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6555 SENATE RESOURCES

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

(10) regulating sport hunting and personal use [SUBSISTENCE] hunting as needed for the conservation, development, and utilization of game.

* Sec. 10. AS 16.05.255(d) is amended to read:

(d) Regulations adopted under (a) of this section shall provide that, consistent with the provisions of AS 16.05.263 [AS 16.05.258], the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents.

* Sec. 11. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.263. PERSONAL USE OF FISH AND GAME. (a) Personal use of fish and game by residents for direct personal or family consumption as food, shelter, fuel, clothing, tools, artifacts, or transportation to satisfy physical, customary and traditional, or cultural needs shall have priority over other consumptive uses of fish and game.

(b) Fish and game taken for personal use may also be used for

(1) making handicraft articles for personal or family use or for sale out of nonedible byproducts of the fish and game;

(2) customary trade, barter, or sharing for personal or family consumption; and

(3) incidental sale of byproducts of fish and wildlife under AS 16.05.833 and regulations of the boards.

(c) The Board of Fisheries and the Board of Game shall adopt personal use fishing, hunting, and trapping regulations.

(d) If the harvestable portion of a fish stock or game

population is not sufficient to accommodate all consumptive uses of the stock or population but is sufficient to accommodate personal use of the stock or population, then personal use shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the needs of residents to take fish and game for personal use. If the harvestable portion is sufficient to accommodate the personal use of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict fishing, hunting, or trapping for personal use in order to assure sustained yield of a fish stock or game population, then the preference shall be limited, and the board shall adopt regulations that establish criteria, including the following criteria, for determining who may take the harvestable portion:

(1) dependence on fish or game as a mainstay of livelihood;

(2) availability of alternative resources; and

(3) customary and traditional use of the particular fish stock or game population.

(e) The boards and the department may not close a season or area to personal use fishing or hunting for a fish or game species while the season or area is open to other consumptive uses of the fish or game species.

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831, 16.05.833, and AS 16.30.

Sec. 16.05.265. PERSONAL USE PERMIT. (a) The Board of Fisheries and the Board of Game shall provide for personal use permits to be issued by the department. The boards may provide for permits to take

fish and game, fish or game, or a species, stock, or population of fish or game.

(b) A person shall receive a personal use permit if the person applies to the department and asserts a physical, customary and traditional, or cultural need to take fish or game for direct personal or family consumption. If a board determines that it is necessary to restrict the take of a fish stock or game population for personal use to assure sustained yield of the stock or population, the board may impose additional qualifications for a personal use permit to take the harvestable portion of that stock or population.

(c) A person who obtains a personal use permit shall report the amount and number of fish and game taken under the permit to the department.

(d) A person may not take fish or game for personal use without having a personal use permit in the person's physical possession.

* Sec. 12. AS 16.05.831 is amended to read:

Sec. 16.05.831. WASTE OF FISH [SALMON]. (a) Except as provided in AS 16.10.173, a [A] person may not waste fish [SALMON] intentionally, knowingly, or with reckless disregard for the consequences. In this subsection [SECTION], "waste" means the failure to utilize the majority of the carcass, excluding viscera and sex parts, of a fish [SALMON] intended for

(1) sale to a commercial buyer or processor;

(2) consumption by humans or domesticated animals; or

(3) scientific, educational, or display purposes.

(b) The commissioner, upon request, may authorize other uses of fish [SALMON] that would be consistent with maximum and wise use of the resource.

(c) A person who violates this section or a regulation adopted

under this section [IT] is punishable by a fine of not more than $10,000, or by imprisonment for not more than one year [SIX MONTHS], or by both. In addition, a person who violates this section is subject to a civil action by the state for the cost of replacing the fish [SALMON] wasted.

* Sec. 13. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.833. COMMERCIAL UTILIZATION OF FISH PARTS FROM FISH TAKEN FOR PERSONAL USE. (a) The department shall issue a commercial use permit to a resident who applies for the permit, satisfies applicable personal use fishing permit requirements, and provides proof of two years of personal use fishing activity within the fish management region for which the permit is issued. A commercial use permit authorizes the sale of specified amounts of underutilized fish parts of fish legally taken in a personal use fishery. A commercial use permit may be issued for more than one species of fish.

(b) The number of pounds of roe that may be sold under a commercial use permit is equal to one-half of the product of the number of fish of each species for which the personal use fishing permit is issued that the applicant will take to satisfy the applicant's personal use needs multiplied by the average weight of roe produced by each species of fish for which the permit is issued.

(c) A commercial use permit may not limit the taking of fish for personal use purposes.

(d) A person may not sell underutilized fish parts from fish taken for personal use without first obtaining a commercial use permit under this section.

(e) The Board of Fisheries shall adopt regulations that are necessary to implement this section in each fish management region established by regulation by the board. The regulations for each

region must be based on recommendations received from the fish and game council for that region.

(f) The sale of underutilized fish parts under a commercial use permit is exempt from the requirements of AS 16.05.675, 16.05.680, and AS 16.43.

(g) In this section "underutilized fish parts" means the skin, bones, viscera, and sex parts, including roe, of fish.

* Sec. 14. AS 16.05.930(e) is amended to read:

(e) This chapter does not prevent the traditional barter of fish and game taken <u>for personal use</u> [BY SUBSISTENCE HUNTING OR FISHING], except that the commissioner may prohibit <u>by regulation</u> the barter of [SUBSISTENCE-TAKEN] fish and game <u>taken for personal use, if the commissioner finds</u> [BY REGULATION, EMERGENCY OR OTHERWISE, IF A DETERMINATION ON THE RECORD IS MADE] that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

* Sec. 15. AS 16.05.940(5) is amended to read:

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

* Sec. 16. AS 16.05.940(23) is amended to read:

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources [,] by

Alaska residents for direct personal or family consumption [USE AND NOT FOR SALE OR BARTER, WITH GILL OR DIP NET, SEINE, FISH WHEEL, LONG LINE, OR OTHER MEANS DEFINED BY THE BOARD OF FISHERIES];

* Sec. 17. AS 16.05.940(28) is amended to read:

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

* Sec. 18. AS 16.10.265(a) is amended to read:

(a) It is unlawful for an individual while acting as a fish processor or primary fish buyer, or as an agent, director, officer, member, or employee of a fish processor, of a primary fish buyer, or of a cooperative corporation organized under AS 10.15 to intentionally or knowingly make an original purchase of fish from a seller who, in violation of AS 16.43, does not hold a landing permit, an entry permit, [OR] an interim-use permit, or a commercial use permit issued under AS 16.05.833.

* Sec. 19. AS 16.10.267(a) is amended to read:

(a) When a fisherman sells fish, the fisherman shall possess

(1) a landing permit, entry permit, or interim-use permit issued or transferred to the fisherman under AS 16.43, commercial use permit issued under AS 16.05.833, or other document authorized by regulation to be used in place of an entry permit or interim-use permit; and

(2) an identification card that has been issued to the fisherman by a state or federal agency or other organization designated by the Department of Public Safety and that bears a photograph

of the fisherman.

* Sec. 20. AS 16.10.267(b) is amended to read:

(b) If requested by the purchaser of the fish or by a peace officer, the fisherman shall present for inspection the identification card, entry permit, interim-use permit, commercial use permit, or other document required to be in the fisherman's possession under (a) of this section.

* Sec. 21. The division of legal services of the Legislative Affairs Agency shall prepare a bill containing appropriate amendments to the Alaska Statutes, outside of AS 16.05, correcting references to "subsistence," "subsistence uses," "subsistence users," "personal use of fish and game," and similar terms in order to conform to the provisions of this Act. The bill shall be presented to the House and Senate Rules Committees for introduction on the first day of the First Session of the Seventeenth Alaska State Legislature.

