

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6467 SENATE RESOURCES

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

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

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

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

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

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

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

7-23
Appellant
Appellant
1-2-90
12-23-99
C. Johnson

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*Judge
Cutler's
decision*

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

SAM E. McDOWELL, et al.)
)
 Plaintiffs)
)
 vs.)
)
 DON W. COLLINSWORTH,)
)
 COMMISSIONER OF FISH AND)
)
 GAME, et al.)
)
 Defendants)
)
 and the ALASKA FEDERATION)
)
 OF NATIVES, et al.)
)
 Intervenor.)

Filed In the Trial Courts
STATE OF ALASKA THIRD DISTRICT
AT PALMER

JUN 1990

Clerk of the Trial Courts
By _____ Dep:

Case No. 3AN-83-1592 Civil

MEMORANDUM OF DECISION SEVERING UNCONSTITUTIONAL
PORTIONS OF STATUTE FROM REMAINDER OF STATUTE

On April 16, 1990 the state filed a motion requesting the court to determine the severability of the remaining provisions of the 1986 subsistence law from the rural preference provision ruled unconstitutional by the Alaska Supreme Court in this case on December 22, 1989. See McDowell v. State, 785 P.2d 1 (Alaska 1989). The motion was assigned to this court on May 16, 1990.

The state asserts that severability is a close question that needs to be decided speedily. The state slightly favors non-severability. Plaintiffs also support non-severability. Intervenor, the Alaska Federation of Natives (AFN), argue for severability. Two amicus briefs also have been filed, one by the class action plaintiffs in several cases pending in federal

F A X T R A N S M I T T A L M E M O
TO: State of Alaska
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district court, Bobby v. Alaska, arguing in favor of severability, and one by Safari Club International, Inc. opposing severability.

The court has thoroughly reviewed all of the briefs filed. The court also has studied the decisions in Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985), and McDowell, supra, and the relevant statutes from 1975 to date cited by the parties.

The court will not repeat the history of the Madison and McDowell cases, in order to avoid unnecessary delay in entering this order, nor will the court outline the extensive legislative history of subsistence regulation that led to the passage of the 1986 amendments to AS 16.05.258 and 16.05.940. The court also will not recite the constitutional doctrine of severability. The parties have adequately set these out in their briefs.

The question before the court is whether the 1986 Alaska Legislature intended the subsistence priority law to fall altogether if the rural resident preference should fall. After review of the pertinent documents and laws the court finds the answer to be no, and therefore finds the remaining provisions of the 1986 subsistence law to be severable from the rural limitation ruled unconstitutional. The court bases its finding, primarily on the analysis set forth in intervenor's brief and amici Bobby's brief.

The court disagrees with the "clear probability" burden of proof enunciated by intervenor, however. With respect to the

burden of proof, the court finds the state's argument in its reply more persuasive. The court thus has used a preponderance of evidence standard in evaluating the legislature's intent with regard to severability. The court finds that even under this less stringent standard the evidence fails to show that the legislature would have intended non-severability.

The parties and all amici agree there were three purposes behind the 1986 legislature's amendment to the subsistence law. The court should find in favor of severability unless a preponderance of evidence shows that the legislature would have intended non-severability to further these purposes.

The first goal of the legislature was to protect those Alaskans most reliant on the non-commercial use of fish and game, i.e., subsistence users. All parties agree that severability serves this purpose because severing the unconstitutional rural residency requirement from the remainder of the statute leaves the subsistence law on the books. A finding in favor of non-severability would delete the law altogether with the result that subsistence uses would not have a priority over any other uses.

The second purpose of the legislature was to put state fish and game laws in compliance with ANILCA to assure the state of control of fish and game management on both federal and state lands. This purpose is not relevant to the question of severability, however, because this purpose cannot be served regardless of the decision on severability. The supreme court's ruling in McDowell renders compliance with ANILCA an

impossibility without a constitutional amendment. Moreover, a decision in favor of non-severability would put the state further out of compliance with ANILCA because there then would be no subsistence preference in Alaska law at all. The legislature likely would have preferred to comply with ANILCA as much as possible because the degree of compliance with ANILCA might affect whether the threatened federal takeover of fish and game management on federal lands actually occurs.

The third purpose of the legislature was to cure the post-Madison confusion and disruption in the harvests of fish and game. This purpose actually is two separate purposes. The first is eliminating uncertainty about the amount of subsistence use. The second is providing for other users some certainty about their use. These other users include commercial users and sportsmen, particularly hunters, including out of state hunters.

For the court to find in favor of non-severability for these last two reasons, the court would have to find that the legislature intended to throw out the decade-old subsistence preference altogether merely to avoid a return to the confusion and disruption caused by the Madison decision. The court finds nothing in the legislative history that indicates a willingness to take such a drastic step, even though some legislators were determined to protect other uses. To the contrary, both the record and the briefs of the parties convincingly show the legislature's emphasis since 1975 on furthering a subsistence priority. As the state acknowledges, the 1986 law retained the

basics of the previous law. Consequently, this court concludes that severability, not non-severability, is the appropriate result.

Some of the arguments made by the parties and amicus Safari Club herein for non-severability appear to be based on untested predictions and fear of the unknown -- the unknown effectiveness of regulations and the unknown quantity of harvest that will be taken by subsistence users. Any confusion resulting from severability should be short-lived. Those who argue against severability exaggerate in predicting that all Alaskans will automatically become subsistence users and that subsistence use will significantly disrupt or cause prohibition of other uses of fish and game.

All Alaskans will not automatically become subsistence users. Before receiving a subsistence permit, a person would have to apply to the agency responsible for determining eligibility and meet the agency criteria for determining eligibility for that particular subsistence fishery or hunt. The agency, in deciding whether the potential subsistence user satisfied the criteria for subsistence use, would be guided by the definition of subsistence in AS 16.05.940(31), with the words "a rural area of" stricken. A subsistence use according to that statute means a use that is "noncommercial, customary and traditional."

Clearly there will be some confusion and difficulty in determining who actually are subsistence users and who are not.

It will be burdensome for the state to decide on appropriate regulations to carry out AS 16.05.258. This difficulty does not require the court to find the remaining provisions non-severable, however. There is no legal or logistical barrier to the promulgation of new regulations that both permit subsistence use to those Alaskans who qualify as subsistence users and foster management of the resources so as to allow other uses.

Regulations could provide deadlines for applying for subsistence permits. All residents will not apply. Applicants could be required to provide some of the information the state needs to make its eligibility determinations. Alaska already has a system in place for all residents to apply for permanent fund dividends. On those applications, certain information must be given, witnesses must be provided, and the applications must be notarized. There appears to be no reason why those who wish to subsistence hunt or fish could not be burdened to provide information in similar form, in order to obtain the benefit of subsistence harvesting.

Logical limitations could be placed on the amount of fish and game taken for subsistence purposes, based on criteria such as size of household and use of product harvested. To permit the state to obtain knowledge to help it wisely control the resource's uses, reports of the amount harvested could be required. Regulations might even be considered that would limit residents who successfully subsistence fish from other harvest activities such as sports fishing, unless they catch and release.

Many innovative but fair ways of distributing the resources are possible, even with a subsistence priority. The above are mere suggestions of possible approaches by the Fish and Game boards. They do not in any way represent the opinion of the court as to what regulations should be passed.

A further finding must be made with regard to "tier-two" determinations and the continued viability of "local residency" as a criterion in AS 16.05.258(C)(2). This criterion will be used only if subsistence use itself has to be limited to fewer than all persons eligible. The court sees no reason to strike down the "local residency" criterion as long as it is interpreted and applied as amici Bobby suggest in their brief. Memorandum for Amici Curiae on the Severability Issue, at 8-9. For example, if an applicant resides in southeast Alaska, there is no reason why his place of residence should not be considered with regard to whether he is chosen for a limited subsistence hunt near Fairbanks. Even though the Alaska Supreme Court held earlier in this case that use of a rural residency requirement is too crude a yardstick for determining all subsistence eligibility, because it is unrelated to the compelling purposes of the subsistence act, the court did not hold that the domicile of a person has no relation to whether the person should be given a permit for a specific subsistence hunt or fish opening if a "tier-two" determination has to be made. This court does not believe the supreme court would reach that far.

A finding also must be made in regard to the first section

of AS 16.05.258, which previously directed the boards to identify "in each rural area" the fish stocks and game populations of the state that are customarily and traditionally used for subsistence. The law directs the boards to make these determinations as a step preliminary to adopting regulations to determine subsistence use and subsistence users. The parties do not address whether the boards now should identify any such stocks or populations anywhere in the state, not merely in rural areas. That the boards should make these determinations anywhere in the state appears to be a logical result of the supreme court's holding in McDowell, supra. The boards still must find, however, that a stock or population is customarily and traditionally used for subsistence before making it available for subsistence use.

Based on the foregoing analysis, the court finds that the following provisions are severed from the following statutes:

from AS 16.05.258(a) - "rural" in line 4
from AS 16.05.940(26) - "rural" in line 1
from AS 16.05.940(29) - "a rural area of" in line 3
from AS 16.05.940(30) - "a rural area of" in line 2
from AS 16.05.940(31) - "a rural area of" in line 3.

DATED at Palmer, Alaska this 20 day of June, 1990.

Beverly W. Cutler
BEVERLY W. CUTLER
SUPERIOR COURT JUDGE

SUMMARY OF JUDGE CUTLER'S DECISION REGARDING SEVERABILITY

* The current statutory preference for subsistence uses over commercial and sport uses of fish and wildlife is severable from the limitation to rural residents held unconstitutional by the Supreme Court in McDowell. This means that subsistence uses of fish and wildlife continue to have a priority over other uses statewide -- i.e., on state lands, private lands, federal lands (once the subsistence needs of rural residents are met under ANILCA), and in all waters of the state.

* The state must determine customary and traditional subsistence uses of fish stocks and game populations -- by individuals and not necessarily on a community basis -- everywhere in the state. This includes both rural areas and areas which until now have been designated non-rural (e.g., the Kenai Peninsula).

* Eligibility for subsistence will be determined on the basis of an individual's personal history of customary and traditional subsistence use. This will require individual permitting decisions by the state. Judge Cutler analogized to the Permanent Fund Dividend application process: "There appears to be no reason why those who wish to subsistence hunt or fish could not be burdened to provide information in similar form, in order to obtain the benefit of subsistence harvesting."

* The use of "local residency" as one of the "tier 2" eligibility criteria for determining who gets a priority when there is not a sufficient harvestable surplus to satisfy all subsistence users is constitutional and valid. This means that, when even subsistence uses must be further restricted, local residents will have a priority.

* There is no statutory approach which can satisfy both the Alaska Constitution and ANILCA: "The supreme court's ruling in McDowell renders compliance with ANILCA an impossibility without a constitutional amendment."

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Plaintiffs)
vs.)
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Filed in the Trial Courts
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from AS 16.05.940(25) - "a rural area of" in line 3
from AS 16.05.940(30) - "a rural area of" in line 2
from AS 16.05.940(31) - "a rural area of" in line 3.

DATED at Palmer, Alaska this 20 day of June, 1990.

Beverly W. Cutler
BEVERLY W. CUTLER
SUPERIOR COURT JUDGE

Operational implications of the Cutler severability decision

1. In talking to you yesterday, our assumptions were that there would be no subsistence priority in the state and that all that would occur on state lands and waters was that subsistence seasons would be open to all Alaskan residents without a priority. This would have required some changes in state regulations where there were not sufficient fish or wildlife for all Alaska residents.

2. Rather, Judge Cutler's decision means that all residents will not be eligible for subsistence uses, but only those individuals who apply and are determined to have customary and traditional uses. These residents can be rural or non-rural residents.

3. To date the boards have only made customary and traditional use determinations of fish stocks and wildlife populations by communities and areas in rural areas. They have made these determinations without regard to individual users. No criteria for determining individuals', as opposed to communities', customary and traditional use patterns have been established. These will have to be developed by the Joint Boards of Fisheries and Game at a meeting to be called.

4. In addition to developing the criteria for individual eligibility, the boards will have to go through a process of 1) determining where there are customary and traditional uses in non-rural areas e.g, the Kenai Peninsula for fishing and hunting and 2) then an application process will have to be instituted to make these individual determinations. Judge Cutler likened this to the permanent fund dividend application process where each individual must apply, have witnesses attesting to use and notarization of applications if necessary. We anticipate that there would be tens of thousands of such applications requiring an extensive outreach program as well as a great deal of money to implement.

5. Before hunts could be implemented for this fall season, determinations of individual eligibility for each of the hunts where there are different rules for subsistence hunting from general hunting will have to be made. Once the subsistence users are determined, and we expect that this information will not be available until sometime during the fall, then if there is any additional surplus animals available for harvest, the persons who have applied for drawing permits will be given permits. Whether all of this can be accomplished in time for any hunting in these areas this fall is problematic at this time. At best, getting the joint boards together, developing individual eligibility criteria, sending out applications, having them filled out, returned, scored, and the people notified of the results will take several months. In 1985 when a similar exercise was begun, it took 2-3 months to accomplish this task. With no potential for a joint board meeting immediately, we believe that it will take at least 3-4 months to accomplish this task.

6. In addition, Judge Cutler has directed the boards to determine where customary and traditional uses of fish and wildlife have occurred in the non-rural areas of the state. In these areas, these customary and traditional uses should be considered, eligibility determinations made, and subsistence opportunities given prior to the allowance of other commercial and recreational uses after July 1. Candidates for these subsistence fisheries include subsistence fishing on the east side beaches of the Kenai Peninsula which were eliminated partially because the area was determined to be non-rural and therefore not eligible for subsistence, Kenai moose hunts, Mat-Su valley moose hunts, greater Fairbanks area moose and caribou hunts, etc.

7. Our initial determination of which hunts which have already been determined to be subsistence hunts will need individual determinations include the following: Unit 4 deer (NE Chichigof Is.), Unit 1D moose (Haines), Unit 5A moose, Unit 11 Mentasta caribou, Unit 12/13 Nelchina caribou, Unit 15C English Bay goats, Unit 13

moose (Copper River), Unit 15 moose and Unit 16 moose Mat-Su Valley.

8. We would not suggest that people who are applying for drawing permits today and tomorrow not apply. They may become eligible for hunts if it is determined that there is a harvestable surplus after the individual customary and traditional use determinations are completed or if some action is taken by the legislature to change the rules laid out in the court's order. We do believe that because of the increased number of people who will qualify for subsistence uses, that non-subsistence uses, including non-resident use will be reduced and possibly eliminated in a number of these hunts.

9. Whether any of the above listed hunts will occur this fall or not is a question which we can't answer for certain at this time. It depends upon how quickly the boards can meet and the administrative determinations of eligibility made.

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THE SECRETARY OF THE INTERIOR

WASHINGTON

JUNE 20, 1990

Honorable Steve Cowder
Governor of Alaska
Juneau, Alaska 99811

Dear Governor Cowder:

As you know, the decision of the Alaska Supreme Court in Medowell v. State of Alaska, which struck down the State's rural subsistence preference, has made it impossible for the state to maintain a subsistence program meeting all of the requirements of title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). On June 15, 1990, the Supreme Court of Alaska denied the State's request for an additional stay. As a result, on July 1, the date the Medowell decision goes into effect, I will be compelled to implement a Federal program to ensure that subsistence uses are given a preference on public lands.

Both the State and Federal governments have an affirmative responsibility to protect and provide the opportunity for continued subsistence uses on public lands in Alaska by rural residents. For both governments this responsibility will require coordinated and cooperative action to ensure that sufficient fish and wildlife resources are available on public lands to meet customary and traditional needs for those resources by rural residents. In some cases this responsibility will require action to ensure that harvest allocations of migratory resources on non-public lands are set at levels that will protect the ability of rural residents on public lands to take at the customary and traditional level.

To this end, the Alaska Department of Fish and Game and the Alaska Department of Public Safety are negotiating a memorandum of understanding on the Federal subsistence program with the Federal land managing agencies and the Bureau of Indian Affairs. The principal purpose of the memorandum of understanding is to facilitate cooperation between the State and Federal governments in managing fish and wildlife resources on public and non-public lands so as to protect subsistence opportunities on public lands. I am confident the memorandum of understanding will achieve this purpose.

