings took place. Also, the court declined to rule on whether State authority may be exercised within Indian country, until the predicate -- a showing of where the events took place -- was made. Judge Kleinfeld noted that based upon the record, he was inclined to think that Tanana was not Indian country and not a dependent Indian community, but it was not necessary for the court to reach that issue.

3) The court found that Tanana Chiefs has standing to assert the rights of individual Natives, citing *UAW v. Brock*, 106 S. Ct. 2523 (1986).

4) As to P.L. 280, Judge Kleinfeld held that the exemption from state criminal laws contained in 18 U.S.C. § 1162(b) for hunting and fishing rights of Natives under "Federal treaty, agreement, or statute" does not apply where there is no treaty or statute. He concluded that the State may exercise jurisdiction over fish and game offenses even in Indian country in the Tanana area. The court based its ruling in part on *Kake v. Egan*, 369 U.S. 60 (1962) which it construed to hold that off-reservation hunting and fishing is subject to state regulation. The court further held that *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987), did not apply because this case involved criminal offenses, unlike the regulatory bingo offenses at issue in *Cabazon*.

5) The judge denied plaintiffs' motion for summary judgment on the freedom of religion issue, finding that proof was lacking of several essential elements of the claim, in particular the religious nature and necessity of memorial potlatches.

In 1989, *Native Village of Tanana* was dismissed by stipulation. The village submitted a proposal to the Board of Game, asking that subsistence regulations be adopted allowing the community to take moose for a traditional festival, Nuchalwoyya. During its March 1989 meeting, the board found that the community had a customary and traditional use of moose for that purpose, and adopted the requested regulation.

In 1988, the state filed a motion for summary judgment in *Tanana Chiefs Conference* on the outstanding equal protection and due process claims. At issue was the lack of regulations allowing memorial potlatches. Tanana Chiefs Conference never petitioned the Board of Game to authorize that use as a subsistence use. In response to the state's motion, TCC again raised the freedom of religion issue, basically contending that the equal protection and due process arguments must be viewed with strict scrutiny by the court because of the first amendment. The state's position is that plaintiff still has not demonstrated the religious nature and necessity of memorial (as contrasted to funeral) potlatches. Following oral argument in June, 1989, Judge Kleinfeld dismissed all of the outstanding constitutional claims with the exception of the religious freedom claim and requested cross-motions for Summary Judgment on that issue. On March 15, 1990, Judge Kleinfeld entered final judgment in favor of the State on the religious freedom claim, based largely on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988).

16. *Natural Resources Defense Council, et al., v. Lujan*, Civ. No. 89-2345-JHG and *Gwich'in Steering Committee v. Lujan*, Civ. No. 89-2393-JHG (D.D.C. filed August 28, 1989) (Cases consolidated by order of Judge Joyce Green on December 18, 1989)

This is an action by the Natural Resources Defense Council, a coalition of environmental organizations, and the Gwich'in Steering Committee, an incorporated

association of Gwich'in Athabascan tribes in Alaska and Canada, challenging the legal adequacy of a Legislative Environmental Impact Statement and Report to Congress (LEIS) regarding whether to allow oil and gas development in the 1.5 million acre coastal plain of the Arctic National Wildlife Refuge ("the coastal plain") prepared by the Secretary of the Interior ("the Secretary"). Plaintiffs seek a declaration that: (1) this document does not comply with Sections 810 and 1002 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, 3142, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4331, *et. seq*; and (2) that the Secretary's conclusions in the LEIS, recommending that Congress allow full oil and gas leasing in the coastal plain, were arbitrary and capricious and not supported by the evidence presented in the body of the LEIS, in violation of the Administrative Procedure Act. Plaintiffs further seek an injunction requiring the Secretary to revise the LEIS to correct his violations of law.

Plaintiffs seek to protect the use rights of their members in ANWR. The Gwich'in tribes' claims center on subsistence use of the Porcupine Caribou Herd as it may be impacted by ANWR development. NRDC's members claim subsistence and recreational use impacts. Both plaintiffs allege harm to their public participation rights in that the LEIS was supposed to enable the public to participate meaningfully in the ANWR development debate. Plaintiffs allege that flawed and incomplete data and analyses produced in the LEIS frustrated the plaintiffs' participation rights.

17. *Payton v. State*, 3AN-88-12223 Civil (Alaska Superior Court) (Ripley), *appeal pending*, No. S-3377 (Alaska Supreme Court)

This case was filed in 1988 and challenged the finding by the Board of Fisheries that residents of the Skwetna area (a rural area across Cook Inlet from Anchorage) did not have customary and traditional uses of salmon, and consequent failure to adopt subsistence regulations for that area.

Plaintiffs alleged a number of violations: (1) that the finding was arbitrary and capricious, because the Board of Game had authorized subsistence moose hunting there, (2) that the finding was not supported by the record; (3) that the action violated ANILCA (though the case was filed in state court); (4) that the board used an impermissible durational residency requirement; (5) that the board applied its criteria in a way that discriminates on the basis of race (in favor of Alaska Natives); and, (6) that the composition of the board violated due process, because of the presence of commercial and sport fishermen.

The court awarded summary judgment to the State on March 15, 1989. A final judgment was entered in early April, and plaintiffs have appealed. By Agreement, the appeal has been stayed until July 1, 1990.

18. ***Peninsula Marketing Association v. State of Alaska***, 3AN-88-12324 **Civil (Alaska Superior Court) (Hunt)**

The False Pass commercial fishery occurs near the Alaska Peninsula in June, targeting mainly sockeye salmon. Along with the sockeye salmon are incidentally harvested chum salmon, five to ten percent of which (at most) may be Yukon fall chum salmon.

In May, 1987, a class action was filed against the Alaska Board of Fish and Commissioner of Fish and Game. *Association of Village Council Presidents, Tanana Chiefs Conference, Paul Philip, and Jonathon Solomon v. Alaska Board of Fish and Commissioner of Fish and Game*, No. 4BE-87-155 Civ. The plaintiffs asserted that the information presented to the Board of Fisheries indicated that not enough fall chum salmon would return to the Yukon in 1987 to provide for both escapement and subsistence fisheries. They argued that the federal and state subsistence laws required that the False Pass commercial fishery be closed.

The State and intervenors (Concerned Area M Fishermen and Peninsula Marketing Association) argued that the information before the Board of Fisheries justified the board's conclusion that there was no need to close the False Pass fishery. The board did not believe it was likely that there would not be enough fall chum salmon to provide for escapement and subsistence fishing at historical levels in the Yukon. Plaintiff's request for a preliminary injunction was denied. Plaintiffs sought review by the state supreme court *via* a petition for review, which was also denied.

The Board of Fisheries imposed a chum salmon cap on the False Pass fishery for the 1988 season. The case was subsequently dismissed when ADF&G's estimate of fish returning proved to be inaccurate and more than enough fish returned.

This case was filed in the late fall of 1988, challenging the False Pass chum salmon cap which the Board of Fisheries had imposed, beginning in June 1988. Plaintiffs in this case include the intervenors in that case. The chum cap is challenged on a number of grounds. The Yukon-Kuskokwim Fisheries Task Force and four (4) residents of western Alaska have intervened on the State's side to support the cap, and have filed a cross claim against the State, arguing for the same reasons put forward in Peninsula Marketing Association that the False Pass fishery should be closed. Cross motions for summary judgment were filed on plaintiffs' claims (not intervenors). Following argument on those motions in early June, the Court ruled in favor of the State and Intervenors. Intervenors are now conducting discovery on their cross claim, putting the State and the plaintiffs on the same side. The Intervenors are seeking to close the False Pass fishery for the same reasons advanced in *Association of Village Council Presidents, et al. vs. Alaska Board of Fish and Commissioner of Fish and Game.*

19. *Sierra Club v. Penfold* , 857 F.2d 1307 (9th Cir. 1988), *on remand*, A86-083 Civ. (D. Alaska) (von der Heydt)

This case challenges BLM 's approval of placer mining plans. In addition to claims under NEPA and BLM's regulations on the procedure for approving and receiving notice of mining activities on BLM administered lands, plaintiffs asserted claims under Section 810 of ANILCA. The subsistence issues of interest include the following:

a) *Subsistence Reviews Must Evaluate Cumulative Impacts*

In a published decision on May 28, 1987, the federal district court held for the first time that Section 810 of ANILCA, 16 U.S.C. § 3120, requires a federal land management agency to consider cumulative impacts when determining whether a federal action may significantly restrict subsistence uses. *Sierra Club v. Penfold*, 664 F. Supp. 1299, 1307 (D. Alaska 1987). The court drew an analogy to NEPA law and held that the "common-sense principles" of NEPA, which require analysis of cumulative impacts when agencies determine the environmental significance of federal actions, would be applied to subsistence evaluations too.