* Sec. 22. AS 16.05.258, 16.05.259, 16.05.330(c), and 16.05.940(26), (29), (30), and (31) are repealed.

* Sec. 23. This Act takes effect immediately under AS 01.10.070(c).

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to retention of state management of fish and wildlife and other wild renewable natural resources; and providing for an effective date.

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

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

SECTION 19. RETENTION OF NATURAL RESOURCES MANAGEMENT BY THE STATE. Nothing in this ~~constitution~~ Section prohibits the legislature from enacting laws providing that the reasonable opportunity to take fish and wildlife and other wild renewable resources for subsistence uses is limited to rural residents, if those laws are consistent with Title VIII of the Alaska National Interest Lands Conservation Act, Pub.L. 96-487, and are necessary in order to retain management authority over those resources by the State.

* Section 2. The intent of the amendment proposed by this resolution, together with the changes to the Alaska National

Interest Lands Conservation Act (ANILCA), Pub.L. 96-487, required before this amendment becomes effective, as specified in section 4 below, is:

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

(b) to require an amendment to ANILCA to conform that act to the provisions of the new statutes and amendments enacted by ch. 52, SLA 1986, and of any regulations adopted under those statutes and amendments, which limit subsistence uses to rural residents who reside in a community or area of the state in which subsistence uses are a principal characteristic of the economy of the community or area, such that the interpretation of ANILCA in the decision of the Ninth Circuit Court of Appeals in Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1989) is negated; and

(c) to require an amendment to ANILCA that removes the term "customary trade" from the definition of "subsistence uses" such that in the future the sale (exchange for money) of fish or game, or parts thereof, will not be held to be a "subsistence use" that State law banning such sale must yield to (see e.g. U.S. v. Sakurai, et al., No. A88-026 CR (D. AK 1989)), and further will not be accorded a priority over the taking of fish or game resources for other purposes.

* Section 3. The amendment proposed by this resolution shall be placed before the voters of the State at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

* Section 4. The amendment proposed by this resolution is effective only upon certification of the election returns by the lieutenant governor and certification by the governor that Congress has amended Title VIII of ANILCA in substance as follows:

(a) the term "rural Alaska residents" in ANILCA is defined as a person domiciled in a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(b) the term "customary trade" is deleted from the definition of "subsistence uses" in ANILCA; and

(c) the term "customary and traditional uses" in ANILCA is defined as a long-term, consistent pattern of use of indigenous fish and game resources, recurring seasonally, within geographic proximity of and accessible to the users' residences, employing traditional methods and means of harvesting, preparing and preserving such resources for personal use, sharing and barter, and which provides substantial benefit to the economic, cultural, and social welfare of the community.

6-2431A
Utermohle
4/18/90

4

BY THE RESOURCES COMMITTEE

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to subsistence fishing and hunting."

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

* Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

(1) new law is needed to ensure that subsistence fishing and hunting opportunities are maintained;

(2) efforts to provide for the needs of residents who primarily rely on subsistence resources further the legitimate interests of the state;

(3) providing for the needs of residents who primarily rely on subsistence resources, most of whom reside in rural areas of the state, is consistent with the purposes and objectives of the Alaska National Interest Lands Conservation Act (P.L. 96-487);

(4) efforts to provide for the needs of residents who significantly use subsistence resources further the legitimate interests of the state;

(5) conservation of sound fish and wildlife populations is in the best interests of all residents of the state;

(6) this Act is consistent with the equal protection and common use principles of the Constitution of the State of Alaska.

(b) The purposes of this Act are to

(1) establish a fish and wildlife allocation system to provide reasonable opportunities to certain subsistence users through a preference system, consistent with fish and wildlife conservation principles;

(2) provide for express consideration of the needs of other

subsistence users; and

(3) establish a fish and wildlife allocation system consister with the Constitution of the State of Alaska.

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

(b) The boards shall determine

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

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

* Sec. 3. AS 16.05.258(c) is amended to read:

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate category I subsistence uses of the stock or population, then nonwasteful category I subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the category I subsistence uses. If the harvestable portion is sufficient to accommodate the category I subsistence uses of the stock or population, then the boards may provide for other consumptive uses, including category II subsistence uses, of the remainder of the harvestable portion. If the boards do provide for other consumptive uses of the remainder of the harvestable portion of the stock or population, the boards shall provide an allocation for category II subsistence uses. The boards may not allocate a portion of a stock or population to commercial or sport uses unless an

allocation is also made to category II subsistence uses. If it necessary to restrict subsistence fishing or subsistence hunting order to assure sustained yield or continue category I subsistenc uses, then the preference shall be limited, and the boards shal distinguish among category I subsistence users, by applying th following criteria:

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

(2) local residency; and

(3) availability of alternative resources.

* Sec. 4. AS 16.05.258 is amended by adding a new subsection to read:

(g) In this section,

(1) "category I subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident (A) proximate to the domicile of the resident, (B) for whom subsistence taking constitutes the primary means of securing personal or family sustenance, and (C) who has customarily and traditionally participated in subsistence taking as a resident for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption;

(2) "category II subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident (A) who has customarily and traditionally taken wild, renewable resources for personal or family uses and (B) for whom subsistence taking constitutes a significant means of securing personal or family sustenance for food, shelter, fuel, clothing, tools, or

transportation, for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption;

(3) "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis.

* Sec. 5. AS 16.05.940(29) is amended to read:

(29) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident [DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

* Sec. 6. AS 16.05.940(30) is amended to read:

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

* Sec. 7. AS 16.05.940(31) is repealed and reenacted to read:

(31) "subsistence uses" means category I and category II subsistence uses as defined in AS 16.05.258.

* Sec. 8. AS 16.05.940(26) is repealed.

5

6-2031Sb

6-2031Sb
Utermohle

5-2-90

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHJR 74 ( ) (version "S")

Page 1, lines 5 - 10:

Delete all material and insert:

"Proposing an amendment to the Constitution of the State of Alaska authorizing the legislature to enact laws relating to allocation of fish and wildlife and other wild renewable natural resources for subsistence uses that are consistent with federal laws relating to subsistence uses in order to retain state management authority over those resources."

5-2-90

6-2031S
Utermohle
5/1/90

Original sponsor(s): REP. JACKO, Goll, Foster, MacLean

IN THE HOUSE

CS FOR HOUSE JOINT RESOLUTION NO. 74 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife and other wild renewable natural resources; and providing for an effective date for the amendment.

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

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

SECTION 19. SUBSISTENCE USES OF RENEWABLE NATURAL RESOURCES. Nothing in this constitution prohibits the legislature from enacting laws of general applicability, consistent with the sustained yield principle, relating to the allocation of fish and wildlife and other wild renewable natural resources for subsistence uses that are consistent with federal laws relating to subsistence uses in order to retain management authority over those resources by the State.

* Sec. 2. In addition to authorizing the legislature to enact laws consistent with federal laws relating to subsistence uses, the intent of the amendment proposed by this resolution is to validate, ratify, and reinstate existing state subsistence laws, including the provisions of ch. 52, SLA 1986, that are consistent with federal laws relating to subsistence uses.

* Sec. 3. The amendment proposed by this resolution, and the intent of the amendment as set out in this resolution, shall be placed before the voters of the state as one ballot proposition at the next general election

in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

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

6-2450E
Utermohle
5/3/90

IN THE SENATE

SENATE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife; and providing for an effective date for the amendment.