As the State entities that make harvest allocations on non-public lands, the Boards of Fisheries and Game obviously play a crucial role in determining whether sufficient fish and wildlife resources will be available to meet subsistence needs on public lands. The subsistence regulations proposed by the Department of the Interior are temporary. They are predicated on a high degree of cooperation between the Boards of Fisheries and Game and the

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Federal land managers in setting harvest limits and other management decisions. The regulations represent the minimum extension of Federal authority necessary to fulfill the statutory obligation the Federal government has in this matter. Absent the high degree of cooperation discussed above, we will be faced with the prospect of either closing public lands to non-subsistence uses of fish and wildlife or further extending Federal authority to comply with the mandates in the law. One of the things I must consider is the possibility that Federal authority may have to be extended predicated on the Federal government's constitutional mandate to protect Native American interests and our fish, wildlife, and other natural resources.

I fully expect the Boards will accommodate Federal obligations on public lands first in making harvest allocations on non-public lands, in order to ensure that sufficient resources will be available to provide rural residents with a meaningful opportunity to take fish and wildlife on public lands at the customary and traditional use level. Otherwise it will be impossible for the State and Federal governments to meet their responsibilities to protect and provide the opportunity for continued subsistence uses on public lands by rural residents.

Your cooperation is appreciated.

Sincerely,

BY THE RULES COMMITTEE

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SENATE CONCURRENT RESOLUTION NO. 60
IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

Suspending Uniform Rule 23 of the Alaska State Legislature concerning measures introduced during the First Special Session of the Sixteenth Alaska State Legislature.

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

That under Rule 54 of the Uniform Rules of the Alaska State Legislature the provisions of Rule 23 of the Uniform Rules relating to notice of meetings are suspended in the consideration of measures introduced during the First Special Session of the Sixteenth Alaska State Legislature.

BY SEN. HALFORD, *Coquill*

1 IN THE SENATE

2 SENATE CONCURRENT RESOLUTION NO. *61*

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Relating to prohibiting the transporta-
6 tion out of the area of harvest of wild
7 game resources harvested under a subsis-
8 tence priority.

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

10 WHEREAS the state supreme court has ruled that the current subsistence
11 priority use law violates the equal protection and common use clauses of
12 the state constitution; and

13 WHEREAS the state constitution does allow for priority of uses under
14 sec. 4 of art. VIII; and

15 WHEREAS the people of the state support subsistence use by all
16 Alaskans but oppose unconstitutional discrimination between users;

17 BE IT RESOLVED by the Alaska State Legislature that the Board of Game
18 is requested to consider the adoption of emergency regulations that prohib-
19 it the transportation out of the area of harvest of wild game resources
20 harvested under a subsistence priority.

21 COPIES of this resolution shall be sent to the Honorable Samantha
22 Castle, chair, Board of Game.

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE JOINT RESOLUTION NO. 86

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Proposing amendments to the Constitution
6 of the State of Alaska relating to
7 subsistence uses of fish and wildlife by
8 rural residents in order to retain
9 management of those resources by the
10 State of Alaska; and providing for an
11 effective date.

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

13 * Section 1. Article VIII, Constitution of the State of Alaska, is
14 amended by adding a new section to read:

15 SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. Consistent
16 with the sustained yield principle, the legislature may grant a pref-
17 erence in the taking of fish and wildlife and other renewable natural
18 resources for subsistence uses by residents of rural areas and, when
19 necessary to assure sustained yield or to protect subsistence uses,
20 may allocate those resources on the bases of customary and direct
21 dependence, local residence, and the availability of alternative
22 resources.

23 * Sec. 2. In addition to authorizing the legislature to enact laws
24 granting a preference for subsistence uses, the amendment proposed in sec.
25 1 of this resolution (1) validates, ratifies, and reinstates state subsis-
26 tence laws, including the provisions of ch. 52, SLA 1986, that are
27 consistent with federal laws relating to subsistence uses, and (2) enables
28 the state to retain management of fish and wildlife on federal land.

29 * Sec. 3. Article XV, Constitution of the State of Alaska is amended

1 by adding a new section to read:

2 SECTION 29. EFFECTIVE DATE AND RECONSIDERATION OF SUBSISTENCE
3 AMENDMENT. (a) Section 19 of Article VIII, regarding a subsistence
4 preference, takes effect immediately upon certification of the
5 election returns by the lieutenant governor.

6 (b) The lieutenant governor shall place the following
7 proposition on the ballot at the general election in 1994: "Shall
8 Section 19 of Article VIII of the Alaska Constitution, regarding
9 subsistence, be retained?" If a majority of the votes is in the
10 negative, that section is repealed.

11 * Sec. 4. The amendments proposed in secs. 1 and 3 of this resolution,
12 and the effect of the amendment proposed in sec. 1 of this resolution, as
13 set out in sec. 2 of this resolution, shall be placed before the voters of
14 the state as one ballot proposition at the next general election in con-
15 formity with art. XIII, sec. 1, Constitution of the State of Alaska, and
16 the election laws of the state.

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STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

June 25, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. II, sec. 9, and art. III, secs. 17 and 18, of the Alaska Constitution, I am transmitting a joint resolution that would (1) amend the Alaska Constitution to authorize the legislature to give rural residents a preference for subsistence uses of fish and wildlife; (2) validate, ratify, and reinstate the provisions of current state statutes relating to subsistence that have been held unconstitutional by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989); (3) make the subsistence amendment effective immediately upon certification by the lieutenant governor of the results of the election at which the amendment will be put before the people; and (4) provide for a second vote by the people at the 1994 general election. Under that same authority, I also am transmitting a bill that would establish a Subsistence Review Commission and amend the definition of the term "rural area" in current statute to authorize the Board of Fisheries and Board of Game to define it in administrative regulations.

In 1978, the Alaska legislature recognized that subsistence -- i.e., the taking of fish and wildlife for personal consumption and use -- should have a preference over sport and commercial uses of fish and wildlife. In Title VIII of the Alaska National Interest Land Conservation Act (ANILCA), P.L. 96 -- 487, 94 Stat. 2371, 2422 (1980), the United States Congress established a priority for rural residents on federal land, and provided that the priority would be implemented by the secretaries of interior and agriculture unless the state enacted laws of general applicability affording the same priority. In 1982, the Board of Fisheries and Board of Game jointly adopted regulations establishing a subsistence preference for rural residents. In the 1982 general election, the voters of the state overwhelmingly supported that subsistence preference by defeating an initiative that would have repealed state subsistence laws. Finally, in 1986, the legislature

established a subsistence preference for rural residents in state statutes.

Although it has been both state and federal policy for more than a decade, the Alaska Supreme Court held in the McDowell case that a subsistence preference for rural residents violates the Alaska Constitution. In subsequent proceedings in that case, the superior court recently ruled that the preference for subsistence uses over sport and commercial uses remains a part of state law, but only those individual Alaskans with a prior history of subsistence use are eligible to participate.

This puts the state in an intolerable position. Under existing state law, as interpreted by the court, only a select few Alaskans will be eligible to participate in subsistence, and they will have a preference over all other Alaskans. Determining who the lucky few are will be incredibly intrusive and burdensome to the residents of rural villages -- those Alaskans who everyone agrees are most reliant on the resources. It will require a substantial and expensive state bureaucracy.

In many ways, however, it will not substantially change the pre-McDowell allocation of fish and wildlife as a practical matter, except on the Kenai Peninsula with respect to salmon. The superior court ruled that the "tier two" criteria used to further allocate subsistence resources among qualifying subsistence users, including the local residency component, is constitutionally valid. As a consequence, when game resources are insufficient to supply the needs of all subsistence users (as is the case with the Nelchina caribou herd), local residents will still have a preference. In other areas of the state, subsistence seasons for local residents are, in most cases, the same as the general hunting seasons in which all Alaskans may participate. On the Kenai Peninsula, on the other hand, those with a history of customary and traditional subsistence uses of salmon will have a statutory preference over commercial and sport users, potentially resulting in a dramatic reallocation of those resources in that area.

On federal land, in the meantime, the federal government will take over management of fish and wildlife to the extent necessary to give rural residents a subsistence preference, as required by ANILCA. This dual management regime will prove awkward at best; at worst, it could seriously jeopardize the sustained yield of fish and wildlife because of the difficulty of coordinating between two sets of managers with two different mandates.

In my view, any advantages that might result from the status quo are greatly outweighed by the disadvantages of (1) the burdensome and intrusive (and expensive)

administrative process that will have to be established, (2) federal management on federal land, and (3) the potentially dramatic reallocation of fish on the Kenai Peninsula. The subsistence constitutional amendment I am proposing will reestablish the pre-McDowell state policy of granting rural residents a subsistence preference and enable the state to retain management of fish and wildlife statewide. Should it choose to do so, the legislature could establish a management regime for federal land different from that for state and private land. If it did so, however, management would remain in state hands and eliminate the confusion and coordination problems of having two sets of managers. Most importantly, passage of the resolution will leave the final decision on this important issue to the people of the state, the ones most directly affected by it.

Section 1 of the joint resolution would add a new section to art. VIII of the Alaska Constitution ("natural resources") to authorize (1) a subsistence preference for rural residents; and (2) the allocation of fish and wildlife for subsistence uses on the basis of local or community residence, availability of alternative resources, and customary and direct dependence on a fish or game population as a mainstay of livelihood. This would give the legislature clear constitutional authority to pass laws that are consistent with the provisions of ANILCA.

Section 2 of the joint resolution validates, ratifies, and reinstates those provisions of the state's subsistence laws held invalid as a result of the McDowell decision. Case law from this and other jurisdictions makes clear that an amendment will have retroactive effect if such an intent is clearly expressed, as here. See, e.g., Matthews v. Quinton, 362 P.2d 932, 938-39 (Alaska 1961). By ratifying and reinstating the provisions of the 1986 law that are consistent with federal law, the state would be back in the same position it was in before the McDowell decision, but with the certainty that the provisions of the state's subsistence laws are constitutional under the Alaska Constitution.

Section 3 of the joint resolution would add a new section to art. XV of the Alaska Constitution ("transitional measures"), providing that the subsistence amendment to art. VIII proposed in sec. 1 of the joint resolution becomes effective immediately upon certification of the election returns by the lieutenant governor, and not the normal 30 days after that certification as provided in art. XIII, sec. 1. The sooner the amendment becomes effective, the sooner the state will be able to take the management of fish and wildlife on federal land back from the federal government. It also provides that retention of the subsistence amendment will be placed on the ballot in the

general election in 1994. This will give the people of the state a second opportunity to speak on this issue. If the amendment is rejected by a majority of those voting in 1994, it will be repealed.

Section 4 of the joint resolution is, essentially, standard language directing the lieutenant governor to place the proposed constitutional amendments, including the statement of effect, before the voters in a single ballot proposition at the next general election.

The bill would establish a Subsistence Review Commission to review all aspects of state and federal laws relating to subsistence uses of fish and wildlife and the implementation of those laws. It would be made up of nine members, including members from the Board of Fisheries or Board of Game, from the Regional Council System, and from organizations representing Alaska Natives, sportsmen, and commercial fishing interests, and four public members. Between now and the second vote of the people, in 1994, the Subsistence Review Commission would provide a forum to bring together all segments of the Alaska population to consider this issue and to make recommendations to the governor and the legislature regarding any necessary changes to state or federal law.

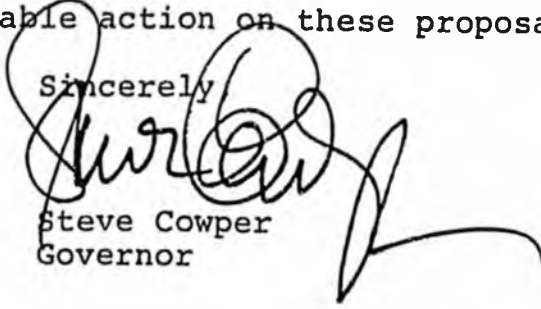
Section 5 of the bill repeals and reenacts the current statutory definition of "rural area," to authorize the Board of Fisheries and the Board of Game jointly to define that term in administrative regulations. In Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that the current state definition of "rural area" is inconsistent with ANILCA. So long as that definition remains inconsistent with ANILCA, that federal law requires federal management of fish and wildlife on federal land. By authorizing the joint boards to define "rural area" in administrative regulations, the state will have the necessary flexibility to adopt a definition that is consistent with ANILCA and thereby retain state management of fish and wildlife on all land in the state.

The subsistence constitutional amendment that I am proposing would give constitutional recognition to what has been state policy for more than a decade: residents of rural areas, those most dependent on fish and wildlife resources, should have a preference for subsistence uses of those resources over other uses. It would enable the legislature to once again implement that policy and, in doing so, retain state management of fish and wildlife throughout the state. Establishing the Subsistence Review Commission would ensure that there is a forum to continue discussion of this issue and to make recommendations for any necessary changes in federal law. Most importantly, it

will enable the people of the state -- those most affected -- to make their will known through their vote at the general election this year, through the commission, and through their vote again in 1994.

I urge your prompt and favorable action on these proposals.

Sincerely


Steve Cowper
Governor

BY SEN. STURGULEWSKI

1 IN THE SENATE

2 SENATE JOINT RESOLUTION NO. 87
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
7 subsistence uses of fish and wildlife;
8 and providing for an effective date for
9 the amendment.

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

11 * Section 1. Article VIII, Constitution of the State of Alaska, is
12 amended by adding a new section to read:

13 SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. Consistent
14 with the sustained yield principle, the legislature may grant a pref-
15 erence to and among residents of rural areas of the State for the
16 taking of fish and wildlife for subsistence uses.

17 * Sec. 2. In addition to authorizing the legislature to enact laws
18 relating to granting a preference for subsistence uses, the intent of the
19 amendment proposed by this resolution is to

20 (1) validate, ratify, and reinstate state subsistence laws,
21 including provisions of ch. 52, SLA 1986, that are consistent with federal
22 laws relating to subsistence uses; and

23 (2) allow the state to retain management of fish and wildlife on
24 federal land.

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

1 * Sec. 4. The amendment proposed by this resolution, if approved by the
2 voters, is effective immediately upon certification of the election returns
3 by the lieutenant governor.

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BY SEN. STURGULEWSKI

1 IN THE SENATE

2 SENATE JOINT RESOLUTION NO. 88

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Relating to the subsistence priority
6 required under the Alaska National
7 Interest Lands Conservation Act.

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

9 WHEREAS the Alaska National Interest Lands Conservation Act (ANILCA)
10 requires rural subsistence users to be given priority, in times of short-
11 age, in the taking of fish and wildlife on federal land in Alaska; and

12 WHEREAS ANILCA further provides that the State of Alaska may retain
13 fish and wildlife management authority on federal lands so long as it
14 provides in laws of general applicability for a state rural subsistence
15 preference; and

16 WHEREAS ANILCA does not specifically define the term "rural" and other
17 key statutory terms; and

18 WHEREAS the lack of such specific definitions has resulted in con-
19 flicting court and administrative decisions on the implementation of the
20 subsistence priority in Alaska; and

21 WHEREAS these conflicting decisions have seriously hampered the abil-
22 ity of the state to effectively manage Alaska's fish and wildlife and has
23 exacerbated conflicts over the subsistence priority; and

24 WHEREAS other federal laws affecting state fish and wildlife manage-
25 ment across the nation also include key terms that are not specifically
26 defined; and

27 WHEREAS there is a clear need to resolve the uncertainty caused by
28 this lack of specificity in federal law and allow Alaska and other states
29 to implement federal standards in a way that recognizes unique local

1 concerns and conditions;

2 BE IT RESOLVED by the Alaska State Legislature that the United States
3 Congress is respectfully requested to provide that terms not specifically
4 defined in federal laws, such as the subsistence priority contained in
5 ANILCA, dealing with state fish and wildlife management shall be defined by
6 reference to definitions found in the laws of affected states.