On the facts of the case, the court then held that the cumulative impacts of multiple placer mines on subsistence uses of Birch Creek were "significant" and triggered the notice and hearing requirements of Section 810(a)(1)-(3). The court specifically found that mineral development "severely degrade[d]" Birch Creek Village's subsistence fishery and "interfere[d] with use of river water for drinking by village residents." The court also held that the cumulative impacts of placer mining on Minto had been unlawfully ignored and remanded the case to the BLM for a determination of the significance of these impacts.

b) *Mining Regulations Invalid for Failure to Consider Subsistence Impacts*

In a subsequent unpublished decision of November 6, 1987, the court invalidated 1983 amendments to BLM's mining regulations because, among other reasons, the amendments were promulgated without a Section 810 evaluation. *Memorandum and Order* at 31-34 (Nov. 6, 1987). These amendments had the effect of allowing mines on "withdrawn lands" (lands closed to new mineral entry) to operate under "notices" without subsistence review if the mines kept their operations under five acres.

On motion for reconsideration, the court also excused the failure of the subsistence plaintiffs to exhaust administrative remedies, relying on the point that the failure to exhaust could be attributed to the agency's failure to provide the notice required by Section 810. *Minute Order* (Nov. 12, 1987) ("the Secretary cannot shield his complete failure to comply with Section 810 by arguing that the very groups

intended to benefit indirectly from the notice provisions of the statute should have reminded him of his statutory duty").

c) *Village Councils Have Parens Patriae Standing*

A final decision of note is the unpublished decision of November 21, 1986, where the court considered and rejected a BLM argument that th[illegible]A and village council plaintiffs in the case lacked standing to sue on behalf [illegible]neir residents. *Memorandum and Order* at 24-26 (Nov. 21, 1986). The court held that *parens patriae* standing is appropriate when a sovereign entity sues "to prevent a violation of federal laws by federal agencies." *Id.* at 25. The court then went on to assume that IRA and village councils have sovereign attributes, without deciding the question. *Id.* at 26. Finally, the court ruled that environmental organizations do not have standing to bring Section 810 actions.

On September 21, 1988, the Court of Appeals affirmed the lower court in all respects. Of primary importance was its conclusion that BLM violated NEPA and Section 810 of ANILCA by failing to prepare EISs addressing the cumulative impact and effect on subsistence uses of all placer mines in each of the four watersheds involved in the litigation (Birch Creek, Beaver Creek, Fortymile River and Minto Flats). The Appeals Court left in place the district court's injunctions prohibiting approval of any placer mines in the four watersheds pending completion of the EIS's.

Following the Court of Appeals decision, BLM completed its final Environmental Impact Statements for all four drainages and then moved to lift the injunctions. At plaintiff's request, the district court agreed to delay its ruling on the motion until BLM issued its final decisions. Final decisions were issued implementing the preferred alternative in all four drainages and imposing more protective measures for reclamation. After evaluating the adequacy of the EISs and the final decisions, plaintiffs decided not to oppose the government's motion to lift the injunctions. The injunctions were subsequently lifted and the agency is proceeding with the program as set out in the final decisions. Plaintiffs are monitoring the implementation of the program.

20. *Stein v. Barton*, J89-016 Civ. (D. Alaska) (von der Heydt)

On August 30, 1989, commercial fishermen and Alaska Natives in Southeast Alaska who use areas on Prince of Wales Island for fishing, hunting and gathering sued the United States Forest Service alleging that salmon habitat and subsistence resources on Prince of Wales Island will be irreparably harmed unless the federal defendants are enjoined from logging and road building within 100 feet of all anadromous streams and their tributaries. The plaintiffs alleged violations of NEPA,

Section 810 of ANILCA, and the Clean Water Act, and sought declaratory, injunctive and temporary relief.

On September 29, 1989, Judge von der Heydt issued a temporary restraining order. In doing so he found (1) that plaintiffs had raised serious questions whether the federal defendants had complied with NEPA, ANILCA and the Clean Water Act when they approved the 1989-94 Operating Plan for the Ketchikan Pulp Company's Long-Term Sale Area; (2) that the balance of hardships tipped in favor of granting temporary relief; (3) that partial temporary relief was necessary to preserve the status quo pending disposition of the plaintiffs' motion for preliminary relief; and (4) that such relief would be narrowly tailored to have only *de minimis* impact on logging in the affected area. Based on these conclusions, the Court enjoined federal defendants from authorizing logging and road building within 100 feet of all streams within the Ketchikan Pulp Company's long-term sale area that are classified as "Class I" streams, and all streams classified as "Class II" streams that are tributaries of Class I streams.

Of interest here is the fact that the Forest Service argued that the subsistence users of Wrangell lacked standing to raise the subsistence fisheries issue because of a finding by the Board of Fisheries in late February, 1989, that Wrangell is ineligible for subsistence fisheries. The eight criteria the Board applied to determine Wrangell's status as a subsistence community are the subject of litigation in *Kitka v. State of Alaska*, (*see* discussion *supra* at p. 21). The Forest Service also attempted to minimize its duties under Section 810 of ANILCA by characterizing Section 810 of ANILCA as purely a procedural statute. The plaintiffs, citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 544 (1987), (*see* discussion *supra* at p. 14) and *Sierra Club v. Marsh*, 872 F.2d 497, 503 (1st Cir. 1989) argued that insofar as the procedural failures of the Forest Service in this case led to an improper choice of mitigation measures to minimize adverse impacts on subsistence resources, the Court may require the agency to choose a new action.

On March 1, 1990, the court entered an Order and Preliminary Injunction enjoining timber development within 100 feet of anadromous streams throughout the Ketchikan Pulp Corporation long-term sale area. In an opinion issued on March 6, the court found that plaintiffs were likely to prevail on their claim that the Forest Service's mitigation measures were arbitrary, capricious, and otherwise no in accordance with law. The court's ruling was based on its interpretation of the Administrative Procedures Act and the National Environmental Policy Act. The Court did not rule on the ANILCA claims. The parties are briefing the remaining issues on summary judgment.

21. ***Sumner Strait Advisory Committee v. State of Alaska*, No. A90-040 Civ. (D. Alaska) (Holland)**

This case was filed on February 8, 1990, by a local advisory committee and non-Native residents of Port Protection and Port Baker (on the northwest tip of Prince of Wales Island). They challenge the finding of the Board of Fisheries that local residents do not qualify for "customary and traditional" subsistence uses of any species of fish (even though the Board of Game has found that they are entitled to subsistence uses of deer). Plaintiffs allege that the Board's action violates ANILCA. They also allege that the Board illegally refused to follow the recommendation of the regional advisory council which called for recognition of and a priority for customary and traditional subsistence uses of finfish and shellfish by residents of Point Baker and Port Protection.

22. ***Tanana Fish and Game Association v. State of Alaska*, No. A90-117 Civ. (D. Alaska) (Kleinfeld)**

This case was filed on April 20, 1990, by the Tanana Fish and Game Association, an unincorporated association organized to represent and advance the interests of users of fish and wildlife resources in and around the Village of Tanana. Plaintiff alleges that its members have been selling the roe from their subsistence harvests of Yukon River (fall chum) for at least 20 years. Currently the sale of roe from subsistence taken salmon is illegal under 5 AAC § 1.010 (d).