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

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

SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. When consistent with the sustained yield principle and necessary to provide for subsistence uses, the legislature may grant a preference for the taking of fish and wildlife for subsistence uses by and among residents of rural areas of the State.

* Sec. 2. The intent of the amendment proposed by this resolution is to validate and ratify state subsistence laws, including "An Act relating to subsistence uses of fish and wildlife; and providing for an effective date" enacted by the Sixteenth Alaska State Legislature, that are consistent with federal laws relating to subsistence uses.

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

* Sec. 4. The amendment proposed by this resolution if approved by the voters is effective immediately upon certification of the election returns

by the lieutenant governor.

6-2449E
Utermohle
5/2/90

agree with 6

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to subsistence uses of fish and game; and providing for an effective date."

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

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

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

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

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

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

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

(5) establishing [AND MODIFICATION] requirements for means used in pursuit, capture, and transport of fish;

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

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

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

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

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

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

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

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

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

(B) will not unduly disrupt the fishery;

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

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North

Pacific Fishery Management Council, and the International Pacific Halibut Commission;

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

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

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.263 [AS 16.05.258], provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

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

(a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

(3) establishing the means and methods employed in the pursuit, capture, and transport of game, including regulations, consistent with resource conservation and development goals, establishing means and methods that may be employed by persons with physical disabilities;

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

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

(6) methods, means, and harvest levels necessary to control predation and competition among game in the state;

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

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

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

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

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

(d) Regulations adopted under (a) of this section shall provide that, consistent with the provisions of AS 16.05.263 [AS 16.05.258], the taking of moose, deer, elk, and caribou by residents for subsistence use [PERSONAL OR FAMILY CONSUMPTION] has preference over taking by nonresidents.

* Sec. 5. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.263. SUBSISTENCE USES OF FISH AND GAME. (a) Residents may take fish and game for subsistence uses as provided by law.

(b) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence. The boards shall identify rural subsistence areas.

(c) The boards shall determine

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

(2) how much of the harvestable portion is needed to

provide a reasonable opportunity for subsistence uses of those stocks and populations by all residents and by residents of rural subsistence areas.

(d) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (c) of this section.

(e) If the harvestable portion of a stock or population is sufficient to accommodate the subsistence uses of the stock or population by residents of rural subsistence areas, then the boards may provide for subsistence uses by nonresidents of rural subsistence areas and for other consumptive uses of the remainder of the harvestable portion. If the harvestable portion of a stock or population is sufficient to accommodate subsistence uses of the stock or population by residents of rural subsistence areas, but is not sufficient to accommodate all consumptive uses of the stock or population, then subsistence uses of the stock or population by residents of rural subsistence areas shall be accorded a preference over other consumptive uses, and the regulations must provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion of a stock or population is not sufficient to accommodate all subsistence uses of a stock or population by residents of rural subsistence areas and it is necessary to restrict subsistence uses in order to assure sustained yield of the stock or population or continue rural subsistence uses, then the preference for subsistence uses of the stock or population by residents of rural subsistence areas shall [illegible] and the boards shall distinguish among residents of rural subsistence areas by applying the following criteria:

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

(2) local residency; and

(3) availability of alternative resources.

(f) The boards may adopt regulations consistent with this section that authorize the taking of fish and game for nonsubsistence uses.

(g) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

* Sec. 6. AS 16.05.330(c) is amended to read:

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of fish and game. The boards shall adopt these regulations when the rural subsistence area preference under AS 16.05.263 requires a reduction in the harvest of a fish stock or game population by subsistence users who do not receive a preference and by nonsubsistence users.

* Sec. 7. AS 16.05.940(23) is amended to read:

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

* Sec. 8. AS 16.05.940(29) is amended to read:

(29) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a

resident [DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

* Sec. 9. AS 16.05.940(30) is amended to read:

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

* Sec. 10. AS 16.05.940(31) is amended to read:

(31) "subsistence uses" means the noncommercial, customary and traditional uses of <u>fish and game</u> [WILD, RENEWABLE] resources by a resident [DOMICILED IN A RURAL AREA OF THE STATE] for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption [; IN THIS PARAGRAPH, "FAMILY" MEANS PERSONS RELATED BY BLOOD, MARRIAGE, OR ADOPTION, AND A PERSON LIVING IN THE HOUSEHOLD ON A PERMANENT BASIS];

* Sec. 11. AS 16.05.940 is amended by adding new paragraphs to read:

(36) "family" means persons related by blood, marriage, or adoption living in a household and other persons living in the household on a permanent basis;

(37) "rural subsistence area" means a subsistence area outside the road connected area of a municipality or other community with a population of 7,000 or more, as determined by the Department of Community and Regional Affairs;

(38) "subsistence area" means an area where significant subsistence uses occur.

* Sec. 12. AS 16.05.258, 16.05.259, and 16.05.940(26) are repealed.

* Sec. 13. AS 16.05.090(c), 16.05.094, 16.05.251(d), 16.05.255(d), 16.05.258, 16.05.259, 16.05.330(c), 16.05.930(e), 16.05.940(2), 16.05.-940(26), 16.05.940(29), 16.05.940(30), and 16.05.940(31) are repealed.

* Sec. 14. The division of legal services of the Legislative Affairs Agency shall prepare a bill containing appropriate amendments to the Alaska Statutes correcting references to "subsistence," "subsistence uses," "subsistence users," and similar terms in order to conform to the provisions of this Act. The bill shall be presented to the House and Senate Rules Committees for introduction on the first day of the First Session of the Seventeenth Alaska State Legislature.

* Sec. 15. NONSEVERABILITY. Notwithstanding AS 01.10.030, if a provision of AS 16.05.263 as enacted by sec. 5 of this Act, or if AS 16.05.-940(23) as amended by sec. 7 of this Act, AS 16.05.940(29) as amended by sec. 8 of this Act, AS 16.05.940(30) as amended by sec. 9 of this Act, AS 16.05.940(31), as amended by sec. 10 of this Act, or AS 16.05.940(37) or (38) as enacted by sec. 11 of this Act, is held invalid by the decision of a court of competent jurisdiction, then that provision is not severable from other provisions of AS 16.05 as amended by or enacted by secs. 2 and 4 - 11 of this Act.

* Sec. 16. Sections 2, 4 - 12, and 15 of this Act take effect only if an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife is approved by the voters of the state at the 1990 general election.

* Sec. 17. Sections 1, 3, 13, and 14 of this Act take effect only if an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife is submitted to and disapproved by the voters at the 1990 general election.

* Sec. 18. This Act takes effect upon certification of election returns for the 1990 general election by the lieutenant governor.

(7)

PROPOSED JOINT RESOLUTION ADDRESSING SUBSISTENCE

JOINT RESOLUTION NO. ____
IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - SECOND SESSION

"Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife; and providing for an effective date."

RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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

SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. The people are entitled to take, consistent with the principle of sustained yield, fish and wildlife for subsistence uses. The Legislature may provide by law for a reasonable opportunity for the people to take fish and wildlife for subsistence uses.

* Section 2. (Intent to validate, ratify, etc.)

* Section 3. (Place before voters, etc.)

* Section 4. (Immediate effective date upon passage by voters.

Offered: 4/23/90
Referred: Judiciary

6-2031D

6

Original sponsor(s): REP. JACKO, Goll, Foster, MacLean

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 74 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to retention of state management of fish and wildlife and other wild renewable natural resources; and providing for an effective date for the amendment.