7 COPIES of this resolution shall be sent to the Honorable George Bush,
8 President of the United States; the Honorable Dan Quayle, Vice-President of
9 the United States and President of the U.S. Senate; the Honorable Thomas S.
10 Foley, Speaker of the U.S. House of Representatives; and to the Honorable
11 Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the
12 Honorable Don Young, U.S. Representative, members of the Alaska delegation
13 in Congress.

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BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE BILL NO. 553

3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 A BILL

6 For an Act entitled: "An Act relating to subsistence uses of fish and
7 wildlife and creating the Subsistence Review
8 Commission; and providing for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. The Subsistence Review Commission is established.

11 * Sec. 2. The Subsistence Review Commission shall review all aspects of
12 state and federal laws relating to subsistence uses of fish, wildlife, and
13 other natural resources, and the implementation of those laws, including
14 the effects of Alaskans' use of and state management of, fish and wildlife.
15 This review must include an examination of

16 (1) what subsistence is and who should qualify as a subsistence user;

17 (2) the most appropriate way to provide for subsistence in Alaska;

18 (3) what a subsistence priority is and how it should be implemented;

19 (4) what constitutes "customary trade and barter" as those terms are
20 used in federal and state subsistence laws, the potential for increases in
21 the sale of subsistence harvests, and the resulting impact on other users
22 under those provisions;

23 (5) the roles of the Board of Fisheries, Board of Game, and the
24 regional councils and advisory committees in enabling local users to par-
25 ticipate in the decision-making process with respect to local resources and
26 in bringing local concerns to the attention of the boards; and

27 (6) what changes, if any there should be in state and federal laws
28 relating to subsistence uses of fish, wildlife, and other natural renewable
29 resources.

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1 * Sec. 3. The Subsistence Review Commission shall report its findings
2 and any recommendations for needed changes to the governor and the legis-
3 lature no later than January 15, 1993.

4 * Sec. 4. (a) The Subsistence Review Commission consists of nine
5 members appointed by the governor, to include

6 (1) a representative of each of the following:

7 (A) the Board of Fisheries or the Board of Game,

8 (B) the Fish and Game regional council system,

9 (C) organizations representing

10 (i) Alaska Natives,

11 (ii) sportsmen's groups and

12 (iii) commercial fishing interests, and

13 (2) four public members.

14 (b) A majority of the commission constitutes a quorum for conducting
15 official business of the commission.

16 (c) The governor may appoint additional non-voting, ex-officio
17 members representing state and federal agencies.

18 (d) Members of the commission who are not state or federal employees
19 are entitled to transportation and per diem expenses as provided in AS AS
20 39.20.180.

21 * Sec. 5. AS 16.05.940(26) is repealed and reenacted to read:

22 (26) "rural area" has the meaning stated in regulations adopted
23 under the Administrative Procedure Act (AS 44.62) by the Board of
24 Fisheries and the Board of Game, meeting jointly under AS 16.05.315;

25 * Sec. 6. Sections 1 - 4 of this Act are repealed upon the filing of
26 the Subsistence Review Commission's report with the governor and the legis-
27 lature as provided in sec. 3 of this Act.

28 * Sec. 7. Sections 1 - 4 and 6 of this Act take effect immediately
29 under AS 01.10.070(c).

1 * Sec. 8. Section 5 of this Act takes effect upon approval by the
2 voters in the 1990 general election of a constitutional amendment relating
3 to a subsistence preference.

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

June 25, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. II, sec. 9, and art. III, secs. 17 and 18, of the Alaska Constitution, I am transmitting a joint resolution that would (1) amend the Alaska Constitution to authorize the legislature to give rural residents a preference for subsistence uses of fish and wildlife; (2) validate, ratify, and reinstate the provisions of current state statutes relating to subsistence that have been held unconstitutional by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989); (3) make the subsistence amendment effective immediately upon certification by the lieutenant governor of the results of the election at which the amendment will be put before the people; and (4) provide for a second vote by the people at the 1994 general election. Under that same authority, I also am transmitting a bill that would establish a Subsistence Review Commission and amend the definition of the term "rural area" in current statute to authorize the Board of Fisheries and Board of Game to define it in administrative regulations.

In 1978, the Alaska legislature recognized that subsistence -- i.e., the taking of fish and wildlife for personal consumption and use -- should have a preference over sport and commercial uses of fish and wildlife. In Title VIII of the Alaska National Interest Land Conservation Act (ANILCA), P.L. 96 -- 487, 94 Stat. 2371, 2422 (1980), the United States Congress established a priority for rural residents on federal land, and provided that the priority would be implemented by the secretaries of interior and agriculture unless the state enacted laws of general applicability affording the same priority. In 1982, the Board of Fisheries and Board of Game jointly adopted regulations establishing a subsistence preference for rural residents. In the 1982 general election, the voters of the state overwhelmingly supported that subsistence preference by defeating an initiative that would have repealed state subsistence laws. Finally, in 1986, the legislature

established a subsistence preference for rural residents in state statutes.

Although it has been both state and federal policy for more than a decade, the Alaska Supreme Court held in the McDowell case that a subsistence preference for rural residents violates the Alaska Constitution. In subsequent proceedings in that case, the superior court recently ruled that the preference for subsistence uses over sport and commercial uses remains a part of state law, but only those individual Alaskans with a prior history of subsistence use are eligible to participate.

This puts the state in an intolerable position. Under existing state law, as interpreted by the court, only a select few Alaskans will be eligible to participate in subsistence, and they will have a preference over all other Alaskans. Determining who the lucky few are will be incredibly intrusive and burdensome to the residents of rural villages -- those Alaskans who everyone agrees are most reliant on the resources. It will require a substantial and expensive state bureaucracy.

In many ways, however, it will not substantially change the pre-McDowell allocation of fish and wildlife as a practical matter, except on the Kenai Peninsula with respect to salmon. The superior court ruled that the "tier two" criteria used to further allocate subsistence resources among qualifying subsistence users, including the local residency component, is constitutionally valid. As a consequence, when game resources are insufficient to supply the needs of all subsistence users (as is the case with the Nelchina caribou herd), local residents will still have a preference. In other areas of the state, subsistence seasons for local residents are, in most cases, the same as the general hunting seasons in which all Alaskans may participate. On the Kenai Peninsula, on the other hand, those with a history of customary and traditional subsistence uses of salmon will have a statutory preference over commercial and sport users, potentially resulting in a dramatic reallocation of those resources in that area.

On federal land, in the meantime, the federal government will take over management of fish and wildlife to the extent necessary to give rural residents a subsistence preference, as required by ANILCA. This dual management regime will prove awkward at best; at worst, it could seriously jeopardize the sustained yield of fish and wildlife because of the difficulty of coordinating between two sets of managers with two different mandates.

In my view, any advantages that might result from the status quo are greatly outweighed by the disadvantages of (1) the burdensome and intrusive (and expensive)

administrative process that will have to be established, (2) federal management on federal land, and (3) the potentially dramatic reallocation of fish on the Kenai Peninsula. The subsistence constitutional amendment I am proposing will reestablish the pre-McDowell state policy of granting rural residents a subsistence preference and enable the state to retain management of fish and wildlife statewide. Should it choose to do so, the legislature could establish a management regime for federal land different from that for state and private land. If it did so, however, management would remain in state hands and eliminate the confusion and coordination problems of having two sets of managers. Most importantly, passage of the resolution will leave the final decision on this important issue to the people of the state, the ones most directly affected by it.

Section 1 of the joint resolution would add a new section to art. VIII of the Alaska Constitution ("natural resources") to authorize (1) a subsistence preference for rural residents; and (2) the allocation of fish and wildlife for subsistence uses on the basis of local or community residence, availability of alternative resources, and customary and direct dependence on a fish or game population as a mainstay of livelihood. This would give the legislature clear constitutional authority to pass laws that are consistent with the provisions of ANILCA.

Section 2 of the joint resolution validates, ratifies, and reinstates those provisions of the state's subsistence laws held invalid as a result of the McDowell decision. Case law from this and other jurisdictions makes clear that an amendment will have retroactive effect if such an intent is clearly expressed, as here. See, e.g., Matthews v. Quinton, 362 P.2d 932, 938-39 (Alaska 1961). By ratifying and reinstating the provisions of the 1986 law that are consistent with federal law, the state would be back in the same position it was in before the McDowell decision, but with the certainty that the provisions of the state's subsistence laws are constitutional under the Alaska Constitution.

Section 3 of the joint resolution would add a new section to art. XV of the Alaska Constitution ("transitional measures"), providing that the subsistence amendment to art. VIII proposed in sec. 1 of the joint resolution becomes effective immediately upon certification of the election returns by the lieutenant governor, and not the normal 30 days after that certification as provided in art. XIII, sec. 1. The sooner the amendment becomes effective, the sooner the state will be able to take the management of fish and wildlife on federal land back from the federal government. It also provides that retention of the subsistence amendment will be placed on the ballot in the

general election in 1994. This will give the people of the state a second opportunity to speak on this issue. If the amendment is rejected by a majority of those voting in 1994, it will be repealed.

Section 4 of the joint resolution is, essentially, standard language directing the lieutenant governor to place the proposed constitutional amendments, including the statement of effect, before the voters in a single ballot proposition at the next general election.

The bill would establish a Subsistence Review Commission to review all aspects of state and federal laws relating to subsistence uses of fish and wildlife and the implementation of those laws. It would be made up of nine members, including members from the Board of Fisheries or Board of Game, from the Regional Council System, and from organizations representing Alaska Natives, sportsmen, and commercial fishing interests, and four public members. Between now and the second vote of the people, in 1994, the Subsistence Review Commission would provide a forum to bring together all segments of the Alaska population to consider this issue and to make recommendations to the governor and the legislature regarding any necessary changes to state or federal law.

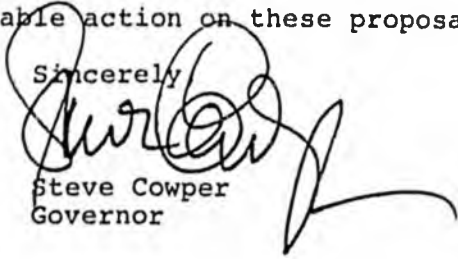
Section 5 of the bill repeals and reenacts the current statutory definition of "rural area," to authorize the Board of Fisheries and the Board of Game jointly to define that term in administrative regulations. In Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that the current state definition of "rural area" is inconsistent with ANILCA. So long as that definition remains inconsistent with ANILCA, that federal law requires federal management of fish and wildlife on federal land. By authorizing the joint boards to define "rural area" in administrative regulations, the state will have the necessary flexibility to adopt a definition that is consistent with ANILCA and thereby retain state management of fish and wildlife on all land in the state.

The subsistence constitutional amendment that I am proposing would give constitutional recognition to what has been state policy for more than a decade: residents of rural areas, those most dependent on fish and wildlife resources, should have a preference for subsistence uses of those resources over other uses. It would enable the legislature to once again implement that policy and, in doing so, retain state management of fish and wildlife throughout the state. Establishing the Subsistence Review Commission would ensure that there is a forum to continue discussion of this issue and to make recommendations for any necessary changes in federal law. Most importantly, it

will enable the people of the state -- those most affected -- to make their will known through their vote at the general election this year, through the commission, and through their vote again in 1994.

I urge your prompt and favorable action on these proposals.

Sincerely


Steve Cowper
Governor

BY SEN. STURGULEWSKI

1 IN THE SENATE

2 SENATE BILL NO. 554

3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 A BILL

6 For an Act entitled: "An Act relating to subsistence hunting and fishing
7 and amending the definition of 'rural;' and providing
8 for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section. 1. AS 16.05.251(a) is amended to read:

11 Sec. 16.05.251. REGULATIONS OF THE BOARD OF FISHERIES. (a) The
12 Board of Fisheries may adopt regulations it considers advisable in
13 accordance with the Administrative Procedure Act (AS 44.62) for

14 (1) setting apart fish reserve areas, refuges, and sanctu-
15 aries in the waters of the state over which it has jurisdiction,
16 subject to the approval of the legislature;

17 (2) establishing open and closed seasons and areas for the
18 taking of fish; if consistent with resource conservation and develop-
19 ment goals, the board may adopt regulations establishing restricted
20 seasons and areas necessary for persons 60 years of age and older to
21 participate in sport or [,] personal use [, OR SUBSISTENCE] fishing;

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

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

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

28 (6) classifying as commercial fish, sport fish, personal
29 use fish, [SUBSISTENCE FISH,] or predators or other categories

1 essential for regulatory purposes;

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

5 (8) investigating and determining the extent and effect of
6 disease, predation, and competition among fish in the state, exercis-
7 ing control measures considered necessary to the resources of the
8 state;

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

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

13 (11) establishing the times and dates during which the
14 issuance of fishing licenses, permits, and registrations and the
15 transfer of permits and registrations between registration areas is
16 allowed; however, this paragraph does not apply to permits issued or
17 transferred under AS 16.43;

18 (12) regulating commercial, sport, [SUBSISTENCE,] and per-
19 sonal use fishing as needed for the conservation, development, and
20 utilization of fisheries;

21 (13) requiring, in a fishery, observers on board fishing
22 vessels, as defined in AS 16.05.475(d), that are registered under the
23 laws of the state, as defined in AS 16.05.475(c), after making a
24 written determination that an on-board observer program

25 (A) is the only practical data-gathering or enforce-
26 ment mechanism for that fishery;

27 (B) will not unduly disrupt the fishery;

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

29 (D) can be coordinated with observer programs of other

1 agencies, including the National Marine Fisheries Service, North
2 Pacific Fishery Management Council, and the International Pacific
3 Halibut Commission;

4 (14) establishing nonexclusive, exclusive, and superexclu-
5 sive registration and use areas for regulating commercial fishing.

6 * Sec. 2. AS 16.05.251(d) is amended to read:

7 (d) Regulations adopted under (a) of this section must, consis-
8 tent with sustained yield [AND THE PROVISIONS OF AS 16.05.258], pro-
9 vide a fair and reasonable opportunity for the taking of fishery
10 resources by personal use, sport, and commercial fishermen.

11 * Sec. 3. AS 16.05.255(a) is amended to read:

12 (a) The Board of Game may adopt regulations it considers advis-
13 able in accordance with the Administrative Procedure Act (AS 44.62)
14 for

15 (1) setting apart game reserve areas, refuges, and sanctu-
16 aries in the water or on the land of the state over which it has
17 jurisdiction, subject to the approval of the legislature;

18 (2) establishing open and closed seasons and areas for the
19 taking of game;

20 (3) establishing the means and methods employed in the
21 pursuit, capture, and transport of game, including regulations, con-
22 sistent with resource conservation and development goals, establishing
23 means and methods that may be employed by persons with physical dis-
24 abilities;

25 (4) setting quotas, bag limits, harvest levels, and sex,
26 age, and size limitations on the taking of game;

27 (5) classifying game as game birds, song birds, big game
28 animals, fur bearing animals, predators, or other categories;

29 (6) methods, means, and harvest levels necessary to control

1 predation and competition among game in the state;

2 (7) watershed and habitat improvement, and management,
3 conservation, protection, use, disposal, propagation, and stocking of
4 game;

5 (8) prohibiting the live capture, possession, transport, or
6 release of native or exotic game or their eggs;

7 (9) establishing the times and dates during which the
8 issuance of game licenses, permits, and registrations and the transfer
9 of permits and registrations between registration areas and game
10 management units or subunits is allowed;

11 (10) regulating sport hunting [AND SUBSISTENCE HUNTING] as
12 needed for the conservation, development, and utilization of game.

13 * Sec. 4. AS 16.05.255(d) is amended to read:

14 (d) Regulations adopted under (a) of this section shall provide
15 that [, CONSISTENT WITH THE PROVISIONS OF AS 16.05.258,] the taking of
16 moose, deer, elk, and caribou by residents for personal or family
17 consumption has preference over taking by nonresidents.