Plaintiff asserts that the regulation violates Section 804 of ANILCA, which mandates that customary and traditional subsistence uses, including customary trade, be given priority over competing non-subsistence uses. Based on the fact that the definition of "subsistence uses" in both state and federal law contains a "customary trade" component which has been interpreted to mean limited exchanges for cash not amounting to a significant commercial enterprise, plaintiff seeks to have the State recognize the right of the residents of Fishing District 5 of the Yukon River to engage in customary trade of Yukon River salmon roe. The association developed a program to regulate and limit the roe trade, which was unanimously endorsed by the local advisory committee. Following hearings in 1988, the proposal was rejected by the Board of Fisheries.

The issue of whether the Yukon River subsistence salmon fisheries should be managed by the state or the federal government has been raised in this case.

23. ***Tenakee Springs v. Clough*, J86-024 Civ (D. Alaska) (von der Heydt)**

This case involves challenges to Forest Service timber cutting plans for the Alaska Pulp Corporation (APC) on Chichagof, Baranof and Kuiu Islands. This case

has proceeded in two phases, challenging the Environmental Impact Statements and associated ANILCA findings for two separate operating plans.

In the first phase, the plaintiffs challenged the five year operating plan for 1981-86 under both NEPA and ANILCA. The plaintiffs were the Sierra Club, Southeast Alaska Conservation Council, the Wilderness Society, and the City of Tenakee Springs.

The case raised two issues relative to ANILCA: what entities have standing to bring actions for a violation of Section 810, and the applicability of Section 810 to the 5-year harvest plan, since it was adopted prior to ANILCA, but implemented afterwards. The government argued that mere implementation of the decision to "withdraw, reserve, lease or otherwise permit the use, occupancy, or disposal" of public lands did not trigger Section 810. It argued that the determination to authorize the roads and harvest units was made prior to the passage of ANILCA in 1980 when the Forest Service approved the 5-year plan.

The federal government argued that state-created municipalities could not sue *parens patriae*, therefore the City of Tenakee Springs had no standing to bring Section 810 actions. The plaintiffs, relying upon cases giving municipalities standing in NEPA cases, claimed they had standing by virtue of Section 802(3) which declares that it shall be a policy of Congress for federal land managing agencies to cooperate with adjacent land owners. They also argued that the City had standing because it performed land planning functions relating to subsistence with which the Forest Service actions conflicted.

Judge von der Heydt (decision June 26, 1987) agreed with the federal government and ruled that the City of Tenakee Springs had no standing to raise a cause of action under Section 810. Citing *In re Multidistrict Vehicle Air Pollution M.D.L. No. 81*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), the court reasoned that the City does not engage in subsistence and its indirect interest in the economic well-being of the taxpayer base was not sufficient to confer standing. The court made no finding as to whether the Forest Service had complied with Section 810, but cautioned "[s]ince other plaintiff parties to this suit could raise the Section 810 issue at a later time, prudence would dictate that the Forest Service reevaluate whether it has complied with the section."

On the NEPA issues, the court enjoined further roading and harvest beyond the existing roads in a given area pending preparation of a supplemental EIS. Completion of the Supplemental EIS.

The second phase of the case involves a challenge to the supplemental EIS, released in November 1989, for the 1981-86 and 1986-90 operating periods. In the

record of decision for that EIS, the Forest Service authorized the cutting of over 400 million board feet of timber in 1990, more than APC had cut in the prior four years combined. In so doing, the agency found that there would likely be a significant restriction on subsistence, but that it was "necessary" due to the 50 year timber contract with APC.

A large number of subsistence users joined the original plaintiffs in the challenge to the supplemental EIS, including Natives and non-Natives from Tenakee Springs, Angoon and Kake, the Kake Tribal Corporation, the Organized Villages of Kake and the Angoon Community Association. The plaintiffs moved for preliminary injunctions on January 8, 1990 and February 2, 1990, alleging that the Forest Service's Subsistence analyses and findings fail to comply with ANILCA, § 810. The preliminary injunction motions also raise issues under NEPA and the Clean Water Act. The motions request protection of selected timber harvest sites around Tenakee Springs, Angoon and Kake, 100 foot no-cut buffer strips on important fish streams, and a water quality monitoring program.

The court consolidated this case with *Hanlon v. Barton (see* p. 15 *infra* or *supra*), which challenged the same Forest Service decision on behalf of residents of Hoonah. The court ordered the parties to negotiate but they were unable to reach agreement. In mid-April, plaintiffs moved for a temporary restraining order. On April 26, 1990, the court heard oral argument on the requests for preliminary injunction and temporary restraining order. The court denied the request for T.R.O. but stated its intention to issue a decision on the consolidated requests for preliminary injunction in the near future.

24. Tlingit and Haida Central Council v. State of Alaska, No. 1JU-90-373 CIV. (Superior Court)

This case was filed on April 8, 1990, by individual Tlingit and Haida Indians and the Tlingit and Haida Central Council. They challenge the State's management of sea cucumber harvests in Southeast Alaska. They allege that the State is mismanaging this resource by allowing commercial harvests in violation of the sustained yield principle, to the detriment of long-established subsistence uses of sea cucumbers throughout the region.

Plaintiffs seek a declaration that the defendants are managing the fishery in violation of Article VIII, Section 4 of the Alaska Constitution, AS 16.05.258, 5 AAC 99.010, AS 16.43.010, 16.43.240, and AS 16.05.092. They also seek a permanent injunction preventing the State from granting permits, and directing them to rescind all outstanding permits, for commercial harvest of sea cucumbers, until such time as they have assessed the biological status of sea cucumbers, determined the portion of those stocks that may be harvested consistent with sustained yield, determined the

portion needed to satisfy subsistence needs, and otherwise complied with the requirements of State law.

25. ***Tuklsarmute Native Community Council v. Conquergood*, A85-604 Civ. (D. Alaska) (Holland)**

This case involves a challenge to a gold dredging permit and mining plan on the Tuluksak River. Defendants are the Corps of Engineers and the BLM. The Corps of Engineers is the agency responsible for the issuance of dredge and fill permits (commonly known as 404 permits, *see* 33 U.S.C. § 1344) involving navigable waters. The Bureau of Land Management approves mining plans involving more than five acres of public land.

The plaintiff claims that BLM failed to comply with its statutory responsibilities under both NEPA and Section 810 of ANILCA. Specifically, they claim that the BLM erroneously concluded that it need not prepare a full environmental impact statement in conjunction with its permit authorizing Northland Gold to relocate a 1½ mile stretch of the Tuluksak River across BLM lands in order to dredge the main channel of the river. While BLM did an 810 analysis before approving the mining plans, plaintiffs argue that BLM erroneously found that the dredging activity and channel diversion would not significantly restrict subsistence uses within the meaning of Section 810.

On October 17, 1989, Judge Holland granted in part plaintiffs' motion for partial summary judgment on their NEPA and ANILCA claims. He found that BLM's conclusion not to prepare an EIS or to comply with the full ANILCA section 810 procedures was not reasonable, due to a failure to analyze fully the downstream impacts of the mining operation; but instead of ordering an EIS or compliance with Section 810, he remanded the matter to BLM to analyze those impacts and decide whether to prepare an EIS or comply with the Section 810 procedures. At the same time, he granted defendants' motion for partial summary judgment as to the remaining counts, which seems to have in effect upheld BLM's permit on the merits. Plaintiffs moved to amend the judgment to vacate the decision in favor of defendants, which the Court denied on January 9, 1989.

Plaintiffs have filed an appeal of the grant of summary judgment to defendants and defendants have moved to dismiss the appeal for lack of jurisdiction. The Court has consolidated that motion with the merits of the appeal. The case is currently tied up in the Conference Program, however, due to the possibility that the appeal may be rendered moot.

26. *United States v. Sakurai*, No. A88-026 Cr. (D. Alaska) (Consuelo B. Marshall, visiting judge)

Grant Boe and Lavina Grey were indicted on charges of taking herring roe on kelp "for other than subsistence purposes," allegedly in violation of 5 AAC §§ 01.010, 01.730, 39.002. Specifically, they were charged with taking and possessing herring roe for commercial sale in the State of Washington in violation of various sections of the Lacey Act, 16 U.S.C. § 3372 (a)(2)(A) and § 3373 (d)(1)(B) and for conspiracy under 18 U.S.C. § 371. The Lacey Act incorporates state law fish and game offenses.