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

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

SECTION 19. RETENTION OF NATURAL RESOURCES MANAGEMENT BY THE STATE. Nothing in this constitution prohibits the legislature from enacting laws relating to subsistence uses of fish and wildlife and other wild renewable natural resources that are consistent with valid federal laws in order to retain management authority over those resources by the State.

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

* Sec. 3. The amendment proposed by this resolution is effective immediately upon certification of the election returns by the lieutenant governor.

A CONSTITUTIONAL AMENDMENT ESTABLISHING
A SUBSISTENCE PRIORITY FOR RURAL ALASKANS

Position paper prepared by
Alaska Department of Fish and Game
and
Alaska Department of Law

March 7, 1990

I. 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 a preference 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.

Without a solution to the problem created by the McDowell decision, management of fish and wildlife will be conducted both by the federal and the state governments. This will undoubtedly lead to conflicts over the allowable uses of fish and wildlife and take many of the decisions out of the hands of Alaskans and give them to the federal government. The state was granted a stay by the supreme court until July 1 with respect to existing regulations only.

II. Objectives to be achieved in any solution

We believe that 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.

III. Review process

In the two months since the ruling, the administration has received comments from a wide range of interested and affected Alaskans, reviewed a number of recommended solutions, and met with a variety of user groups including Alaska Native organizations, commercial fishing organizations, and sportsmen and outdoor groups. Since allocation of Alaska's fish and wildlife resources touches nearly everyone in the state, the administration has kept an open mind in reviewing all proposed solutions. For that reason, a great deal of time has been spent in reviewing the legal parameters of the court ruling and all such proposals.

IV. Options suggested

* Ask the Alaska Supreme Court to reconsider its decision in McDowell.

The state requested a rehearing of the supreme court's decision, arguing that the court overlooked or misconceived several legal principles and material facts. That request for rehearing has been denied.

* Amend the Alaska Constitution to authorize a subsistence priority for rural residents.

Since this is the preferred option chosen by Governor Cowper, it will be discussed in more detail in sections V and VI of this paper.

* Amend ANILCA to eliminate the federal subsistence priority for rural residents.

The administration rejected this approach primarily because it does not have the support of either the Alaska Congressional delegation or the Alaska Native community, both of which would be essential for any amendment to pass Congress. ANILCA was crafted as a compromise which balanced a number of competing interests. Amending it would require an agreement among the state, the Alaska Native community, and the Alaska Congressional delegation at the very minimum. In addition, in the 1978 subsistence statute, throughout the ANILCA legislative process, in the 1982 statewide ballot referendum, and in the 1986 subsistence statute the state has continually supported a subsistence priority for rural residents.

* Amend ANILCA to preempt state law as necessary to grant rural residents a subsistence priority statewide.

Under this scenario, we would ask Congress to apply the supremacy clause and require the state to give rural residents a subsistence priority statewide, despite the constitutional problems addressed by the Alaska Supreme Court in McDowell. Because of state sovereignty principles, this was not considered to be an option that the state should willingly support. Without state support, it is probably not politically attainable.

* Amend state law to provide a subsistence priority to state residents most dependent on fish and wildlife, as determined through some kind of individualized permitting system, and then amend ANILCA to conform to the state law.

This option was initially suggested by Governor Cowper early in the debate on how to resolve the dilemma posed by the supreme court's ruling. State officials went to great lengths to attempt to develop a system that would be consistent with the state constitution. The tentative proposal was for a three-member Subsistence Commission with powers and authorities similar to the Commercial Fisheries Entry Commission to determine who was a "subsistence user," using a set of criteria for making those determinations. This option 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 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.

In addition, this approach would still result in state law being inconsistent with the subsistence preference provisions of ANILCA, in the absence of an amendment to ANILCA, already determined to be unattainable. This would create an unacceptable risk of a federal takeover of fish and wildlife management.

* Interpret [illegible] 804 of ANILCA as preempting state law on federal lands ([illegible]ay ultimately be defined by the courts), with implementation carried out by state officials.

State and federal attorneys agree that Congress intended the ANILCA subsistence priority for rural residents to apply on federal lands and to preempt conflicting state laws. A legal argument can be made that, under the supremacy clause of the United States Constitution, state officials can implement the ANILCA subsistence priority by rural residents on federal lands directly under ANILCA. On the other hand, it can be argued that state officials are bound by the state constitution and cannot implement a conflicting federal law.

Another uncertainty is the geographic scope of the ANILCA preference. "Public lands" are defined as "land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except [valid state and Native corporation selections]." "Federal land" is defined as "lands the title to which is in the United States after the date of enactment of this Act." "Land" is defined as "lands, waters, and interests therein."

The possible geographic scope of the ANILCA preference under these definitions ranges from "narrow" (wildlife only when they are physically present on federal land, and fish only when in non-navigable waters on federal land) to "broad" (wildlife throughout their migratory range, even when not on federal land, and fish wherever they are in any waters of the state, including the territorial sea).

This option is not the preferred option for reasons in addition to the uncertainty over the geographical scope of ANILCA. Since the state would be acting under federal, as opposed to state, authority there would undoubtedly be litigation challenging the ability of the state to proceed directly under ANILCA. The more direct avenue is to amend the state constitution to allow state agencies to act directly under state law. However, the preemption option may provide a fallback position if the constitutional amendment fails.

* Seek cooperative agreements with the Secretaries of Interior and Agriculture under which the ANILCA priority would be implemented by them, perhaps only through closure authority to avoid dual management of the resource.

It is clear that a failure by the state to give rural residents a subsistence priority, something which McDowell now says is impossible under the state constitution, would result in a federal takeover of fish and game management for subsistence uses on federal public lands. The Secretary of the Interior has made it clear he wishes to see the state resolve this issue in order to bring us into compliance with the provisions of ANILCA. One former Interior Department official believes that the Secretaries' authorities to implement a subsistence priority for rural residents on federal lands is limited under ANILCA to their authority to close the lands to the taking of fish and wildlife until the priority is satisfied. However, current Department of the Interior officials have also made it clear that they believe their authority to be much more expansive than mere closure authority.

This is an option that, of necessity, is being discussed with federal officials both for the time period between July 1 and the effective date of a constitutional amendment, and in the event an amendment does not pass the Legislature or the voters. Because it

easily could result in a federal takeover of fish and wildlife management however, it is not the preferred option.

* Use current management tools -- seasons, bag limits, same-day (or even two-day) airborne prohibitions, etc. -- creatively to benefit those most dependent on fish and wildlife.

Some people point to the fact that 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. They argue that in order to make the state approach consistent with ANILCA, these traditional regulatory tools could be employed to explicitly favor rural residents. 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, ANILCA only stays the federal responsibility for providing the subsistence priority by rural residents on federal lands if the state has, in laws of general applicability, the same definition of and priority for subsistence as the federal law. Simply using traditional management tools would not satisfy that requirement of ANILCA, again running the risk of a federal takeover.

* Challenge the ANILCA subsistence priority for rural residents and/or Congress' power to require such a priority on constitutional grounds.

The administration does not support this option primarily because we support the rural subsistence preference contained in ANILCA and believe an attempt to challenge that priority is not warranted. Such a challenge would probably be based on the grounds that the ANILCA priority violates 1) equal protection, applicable to federal statutes under the due process clause of the Fifth Amendment to the United States Constitution, and 2) the statehood compact. With respect to the first argument, the federal constitution has a much more deferential equal protection test than the Alaska Constitution, and the state is not considered to have very strong legal arguments. With respect to the second argument, a unanimous United States Supreme Court ruled in 1976 that the federal government has the constitutional authority to regulate fish and wildlife on federal lands.