18 * Sec. 5. AS 16.05.258 is amended by adding a new subsection to read:

19 (g) The Board of Fisheries and the Board of Game shall determine
20 which areas of the state are rural in character based on fish and
21 wildlife use, on the development and diversity of the economy, trans-
22 portation systems, communication links, community infrastructure,
23 educational and cultural institutions, and government institutions,
24 and on other similar factors that may be established by regulation.
25 The boards shall consider in the aggregate communities or areas that
26 are economically, socially, and communally integrated. A community or
27 area with a population of

28 (1) 2,500 or less is rural unless the community or area
29 possesses significant characteristics of a nonrural nature or is part

1 of an urbanized area;

2 (2) more than 2,500 but less than 7,000 may be rural or
3 nonrural, depending on its characteristics;

4 (3) 7,000 or more is nonrural unless the community or area
5 possesses significant characteristics of a rural nature.

6 * Sec. 6. AS 16.05.940(5) is amended to read:

7 (5) "commercial fishing" means the taking, fishing for, or
8 possession of fish, shellfish, or other fishery resources with the
9 intent of disposing of them for profit [,] or by sale, barter, trade,
10 or in commercial channels; [THE FAILURE TO HAVE A VALID SUBSISTENCE
11 PERMIT IN POSSESSION, IF REQUIRED BY STATUTE OR REGULATION, IS CON-
12 sidered PRIMA FACIE EVIDENCE OF COMMERCIAL FISHING IF COMMERCIAL
13 FISHING GEAR AS SPECIFIED BY REGULATION IS INVOLVED IN THE TAKING,
14 FISHING FOR, OR POSSESSION OF FISH, SHELLFISH, OR OTHER FISH RE-
15 SOURCES;]

16 * Sec. 7. AS 16.05.940(26) is amended to read:

17 (26) "rural area" means a community or area of the state
18 designated as "rural" under AS 16.05.258(g) [IN WHICH THE NONCOMMER-
19 CIAL, CUSTOMARY, AND TRADITIONAL USE OF FISH OR GAME FOR PERSONAL OR
20 FAMILY CONSUMPTION IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY OF THE
21 COMMUNITY OR AREA];

22 * Sec. 8. The division of legal services of the Legislative Affairs
23 Agency shall prepare a bill providing for the repeal of secs. 1 - 4, 6, 9,
24 10, and 12 of this Act. The bill shall be presented to the House and
25 Senate Rules Committees for introduction on the first day of the First
26 Session of the Eighteenth Alaska State Legislature.

27 * Sec. 9. The division of legal services of the Legislative Affairs
28 Agency shall prepare a bill containing appropriate amendments to the Alaska
29 Statutes, outside of AS 16.05, correcting references to "subsistence,"

1 "subsistence uses," "subsistence users," and similar terms in order to
2 conform to the provisions of this Act. The bill shall be presented to the
3 House and Senate Rules Committees for introduction on the first day of the
4 First Session of the Nineteenth Alaska State Legislature.

5 * Sec. 10. AS 16.05.090(c), 16.05.094, 16.05.258, 16.05.259, 16.05.-
6 330(c), 16.05.930(e), 16.05.940(26), 16.05.940(29), 16.05.940(30), and
7 16.05.940(31) are repealed.

8 * Sec. 11. Sections 5, 7, 8, and 9 of this Act take effect on the
9 effective date of a constitutional amendment relating to subsistence that
10 is approved by the voters in the 1990 general election.

11 * Sec. 12. Except as provided in sec. 11 of this Act, this Act takes
12 effect on the last legislative day of the Second Regular Session of the
13 Eighteenth Alaska State Legislature.

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By Sen. Kelly + Sturgis

Kelly

1 IN THE SENATE

2 SENATE BILL NO. 555

3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 A BILL

6 For an Act entitled: "An Act establishing the Commission on Subsistence
7 Use of Fish and Game; and providing for an effective
8 date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. COMMISSION ON SUBSISTENCE USE OF FISH AND GAME ESTABLISH-
11 ED. (a) There is established in the Department of Fish and Game the
12 Commission on Subsistence Use of Fish and Game. The commission consists of
13 nine members. Members of the commission serve without compensation, but
14 are entitled to per diem and travel expenses authorized for boards and
15 commissions under AS 39.20.180. Members of the commission serve until the
16 repeal of this Act as provided under sec. 3 of this Act.

17 (b) The nine members of the commission consist of

18 (1) the speaker of the house of representatives, or the speak-
19 er's designee;

20 (2) the president of the senate, or the president's designee;

21 (3) two members representing Alaska Natives, appointed by the
22 governor, who shall consider nominations made by the Alaska Federation of
23 Natives and other Native organizations;

24 (4) two members representing sport fishermen and hunters, ap-
25 pointed by the governor, who shall consider nominations made by the Alaska
26 Outdoor Council and other sport hunting and fishing organizations;

27 (5) two members representing commercial fishermen, appointed by
28 the governor, who shall consider nominations made by the United Fishermen
29 of Alaska and other commercial fishermen's organizations; and

1 (6) one member representing the public, appointed by the gover-
2 nor.

3 (c) The commission, by majority vote of the membership, shall elect a
4 chair and other officers it considers necessary from among its membership.

5 (d) In this section, "commission" means the Commission on Subsistence
6 Use of Fish and Game.

7 * Sec. 2. The Commission on Subsistence Use of Fish and Game shall
8 study the question of how to best resolve the issue of subsistence use of
9 fish and game in the state. The commission shall recommend to the legis-
10 lature definitions for "rural," "customary trade and barter," "wild renew-
11 able resources," and other key terms used in federal and state laws, and
12 shall make recommendations as to when a subsistence preference should be
13 implemented, and how and to whom the preference should be applied. The
14 commission shall report its findings and recommendations to the legislature
15 no later than the 10th legislative day of the First Session of the
16 Eighteenth Alaska State Legislature. The commission's report may include
17 recommended changes in state and federal laws and regulations.

18 * Sec. 3. This Act is repealed January 21, 1993.

19 * Sec. 4. This Act takes effect immediately under AS 01.10.070(c).
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A Constitutional Amendment for Subsistence

**Prepared by
Office of the Governor
P.O. Box A
Juneau, AK 99811-0101
465-3500**

Proposed Subsistence Amendments to the Alaska Constitution

Governor's Version (HJR 88 and SJR 78)

- Limits subsistence to rural residents
- Allows for allocation among rural residents when resources are not sufficient for all rural residents.
- Reinstates existing state subsistence law.
- Complies with federal law.
- Resolves the *McDowell* case.
- Most closely tracks existing federal and state laws. Allows state to retain management of fish and game.

House Judiciary Version (HJR 74, Judiciary)

- Provides for a preference for subsistence uses by rural residents.
- Does not preclude subsistence use by residents in non-rural areas.
- Reinstates existing state subsistence law.
- Complies with federal law.
- Resolves the *McDowell* case and once technical amendment to intent language is added in Section 2, allows state to retain management of fish and game.

House Resources or "Hoffman" Version (HJR 74, Resources)

- Gives legislature authority to enact laws relating to subsistence uses which are consistent with valid federal law in order to retain management of fish and wildlife resources.
- Existing valid federal laws require a rural preference.
- Requires technical amendment to reinstate existing state law (except for definition of "rural").
- Resolves the *McDowell* case and, once technical amendment is added, would allow state to retain management of fish and wildlife.

Senate Resources Version (SJR 78, Resources)

- Provides for a preference for subsistence uses by rural residents.
- Does not preclude subsistence use by residents in non-rural areas.
- Reinstates existing state subsistence law, except for rural definition.
- Complies with federal law.
- Resolves the *McDowell* case and allows state to retain management of fish and wildlife.

The Problem

On December 22, 1989, the Alaska Supreme Court issued a decision in *McDowell v. State* that the rural preference in the state subsistence law was unconstitutional. This ruling makes it constitutionally impossible for Alaska to enact a law consistent with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). That section makes federal officials responsible for providing for subsistence uses of fish and wildlife by rural residents on federal public lands unless, in laws of general applicability, the state provides for such uses. **In order to retain unified state management of fish and wildlife on all lands in Alaska, a constitutional amendment is the only viable solution available to Alaskans.**

Objectives

- Any solution must meet the following objectives:
- The state must retain its traditional role as manager of the fish and wildlife resources in Alaska in order to ensure the continued health and viability of those resources, as well as to make sure management of the resources is responsive to the needs of Alaskans.
- There should be a priority for subsistence uses of fish and wildlife by those Alaskans who most rely on such uses, the majority of whom live in rural areas of the state.
- The greatest certainty and predictability must be given to all fish and wildlife users, requiring that potential management conflicts between state and federal management agencies be minimized.

Failure to Act

A proposed constitutional amendment must be approved by two thirds of both the House and Senate before being placed on a statewide, general election ballot. If the Legislature fails to act on this amendment, there will be no vote of the people in November to determine if there should be a rural preference. As a result, the state will not be able to come into compliance with federal law for at least over two years (until the next statewide election). During that time and beginning on July 1, there will be federal management of subsistence uses of fish and wildlife over two-thirds of Alaska. The exact extent of federal authority will be the subject of litigation for years to come. There is no question that state residents will lose opportunities currently provided by the state for hunting and fishing.

What Federal Management Means

On July 1, the federal government assumes management authority over fish and wildlife on federal lands in order to provide for subsistence uses. Since the federal agencies do not plan to release their interim plan until June 11, we do not know for sure what that plan means for Alaskans. However, we do know some things:

- That the federal definition of rural will most likely be more restrictive than the definition the state has used in the past, meaning that fewer Alaskans will be granted the subsistence priority.
- That the geographic scope of federal jurisdiction will most likely be narrow to start with (primarily wildlife only when on federal lands), but will be subject to intense litigation and could very well be expanded to include all fish in all navigable waters and the territorial sea, as well as wildlife that migrate between federal and state lands.
- That federal land management agencies have different standards for measuring a fish or wildlife population's health and viability. These differences could result in a more conservative management approach, resulting in fewer hunting and fishing opportunities for Alaskans.
- That federal agencies are more susceptible to national political pressures exerted by animal rights groups and anti-hunting and anti-trapping forces.
- That the uncertainties created by dual management could make it difficult to determine what surpluses are available for harvest and result in more conservative management approaches by both the state and federal governments.
- That federal management will be conducted by a Federal Management Board and that Alaskans will have significantly less involvement in the regulatory process.
- Although the federal agencies say they want to cooperate with state fish and game managers, they have designed a stand-alone program that gives them virtual veto power over all fish and game management decisions on federal lands, or two-thirds of the state. For example, if the state approved regulations allowing a higher sport harvest than federal officials deemed appropriate, the federal managers could veto that allowable harvest.
- Although federal agencies do not plan to contract with the state, they have acknowledged contracting with tribal organizations is under consideration.

Amending the State Constitution is the Only Answer

Amending the state constitution is the cleanest way to allow the state to again be consistent with ANILCA and provide a subsistence priority for rural residents. Such an amendment would ensure that the state would retain management of fish and wildlife on federal land, a goal which played a major role in the statehood movement. In addition, it would permit the state to ensure that rural residents most reliant on fish and wildlife have the necessary opportunities to take those resources when needed. The state has attempted to do so for more than 10 years now, only to be stymied by one court decision after another. By authorizing a subsistence priority for rural residents in the Alaska Constitution, the state would have clear authority to finally implement what has been state policy for more than a decade.

Other Options

Short of amending the state constitution, there are two other options available to the state in order to retain management of fish and wildlife:

- **Challenge ANILCA in federal court**

The administration could go to court over the constitutionality of the requirements of ANILCA. However, a Department of Law analysis (see attached letter from Mr. Thomas Koester, Assistant Attorney General) indicates that such a challenge has little chance of success. In addition, the state has supported the rural subsistence preference contained in ANILCA for over 10 years and such a legal challenge would be totally contrary to past and current state policy. Another suggestion has been to challenge ANILCA on the basis that the definition of subsistence is vague. However, Congress very clearly defined subsistence uses in ANILCA as "the customary and traditional use of fish and game" in rural areas for food, crafts, and customary sharing and exchange.

- **Amend ANILCA**

ANILCA was crafted as compromise legislation which balanced a number of competing interests. The state participated in the final compromise. Amending ANILCA would require an agreement among the state, the Alaska Native community, and the Alaska Congressional delegation at the very minimum. There is virtually no chance of reaching any kind of agreement on how ANILCA could be changed to be consistent with the state's constitution, yet still provide for subsistence uses of rural residents. Another option would be to ask Congress to amend ANILCA to clearly preempt state law and require the state to give rural residents a subsistence priority statewide, in spite of the Supreme Court's interpretation of our state constitution. Because of state sovereignty principles, this was not considered to be an option that the state should willingly support.

Some people have recommended other options, but these have been rejected by the state:

- **Use current management tools creatively to benefit rural residents**

Prior to the state's 1978 statute giving subsistence uses a priority, the Boards of Fisheries and Game had the authority to provide for subsistence uses using the traditional regulatory tools of methods and means. Some people, including the Alaska Outdoor Council, have argued that these tools could be used creatively to explicitly favor rural residents. However, any direct attempt by the boards to implement such a priority through regulations would be subject to the same constitutional challenge as the rural preference struck down in *McDowell*. In addition, simply using these tools would not satisfy the requirements of ANILCA, resulting in federal takeover. Finally, improved means of access throughout the state have greatly reduced the ability to address subsistence uses through such regulatory means.

- **Amend both state and federal law**

Governor Cowper originally proposed amending state law to provide a subsistence priority through some kind of individualized permitting system, and then amend ANILCA to conform to the state law. State officials went to great lengths attempting to develop a system that would be consistent with the state constitution. This approach was eventually rejected because 1) it would be extremely burdensome and intrusive on those Alaskans it was intended to protect; 2) it would create a large, cumbersome bureaucracy with a cost of many millions of dollars a year; 3) it was estimated that at least 100,000 individual determinations would need to be made, all of them subject to appeals and litigation; 4) it would require a minimum of three to four years to establish such a system and to make the initial determinations; and 5) there was a serious question whether such a system would be consistent with the Alaska Constitution as interpreted in *McDowell*. Without an amendment to ANILCA, which would be difficult to achieve, this approach would still result in the state being out of compliance with federal law, resulting in federal takeover of fish and wildlife management.

State Actions to be Taken if the Legislature Fails to Act

The most pressing issue facing the Department of Fish and Game is how to prepare for the upcoming summer and fall hunting seasons. Those preparations, which will include an emergency meeting of the Board of Game, are currently on hold until the federal government announces its rules for July 1 on, and until the Superior Court rules on the severability question. At issue is whether the entire subsistence law was struck down by last December's Supreme Court decision or just the portion that provides for a rural preference. The state has requested the court to expedite its ruling.

If the Court rules that the subsistence law is still valid, but that all Alaskans qualify as subsistence users, the Board of Game and the Department of Fish and Game will review hunts around the state to determine whether seasons and bag limits will need to be adjusted to accommodate the increased number of people eligible for subsistence hunting and fishing. Restrictions may need to be placed on subsistence harvests, or general non-subsistence hunting may need to be capped, depending on how the Superior Court rules. On the other hand, the board may be permitted to provide for subsistence uses on state lands, but without a priority.

Of particular concern are the approximately 180 drawing permit hunts which are scheduled, beginning in early August. Administration of these hunts is time-consuming. Once the department knows which hunts will occur and with what seasons and bag limits, approximately two months is needed to process them. Last year more than 25,000 people were drawn for the 178 permit hunts that were held. Over 80,000 applications for the hunts were submitted. The state still does not have enough information to proceed with the normal process for this year's permit hunts. As a result, this year's hunts will be delayed, but by how long is still unknown.

The other unknown is the federal government. Since many wildlife populations migrate back and forth between state, federal and private lands, it is absolutely essential to know what federal plans are. For example, if a certain number of animals will be taken from a particular caribou herd while it's on federal lands, the state will need to adjust the allowable take on adjacent state and private lands accordingly. The state will not be able to manage on state and private lands until the federal government makes its decisions public.

Answers to Some Other Arguments

"Alaskans don't support a subsistence priority." This is simply not true. Time and again, Alaskans have consistently shown their support for a subsistence priority for rural residents: in the 1978 subsistence statute, throughout the ANILCA legislative process, in the 1982 statewide ballot referendum, and in the 1986 subsistence statute. Recent polls show that Alaskans support a rural preference by a 2 to 1 margin.