On September 12, 1988, Boe and Grey moved to dismiss the indictments against them on the ground that the sale of roe on kelp in the State of Washington is consistent with the definition of subsistence uses under both Alaska and federal law. In addition, they alleged that Alaska's regulations failed to apply the policies mandated by Title VIII of ANILCA.

The matter was referred to Magistrate Roberts, who issued a Report and Recommendation on October 11, 1988. He concluded that "[t]he large scale interstate commercial sales of roe on kelp that defendants are alleged to have undertaken clearly are not the type of "customary trade" that Congress or the Alaska legislature intended to protect." *Magistrate's Report* at 28. Judge Kleinfeld accepted the magistrate's report, noting that neither of the defendants had presented sufficient factual support for the predicate of their argument, and therefore denied the motions to dismiss.

On May 11, 1989, the parties stipulated to reopening defendants' motion to dismiss for the purpose of allowing the court to consider additional evidence offered by the defendants. At a hearing on May 15, 1989, the defendants presented evidence demonstrating that they had earned approximately $8,700 from the harvest and sale of roe on kelp in 1988 and approximately $7,600 in 1987. The Court concluded that the exchange of roe on kelp for currency is customary trade within the native community, and that the income received from the defendants' sale of roe on kelp was not sufficient for the Court to conclude that they were engaged in a "significant commercial enterprise." The Court dismissed the counts involving violations of the Lacey Act and the Government voluntarily dismissed the conspiracy count.

Although the Government took an appeal from Judge Marshall's dismissal of the Lacey Act violations, the appeal was subsequently dismissed on September 29, 1989, at the Government's request.

27. *United States v. Skinna*, No. CR-88-026 (D. Alaska) (Fitzgerald), appeal pending, No. 88-3286 (9th Cir.)

Byron Skinna was convicted following a jury trial of one count of unlawful transportation in Interstate Commerce of illegally taken herring spawn on kelp in

violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(2)(A) and 3373 (d)(1)(B). On appeal Skinna argues that the State of Alaska's regulations restricting the commercial harvest of herring roe on kelp conflict with the "customary trade" provisions of ANILCA and are therefore invalid.

MISCELLANEOUS NATIVE INITIATIVES

Alaska Sea Otter Commission

The Alaska Sea Otter Commission was founded in December 1988 for the purposes of managing, protecting, and regulating sea otter hunting. In addition, the Commission intends to educate and inform the public about this long-established way of life.

The immediate impetus for organization of the Commission was the initiation by the U. S. Fish and Wildlife Service of a formal rulemaking proceeding proposing to prohibit Alaska Native use of sea otters for making handicrafts and clothing. The Commission took a lead role in coordinating participation by coastal Alaska Natives in the public hearings regarding the proposed rule which were held in October, 1989.

The Commission, made up of representatives from each of the six affected coastal Native regions in Alaska, also plans to take an active role in management and conservation of the sea otter population in general, but in the Prince William Sound area in particular, due to the damage to the sea otter population caused by the Exxon Valdez oil spill. The long-term goal of the Commission is to develop a comprehensive management plan in cooperation with the Fish and Wildlife Service and the Department of Fish and Game.

Eskimo Whaling Commission

The Alaska Eskimo Whaling Commission (AEWC) is organized as a state non-profit association for the purpose of actively representing the interests of Native whalers before the International Whaling Commission. As noted above, the AEWC was successful in convincing the International Whaling Commission to relax its ban on bowhead whaling.

International Porcupine Caribou Commission

The International Porcupine Caribou Commission (IPCC) was initially formed to resist oil development in the Arctic National Wildlife Refuge. It has subsequently become a trans-boundary commission of Athabascan and Inuit people who seek an international accord protecting the Porcupine Caribou herd. The IPCC has focused efforts on two different fronts. Internationally, the IPCC has attempted to influence the treaty negotiations between the United States and Canada concerning the herd

population and the protection which should be given to the herd's habitat. Domestically, the IPCC represents Native users who are concerned that substantial development in the Arctic National Wildlife Refuge will significantly and adversely affect the size of the herd.

The Eskimo Walrus Commission

The Eskimo Walrus Commission was founded in 1978 in response to negative publicity about Eskimo walrus hunting. The Commission has representatives from 18 villages whose residents secure a significant proportion of their food from walrus hunting. The Commission was founded for the purpose of managing, protecting and regulating walrus hunting. In addition, the Commission sought to educate and inform the public about this long-established way of life.

After years of working together, the Commission, the Department of Fish & Game and the Fish & Wildlife Service formalized their mutual interest in the welfare of Pacific Walrus by signing a Memorandum of Agreement on May 21, 1987. The Agreement outlines management responsibilities and conservation obligations and recognizes the need for ongoing cooperation to maintain a healthy walrus population.

RECENT ARTICLES AND PUBLICATIONS

1. Conn and Garber, *State Enforcement of Alaska Native Tribe Law:* The Congressional Mandate of the Alaska National Interest Lands Conservation Act, 1989 HARV. INDIAN L. SYMP. 99 (1990).

2. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U COLO. L. REV. 1009 (1989).

3. Berger, *Conflict in Alaska*, 28 Nat. Resources J. 43 (1988).

4. Frost, *Amoco Production Co. v. Village of Gambell and Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.: Authority Warranting Reconsideration of the Substantive Goals of the National Environmental Policy Act*, 5 ALASKA L REV. 15 (June, 1988).

5. *Amoco v. Gambell: Aboriginal Rights on the Outer Continental Shelf: Reopening Alaska Native Claims*, 28 NATURAL RESOURCES JOURNAL 623 (Spring, 1988).

6. Jones, *Black Gold and the Tlingit Indian Village of Yakutat, Alaska: A Case Study of the Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility of Native Alaskans*, 24 WILLAMETTE L. REV. 565 (Summer 1988).

7. *Amoco Production Co. v. Village of Gambell: Federal Subsistence Protection Ends at Alaska's Border*, 18 ENVTL. L. 635 (Spring 1988).

8. *Final Subsistence Management and Use: Implementation of Title VIII of ANILCA*, U.S. Department of the Interior, Fish & Wildlife Service (1988).

9. *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, 66 OR. L. REV. 195 (1987).

10. *Amoco Production v. Village of Gambell: The Limits of Federal Protection of Native Alaskan Subsistence*, 7 VA. J. NAT. RESOURCES L. 143 (Fall 1987).

11. Note, *Preliminary Injunctions as Relief for Substantial Procedural Violations of Environmental Statutes: Amoco Production Co. v. Village of Gambell*, 4 ALASKA L. REV. 105 (June, 1987).

12. Noble, *Tribal Powers to Regulate Hunting in Alaska*, 4 ALASKA L. REV. 223 (1987).

13. Note, *The Alaska National Interest Lands Conservation Act: Striking the Balance in Favor of "Customary and Traditional" Subsistence Uses By Alaska Natives*, 27 NATURAL RESOURCES JOURNAL 421 (1987).

14. Note, *Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility to Native Alaskans*, 6 VA. J. NAT. RESOURCES 53 (1986).

McDowell Case

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

SAM E. McDOWELL, DALE E. BONDURANT, RONALD MAHLE and HAROLD EASTWOOD, Appellants, v. STATE OF ALASKA, ALASKA DEPARTMENT OF FISH AND GAME, ALASKA BOARD OF FISHERIES, ALASKA BOARD OF GAME and DON W. COLLINSWORTH, Commissioner of Fish and Game, Appellees, THE ALASKA FEDERATION OF NATIVES, PROTECTORS OF THE LAND d/b/a NUMAN KITLUTSISTI, TONY VASKA and WALTER CHARLEY, on behalf of himself and all other persons similarly situated, Intervenors/ Appellees.	Supreme Court File No. S-2712 Trial Court File No. 3AN-83-1592 Civil OPINION [No. 3540 - December 22, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Douglas J. Serdahely, Judge.