* Amend the Alaska Constitution to authorize a subsistence priority for Alaska Natives.

Although many of the rural residents who most rely on fish and wildlife for their economic and cultural well-being are Alaska Natives, there are also many non-Native rural residents who depend on the same fish and wildlife. The administration does not support

a Native only preference. Further, such a priority would not be consistent with ANILCA.

* Amend ANILCA to authorize a subsistence preference for Alaska Natives.

The same position as above applies to this option.

V. The administration's preferred approach

In McDowell, the Alaska Supreme Court struck down the state's subsistence priority for rural residents because it violated article VIII of the Alaska Constitution. It did not rely on any provisions of the federal constitution in striking down the subsistence priority for rural residents. Accordingly, the Alaska Constitution can be amended to make constitutional the subsistence priority by rural residents struck down in McDowell.

Amending the state constitution is the cleanest way to allow the state to again be consistent with ANILCA and provide a subsistence priority by 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.

VI. Further Discussion and Considerations

A. The amendment and its effect.

The governor has proposed a constitutional amendment which would authorize the limitation of subsistence uses of fish and wildlife to rural residents. Such uses already can be the subject of a priority under the current article VIII, section 4, which authorizes "preferences among beneficial uses." The proposed section 19 would be added to article VIII, and would read:

> Nothing in this constitution prohibits the Legislature from limiting the taking of fish and wildlife for subsistence uses to rural residents, and from providing for the allocation of that taking among rural residents on the basis of local or community residents, availability of alternative resources, and customary and direct dependence on

a fish or game population as the mainstay of livelihood.

The wording of the proposed resolution makes clear that:

> The intent of the amendment proposed by this resolution is to validate, ratify, and reinstate any provisions of [the 1986 state subsistence law] and of any regulations adopted [thereunder], which otherwise might have to be declared invalid under the Alaska Supreme Court's decision in McDowell v. State, 785 P.2d 1 (Alaska 1989), and to explicitly reverse the effect of the McDowell decision as to those provisions and regulations.

If this resolution passes the Legislature and in the November general election, the state would be authorized to have legislation consistent with ANILCA and the legislation which was enacted in 1986 would be validated retroactively, rather than requiring reenactment. The principle of retroactive validation is accepted in caselaw from other jurisdictions, and has been noted by the Alaska Supreme Court in Matthews v. Quinton, 362 P.2d 932, 938 (Alaska 1961).

B. What happens between July 1 and the general election?

If this resolution passes the Legislature, the state could ask the Alaska Supreme Court for an extension of the stay in McDowell until after the November general election results were certified. The justification for the request would be that, if the amendment does pass in the general election, the disruptions and start-up costs for a contingency plan which would only be effective from July 1 through the general election would not be in the best interests of the state.

The court may not be receptive to such a request, since in a February 26, 1990, order denying a request that the current stay be vacated, the court stated:

> The stay entered on January 5, 1990, will expire on the close of business July 1, 1990. Extensions to the stay will not be granted.

The court may have been indicating that the state must face up to the consequences of the McDowell decision. The comment, however, was made in a context in which no party had asked for an extension of the stay. It is possible that if a constitutional amendment did pass the Legislature, the court might consider an extension. At the same time, we cannot rely on an extension of the stay. Thus, a contingency plan will have to be developed which would apply from July 1 until after the November election, in the

event the stay were not continued. The state is currently participating in the federal contingency planning process.

C. The amendment's relationship to the Kenaitze problem.

The proposed amendment only attempts to resolve the problem created by the supreme court's decision in McDowell, which conclusively precludes the state from having a law that is consistent with the definition of and priority for subsistence uses in ANILCA. This imminently threatens the unified management so necessary for the welfare of the fish and wildlife in Alaska and for those who use those resources. The proposed amendment does not attempt to address other subsistence issues, such as the inconsistency of the state's definition of "rural" and Congress's use of that term in ANILCA, as identified by the ninth circuit court of appeals in Kenaitze Indian Tribe v. State, 860 F.2d 312 (9th Cir. 1988).

In that case, the court held that the state's current definition of "rural area" found in AS 16.05.940(25) is not consistent with the use of the term "rural" in ANILCA. The state had defined "rural area" as:

> a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area.

The ninth circuit concluded that focusing on the economy of the community or area was not consistent with Congress's intent. It based its view on what it considered the "common sense" meaning of "rural" as being connected to population levels and densities. If the proposed constitutional amendment passes, it would not resolve the "rural" issue; unless the proposed constitutional amendment passes, however, the state cannot even attempt to achieve consistency between its definition of "rural" and the federal one.

Even if the McDowell decision had not been issued, it would still be premature to consider changing state law to define "rural" in a way which would be consistent with ANILCA. Although the ninth circuit said the state definition was not consistent, it did not say what the term "rural" in ANILCA meant, and gave the state no clear guidance as to how the state definition should be amended to make it consistent with ANILCA. The meaning of "rural" in the federal law is currently the subject of federal district court proceedings in the Kenaitze case. Until that litigation provides more guidance as to what would be consistent with ANILCA, it would be inappropriate to try to amend state law to match the federal law. At this point, of course, the state does not even

have the authority to define subsistence in terms of rural residents, quite apart from refining the "rural" definition.

If this constitutional amendment passes, the state will in the meanwhile have gathered more information about the scope of the term "rural" in ANILCA through the federal district court case. A reasoned decision can then be made whether the best course is to repeal the state definition, replace the state definition with another definition, or attempt to amend ANILCA to reflect the state definition in the federal law.

D. Severability.

If the constitutional amendment validating the 1986 subsistence law does not pass, the ANILCA standards will apply to federal land in the state. However, what the rules would be for state and private lands depends on the question of severability.

Under McDowell, the limitation of the subsistence priority to only rural residents in the 1986 state law is invalid on state and private lands. However, the court did not decide whether the remainder of the 1986 law, including the priority of subsistence uses over other uses, is also invalid.

The basic question is whether the Legislature would have intended the subsistence mandate and priority to remain in effect if the class of subsistence users included all Alaskans. In that event, hunting by nonresidents and sport and commercial fishing would have to be eliminated before subsistence uses (open to all Alaskans) on any fish stock or game population could be cut back. (The subsistence uses would be subject to reasonable regulation, however, without requiring other uses be eliminated.)

If the Legislature intended that the rest of the law fall if the rural limitation were invalid, then the boards would not be required to authorize subsistence fishing and hunting (open to all Alaskans), and would not be required to give it a priority. The boards could in their discretion, however, authorize subsistence uses and give these uses (as opposed to users) a priority, in any given situation.

This question will probably be presented to the superior court when the case returns there from the supreme court.