"The Supreme Court gave all Alaskans equal rights, and a constitutional amendment would take those rights away." Not true also. Governor Cowper's proposed constitutional amendment would merely exempt the subsistence priority law from the constitution's equal access provisions. The amendment would clarify that the Legislature does have the authority to grant a preference based on residency for subsistence uses. Granting a preference or an exemption based on residency is nothing new; many state programs treat people differently because of where they live in the state, and rightfully so.

"The federal government will merely contract with the state to run the existing program; nothing will change." The federal government has designed a stand-alone program in order to manage fish and wildlife for subsistence uses, and has no intention of contracting those responsibilities out to the state." This program gives the federal agencies absolute veto authority over every management decision made by state fish and game managers on federal lands. Federal agencies have also indicated they are considering contracting with tribal organizations such as regional, non-profit Native corporations, for certain functions. The state supports a unified management system. Dual management will cause major problems and multiple management will be a nightmare.

Kenaitze Problem: Rural Definition

The Problem: The state definition of "rural area" is inconsistent with ANILCA. Either the state or the federal law must be changed for the state to retain fish and game management.

Relation to *McDowell*: This inconsistency is a separate problem from the *McDowell* problem (constitutional prohibition of a rural priority). Until *McDowell* is fixed, the state cannot deal with a rural priority, either to define it in state law, or to attempt to convince Congress to define it.

ANILCA: The federal subsistence law allows the state to retain management of fish and game on federal lands if the state has the same definition of and priority for subsistence uses as the federal law. ANILCA defines "subsistence uses" as customary and traditional uses by "rural Alaska residents," but does not define "rural."

State Law: In the 1986 state subsistence law, the legislature defined "rural area" as places in the state in which the noncommercial use of fish and game is "a principal characteristic" of the economy. This definition was specifically certified by the Department of Interior as being consistent with ANILCA and its legislative history.

Kenaitze Challenge: The state definition of "rural area" was challenged in the Kenaitze case. Plaintiff argued that as used in ANILCA, "rural" was tied to population levels or densities.

District Court Ruling: The U.S. District Court in Anchorage ruled in the state's favor, holding that the state definition was consistent with ANILCA.

Ninth Circuit Decision: The federal court of appeals reversed, holding that "rural" as used in ANILCA must have some link to population level, and that the state's reliance on federal legislative history and on the Secretary of Interior's certification of consistency had been misplaced. The state unsuccessfully petitioned for review by the U.S. Supreme Court.

Result of Inconsistency: Under the ninth circuit ruling, the state definition of subsistence is no longer consistent with ANILCA, because of the inconsistency of the rural definition. Thus, unless either the state or the federal law is changed, the state cannot continue to manage fish and game on federal land.

Attempt to Change ANILCA: In the spring of 1989, the state, with the help of Congressman Young, attempted to technically amend ANILCA by incorporating the state's definition of "rural area" into the federal law. This attempt was stalled by opposition from rural groups.

McDowell: While the state was evaluating its options, the Alaska Supreme Court in *McDowell* ruled that under the Alaska Constitution, the state cannot define and provide for subsistence in terms of rural. This removed the state's ability to deal with the definition of "rural" in its own statutes, and removed the state's leverage in attempting to obtain a definition of "rural" in ANILCA, because the state can no longer constitutionally manage for subsistence on a rural basis.

"Rural" in ANILCA: Although the appeals court decided that the state's definition of "rural area" was not consistent with ANILCA, and that a consistent definition would have to involve population levels, the court did not state what such a definition would look like. Since that time, the U.S. District Court (which has the case again on remand) has refused to issue further guidelines to an acceptable definition, but has also decided that the ninth circuit decision does not necessarily mean that the entire Kenai Peninsula is rural.

"Rural" as of July 1, 1990: In anticipation of federal management after July 1, the federal agencies are considering a definition of rural which would incorporate two population levels; as we understand it, communities with populations above 7,000 would not be rural, communities with populations of less than 2,500 would in most cases be rural, and communities in between may be rural depending on such factors as fish and game use, development and diversity of the economy, transportation, communication, infrastructure, educational and cultural institutions.

Summary: The definition in the 1986 state statute of "rural area" has been found inconsistent with ANILCA, but the state cannot replace that definition with another one unless the *McDowell* constitutional problem is addressed first. Further there is little guidance about what definition would be consistent with the ninth circuit's reading of ANILCA.

Chronology of the State's Subsistence Law

- 1978 **State's first subsistence law:** The state passes its first subsistence law which, once sustained yield has been ensured, requires that subsistence uses be allowed, with a priority if necessary. The law defines subsistence uses as "customary and traditional uses" of fish and game for specific purposes such as food.
- 1980 **ANILCA:** Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves and wildlife refuges. Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.
- 1982 **Consistency:** The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses, and the Department of Interior certifies the state's consistency with ANILCA.
- 1982 **Repeal initiative:** A statewide effort to repeal the subsistence law fails by a large margin at the polls.
- 1983 **Subsistence suit:** Several Alaskans file suit against the state subsistence law. In *McDowell v. State*, they argue that the law denies subsistence privileges to some urban residents who have long depended on fish and wildlife resources, while granting those privileges to some rural residents who do not need it, and for that reason the law is unconstitutional.
- 1985 **Madison decision:** The Alaska Supreme Court, in the *Madison* decision, rules that state regulations limiting subsistence to rural residents are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions on ANILCA and threatens takeover of fish and wildlife management on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.
- 1986 **New subsistence law:** The Alaska Legislature enacts a new law limiting subsistence to rural residents. In state superior court, the *McDowell* suit is amended to challenge the new subsistence law. The Kenaitze Indian Tribe also files a suit in federal court under ANILCA to protest the classification of the Kenai Peninsula as an urban area.
- 1987 **Kenaitzes initially denied:** A federal judge rules against the Kenaitzes, saying the state subsistence law's definition of rural agrees with the use of the word "rural" in federal law.
- 1987 **McDowell initially denied:** The state superior court holds that the 1986 subsistence law is constitutional.
- 1988 **Kenaitze decision reversed:** The Ninth U.S. Circuit Court of Appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA. The U.S. Supreme Court ultimately denies the review.
- 1989 **Kenaitze negotiations:** Under direction by the federal district court in a preliminary injunction, the state and the Kenaitze tribe agree to a one-year educational fishery, for plaintiffs in that case only, until a permanent subsistence solution can be found. The state initially believes that a simple amendment to ANILCA, which changes the federal definition of rural to match the state definition, is the best solution. However, that effort failed, and negotiations begin toward reaching a consensus opinion.
- 1989 **McDowell decision:** On December 22, the Alaska Supreme Court rules the 1986 state subsistence law is unconstitutional because it excludes urban residents from subsistence activities.
- 1990 **Stay granted:** On January 5, the Alaska Supreme Court granted the state a stay in the *McDowell* decision until July 1 with regard to existing regulations. As a consequence, all existing regulations are in effect and are enforceable until that time.
- 1990 **Reconsideration denied:** On February 9, the State of Alaska petitions the court requesting reconsideration of the *McDowell* decision. That request was denied.
- 1990 **Legislature adjourns:** On May 8, the Alaska Legislature adjourned failing to take action on a proposed constitutional amendment thus triggering significant federal management of fish and wildlife in Alaska on July 1.

FEDERAL SUBSISTENCE MANAGEMENT PROGRAM

Questions & Answers

QUESTION: Why is the Federal government assuming responsibility for managing subsistence hunting, trapping, and fishing on Public lands 7/1/90?

ANSWER: Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111-3126) requires the Secretary of the Interior and the Secretary of Agriculture to implement a program to grant preference in favor of subsistence uses of fish and wildlife resources on public lands unless the State of Alaska implements a subsistence program consistent with ANILCA's requirements. The State implemented such a program which the Department of the Interior found to be consistent with ANILCA. In December 1989, however, the Alaska Supreme Court ruled in *McDowell v. State of Alaska* that the rural preference in the State subsistence definition, which is required by ANILCA, violated the Alaska Constitution. The Court stayed the effect of the decision until July 1, 1990.

QUESTION: What are "Public Lands"?

ANSWER: "Public lands" applies to public lands as defined in Section 102(3) of ANILCA. Lands validly selected by the State or Native corporations formed under the Alaska Native Claims Settlement Act are excluded from the public lands definition in Section 102(3).

QUESTION: Why does ANILCA deal with subsistence?

ANSWER: Congress wanted to make sure that Alaskans can continue to take part in subsistence activities. Following the passage of the Alaska Native Claims Settlement Act, Congress decided that Federal and State agencies needed to provide for subsistence uses. Congress made provisions in ANILCA to ensure that State and Federal agencies would give adequate consideration to subsistence uses.

QUESTION: When will the State regain management of subsistence on Federal lands?

ANSWER: The State may regain control of subsistence management when there is no longer a conflict between ANILCA Title VIII and the State Constitution.

QUESTION: What is ANILCA Title VIII?

ANSWER: ANILCA is the acronym for the Alaska National Interest Lands Conservation Act of 1980. Title VIII is the section of ANILCA which deals with subsistence.

QUESTION: How can ANILCA be changed?

ANSWER: ANILCA can be amended by Congress.

QUESTION: How will the Federal government implement their responsibility for managing subsistence hunting, trapping, and fishing on Public lands?

ANSWER: The Secretary of the Interior and Secretary of Agriculture will jointly develop subsistence regulations and are responsible for implementing the subsistence provisions of ANILCA. The US Fish & Wildlife Service (Service) was delegated the lead responsibility for coordinating the other Federal agencies to develop and implement the Federal subsistence management program. Five Federal agencies, including USF&WS, USFS, BLM, BIA, and NPS, are responsible for management of lands covered by Title VIII. Other Federal agencies with subsistence management interests are the U.S. ARMY, U.S. Air Force, and National Marine Fisheries Service.

Given the short time to prepare these regulations, the Federal program will minimize change to the State program consistent with meeting the Federal government's responsibilities under Title VIII. These regulations will be published in the Federal Register prior to 7/1/90.

A Federal Subsistence Board, made up of the Regional or State Directors of the Fish and Wildlife Service, National Park Service, Forest Service, Bureau of Land Management, and Bureau of Indian Affairs, will broadly execute the Secretary of the Interior's and Secretary of Agriculture's subsistence responsibilities which include: Set subsistence seasons and bag limits; make determinations of rural and non-rural communities and areas; determine customary and traditional subsistence uses; and establish and determine the membership of Regional Advisory Councils and local Advisory Committees specific to public lands.

QUESTION: What will be the process for promulgating permanent Subsistence management regulations for Public lands in Alaska?

ANSWER: If the State appears to be unable to resume subsistence management on public lands by December 31, 1990, the Federal government will begin developing permanent regulations shortly after the interim regulations take effect 7/1/90. Public comment will be solicited on the temporary regulations which will serve as proposed rules. Public meetings will also be held in the affected areas to solicit comments. The federal government will then revise the temporary regulations in response to public comments and agency and legislative mandates and publish them as final regulations.

Recommendations and information concerning the management of hunting and fishing for subsistence priority on public lands will be requested of existing advisory councils and advisory committees. If the Secretary of the Interior determines that existing regional advisory councils, or local advisory committees are inadequate to fulfill the functions outlined in Section 805 of ANILCA, then Federal subsistence advisory councils and local advisory committees will be established to focus on subsistence uses specific to public lands. Regulation proposals may originate from a variety of sources, but emphasis will be on the advisory council and committee system.

While the public may comment and interact directly with the Board, it is the intent that most public comments be channeled through the councils and committees.

QUESTION: What priority will the Federal Subsistence Board consider in establishing fish and wildlife uses on public lands?

ANSWER: Highest priority will be for the maintenance of "Healthy" fish and wildlife populations. Second priority will be for providing for all "Customary and Traditional" subsistence uses of fish and wildlife. U.S. District Court's decision in *Bobby v. State of Alaska* emphasized the need for sound data on fish and wildlife populations and on subsistence use before restricting subsistence harvest.

QUESTION: How will the Federal Subsistence Board determine if a fish or wildlife population is "Healthy"?

ANSWER: A "healthy" population is stable, in balance with its ecosystem, and without a long term, irreversible, downward trend. Such populations may be non-indigenous. Such determinations shall recognize that customary and traditional subsistence uses by local rural residents may be a natural part of such ecosystems.

QUESTION: What is the State's role in this Federal takeover process?

ANSWER: Alaska Department of Fish & Game has broad continuing responsibilities for dealing with subsistence, as well as sport and commercial take statewide. The State Boards of Fisheries and Game will continue to set seasons and bag limits for non-subsistence harvest of fish and wildlife on Federal lands. The State Boards may recommend seasons and bag limits for subsistence harvest of fish and wildlife on Federal lands to the Federal Subsistence Board. Federal Subsistence regulations promulgated in 36 CFR and 50 CFR Part 40 anticipate an interactive process between the State fish and game regulatory procedure and the Federal Subsistence regulatory process. Because of its State Constitution the State cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. The State can facilitate harvest by rural residents through various regulations dealing with means and methods of take and perhaps other mechanisms.

If rural residents cannot obtain their customary and traditional take and uses of fish and wildlife because of State regulatory impediments, the Federal Subsistence Board will be required to modify or negate State regulations as they apply to Public lands. However, if State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations should closely parallel State regulations.

QUESTION: Who will qualify as a Subsistence user?

ANSWER: Local "rural" residents who have a "customary and traditional" subsistence use of fish or wildlife. The Federal Subsistence Board will determine which communities or areas are rural. The Federal Subsistence Board will also determine which communities or areas have customary and traditional use of fish and wildlife. The subsistence priority will not be based on race, color, creed, or national origin.

A rural resident is one who resides in an area or community with a population of 2,500 or less; or 2,500 - 7,000 if it possesses the characteristics of a rural area or community and is not part of an urbanized area. Rural determinations will consider population; size; economic size and diversity; fish and game

use; and development and variety of transportation, communication links, community infrastructure, demographics, educational and cultural institutions and government facilities.

"Customary and traditional uses" will be identified as a long-term, consistent pattern of use for subsistence purposes, which provides substantial economic, cultural, social, or nutritional elements of the subsistence user's life, and which are exemplified by the following characteristics:

- (1) methods and means of harvest which reflect efficiency and economy of effort and cost, as conditioned by local circumstances;
- (2) means of handling, preparing, preserving, and storing fish or game which have been traditionally used by past generations, but not excluding recent technological advances where appropriate;
- (3) the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;
- (4) the hunting or fishing effort or the products of that effort are distributed or shared among others according to custom and tradition, including customary trade, barter, sharing, and gift-giving.

QUESTION: What are "subsistence uses"?

ANSWER: ANILCA defines subsistence uses as 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 non-edible by-products of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal family consumption; and for customary trade.

QUESTION: Why is there a subsistence priority?

ANSWER: ANILCA requires that residents of rural areas be given priority use of fish and wildlife on Federal lands. This priority is given only when there is not enough fish or wildlife to satisfy everyone's needs. In an area where there is not enough fish or wildlife for everyone, rural residents with customary and traditional uses of that fish or wildlife will be the last group of users to be restricted.

QUESTION: Will sport and commercial taking of fish and wildlife still be allowed on Federal lands?

ANSWER: Yes. If subsistence uses are adequately provided for, then sport and commercial hunting and fishing will be allowed. National Parks will continue to be closed to sport hunting.

QUESTION: How do we find out which lands are under Federal subsistence management?

ANSWER: Most Federal and State land management offices have maps showing Federally managed areas. Most offices of Alaska Department of Fish & Game, Fish and Wildlife Service, Forest Service, and Bureau of Land Management have maps.

QUESTION: Will there be one set of regulations for all Federal lands or will each Federal agency have its own set of regulations?

ANSWER: There will be one set of general regulations which apply to all Federal lands. Individual agencies may set additional regulations which apply only to their lands. For example, individual agencies will continue to regulate access on lands they manage.

QUESTION: Will the Federal Subsistence Management Board adopt regulations for assuring 'access' to public lands for subsistence take of fish and wildlife as provided for in Section 811 of ANILCA?