Appearances: Cheri C. Jacobus, Ross, Gingras, Bailey & Miner, P.C., Anchorage, for Appellants. Larri Irene Spengler, Assistant Attorney General, Grace Berg Schaible, Attorney General, Juneau, for Appellees. Donald Craig Mitchell, Anchorage, for Intervenors/Appellees.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

MATTHEWS, Chief Justice.
COMPTON, Justice, concurring.
MOORE, Justice, concurring.
RABINOWITZ, Justice, dissenting.

INTRODUCTION

This case challenges chapter 52 SLA 1986 which grants a preference to rural residents to take fish and game for subsistence purposes. The only requirement to be met by a subsistence fisherman or hunter is residency in a rural area of the state.

The rural preference is challenged under several provisions of the Alaska Constitution: the common use clause, article VIII, section 3; the no exclusive right of fishery clause, article VIII, section 15; the uniform application clause, article VIII, section 17; the equal rights clause, article I, section 1; and the due process clause, article I, section 7. In addition, violation of the equal protection and due process clauses of the United States Constitution is claimed. For the reasons that follow, we hold that the rural preference violates article VIII, sections 3, 15 and 17 of the Alaska Constitution.

FACTUAL AND PROCEDURAL SETTING

The 1986 act[1] defines subsistence fishing and hunting as activities which can be undertaken only "by a resident domiciled in a rural area of the state . . . ." Subsistence uses are also defined in terms of residency in rural areas:

> "Subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption.

AS 16.05.940(30). A "rural area" is defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." AS 16.05.940(25).

Appellants are Alaska residents who have engaged in subsistence hunting and fishing in the past and wish to continue to do so. Under the 1986 act, they are disqualified as subsistence users because they reside in areas classified as non-rural by the joint Boards of Fisheries and Game. Appellants McDowell and Mahle reside in Anchorage, Bondurant resides in

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1. For ease of reference, citations to chapter 52 SLA 1986 in this opinion will be to the appropriate section of the Alaska Statutes where that act is codified.

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Cooper Landing, and Eastwood resides in the community of McKinley Park.

The 1986 act requires the Board of Fisheries and the Board of Game to decide what portion of each fish stock and game population can be harvested consistent with the principle of sustained yield. Next the Boards must determine how much of the harvestable portion is needed to satisfy subsistence needs. If the harvestable portion of any stock or population is not sufficient to accommodate all consumptive uses -- sport, personal use, and commercial -- then 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.

AS 16.05.258(c). If the harvestable portion of a stock or population is insufficient to satisfy all subsistence needs, all non-subsistence uses are barred, and the Boards are required to distinguish among subsistence users by applying three 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." Id.

This case was brought in 1983 as a challenge to the 1978 subsistence statute, chapter 151, section 4 SLA 1978. The 1978 statute established that subsistence hunting and fishing had priority over other uses of fish and game stocks. Like the 1986

statute, it provided for two tiers of subsistence users. In the first tier were those who could take fish or game for subsistence purposes when populations were adequate to satisfy all subsistence needs. The second tier was limited to those who could take fish and game for subsistence purposes when populations were inadequate to supply all subsistence needs. The 1978 statute distinguished the second tier of subsistence users from the first tier on the basis of the same three factors utilized in the 1986 statute, namely, customary and direct dependence, local residency, and availability of alternative resources. Id. However, unlike the 1986 statute, the 1978 statute did not impose a rural residency requirement as a condition to becoming a first-tier subsistence user.

The appellants' initial complaint challenged the second-tier subsistence priority of the 1978 statute. The complaint was amended several times to expand on the original theory and add challenges to various regulations. All parties submitted motions for summary judgment. The superior court granted some of these motions and deferred others on October 24, 1984. Before the deferred motions could be ruled on, this court decided Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985), which struck down, as inconsistent with the 1978 statute, subsistence fishing regulations which imposed a rural residency requirement on first-tier subsistence users. Id. at 178.

The next event of significance was the passage in 1986 of chapter 52 SLA 1986, which, as noted, provides that only rural residents can be first- or second-tier subsistence users. Following passage of this act, the appellants again amended their complaint, challenging the rural preference on constitutional grounds. Both the appellants and the state moved for summary judgment. The superior court granted the motion of the state and denied the motion of the appellants. Judgment was entered on the basis of this ruling.

The setting of this case would not be complete without mention of the Alaska National Interest Lands Conservation Act (ANILCA), enacted by Congress in 1980.[2] Section 3114 of this act requires that on federal public lands in Alaska, subsistence uses are to be given priority over the taking of fish and wildlife for other purposes. Under ANILCA, only rural Alaska residents are entitled to a subsistence priority.[3] ANILCA requires federal

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2. 16 U.S.C.A. §§ 3101-3233 (West 1985).

3. ANILCA § 804, 16 U.S.C.A. § 3114, states:

> 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

(Footnote Continued)

management of public lands in Alaska in order to ensure the subsistence priority.[4] However, federal management may be supplanted by the state so long as the state enacts and implements subsistence laws "which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA.[5]

(Footnote Continued)

> 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.

(Emphasis added).

ANILCA § 803, 16 U.S.C.A. § 3113, defines the term "subsistence uses" as used in ANILCA to mean

> 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.

(Emphasis added.)

4. 16 U.S.C.A. § 3115(c).

5. 16 U.S.C.A. § 3115(d).

After this court's Madison decision, the Secretary of the Interior notified the state that state law was no longer consistent with ANILCA and that federal management would begin unless consistency was achieved by June 1, 1986. Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 105 L. Ed. 2d 695 (1989). With the passage of the 1986 act, the Interior Department has stated that Alaska is once again in compliance with ANILCA. Id.

After final judgment was entered by the superior court, the 9th Circuit Court of Appeals ruled that the definition of "rural" in the 1986 act does not comply with § 3113 of ANILCA. Id. at 318. "Rural," in ANILCA, according to the court, refers to "sparsely populated" areas; "rural is the antonym of urban and includes all areas in between cities and towns of a particular size." Id. at 316-17. The court referred to Census Bureau standards under which "the urban population consists of people living in communities of 2,500 or more, while the rural population comprises everyone else." Id. at 317. Thus, the 1986 act's subsistence-oriented definition was held inconsistent with ANILCA.

Bondurant and Eastwood both reside in rural areas as Kenaitze has interpreted ANILCA's use of that term. They are thus probably entitled to injunctive relief under ANILCA, 16

U.S.C.A. § 3117(a).[6] However, the Kenaitze decision does not change the issues presented in this appeal because the 1986 statute remains fully applicable to all non-federal lands.

Background and Purpose of the 1986 Statute

Prior to 1978, urban residents could engage in subsistence hunting and fishing. However, there was no statutory preference given to subsistence over sport or commercial fishing or sport hunting. With the enactment of chapter 151 SLA 1978, subsistence hunting and fishing was given such a priority. Madison, 696 P.2d at 174 n.12. The 1978 statute did not bar urban residents from eligibility as first-tier subsistence users. Madison, 696 P.2d at 176. However, a regulation adopted by the Board of Fish and Game did exclude urban residents. 5 AAC 01.597. Madison held that this regulation violated the 1978 statute. Id.

In 1985 the Alaska House of Representatives adopted a letter of intent which accompanied the bill that became the 1986 subsistence act. 1985 House Journal 1246. The letter explained the rural preference of the 1986 act as follows:

> This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities in rural areas in Alaska is significantly dependent upon participation by the residents of these communities in the

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6. Such relief has not been requested in this case, and the question whether the § 3117(a) remedy is available only in federal courts has not been briefed.

> taking of fish stocks and game populations for personal and family consumption. Further, the legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.

Id. at 1229-30. In making this determination, the legislature sounded a theme that was also expressed by Congress in enacting ANILCA. The House Committee on Interior and Insular Affairs determined that:

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

H.R. Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978). The intervenors in this appeal similarly expressed the purpose of the rural preference as follows:

> If village access to fish and game is overwhelmed by competition from the tens of thousands of sportsmen who Alaska's fortuitous oil wealth has drawn to the urban centers, the effect on the rural village economy would be adverse, and the effect on the health and welfare of rural residents would be even more so.