2/9/90

SUBSISTENCE OPTIONS EXPLORED BY THE DEPARTMENT OF LAW

*1 Ask the Alaska Supreme Court to reconsider its decision in McDowell

*2 Amend the Alaska Constitution to authorize a subsistence priority for rural residents

*3 Amend ANILCA to eliminate the federal subsistence priority for rural residents

*4 Amend ANILCA to preempt state law as necessary to grant rural residents a subsistence priority statewide

*5 Interpret section 804 of ANILCA as preempting state law on federal lands (as those may ultimately be defined by the courts), with implementation carried out by state officials

*6 Seek cooperative agreements with the Secretaries of Interior and Agriculture under which the ANILCA priority would be implemented by them, perhaps only through closure authority to avoid dual management of the resource

*7 Amend state law to provide a subsistence priority to state residents most dependent on fish and wildlife, and then amend ANILCA to conform to the state law

*8 Use current management tools -- seasons, bag limits, same-day (or even two-day) airborne prohibitions, etc. -- creatively to benefit those most dependent on fish and wildlife

*9 Challenge the ANILCA subsistence priority for rural residents and/or Congress' power to require such a priority on constitutional grounds

CHRONOLOGY OF THE STATE'S SUBSISTENCE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

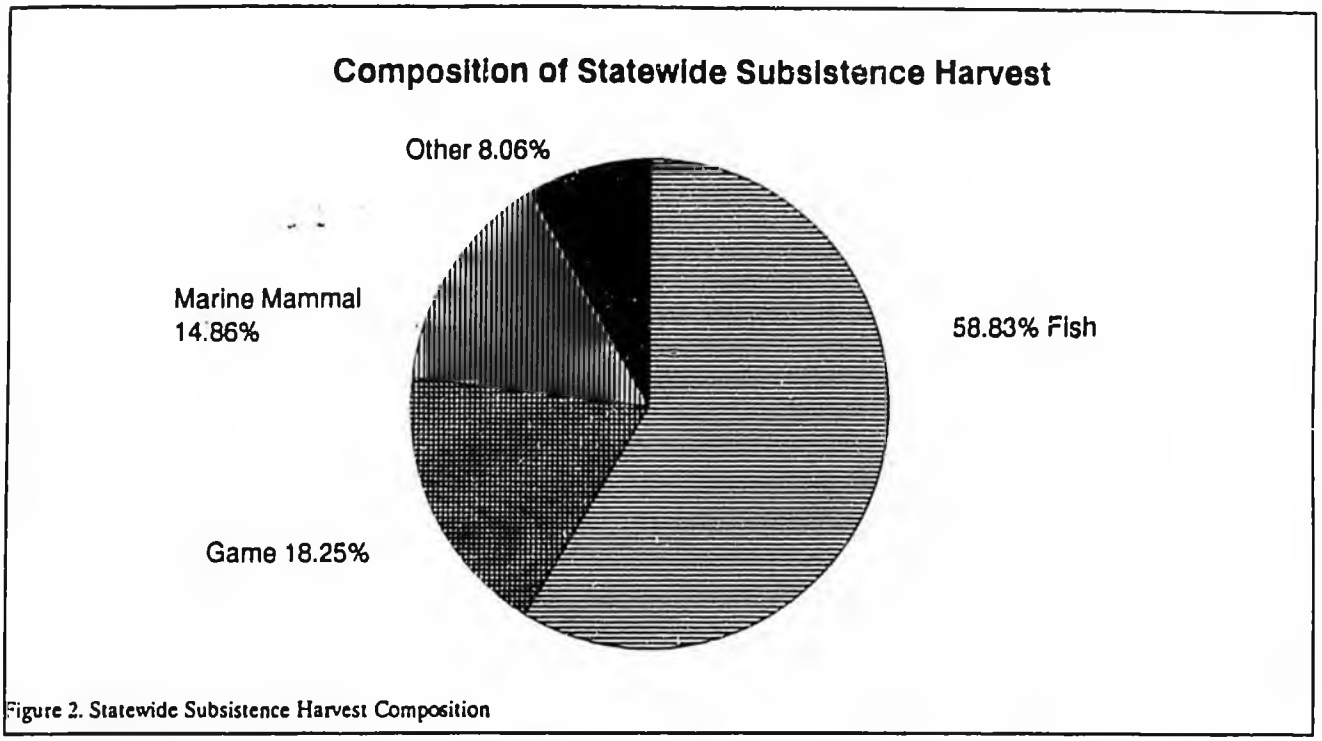


Figure 2. Statewide Subsistence Harvest Composition

How Large is the Subsistence Harvest?

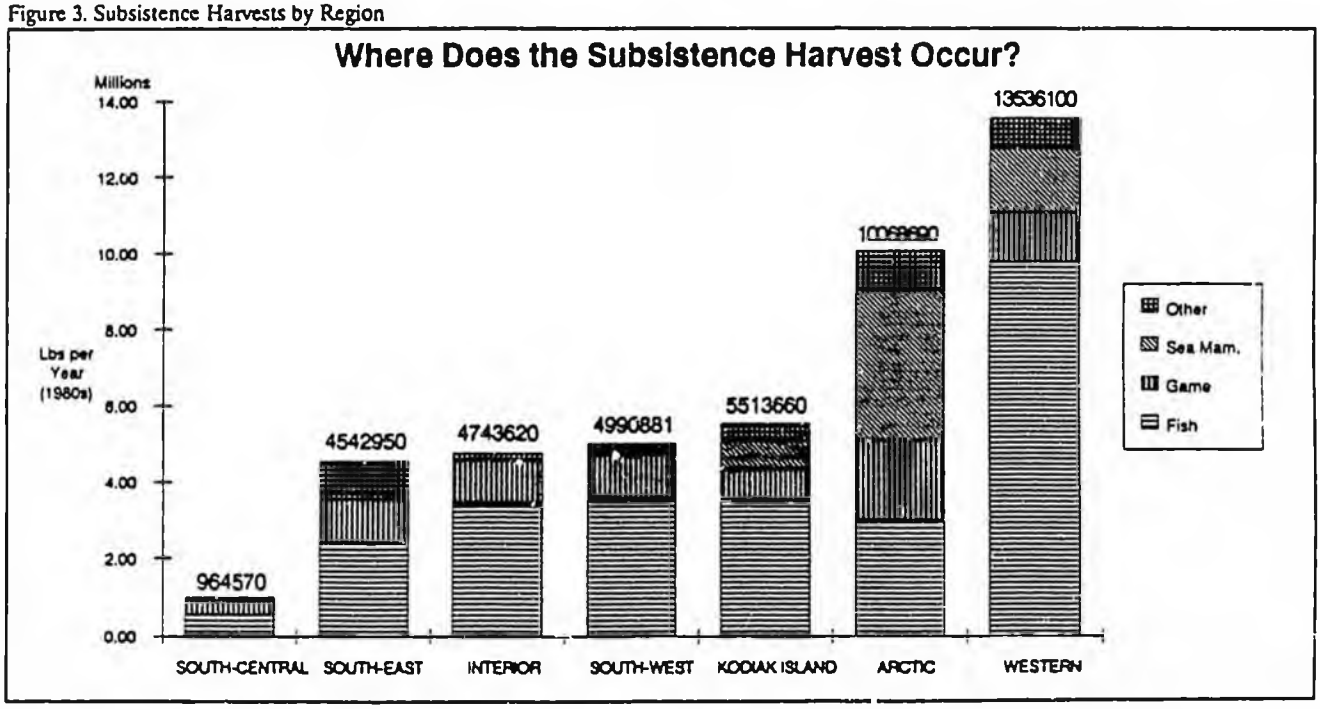
Statewide, non-commercial fishing and hunting provided an estimated 35-45 million pounds of food annually to rural areas during the 1980s. This comes to about 300-400 lbs per person a year, or about a pound of food per day.

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 pet cent went to sport uses, and 95 percent went to commercial uses (Fig. 4).