ANSWER: No. Decisions and regulations concerning access will be the responsibility of the respective Federal land manager. Appropriate means of access include snowmobiles, motorboats, and other means of surface transportation traditionally employed for subsistence hunting and fishing. Currently, access by foot, snow machine, and boat is allowed on public lands, but the use of all-terrain vehicles is on a site-specific basis. In National Parks and Monuments only, "...subsistence uses without use of aircraft as a means of access..." is allowable (48 FR 31849, June 17, 1981). The Park Service currently provides for "certain exceptions" which are managed under special permits issued by park superintendents for unusual circumstances, like matters involving safety.

QUESTION: How will the Federal Subsistence Board likely regulate to achieve subsistence hunting, trapping, and fishing priority on public lands?

ANSWER: Closure of public lands through individual agency closure authority may be used where all sport hunting or fishing seasons affecting a given area have to be curtailed to achieve subsistence priority for that area. The Board may also establish sport fishing and hunting seasons and bag limits on public lands, different from the State seasons and bag limits, in order to achieve subsistence priority. The Board may also defer to State closures which serve to achieve the objectives of ANILCA.

QUESTION: Must subsistence users on public lands have a State hunting, trapping, or fishing license to subsistence hunt, trap, or fish?

ANSWER: Yes. All persons engaged in subsistence hunting, trapping, or fishing on public lands must possess State of Alaska licenses, permits, harvest tickets, and tags and must comply with State reporting and validation requirements. In addition, such persons must possess any Federal licenses or permits required for such activities. Contact the Federal land management office nearest the area you want to hunt or fish in to find out if there is a special permit required.

QUESTION: Can a hunter harvest one bag limit of a species under State regulations and an additional bag limit of that same species under Federal regulations?

ANSWER: No. Hunters may take only one bag limit for each species. Subsistence bag limits and general bag limits are not cumulative.

QUESTION: Where will regulation booklets be found that list subsistence seasons and bag limits for Federal lands?

ANSWER: Federal regulations will be available from hunting/fishing license vendors throughout the State after July 15th.

QUESTION: Will the Federal subsistence program manage subsistence fisheries that take place in navigable waters, such as the subsistence salmon fisheries on the Yukon and Kuskokwim Rivers?

ANSWER: No. Federal managers currently do not plan to manage subsistence fisheries in State navigable waters.

QUESTION: Is the Endangered Species Act or the Marine Mammal Protection Act subservient to Title VIII of ANILCA?

ANSWER: No.

QUESTION: Will the Federal Subsistence Management Board adopt regulations for the take of wild renewable resources other than fish and wildlife?

ANSWER: No. Because of past management and the desire to avoid confusion, wherever possible, regulation of the use of other wild renewable resources will be left to the individual Federal land managing agency.

QUESTION: Can decisions of the Federal Subsistence Board be appealed?

ANSWER: Yes. Any affected person may file a request for reconsideration. The Board shall make a final decision on the request within 45 days. The Board is, however, the final administrative remedy. Further relief is only available through the courts. Decisions by a Federal agency outside its role on the Board are subject to appeal under the appeal procedures of that agency.

SUMMARY

of

TEMPORARY SUBSISTENCE MANAGEMENT REGULATIONS

FOR FEDERAL PUBLIC LANDS IN ALASKA

BACKGROUND:

Proposed temporary regulations were issued June 8, 1990 for the federal management of subsistence uses of fish and wildlife on federally-owned public lands in Alaska. (Throughout this document, the term "public lands" refers to those lands owned or administered by the Federal government.)

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 requires a priority use of fish and wildlife for subsistence uses over uses for sport and commercial purposes on public lands in Alaska.

The State had such a program in place, but in December, 1989 the Alaska Supreme Court ruled that rural preference in the State subsistence statute violated the Alaska Constitution. The Court delayed implementation of the decision until July 1, 1990.

As a result of that decision, the Department of the Interior and the Department of Agriculture will be required to manage for subsistence priority on public lands to meet the requirements of ANILCA. The U.S. Fish & Wildlife Service has been delegated the lead responsibility for developing a contingency plan with other Department of Interior and Department of Agriculture agencies which fulfills their subsistence responsibilities.

These temporary rules will affect the subsistence uses of fish and wildlife on public lands in Alaska managed by the Fish & Wildlife Service, National Park Service, Bureau of Land Management, Forest Service, Bureau of Indian Affairs, Air Force, Army and various other federal land managing agencies.

If a State Constitutional amendment, which allows rural preference for subsistence, is passed during the upcoming special session of the State Legislature, and if it is ratified by the voters in the State's November election, the State would presumably be back in compliance with ANILCA. The State would then once again assume responsibility for subsistence management of fish and wildlife on federal lands.

Because the subsistence preference under State law will end July 1, 1990, this has created a very short time frame for the Federal Government to act in developing regulations and implementing a subsistence management program for public lands July 1.

In April, a Notice of Intent to Propose Rules was established in the Federal Register, and public comments were solicited. Because of the short time available, the opportunity for public review and comment was limited. Seventy-two written comments were received, and were taken into account in developing these proposed regulations.

The proposed regulations were published in the Federal Register on June 8, 1990, and the comment period ends June 18. Given the short time to prepare these regulations, and in anticipation that the State will be able to re-establish subsistence management, the federal regulations minimize change to the State program, but ensure that the federal requirements under ANILCA are met. To do otherwise would be extremely disruptive to subsistence users and create unnecessary chaos if and when the State is again able to assume subsistence management.

Major changes to existing State seasons and bag limits are not anticipated. Should the federal government be required to retain management responsibility beyond this year, changes to the seasons and bag limits will be considered only after review by local and regional advisory councils and public comment.

These temporary regulations will remain in effect until December 31, 1991 (18 months), or until the State subsistence management program is certified by the Secretary of Interior to be in compliance with direction contained in ANILCA, whichever comes first. The development of permanent regulations, which is expected to start later this year, will involve extensive public interaction and comment and will be completed by December 31, 1991.

SPECIAL ISSUES:

Cooperation with the State: Because the Federal Government intends to minimize disruption to traditional State regulation and management of fish and wildlife, a high level of coordination and cooperation between the State and Federal regulatory programs is anticipated. A memorandum of agreement will be developed with the State, and it will address coordination of the State and Federal fish and wildlife management programs.

Definition of Public Lands: Lands affected by these regulations are federal lands, but exclude lands selected by the State or Native Corporations. This meets the definition of public lands in ANILCA which excludes validly selected lands in its public lands definition. Even though some of the selected lands will not be conveyed to the State or to Native Corporations because of over-selection, none of the selected land will be considered public lands for subsistence management purposes.

Federal Subsistence Board: The regulations set up a Federal Subsistence Board which will function similarly to the State Boards of Fisheries and Game. The Board will broadly execute the subsistence requirements under ANILCA which include:

1. Maintain healthy fish and wildlife populations.
2. Set federal subsistence seasons and bag limits.
3. Make determinations of rural and non-rural communities and areas.
4. Determine customary and traditional subsistence uses.
5. Establish and determine the membership of regional and local advisory committees specific to public lands.

Board membership is comprised of the regional or State directors of the Fish & Wildlife Service, National Park Service, Forest Service, Bureau of Land Management, and Bureau of Indian Affairs.

Advisory Structure: Regional and local advisory committees are an important part of the ANILCA requirements for subsistence management; however, the existing State advisory system has broad responsibilities for dealing with subsistence take and uses as well as sport and commercial take statewide. These regulations require the Secretary of Interior to determine if the existing advisory structure meets the ANILCA requirements. This determination must be made by June, 1991. Pending the Secretary's decision, the Federal Subsistence Board will rely on the existing advisory structure and public comment.

Definition of Rural: The definition of rural is, perhaps, the key element in these regulations. ANILCA did not define rural, and the State has wrestled with the rural definition since passage of ANILCA. A court ruling in 1988 stated that the rural definition in the State's Subsistence law was not consistent with ANILCA and the common meaning of the term rural.

Because there are a number of factors which determine whether a community is rural or not, population alone cannot be used for definition. These regulations adopt the State's determinations of rural or non-rural until December 31, 1990, unless superseded by determinations of the Federal Subsistence Board.

Access: Reasonable access for subsistence use was provided for in ANILCA. Generally, access by foot, snow machine, aircraft, and boat is allowed on public lands, but the use of all-terrain vehicles is on a site-specific basis. Aircraft access is prohibited in National Parks and Park Monuments with certain exceptions. Decisions and regulations concerning access are the responsibility of the respective federal land manager. Correspondingly, information on access is available from the federal land manager.

REGULATION SUMMARY

Subpart A - General Provisions: The first part of the regulations outlines the purpose of the regulations for federal subsistence management on public lands in Alaska, the authority which is the Alaska National Interest Lands Conservation Act. It also provides definitions used in the regulations.

Subpart B - Program Structure: The second section of the regulations outlines the makeup of the Federal Subsistence Board and its duties. It also outlines the structure of the regional and local advisory councils and committees should they be set up after the Secretary of Interior determines the adequacy of the existing State of Alaska advisory structure.

This section also outlines the Federal Subsistence Board's relationship with federal agencies, providing for a single set of regulations to apply to subsistence on public lands. It also addresses the relationship with the State of Alaska, providing that State of Alaska fish and wildlife regulations apply to public lands, except for the subsistence regulations.

This section further provides for the Federal Subsistence Board's determination of a healthy population of fish and wildlife. This determination is based upon the maintenance of fish and wildlife resources and their habitats in a condition which assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems and minimizes the likelihood of irreversible or long term adverse effects upon such populations and species.

Rural Determinations are outlined in this section also. The Federal Subsistence Board will determine the rural or non-rural status of all areas or communities within Alaska no later than December 31, 1990. Pending such determinations, each area or community will retain its rural or non-rural status under Alaska law. The general guidelines for rural and non-rural are as follows:

- A community with a population of 2500 or less is considered rural.
- A community with a population of 7000 or more is considered non-rural.
- Communities with a population between 2500 and 7000 will be reviewed first.
- Population data from the most recent census will be used for the determination process.

Other factors besides population will be used to determine a community's rural or non-rural status. These include fish and wildlife use, development and diversity of their economy, transportation, communication links, community infrastructure, educational and cultural institutions, and government institutions.

For determining whether subsistence uses are CUSTOMARY AND TRADITIONAL, the Federal Subsistence Board will consider such factors as length, consistency, and pattern of use, reliance on subsistence, methods and means of take, passage of knowledge from generation to generation, and distribution or sharing. Additional items in this section include provision for public comment on regulations, emergency closures to subsistence hunting, and appeals.

Part C - General Requirements: This section addresses subsistence use qualifications, licenses, permits, tags, and fees, and penalties. The taking of fish and wildlife on public lands for subsistence uses is restricted to Alaska residents of rural areas or communities, and subsistence users on public lands must possess State of Alaska licenses, permits, harvest tickets, and tags and must comply with reporting and validation requirements.

Subpart D - Subsistence Hunting, Trapping, and Fishing: This section very closely follows existing State fish and Game regulations. In many cases the language is identical to state regulation or modified so it applies only to this federal program on public lands. The regulations note particular State provisions from which they were derived.

Definitions for subsistence hunting and trapping are included, specific prohibitions for subsistence use are included for both small and large game animals, and for fur animals and furbearers.

Additional requirements outline possession and transportation, evidence of sex and identity, sealing of bear skins and skulls, sealing of skins, prohibition on use of game as food for dog or furbearer or as bait.

Subsistence taking of fish and wildlife shall not be considered an emergency taking and nothing in these regulations prohibit a person from taking wildlife in defense of life or property.

The remainder of this section outlines requirements and definitions for subsistence fishing, including types of fish, methods and means of take, legal types of gear, and requirements for shellfish. The bag limits specified for fish and shellfish for subsistence season and the state bag limit set for a State general season for the same species are not cumulative. A person or group may not take the bag limit under a subsistence season and then take an additional bag limit under the State's general season.

June 6, 1990

MEMORANDUM

TO: DAVID RAMSEUR, Press Secretary
NORMAN COHEN, Department of Fish and Game

FROM: JAMES E. TORGERSON, Special Assistant Attorney General

THROUGH: JOHN W. KATZ, Director of State/Federal Relations and
Special Counsel to the Governor

SUBJECT: SUBSISTENCE REGULATIONS

The federal government's proposed regulations are labeled "temporary," in anticipation of the State rapidly returning to compliance with ANILCA. Accordingly, the proposed regulations were drafted to "minimize change" to existing State law while still complying with ANILCA. However, if the State is not in compliance by December 31, 1990, the federal government will begin development of permanent regulations, not necessarily designed to ameliorate the affects of a takeover.

Even in the proposed temporary regulations, the federal government is given ultimate authority to decide issues of fish and game management on federal lands. The State believes that it is inappropriate for the federal government to manage resources traditionally managed by the State. Further, the State has a number of specific concerns, among which are the following, with the federal government's proposed authority over Alaska's fish and game management.

1. Federal Subsistence Board - This board will have ultimate responsibility to execute the Secretary of the Interior's subsistence responsibility. It will be composed of five (5) federal bureaucrats, selected because they are the regional or state director of one of the five (5) primary federal land management agencies in Alaska. This arrangement is objectionable to the State because:

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- a. All final decisions regarding subsistence management in Alaska will be made by federal bureaucrats who are more accountable to national interest groups and their superiors in Washington, D.C. than they are to Alaskans.
 - b. The federal government may ignore or override State fish and game officials factual findings and resource management decisions.
2. Harvestable Surplus - Presently the State determines the harvestable surplus of fish and game resources using a "sustained yield" standard. In many instances, the federal government will use a "healthy population" standard. For now, the federal government says that the terms frequently are similar; this perspective may change. Further, it is clear that the federal government will use a separate, more restrictive "healthy and natural population" standard in National Parks and Monuments.
3. Definition of Rural - The federal government will have the authority to determine which communities are and which are not considered rural, even though there will be some initial deference to State determinations.
4. Geographic Scope - The federal government has the authority to define the geographic scope of its jurisdiction.
- a. Navigable waters are not now included in the definition of federal lands but may well be if the Department of the Interior is required to regulate salmon for subsistence purposes.
 - b. Lands selected by the State and ANCSA corporations but to which they have not yet received title are not now lands the federal government will manage for subsistence purposes, but that could change in the future.
 - c. State and private lands used by migratory game that also traverses federal land may be managed by the federal government in the future, although this would not occur under the present regulations. (See Kleppe v. New Mexico - The Wild Burro Case)
5. Litigation - A federal takeover of control of fish and game management for subsistence purposes is virtually certain to spawn a number of lawsuits that will consume the time and resources of the participants and create uncertainty for fish and game users state-wide. Furthermore, as a result of the litigation, federal judges could end up managing fish and wildlife on state lands as well as federal lands. In this regard, we have been advised that some litigants may seek to expand the geographic ambit of the takeover by including coastal and navigable waters and State and Native selected lands which have not yet been conveyed.

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6. Alaskans Access to Process - The presence of a federal rather than State resource manager almost certainly will diminish State residents' access to the management process, because of the federal decision-makers insularity and lack of accountability, and because of the difficulty of getting necessary information from the federal managers.

7. Management Coordination - While State hunting rules apply to State game management units and subunits, the same does not apply to the federal rules. The latter will only apply to federal lands within these units and subunits. Without adequate maps, the general public will be without the tools to understand which rules apply to their activities. Detailed maps have not been supplied and must be if the transition is to come off with a minimum of conflict and misunderstanding.

cc: Garrey Peska
Denby Lloyd
Low Pamplin

Subsistence in Alaska: A Summary

Division of Subsistence, Alaska Department of Fish and Game
Box 3-2000, Juneau Alaska, 99802 (907) 465-4147
February 26, 1990

Introduction

Subsistence is important to the economy and culture of many families and communities in Alaska. This report describes some characteristics of subsistence in Alaska, based on studies by the Division of Subsistence, Alaska Department of Fish and Game.

What is Subsistence?

Subsistence is part of the cultures, traditions, and economics of many families and communities in Alaska. In current state and federal law, subsistence is defined as customary and traditional, non-commercial uses of wild resources, for a variety of purposes. These uses include harvesting and processing wild resources for food, clothing, fuel, transportation, construction, arts, crafts, sharing, and customary trade.