An additional purpose of the 1986 subsistence law is to retain state management of fish and game on federal lands by meeting the requirements of ANILCA.[7]

Urban-Rural Subsistence Patterns

Appellants' basic objection to the 1986 act is that by excluding from eligibility as subsistence users all urban dwellers and by including all rural dwellers, the act unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so, while needlessly including numerous rural residents who have not engaged in subsistence hunting and fishing. Appellants claim, in other words, that the urban/rural criterion is both unfairly under-inclusive, because it excludes deserving urban residents, and over-inclusive, because it includes undeserving rural residents. Appellants instead suggest that the right to subsistence should depend upon individual needs and traditions, not on one's place of residence.

The record supports the appellants' claim that there are substantial numbers of urban subsistence users. A state

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7. Senator Fisher, a member of the Senate Resource Committee, noted in the Senate floor debate: "[T]his legislation will provide the boards the tools to solve the problems in harvest disruption that followed Madison, and will assure the state will retain management of fish and game throughout Alaska by meeting the requirements of the federal subsistance law."

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study of subsistence use patterns[8] found that of some 255 holders of subsistence salmon permits for the 1980 Tanana River fishery, approximately 20% exhibited the attributes commonly associated with a traditional subsistance lifestyle, even though they all resided in the urban Fairbanks area. The report states:

> Despite their residence in or near populated areas of the Fairbanks North Star Borough, these households generally participated in the wage economy on a seasonal basis and had longer histories of participation in the fishery, lower cash incomes, and somewhat larger household sizes than the majority of users. Some of these households have long-standing cultural ties to the subsistance fishery. For these more intensive users, fishing in sub-district Y-6C was less a recreational outing than an integral component of their way of life in Interior Alaska. Their residence in an area which is currently defined by regulation as urban, coupled with escalating demands upon the resource base, however, raise questions about whether these more intensive uses can continue in the future.

Study at 12. Similarly, in the city of Homer, an urban area under the regulations,[9] the study reports that 38.2% of the city residents obtained at least one-half of their meat and fish supply from personal hunting and fishing activities. Id. at 162.

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8. R.J. Wolfe and L.J. Ellanna Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, Technical Paper Number 61, Alaska Department of Fish and Game, Division of Subsistence, Juneau, March, 1983 (hereinafter "Study").

9. 5 AAC 99.014.

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Likewise, the study documents the fact that numerous Alaskans who live in areas classified by the regulations as rural do not engage in subsistence activities. For example, in the City of Sitka, which is classified as rural, although it has a population of 7,803, some 26% of the households sampled did no hunting and 7% did no fishing. Id. at 235. Similarly, in the City of Nome, population 3,249, which is also rural under the regulations, id. at 93, some 5% of all households use no locally taken fish or game. Id. at 111.

The study also amply supports the critical importance of subsistence hunting and fishing to residents of the numerous small and remote villages of our State. For example, in the Wade Hampton census area of Western Alaska, the average annual per capita cash income was only $2,737 (1979),[10] id. at 30, and the average household harvested 4,597, dressed weight, pounds of fish and game each year. Id. at 42.

The Article VIII Clauses - History and Analysis

A.

Section 15 of article VIII of the Alaska Constitution provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to

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10. The 1979 statewide average was $11,152. Study at 30.

> limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 3 of article VIII provides:

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

Section 17 of article VIII provides:

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

Although the ramifications of these clauses are varied, they share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited. Section 15 states this explicitly with respect to fisheries. The proceedings of our Constitutional Convention show that the same meaning was intended with respect to sections 3 and 17.

A memorandum of the Constitutional Convention Committee on Resources expresses the view that the common use clause has as one of its purposes a prohibition on exclusive grants or special privileges. The memorandum states: "The expression 'for common use' implies that these resources are not to be subject to exclusive grants or special privileges as was so frequently the case in ancient royal tradition." Alaska Constitutional Convention Papers, Folder 210, Papers Drafted by Committee on Resources, entitled "Terms."

The Committee on Resources commentary with respect to the uniform application clause states:

> This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state.

6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).

In Owsichek v. State, 763 P.2d 488 (Alaska 1988), we observed that the article VIII provisions were designed to ensure to the public the broadest possible access to wildlife. We noted that "the common use clause impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." Id. at 495 (emphasis added). "[A] minimum requirement of this duty is a prohibition against any . . . special privileges." Id. at 496. In State v. Ostrosky, 667 P.2d 1184, 1191 (Alaska 1983), we observed that the common use and no exclusive right of fishery clauses reflected "anti-exclusionist values."

Appellants contend that the rural residency requirement amounts to an exclusive or special privilege prohibited explicitly by section 15 and implicitly by sections 3 and 17. They focus on Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), a case which interpreted section 1 of the White Act, former 48 U.S.C. §§ 220-224 (1941), under which Alaska fisheries were regulated before statehood. In Hynes, the Supreme Court held that the White Act prohibited granting a preferential right to fish to Native residents of the Karluk Reservation. Id. at 121.

This case is of precedential importance, they contend, because section 15 was based on section 1 of the White Act.

In response, the state agrees that the first sentence of section 15 is based on section 1 of the White Act. However, the state distinguishes Hynes on the grounds that the exclusive right to fish there was available to "a closed class." In contrast, it argues there is no closed class here because "people may become eligible to participate in subsistence uses by establishing their domicile in a rural area." Further, the state relies on Kenai Peninsula Fishermen's Cooperative Association v. State, 628 P.2d 897, 904 (Alaska 1981) which held that section 15 does not bar differential treatment between commercial, sport, and subsistance fishermen. The intervenors' argument in response relies exclusively on this case.

The parties correctly agree that the no exclusive right of fishery clause is based on section 1 of the White Act. The commentary concerning the exclusive right of fishery clause prepared by the Committee on Resources of the Constitutional Convention states:

> This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that Act the purposes sought by it are given expression in a prohibition of exclusive right or special privileges of any person to the fisheries of the state.

6 Proceedings of the Alaska Constitutional Convention Proceedings at 87 (Alaska Legislative Council).

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The language of the White Act, for which the no exclusive right clause is meant to be a substitute, is as follows:

> Provided, that every such regulation made by the Secretary of the Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

Act of June 6, 1924, ch. 272, § 1, 43 stat. 464.

The appellants' reliance on Hynes as an explanation of the meaning of the bar on exclusive rights and special privileges is apt. At issue in Hynes was a regulation of the Secretary of the Interior[11] prohibiting commercial salmon fishing in all waters within 3,000 feet of the shores of the Karluk Reservation. 337 U.S. at 92. The Secretarial Order made an exception which allowed Natives residing on the Reservation and their licensees to fish in these waters. Id. The Supreme Court held that this exception in favor of the Native residents and their licensees violated section 1 of the White Act. The court stated:

> [W]e think it clear that its proviso, "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by Natives equally with

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11. Regulatory jurisdiction over the administration of the White Act was transferred from the Department of Commerce to the Department of the Interior, effective July 1, 1939; Hynes, 337 U.S. at 92 n.4.

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> fishing companies, nonresidents of Alaska or other American citizens and so applies whether those Natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. . . . "Exclusive," as used in Section 1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people. The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in § 1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations.

337 U.S. at 122.[12]

As noted above, the state seeks to distinguish Hynes on the ground that Hynes involved a closed class of recipients of a special privilege, whereas the 1986 subsistence law does not because anyone who wants to hunt and fish for subsistence purposes can move to a rural area. We find this argument unpersuasive. If it were valid, virtually any discrimination based on residence would be justified - the residents of the disfavored area could simply move. Such a rationale is inconsistent with the prevailing approach in territorial

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12. We do not agree with Justice Rabinowitz's statement in dissent that the limitation struck down in Hynes was predicated solely on the fact that the users were Indians. Infra at 50. Both ethnic status and local residency were required as the regulation in question applied to "natives in possession of [the Karluk] reservation." 337 U.S. at 92. In any case, the quote in the text makes it clear that if the exception had been based solely on residence, rather than on residence and race, it would also have been struck down.

discrimination cases, which is to subject territorial classifications to scrutiny under the equal protection clause. Gilman v. Martin, 662 P.2d 120, 125 (Alaska 1983); Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 U. Pa. L. Rev. 261, 274-75 (1987).