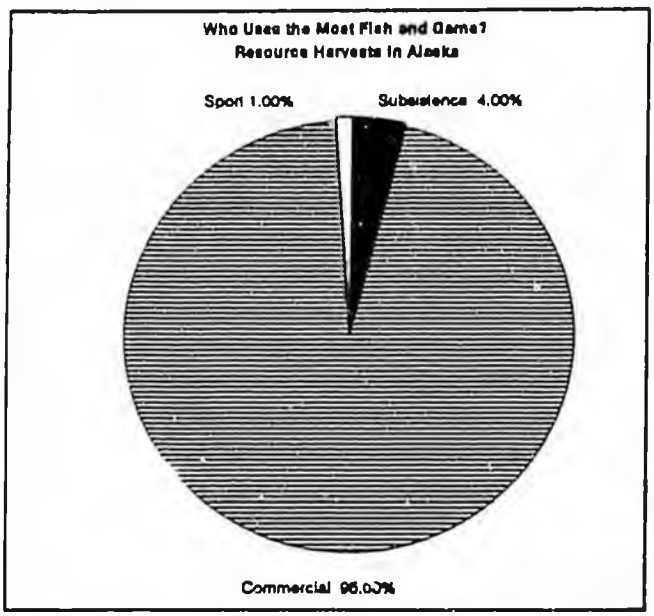


Figure 4. Fish and Game Harvests by Principal User Group

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 Economies 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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ENCLOSURE 4

Subsistence in Alaska: A Summary

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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 economies 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.

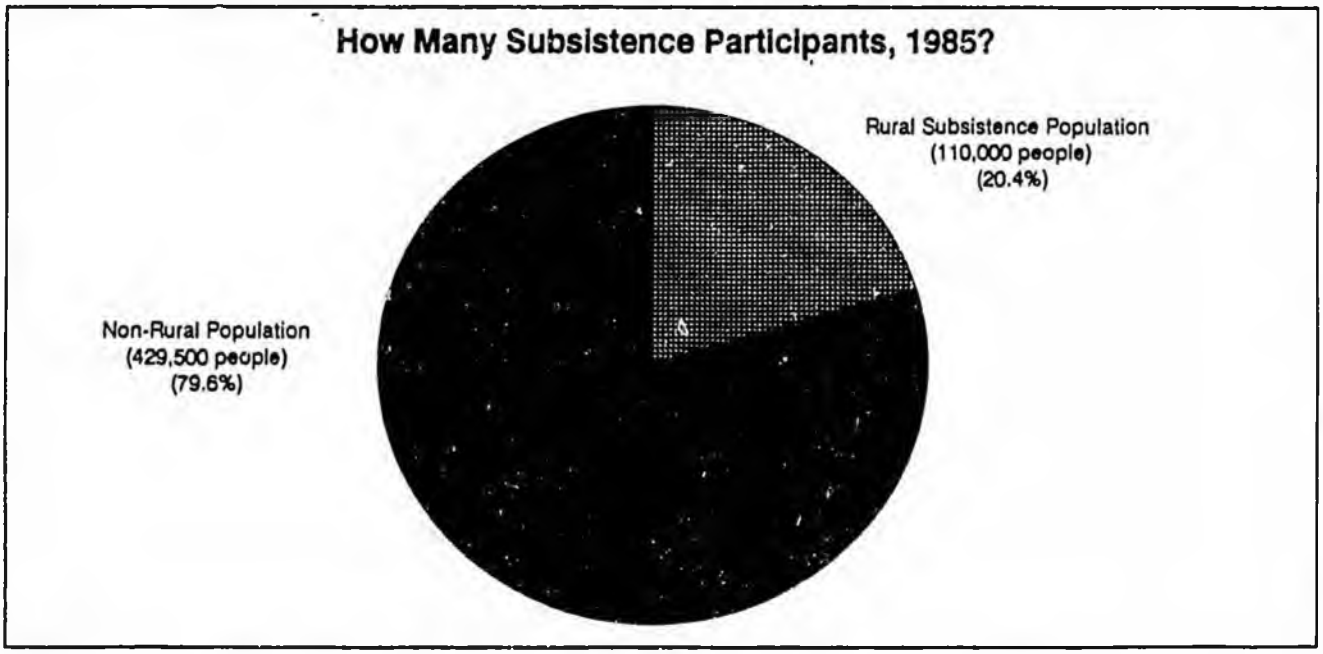
How Many People Participate in Subsistence?

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 responsibity 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



ENCLOSURE 5

Summary of Recent Decisions and

Active Cases Involving Subsistence

Excerpted from

Alaska Bar Association
1989 Subsistence Update

1. *Akutan v. Hodel*, Nos. A85-701 Civ., J85-037 Civ., and J85-038 Civ. (consolidated) (D. Alaska) (von der Heydt), *appeals pending*, Nos. 88-3610, 88-3703, 88-3703 (9th Cir.)

This case was initially filed in December 1985 and involved the interpretation of Section 810 of ANILCA. Its focus was on when the Secretary of the Interior must follow procedures designed to ensure that use and/or disposition of federal lands does not unnecessarily restrict subsistence uses. Interior's position was that it had only to undertake such procedures when the proposed use or disposition had a probability of significantly restricting subsistence uses. The plaintiffs contended that Interior had to undertake the procedures whenever such use or disposition might significantly restrict subsistence uses.

The district court held that Interior erred when it applied the "probabilit standard in determining when to undertake the procedures. Its decision was based on th Court of Appeals' earlier decision in *Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*). Both the government and the intervening oil companies appealed and the Ninth Circuit affirmed. *Tribal Village of Akutan v. Hodel*, 792 F.2d 1376 (9th Cir. 1986). The government and the oil companies petitioned for certiorari. Following the Supreme Court's decision in *Amoco Production Co. v. Village of Gambell*, 107 S. Ct. 1396 (1987) (see discussion below), the Supreme Court granted their petitions, reversed, and remanded for reconsideration in light of *Amoco*, 107 S. Ct. 1598 (1987).

On remand to the district court, the tribal villages amended their complaint to allege aboriginal hunting and fishing rights in the lease sale area. The parties then agreed to a stay of all proceedings on the Tribes' aboriginal title claim pending a decision by the Ninth Circuit in *Gambell* on remand. Meanwhile, the State, the tribal villages, and various environmental organizations sought summary judgment on their claims that the lease sale violated the Outer Continental Shelf Lands Act, the National Environmental Policy Act, and the Endangered Species Act. On January 22, 1988, the district court denied the State's claims under the OCSLA and on March 11, 1988 denied the NEPA and ESA claims. The plaintiffs appealed both decisions to the Ninth Circuit and moved the district court for an order enjoining the sale pending the appeal. On March 15, 1988, the district court granted the injunction pending appeal.

On October 5, 1988, the Court upheld the District Court's decision on all counts. It held that the Secretary properly decided not to accept the State's recommendations under OCSLA; that the Secretary could remedy any deficiencies in his Environmental Impact Statement at the exploratory or production stages of development; and that the Secretary's reasons for rejecting recommendations by the National Marine Fisheries Service to implement the ESA were not arbitrary or capricious.

Plaintiffs moved for a rehearing, with a suggestion for rehearing *en banc*, together with a request that the sale be stayed pending rehearing. The motion for stay was denied as moot shortly after the lease sale was held in mid-October; the petition for rehearing was rejected on March 9, 1989, although the Court did modify its opinion in some minor respects on that date. Plaintiffs are now evaluating whether to file an appeal in the Supreme Court.

2. *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkel*, 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3682 (April 4, 1988), *on remand*, No. J84-013 Civ. (D. Alaska) (von der Heydt)

This case was filed in the Spring of 1984 by the Alaska Fish and Wildlife Federation and Outdoor Council and the Alaska Fish and Wildlife Conservation Fund (Conservation Fund). The plaintiffs sought a declaration that two cooperative agreements (the Hooper Bay Agreement and the 1985 Goose Management Plan) entered into by the Fish & Wildlife Service, the ADF&G, AVCP and the California Department of Fish and Game violate the Migratory Bird Treaty Act, 16 U.S.C. § 712, the notice and comment provisions of the federal Administrative Procedure Act, the National Environmental Policy

Act, and provisions of ANILCA, 16 U.S.C. § 668dd, which create the Yukon Delta Wildlife Refuge.