Alaska has a subsistence law because subsistence continues to support a major part of state's rural economy and culture. Alaska is unique in this regard. Alaska is a pluralistic state. A sizable number of traditional cultures and economies exist side-by-side in the state. These traditional cultures and economies coexist with the industrial-capitalism of Alaska's urban centers.

The stated intent of the federal and state subsistence

statutes was to provide the opportunity for these traditional cultures and economies to continue to exist.

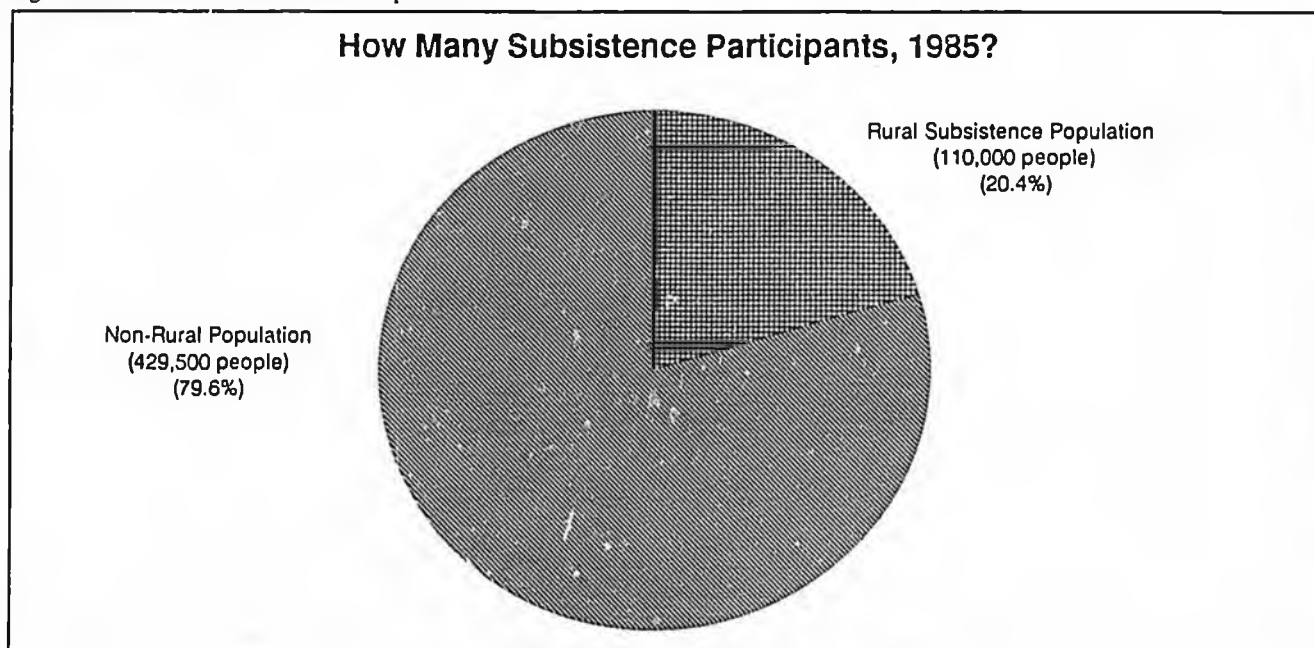
How Many People Participate in Subsistence?

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

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

Our studies indicate that not all 110,000 rural residents actually harvested wild resources for subsistence. In fact, harvesting fish and game was the responsibility of a minority of people in rural areas. However, subsistence foods are widely distributed through non-market networks in rural communities. Because of non-commercial sharing, most residents in rural communities make use of subsistence foods during the course of a year to some extent. Thus, the best estimate of the number of participants in subsistence is the size of the rural population.

Figure 1. Alaska Rural and Non-Rural Population



Composition of Statewide Subsistence Harvest

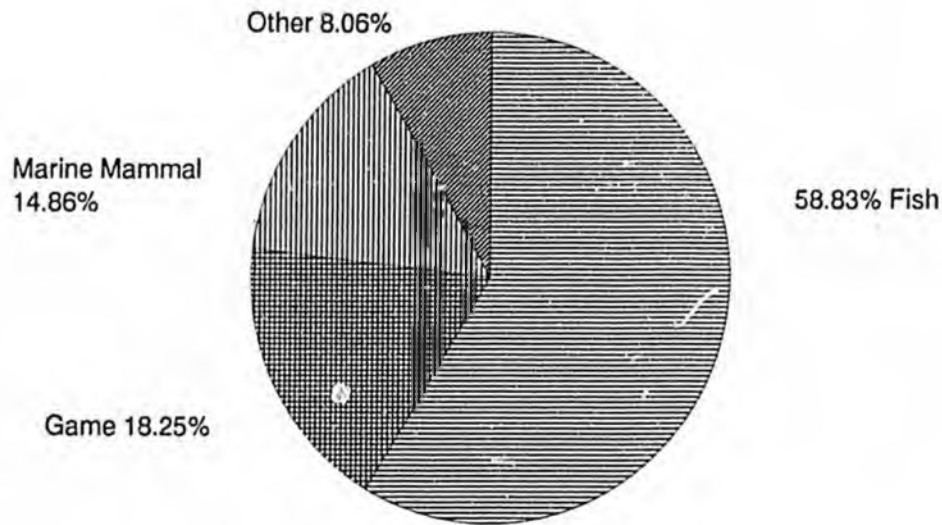


Figure 2. Statewide Subsistence Harvest Composition

How Large is the Subsistence Harvest?

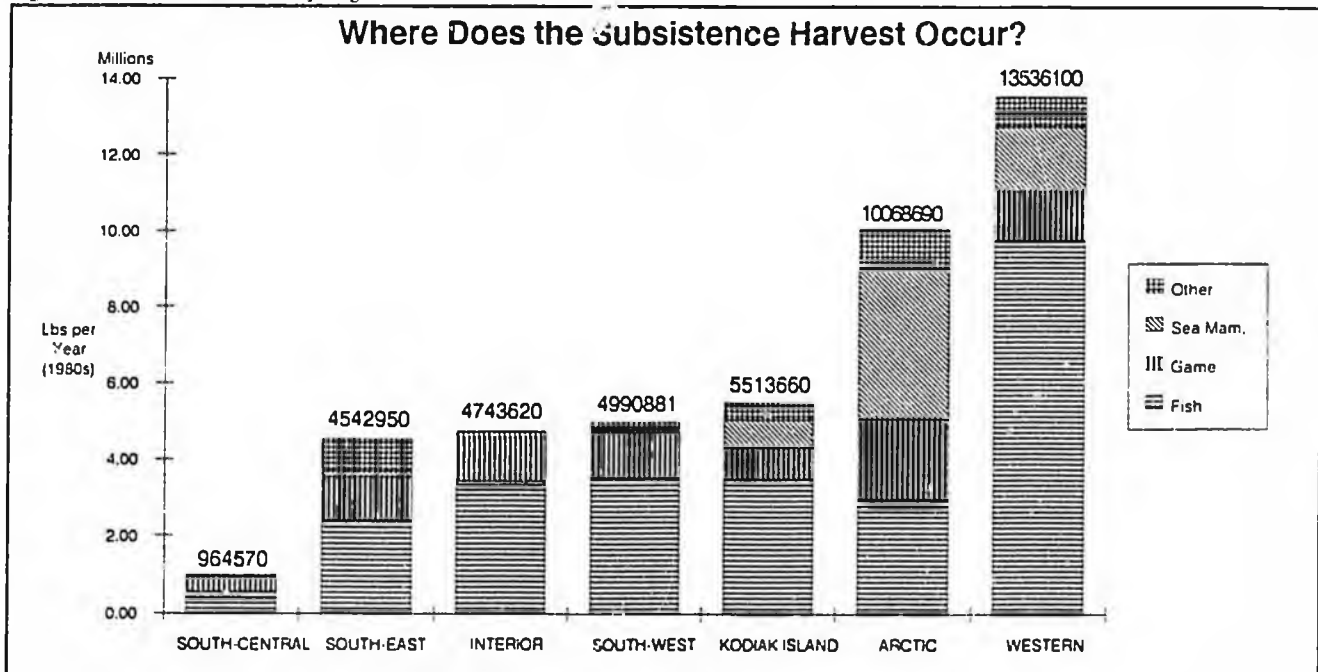
Statewide, non-commercial fishing and hunting provided an estimated 35-45 million pounds of food annually to rural areas during the 1980s. This comes to about 300-400 lbs per person a year, or about a pound of food per day.

Most of the subsistence harvest was fish (about 59 percent by weight), along with marine mammals (about 15 percent), land mammals (about 18 percent), and other wild resources (about 8 percent, including shellfish, birds, and wild plants) (Fig. 2).

Where Does the Subsistence Harvest Occur?

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

Figure 3. Subsistence Harvests by Region



How Does Subsistence Compare with Commercial and Sport Uses?

While subsistence is important, it represents a comparatively small portion of the wild resources harvested annually in Alaska. In Alaska's salmon fisheries, subsistence harvests generally represent less than 1 percent of the total salmon harvests. Considering all fish and game harvested in the state, about 4 percent by weight went to subsistence uses, 1 percent went to sport uses, and 95 percent went to commercial uses (Fig. 4).

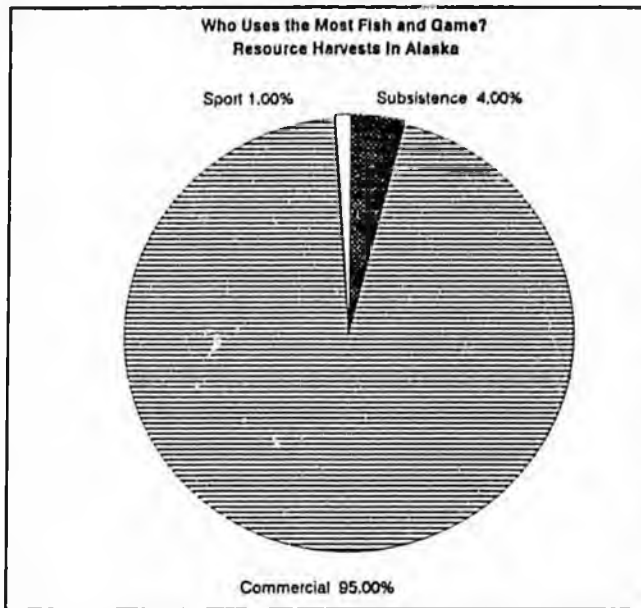


Figure 4. Fish and Game Harvests by Principal User Group

Subsistence and Cash

Our studies indicate that in many rural areas, subsistence is part of a traditional regional economy, termed a "mixed, subsistence-market economy". This type of economy occurs in the Canadian north as well. In mixed, subsistence-market economies, fishing and hunting are central activities conducted by extended family groups. The family invests in small-scale, efficient technologies, such as fishwheels, gill nets, motorized skiffs, and snowmachines, used for producing food. Subsistence production is not oriented toward market sale or accumulated profit, as is commercial market production. Rather, it is directed toward meeting the self-limiting needs of families and small communities.

A family's subsistence production is augmented and supported by cash employment by family members. Depending upon the region, employment commonly is in commercial fishing, commercial trapping, and public sector wage

employment. Typically, but not always, mean annual monetary incomes in the region are modest and intermittent. Families follow an economic strategy of using a portion of the annual monetary earnings to capitalize in subsistence technologies for producing food. This combination of subsistence and commercial-wage activities by extended family groups characterizes the mixed, subsistence-market economy.

This mixed, subsistence-market system underlies the economies of most rural areas of the state. The mixed economic system has existed in various forms since before the Russian period. It is very durable, which indicates its success in providing for rural families.

Traditional Harvest Areas

Our studies show that subsistence users tend to harvest in traditional use areas surrounding their communities. This means that most subsistence harvest areas tend to be relatively accessible from the community, although seasonal camps are used for certain species.

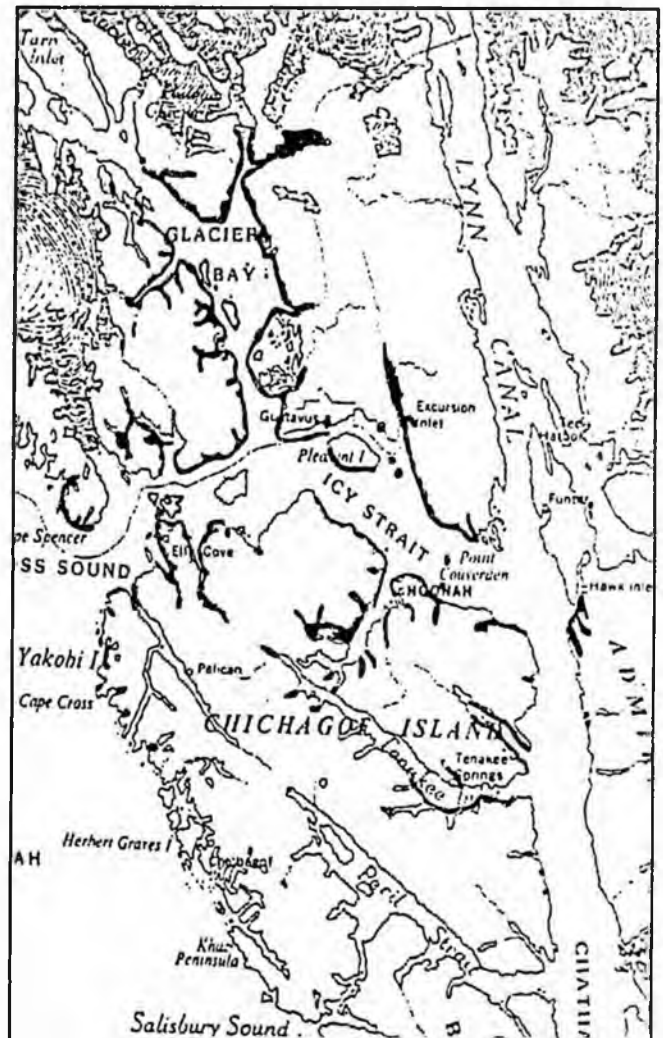


Figure 5. Subsistence Fishing Areas, Hoonah, 1920-1985.

Consequently, subsistence harvest areas for particular groups of people are definable and relatively predictable. Subsistence users generally do not harvest outside their community's traditional use areas (Fig. 5).

Subsistence Values

In addition to its nutritional value, subsistence provides important cultural and social values to rural communities. Our studies indicate that subsistence are central activities unifying extended families and small communities. The traditional wide-scale sharing of subsistence products between families help unify communities.

Subsistence activities bring meaning and purpose to life in many communities. This is especially true for Alaska Native groups. In many places, subsistence still expresses ancient spiritual linkages between humans, wild animals, and the land handed down by oral traditions.

The Importance of Subsistence

In summary, Alaska's rural regions tend to be different from Alaska's urban centers in terms of culture, traditional food use, and economic circumstance, reflecting the state's historic pluralism. Subsistence continues to be an essential part of the economy and culture of many rural areas. Subsistence fishing and hunting produces a substantial portion of the state's food supply in rural areas. Subsistence provides economic stability to many areas which have mixed, subsistence-market economic systems. And subsistence expresses a number of traditional values of importance to Alaska's diverse cultural groups.

Additional Reading

Alaska Department of Fish and Game, Division of Subsistence, Technical Paper Series. This series is the primary source of information on contemporary subsistence uses in Alaska. Write Technical Report Librarian, Division of Subsistence, ADF&G, Box 2-3000, Juneau, AK 99802, for listings and reports.

Wolfe, Robert J. and Robert J. Walker (1987) Subsistence Economics in Alaska: Productivity, Geography, and Development Impacts. Arctic Anthropology 24(2):56-81. This paper describes subsistence harvests in Alaska for the 1980s by geographic region.

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ALASKA'S NEW SUBSISTENCE LAW--
WHAT DOES IT MEAN AND HOW DOES IT WORK?