The state's and the intervenors' reliance on Kenai Peninsula is also off the mark. That case merely affirmed what article VIII, section 4[13] says explicitly - that preferences among beneficial uses of fish and game may be legislatively or administratively established. We stated in Kenai Peninsula:

> While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species must also be allowed, would be to go far beyond the purpose of the section.

628 P.2d at 904 (footnote omitted). The state may, indeed must, make allocation decisions between sport, commercial, and

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13. Article VIII, section 4 of the Alaska Constitution provides:

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

subsistence users. That authority, however, does not imply a power to limit admission to a user group.[14]

Section 1 of the White Act guaranteed equal access to fisheries regardless of residence. The language of the Act and Hynes make this clear.[15] Alaska's constitutional framers were

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14. The foregoing also answers Justice Rabinowitz's contention that our interpretation of the equal access clauses of article VIII is in conflict with article VIII section 4. We have consistently taken the position that limits on admission to user groups are subject to scrutiny under the article VIII equal access clauses. See State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v. State, 763 P.2d 488, 492 (Alaska 1988).

15. The legislative history of the White Act is in accord. Congressional debate at the time the White Act was proposed demonstrated concern that Alaska residents and non-residents alike were being excluded from Alaska fisheries. The debate also demonstrated Congress' desire that Alaska fisheries be equally accessible to everyone:

> Mr. Robinson. The Secretary of Commerce sought to give exclusive right to fish in certain Alaskan water, and out of this attempt to give exclusive rights to fish, thus depriving a large number of the people the right to pursue their usual vocation, great complaint arose. This bill, however, denies to the Secretary of Commerce any power to grant an exclusive right to fish and requires him to give everyone equal rights within the areas where fishing is permitted.
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> . . . .
>
> Mr. Jones of Washington. The bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce. . . . Within the two reservations [of restricted fishing areas] that were created by Executive Order a year or two ago the Secretary of Commerce has seen

(Footnote Continued)

(Footnote Continued)

fit to make regulations under which outsiders might not go in order to fish. In other words, those who are already located there, if [the Secretary] thought they took all the fish that should be taken, were given the full rights, and nobody else could go in there and take fish.

Mr. King: They were given exclusive rights.

Mr. Jones of Washington. They may be called exclusive rights, but I went to say this in justice to the Secretary of Commerce:

When I came back this fall, and came down here, and we were considering matters of this kind, the Delegate from Alaska and I talked over the matter with reference to those exclusive rights, and I saw the Secretary of Commerce, and the Secretary of Commerce himself said that he would be glad to have that discretion taken away, that certainly he was not in favor of that policy, but those who were on the ground and who had been dealing with the matter especially and who might be considered to be experts had recommended and urged that that policy be pursued. I will say, in justice to him, that he said frankly that he would prefer not to have that absolute power, so I can say for him that he is glad that this provision is put in the bill prohibiting him from granting exclusive rights within the fishing areas up there.

. . . .

Mr. Robinson. I have been unable to find any authority for [the Secretary] to grant exclusive rights of fishery. It was about that alleged abuse of authority that most of the complaints arose; namely, that the Secretary in some instances had created reservations, and in others had granted in certain waters the exclusive right to fish, usually to large corporations or packing concerns, which deprived the fisherman of the

(Footnote Continued)

aware of Hynes.[16] As noted, section 15 of article VIII was meant to be a substitute for section 1 of the White Act and to further

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(Footnote Continued)

> opportunity to pursue their occupations; and they desired very much the provision that is in this bill, which secures to every citizen of the United States the right to fish in Alaskan waters upon equal terms and without discrimination. The bill deprives the Secretary of any power . . . to grant exclusive rights to fish in Alaskan waters.

65 Cong. Rec. 9520-21 1924) (emphasis added).

Based in part upon the Congressional debate identified above, Hynes concluded that

> [T]he legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.

Hynes, 337 U.S. at 120 (footnote omitted).

16. A memo of the Committee on Resources defining terms states the following under "White Act Provisions 48 U.S.C.A. 222:"

> That every such regulation made by the Secretary shall be of general application within the particular area to which it applies, and that no exclusive or general right of fishery shall be granted therein, nor shall any citizen of the U.S. be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary. . . . The word "exclusive" forbids not only a grant to a single person or corporation, but to any special group or number of people. (Hynes-Grimes Karluk Reservation)

Alaska Constitutional Convention Papers, Folder 210.

its purposes.[17] It follows that section 15 likewise was meant to ensure an equal right to participate in fisheries, regardless of where one resides.

Although section 15 pertains only to fisheries, the prevention of grants of exclusive or special privileges with respect to fish and game is also one purpose of the common use and the uniform application clauses.[18] It follows that the grant of special privileges with respect to game based on one's residence is also prohibited.

We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.[19]

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17. Commentary on Article on State Lands and Natural Resources, 6 Proceedings of the Alaska Constitutional Convention at 87.

18. See supra pages 14 and 15.

19. Justice Rabinowitz states in his dissenting opinion that he does not interpret the statute to mean that "eligibility to participate in subsistence uses is determined solely with reference to where an individual lives." Infra at 47. That, however, clearly is the case with respect to first-tier subsistence users. Urban resident may not be subsistance users because subsistence uses are by definition limited to rural residents. AS 16.05.940(30), quoted supra at pp.2-3. Yet all rural residents may be first-tier subsistence users without regard to their individual characteristics. The regulation on which Justice Rabinowitz relies, 5 AAC 99.010(b), defines customary and traditional uses but does not state that first-tier subsistence rights can be limited to customary and

(Footnote Continued)

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The conclusion we have reached does not mean that everyone can engage in subsistence hunting or fishing. We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons. We hold only that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional.

We are not called upon in this case to rule on what selection criteria might be constitutional. It seems appropriate, however, to note that any system which closes participation to some, but not all, applicants will necessarily create a tension with article VIII. In such cases, assuming that the exclusionary criterion is not per se impermissible, our decisions suggest that demanding scrutiny is appropriate.

We alluded to this in State v. Ostrosky, 667 P.2d 1184 (Alaska 1983) in discussing the interplay between the constitutionally allowed limited entry system, which was permitted by

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(Footnote Continued)

traditional users. As we stated in Madison "the phrase 'customary and traditional' modifies the word 'uses' . . . it does not refer to users." 696 P.2d at 174. The state acknowledges that only in the second-tier subsistence context may individual characteristics separate those rural residents who may be second-tier subsistence users from those who are ineligible. Brief of Appellees, p. 8. The state also notes that the need for a second-tier limitation has, to date, not arisen. Id.

amendment to article VIII, section 15, and the common use and no exclusive right of fisheries clauses. We stated:

> [S]ince the common use clause of section 3 and the no exclusive right of fishery clause of section 15 remain in the constitution, the premise of the argument is that whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause. The argument concludes that free transferability does not entail the least possible impingement on the anti-exclusionist values which these provisions reflect.
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> . . . [T]he premise of this argument is logical.

Id. at 1191. We expressed the same theme in Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256 (Alaska 1988) concerning the obligation of the Commercial Fisheries Entry Commission to establish an optimum number of entry permits. We stated in Johns:

> In [Ostrosky], we noted that there is a tension between the limited entry clause of the state constitution and the clauses of the constitution which guarantee open fisheries. We suggested that to be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation. Ostrosky . . . . The optimum number provision of the Limited Entry Act is the mechanism by which limited entry is meant to be restricted to its constitutional purposes. Without this mechanism, limited entry has the potential to be a system which has the effect of creating an exclusive fishery to ensure the wealth of permit holders and permit values, while exceeding the constitutional purposes of limited entry. Because this risk of unconstitutionality

> exists, the [Commercial Fisheries Entry Commission] should not delay in embarking on the optimum number process, except where there is a substantial reason for doing so.

Id., 758 P.2d at 1266 (footnote omitted).