Alaska Department of Fish and Game

August 27, 1986

In May 1986, the Alaska Legislature adopted several major changes to the state's subsistence law. These changes ensured that the state retained management of fish and game on all lands in Alaska. In June 1986, the Board of Game held an emergency meeting and eliminated the controversial Tier II hunting regulations. The emergency meeting provided some experience in implementing the new law.

Beginning with the next meeting of the Joint Board in November, both the Board of Fisheries and the Board of Game will begin to implement routinely the requirements of the new subsistence law, which are similar, but not identical to, the boards' approach before the Madison decision by the Alaska Supreme Court in 1985.

This report describes the subsistence law and how it works. It is intended to give the public, including fish and game advisory committee members, the information they need to participate in the board process.

WHAT DOES THE NEW SUBSISTENCE LAW REQUIRE?

The changes made in 1986 clarified what the Legislature intended the subsistence law to do. They confirmed that the Boards of Fisheries and Game should identify subsistence uses as customary and traditional uses of fish and game by people living in rural communities and areas. They also confirmed that hunting and fishing regulations should provide for subsistence uses. And they confirmed that subsistence has a preference over other uses when there is a resource shortage.

Under the new law, for a use of fish and game to be a subsistence use, the boards must make two findings:

- 1) that the area or community where the use occurs is "rural," that is, noncommercial, customary and traditional use of fish and game for personal and family consumption is a principal characteristic of its economy; and
- 2) that the use by an area or community of the particular game population or fish stock is customary and traditional, as determined under the eight criteria in 5 AAC 99.010 (Enclosure 1).

If those two conditions are met, the residents of that area or community are eligible for subsistence fishing or hunting for that specific fish stock or game population, if the resource can sustain a harvest.

The Legislature also clarified that subsistence hunting and fishing are subject to reasonable regulations, and that these will be separate from other hunting and fishing regulations. Subsistence fishing has long occurred under separate subsistence regulations, but subsistence hunting has not. Subsistence regulations will spell out which game populations and fish stocks are used for subsistence and who may harvest each population and stock for subsistence uses.

The identification of subsistence uses will be made on a community or area basis rather than for individual people. It will not be based on an individual's income, but rather on the role that use of fish and wildlife plays in the economy of communities and areas in the state.

To guide the boards in their decisions, the Legislature adopted a letter of intent. The letter specifically mentions eight criteria for identifying customary and traditional uses of fish and game resources, criteria similar to those previously adopted by the board which were subsequently overturned in the Madison case. The legislative record makes it clear that the criteria are consistent with the Legislature's intent. These eight criteria appear in regulation 5 AAC 99.010.

The Legislature also clarified in statute that non-subsistence uses (sport, commercial, and personal use) of fish are to be fairly and reasonably provided for. In addition to the protections for subsistence, the statute gives Alaska residents a preference over non-residents in the hunting of moose, caribou, elk, and deer. It also creates a new category, personal use fishing, to provide opportunities for residents who do not qualify for subsistence fishing to take fish by net for their own use.

HOW WILL THE THE NEW LAW WORK?

The Boards of Fisheries and Game are responsible for implementing the law. They will adopt hunting and fishing regulations which conform to the new law and are consistent with the requirements of public participation, the constitutional mandate to provide for sustained yield, and the available information on subsistence uses.

Alaskans who live in rural areas where customary and traditional uses of fish stocks and game populations have been identified by the boards may hunt and fish for those populations and stocks under subsistence regulations. Other

Alaskans will hunt and fish under non-subsistence regulations--in many cases the same general hunting and sport and personal use fishing regulations that existed before the Madison decision.

To implement the new law, the Board of Fisheries and the Board of Game will be conducting a systematic review of all areas, fish stocks, and game populations in the state. The review involves these specific steps:

(1) In November, the two boards will meet jointly to decide which areas or communities are rural. The law says that a "rural area" is a place where the "noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy...." To make a decision on a particular area, the board will take into account many aspects of its economy.

To identify rural areas, the boards need to know what role fish and game play in the economy of those areas. They will examine such things as communities' income, employment, businesses, population growth, population characteristics, settlement patterns, distance from urban areas and boundaries, and levels of use of fish and game.

No single indicator or formula determines whether a community or area qualifies as rural. For example, the boards cannot consider income alone. Nor can they consider per capita harvests alone. Many factors have to be weighed together. The boards need to consider the whole pattern of how personal and family use of fish and wildlife fits into the economy of each area or community. This information will come from the Department of Fish and Game, other agencies, the public, and advisory committee members.

The Joint Boards will deal with three types of communities and areas: those that clearly satisfy the standards for rural, those that clearly do not, and those that seem to be near the dividing line between rural and non-rural. The third type will probably get the most attention at the November meeting.

Remote parts of the state with isolated, small communities, few jobs, and heavy reliance on fish and game are most likely to be readily identified as rural. People living there will fish and hunt under subsistence regulations for resources that have customarily and traditionally been used in that area. When game populations that rural people customarily and traditionally use are in short supply, and

subsistence uses must be cut back, these uses will be given preference over non-subsistence uses.

Because the Alaska Legislature intended the changes in the state statute to be consistent with federal law, the boards can use federal legislative intent in interpreting what is meant by rural. The 1979 legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) described Anchorage, Fairbanks, Juneau, and Ketchikan as urban. Residents of those areas will fish and hunt under sport and personal use fishing regulations, and general hunting regulations. They will be able to hunt under these regulations in rural areas.

The boards will probably devote more time to decide whether moderately sized or more recently settled communities are rural or non-rural. People in these places have been able to fish, in many cases, under subsistence regulations, while hunting under general regulations.

ANILCA legislative history also described certain communities (Bethel, Nome, Kotzebue, Dillingham, and Barrow) as rural. At its emergency meeting in summer 1986, the Board of Game determined that Bethel and Kotzebue are rural, but did not have occasion to examine Nome, Dillingham, or Barrow.

These examples will help guide the boards in determining which communities are rural. In reaching their conclusions the boards have to be reasonable. They must do the best they can with the available information to decide if personal use of fish and game is a principal component of the economy of each area or community they examine.

(2) Each board, during their normal separate meetings, will determine whether specific fish stocks and game populations can sustain a harvest. The Division of Game and the fisheries divisions will provide biological information to aid in these decisions.

(3) If a harvest can be allowed, the boards must determine whether the specific fish stock or game population had customarily and traditionally been used by the residents of specific areas or communities for "food, shelter, clothing . . ." or the other purposes listed in the law. The boards will use information from the department and the public in making this determination. The Division of Subsistence provides information on the characteristics of local resource use throughout the state. The Divisions of Game, Commercial Fisheries, and Sport Fish also provide

information about levels, seasons, and methods of harvest. The public, fish and game advisory committees, and regional advisory councils will provide testimony on their uses. The board examines these data against the eight criteria in 5 AAC 99.010 to determine if there are customary and traditional uses.

(4) Each board must then authorize subsistence fishing or subsistence hunting on these specific fish stocks and game populations by the residents of specific rural areas or communities which have customary and traditional uses of those resources.

(5) If there is a harvestable surplus after subsistence uses are provided for, the Board of Fisheries may adopt commercial, personal use, or sport fishing regulations, and the Board of Game may adopt general hunting regulations. In many cases, these additional regulations already exist. The boards must provide for fair and reasonable opportunities for non-subsistence uses, taking into account factors set out in the law, and must give Alaska residents a preference over non-residents in harvesting moose, caribou, elk, and deer.

Obviously, this is a great deal of work for the boards. There is no simple formula, but the law and the eight criteria provide extensive guidelines for decisions.

Because some important hunting seasons would have opened before the next regularly scheduled meeting, the Board of Game held an emergency session to deal with these critical hunts. Here are some examples of how the process worked during that board meeting:

The board decided that Delta bison could be harvested. But the board concluded that bison, a recently introduced species, were not the subject of customary and traditional uses. Therefore they will not be harvested under subsistence regulations. Alaskans will hunt bison under general hunting regulations; and because of the high demand, opportunity will be based on a drawing permit system.

In another case, the board found that moose in the Yakutat area could be harvested; were used for customary and traditional subsistence purposes by the residents of Yakutat; and that Yakutat is rural. Therefore, Yakutat area moose will be harvested under subsistence regulations by residents of Yakutat. The board also determined that there were enough moose to provide for both subsistence and non-subsistence hunting. Thus, Yakutat area moose will be available to all Alaskans under general hunting regulations.

In this case subsistence and general regulations are identical.

Under the subsistence law, subsistence hunting and fishing are subject to seasons, bag limits and other conservation and management measures, just as are all hunting and fishing. Subsistence uses will be provided for, and given a preference when necessary through separate seasons, bag limits, limits on methods of access, etc. In a few extreme cases, such as very low moose populations in the Minto Flats, only local residents will be allowed to hunt. In most cases, however, all Alaskans will have the opportunity to participate in general, drawing permit, registration, or open hunts.

PUBLIC INVOLVEMENT

Like all board decisions, board deliberations on rural areas, customary and traditional uses, and the regulations governing subsistence fishing and subsistence hunting are open to public comment, and to modification. The public and advisory committee members may recommend that certain communities or areas be found to be rural or non-rural, or that certain fish stocks or animal populations be identified as being subject to customary or traditional uses, and may provide information supporting the proposed result. The most useful information on whether an area is rural or not is that concerning the role of noncommercial use of fish and game in the area's economy. The eight criteria identify the factors and types of information that the boards use to determine whether a game population or fish stock is subject to customary and traditional uses.

At their November meeting, the boards will hear testimony on rural areas, including those areas examined in June by the Board of Game. Additionally, at the next regular board meetings, advisory committees and the public will have opportunities to comment on subsistence hunting and fishing regulations, and whether they correctly identify and adequately provide for subsistence uses. The process of fine-tuning the regulations will then become part of the boards' normal regulatory cycles.

FOR MORE INFORMATION

If you have questions about the upcoming Board of Fisheries and Game meetings, please contact any of the following:

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Southeast Region and Statewide

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THE EIGHT CRITERIA

Before Madison, the Boards of Fisheries and Game developed eight criteria in 5 AAC 99.010 which were used to identify customary and traditional uses by rural Alaska residents. The Department of Interior had certified that the eight criteria identified subsistence uses in a way which complies with ANILCA. The state subsistence law as recently amended again authorizes their use.

(1) a long-term consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in specific seasons of each year;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and love from generation to generation;

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community of persons, including customary trade, barter, sharing and gift-giving; customary trade may include limited changes for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection; and

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and in which that pattern of subsistence uses provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

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Southeast Alaska Subsistence Fishing and Hunting Update November 1989

Subsistence fishing and hunting are important parts of the culture and economy of many southeast Alaska communities. Subsistence is a social issue with a long history. Major changes have been occurring in state subsistence regulations that affect southeast villages. Many residents have not heard of them. This report is a current update of recent events effecting subsistence in southeast Alaska.

Background

Since 1979, the state has had a state law protecting subsistence fishing and hunting. The law requires that subsistence fishing or hunting be allowed where it traditionally occurs. The law requires that subsistence be given priority over commercial fishing and sport fishing and hunting. This means that in times of shortages of wild fish stocks and game populations, where it becomes necessary to restrict harvests, the state must cut back on sport and commercial uses before subsistence uses are cut back. Since 1981, the federal government also has had a federal law protecting subsistence (in ANILCA). It is almost identical to the state law. In both laws, subsistence is defined as the "customary and traditional use" of wild resources in "rural areas".

The subsistence laws are implemented by the Alaska Board of Fishery and Alaska Board of Game. These are two state boards made of seven citizens, appointed by the governor. They meet at least twice a year to make fishing and hunting regulations for the state.

The Board of Fisheries and Board of Game have just recently started to implement the subsistence law in the southeast region. This means they are in the process of creating regulations that will affect subsistence fishing and hunting for years to come in southeast Alaska.

Recent Decisions Affecting Southeast Alaska

The Boards of Fisheries and Game decide which communities in southeast qualify for subsistence. That is, the boards decide who may fish and hunt under subsistence regulations. Deciding who qualifies is a two step process.

In the first step, the Boards of Fisheries and Game decide which communities are "rural communities" in southeast. By law, subsistence occurs only in "rural communities or areas". Over the past four years, the Boards have decided that all communities in southeast (including Saxman) are "rural", except for the Juneau Borough and the Ketchikan area, which are "non-rural." This means that residents of Juneau or Ketchikan (except Saxman) cannot fish or hunt under subsistence regulations, but can only fish or hunt under general, sport, commercial, or personal use regulations.

In the second step, the Board of Fisheries and the Board of Game decide which rural southeast communities have "customary and traditional uses" of fish or game. By law, subsistence is defined as "customary and traditional uses." Over the past two years, the Board of Game has decided that all rural communities in southeast have customary and traditional uses of deer. They have decided that only residents of Chichagof and Baranof islands and residents of Kake have customary and traditional use of brown bear. The Board of Game has not completed their decisions about other game animals.

In their January-March 1989 meetings, the Board of Fisheries decided that the following southeast rural communities have customary and traditional uses of all types of salmon: Yakutat, Klukwan, Haines, Kake, Hoonah, Angoon, Hydaburg, Kasaan, Saxman, Klawock, and Craig. These communities qualify for subsistence salmon fishing. The Board decided that residents of Sitka had customary and traditional uses of sockeye salmon only.

The Board decided that these rural communities do not have customary and traditional uses of salmon: Skagway, Gustavus, Elfin Cove, Pelican, Tenakee Springs, Petersburg, Wrangell, Point Baker, Port Protection, Port Alexander, Thorne Bay, Coffman Cove, North Whale Pass, Hollis, Edna Bay, Meyers Chuck, and Hyder. These communities do not qualify for subsistence salmon fishing. The Board of Fisheries did provide "personal-use" fishing regulations for these communities. Personal use is a new fishing category for southeast. It allows salmon to be taken with nets for home use, under the terms of permits issued by ADF&G, but this type of fishing does not carry the subsistence priority.

The Board of Fisheries also decided about shellfish and bottomfish. In general, the same communities that qualified for subsistence salmon also qualified for subsistence shellfish (except king crab) and subsistence bottom fish. The same communities that did not qualify for subsistence salmon did not qualify for subsistence shellfish and bottom fish.

The Board of Fisheries determined that subsistence king and coho salmon may only be taken incidentally to sockeye, pink, and chum salmon fishing, except for kings and coho in Yakutat, and coho in Angoon.

Discussion of Recent Southeast Subsistence Decisions

These recent decision are important ones, for they affect the ability of residents to subsistence fish and hunt for years to come. The decisions by the Board of Fisheries are particularly important. The Board of Fisheries has eliminated from subsistence fishing a major portion of the rural residents in southeast, including residents of two major communities (Wrangell and Petersburg) and seventeen small communities. This includes both the Native groups and non-Native residents of these communities.

The system for establishing Alaska's fish and game regulations provides for citizen input in formulating and changing these regulations. The Boards have kept all upcoming agendas open for considering proposed revisions to subsistence regulations. Proposals submitted to the Board of Game by mid-December will be considered at the spring, 1990 meeting. Proposals submitted to the Board of Fisheries by April 1 will be considered at the fall, 1990 meeting.

Decisions by the Boards may also be challenged by legal suits. On June 30, 1989, a lawsuit was filed by Herman Kitka, Mark Jacobs, Jr., and John Dapceovich, on behalf of themselves and residents of the City and Borough of Sitka. They are suing the State of Alaska, Alaska Department of Fish and Game, and the Board of Fisheries over the recent decisions in Sitka that recognize Sitka's customary and traditional uses of some food species but not others.

Statewide Subsistence Issue: The Kenaitze Case

Another major subsistence issue is the lawsuit by the Kenaitze Indian Tribe on the Kenai Peninsula against the State of Alaska. It is a complicated suit, but in general, the Kenaitze Tribe is suing for an opportunity to subsistence salmon fish on the Kenai Peninsula. Recently, a California federal court found in favor of the Kenaitze on part of their suit. The federal court found that the state's current definition of "rural" did not match a "common" definition, and was not in compliance with ANILCA (the federal subsistence law).

This court decision throws the state's approach toward defining "rural" into confusion. The state has not wanted to define "rural" with a simple population size (the usual standard is 2,500 people), because