Most recently in Owsichek, we suggested that section 17 of article VIII, the uniform application clause, "may require 'more stringent review' of a statute than does the equal protection clause in cases involving natural resources." Owsichek, 763 P.2d at 498 n.17 (quoting Gilman v. Martin, 662 P.2d 120, 126 (Alaska 1983)). We also cited with approval Justice Rabinowitz's dissent in Ostrosky, 667 P.2d at 1196 which employs a least restrictive alternative approach in view of the "highly important interest running to each person within the state" by virtue of the common use clause. 763 P.2d at 492 n.10.

In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values. Ostrosky, supra at 1191, Johns, supra at 1266.

We employ this method of analysis in the present case as an alternative ground of decision. Using this approach, we conclude that the rural-urban residency criterion is unconstitutional for the reasons that follow.

One purpose of the 1986 act is to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so.

This is an important interest.[20] However, the means used to accomplish this purpose are extremely crude. There are, as noted above, substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsistence users. Likewise, there are substantial numbers of Alaskans living in areas designated as rural who have no legitimate claims. A classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion.

We note that several other jurisdictions have struck down intrastate residential preferences in fish and game statutes. These authorities support our view that the equal access clauses of article VIII, which are a special type of equal

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20. Another expressed purpose is to aid communities whose residents are dependent on subsistence, as distinct from aiding the individual residents. This is not a purpose separate from aid to individual community members where the aid goes directly to the individuals. As we stated in State v. Enserch, __ P.2d __ , Slip Op. No. 3539 at 31 (Alaska, December 18, 1989): "It would not make sense to conclude that a statute may not discriminate between residents of two areas in order to aid the residents of the more disadvantaged area, but that such a statute could discriminate between residents of two areas in order to aid the communities in the more disadvantaged area. The communities are merely the collective sum of the residents."

A third purpose is to comply with ANILCA in order to retain state fish and game control on federal lands. It is difficult to view this as a sufficiently important purpose. ANILCA does not require state compliance. State control merely for the sake of control is a questionable goal when the terms infringe upon the open access values of article VIII.

protection guaranty, bar the residential discrimination imposed in this case.[21] Lewis v. State, 161 S.W. 154 (Ark. 1913) contains an excellent historical statement:

> When it becomes necessary for the propagation and preservation of wild game and fish for the use of the public, the people acting in their sovereign capacity, through their lawmaking power, may pass laws to regulate the right of each individual which he enjoys in common with every other member of the community to use of same. But when

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21. See State v. Bryan, 99 So. 327, 330 (Fla. 1924) (state law levying $10 and $50 license tax on state residents who are non-residents of certain counties, as a prerequisite to hunting in those counties, when residents of those counties pay only $1 or $1.25, violates equal protection); State v. Barkley, 134 S.E. 454, 455 (N.C. 1926) (state law levying $3 hunting fee on non-resident hunters in the county, and a $1 fee on residents of the county, held invalid in that it taxed inhabitants unequally); Harper v. Galloway, 51 So. 226, 229 (Fla. 1910) (state law that required citizens of the state of Florida who were not residents of Marion County to give a previous notice of intention to hunt and to pay a special license tax for the privilege of hunting game in Marion County, while no notice or license tax was required of residents of Marion County, denied equal protection of the laws); Bruce v. Director, Dep't of Chesapeake Bay Affairs, 276 A.2d 200, 208 (Md. 1971) (statutes prohibiting crabber from crabbing in waters of county other than his county of residence and prohibiting oystermen from going to waters of another county invalid); Power, More About Oysters Than You Wanted To Know, 30 Maryland L. Rev. 199, 218 (1970) ("A county non-resident represents no peculiar threat to the fishery but merely the same threat as represented by a county resident.").

But see Commonwealth v. Milton, 54 N.E. 362, 364 (Mass. 1899) (selectmen of a town may prohibit the digging of clams by nonresidents of the town); State v. Norton, 335 A.2d 607, 615 (Me. 1975) (state had compelled governmental interest in conservation of its clams and its attempt to achieve that purpose by, in part, authorizing municipalities to apply a resident-nonresident standard in licensing shell fisheries did not unconstitutionally discriminate against nonresidents).

the sovereign undertakes to regulate or restrain the individual in its right as a member of the community to enjoy the right to take and use this common property of all, it must do so upon the same terms to all members of the community alike. The common right, which one individual of the whole community is entitled to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right which one individual has in common with every other individual in the community to take and use fish and game, ferae naturae, is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. "The rights," says Green, "which the barons claimed for themselves they claimed for the nation at large." Green's History of the English People, vol. 4, pp. 252-254.

These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to us from the laws of England and may be regarded as a common heritage of the English-speaking people. See Parker v. People, 111 Ill. 581, 53 Am. Rep. 643. Also Geer v. Conn., 161 U.S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; Martin v. Waddell, 16 Pet. 412, 10 L. Ed. 997. The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity for protecting the same from extinction, and thus to preserve and perpetuate to the individual members of the community the inalienable rights which they have had from time immemorial. While the state, holding the title to game and fish, so to speak, in trust for every individual member of the community, may pass laws to regulate the rights of each individual in the manner of taking and using the common property, yet, as we have already stated, this must be done, under the

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> Constitution, upon the same terms to all the people. No special privileges or immunities can be conferred.
>
> Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation. Hayes v. Territory, 2 Wash. T. 286, 5 Pac. 927. In the cases of State v. Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561, and Harper v. Galloway, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N.S.) 794, 19 Ann. Cas. 235, the question here involved was considered and determined in accord with the doctrine we have announced.

Id. at 155-156 (footnote omitted, emphasis added).

CONCLUSION

Our disposition of this case makes it unnecessary to discuss the other grounds advanced by appellants. For the above reasons, the judgment of the superior court is reversed. This case is remanded to the superior court with instructions to issue a declaratory judgment that the rural preference of ch. 52 SLA 1985 is unconstitutional and to take such further action as may be appropriate.

REVERSED and REMANDED.

COMPTON, Justice, concurring.

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

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

MOORE, Justice, Concurring.

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

Equal Protection

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

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

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

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

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

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

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

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

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

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

Common Use and Exclusive Right of Fishery

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

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

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

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

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

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

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

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

RABINOWITZ, Justice, dissenting.

I dissent from the court's holding that ch. 52 SLA 1986 is unconstitutional.[1] In my view Alaska's subsistence laws are not violative of either section 3 ("common use"), section 15 ("no exclusive right of fisheries"), or section 17 ("equal application of laws") of article VIII of the Alaska Constitution.

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

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

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1. Hereinafter state subsistence laws.

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

INTRODUCTION.

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

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

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

The federal subsistance law specified that subsistence uses must be "customary and traditional uses by rural Alaska residents." ANILCA § 803; 16 U.S.C. § 3113 (emphasis added). Thus, under ANILCA, eligibility for subsistence permits was dependent in part upon one's geographic place of residence. ANILCA § 804; 16 U.S.C. § 3114.[4]

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

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

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4. "Rural" areas are those with sparse populations, and the term "rural" as used in ANILCA is not a term of art. Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1988), cert. denied, 105 L. Ed. 2d 835 (1989), (term "rural" is to be given its ordinary significance, meaning "sparsely populated").

5. 1985 House Journal 1246.

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

The subsistence statutes challenged here define "rural area" as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." AS 16.05.940(25).

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

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

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

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

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

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

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7. Section 3 of article VIII provides:

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

Section 15 of article VIII provides:

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

(footnote continued)

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

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

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

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(footnote continued)

> waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.
>
> Section 17 of article VIII provides:
>
> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

8. In Lewis v. State, 161 S.W. 134 (Ark. 1913), the court described the history of the common use principle in the following terms:

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

(footnote continued)

"public trust" doctrine[9] "impose(s) upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." Owsichek v. State, 763 P.2d 488, 495 (Alaska 1988) (citations omitted); see also Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), aff'd, 369 U.S. 45 (1962); Merscher v. State, Dep't of Commerce, 568 P.2d 996, 1003 (Alaska 1977).

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

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(footnote continued)

> sion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John.
>
> . . .
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> These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to use from the laws of England and may be regarded as a common heritage of the English-speaking people.

Id. at 155 (citations omitted).

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

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

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

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10. Alaska Statute 16.05.258(c) authorizes complete

(footnote continued)

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

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

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(footnote continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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