The challenged cooperative agreements grew out of recognition by the federal and state governments that migratory birds represent an important part of the traditional Native diet on the Yukon-Kuskokwim Delta. Even though the Migratory Bird Treaty Act, through the 1978 Fish and Wildlife Improvement Act, 16 U.S.C. § 712, permits the Secretary of the Interior to authorize hunting of migratory birds in the spring and summer, it requires that the hunting be consistent with the four migratory bird treaties to which the United States is a party. The 1916 U.S./Canada treaty prohibits harvest of migratory birds in the spring and summer. Even though the Fish and Wildlife Service had long assumed that all harvesting of migratory birds between March 10 and September 1 is prohibited, it adopted a written policy in 1975 stating that subsistence hunting in Alaska during the closed season would not be punished. This enforcement policy was adopted in part because the service recognized the importance of spring waterfowl to Alaska Natives and in part because of the practical problems of enforcing the game laws in the vast reaches of rural Alaska.

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

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

On appeal, the Ninth Circuit reversed with respect to the 1925 Game Act, pointing out that the 1916 U.S./Canadian treaty did not provide for spring and summer hunting, and thus it could not be authorized under the 1978 Fish and Wildlife Improvement Act. The court remanded the case to the district court on all of the original challenges to the plan under the Migratory Bird Treaty Act, the migratory bird treaties, the federal Administrative Procedure Act, NEPA and the section of ANILCA creating the Yukon

Delta National Wildlife Refuge. 829 F.2d 933 (9th Cir. 1987). The Supreme Court denied AVCP's petition for certiorari. 56 U.S.L.W. 3682 (April 4, 1988).

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

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

On April 29, 1988, the Yukon-Kuskokwim Delta Goose Management Plan for 1988, which corresponds with the Service's recently adopted policy on migratory bird hunting in Alaska, was signed by the Service and Native Groups in the Yukon-Kuskokwim Delta. The state fish and game departments from both Alaska and California also signed the plan. The plan lists priorities the signatories will observe to enforce the closed season on migratory birds in spring and summer. It calls for a cooperative effort in monitoring compliance. Reports of violations will be coordinated with local village governments, which will assist in investigations conducted by the Service. The Service also agreed to make a "good faith effort to reach agreement with Canada" on an amendment to the Migratory Bird Treaty. As noted above, that treaty, signed in 1916, makes most hunting for migratory birds, even for subsistence, illegal.

3. *Association of Village Council Presidents, Tanana Chiefs Conference, Paul Philip, and Jonathon Solomon v. Alaska Board of Fish and Commissioner of Fish and Game*, No. 4BE-87-155 Civ. (Alaska Superior Court) (Fraties)

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

In May, 1987, AVCP, Tanana Chiefs Conference, Paul Philip and Jonatho Solomon, on behalf of themselves and all other persons similarly situated, filed suit agains the Alaska Board of Fish and Commissioner of Fish and Game. They asserted that the information presented to the Board of Fisheries indicated that not enough fall chum salmon would return to the Yukon in 1987 to provide for both escapement and subsistence fisheries. They argued that the federal and state subsistence laws required that the False Pass commercial fishery be closed.

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

The State supplied discovery in response to some pending requests by plaintiffs and the Board of Fisheries imposed a chum salmon cap on the False Pass fishery for the 1988 season. The case was subsequently dismissed when ADF&G's estimate of fish returning proved to be inaccurate and more than enough fish returned. (*See* discussion of *Peninsula Marketing Ass'n v. State*, p. 21, a subsequent and related case).

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

This case was filed in November, 1984, by Wasilie Bobby, Sr., individually and on behalf of the people of Lime Village.

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

Plaintiff argued that individual bag limits are not necessary for any conservation or management purpose in the case of Lime Village and are not consistent with the village's historic hunting patterns. Plaintiff asserted that several good hunters may supply the entire community with meat over the course of the year, rather than each household hunting for itself. Plaintiff also argued that the now-existing closed seasons for moose and caribou harvest are not consistent with ANILCA. Plaintiff asserted that under ANILCA, there should not be a closed season at all unless necessary to protect the resource. The State's position was that ANILCA regulations provide a "reasonable opportunity" for subsistence uses, but not necessarily year round seasons.

Another issue raised in this case is whether people can harvest game or fish outside the existing regulations and then successfully defend in a criminal case by asserting that the regulations did not adequately accommodate subsistence uses. This "subsistence

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

Status of the Case: The court ruled on the pending motions for summary judgment of February 14, 1989. The judge held that seasons and bag limits are permissible under the subsistence law, but only when those seasons and bag limits are consistent with customary and traditional uses. He indicated that he would defer to the Board of Game's determinations, but that in this instance, in part because of the (at that time) constantly changing ground rules under which the Board of Game was operating, the analysis required by the state 1986 subsistence law about how much moose and caribou were needed to accommodate subsistence hunting by residents of Lime Village was not done. The judge also held that the existing Board of Game record did not reconcile a specific finding by the board that residents of Lime Village had historically harvested moose and caribou opportunistically throughout the year with the seasons contained in the regulations, nor did the record reconcile the evidence therein that the best hunters from Lime Village did most of the hunting and shared with the other villagers with the bag limits contained in the regulations. The judge also interpreted the state "no subsistence defense" statute in a way which he believed was consistent with fundamental principles which allow a defendant to challenge the validity of regulation he or she is charged with violating, and with the Alaska Supreme Court's ruling in *Eluska*; by concluding that the provision was only intended to preclude a defendant in a criminal proceeding from claiming a subsistence right in gross, outside of and apart from validly enacted subsistence regulations.

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

These regulations will be submitted to the court by June 15, and plaintiff at that time may express any unresolved objections.

5. *Cook v. Secretary of the Interior*, F87-42 Civ (D. Alaska) (Kleinfeld)

This case was filed on August 17, 1987, by a resident of the Yukon-Charley Rivers National Preserve who lives a subsistence lifeway. He alleges that a fly-in trapper from Eagle, Alaska has engaged in trapping activities within the area he claims as his trapline, depleting furbearer resources and negatively affecting his own trapping efforts. The basic

legal issue presented by the case is whether the National Park Service has any lega obligation under Title VIII of ANILCA to provide affirmative protection to subsistence users on Park Service lands.

The plaintiff takes the position that Title VIII of ANILCA imposes upon the Secretary of the Interior the affirmative duty to protect the plaintiff's subsistence uses. Plaintiff contends that subsistence-trapline management implicates land-use and land-management policy with respect to which NPS, as land manager, has jurisdiction and principal responsibility. Even though the Park Service's regulations authorize it to declare plaintiff's subsistence trapline off-limits to all other trappers (36 C.F.R. § 13.40), or to prohibit aircraft from operating on his trapline for the purpose of trapping, § 13.13, the Secretary argues that this is a subsistence-resource "allocation" issue over which jurisdiction has been confided exclusively in the State. Under the Secretary's theory, the federal government has no authority to protect subsistence users in the National Parks.

On October 14, 1987, the plaintiff moved for a preliminary injunction to require the Secretary to take all actions necessary to protect his trapline from encroachment by any other trapper during the marten season or until such time as the merits of the case could be decided. Judge Kleinfeld denied the plaintiff's request for a preliminary injunction on November 20, 1987. The government then moved for summary judgment, which the plaintiff opposed. At the conclusion of arguments on the motion for summary judgment on June 23, 1988, Judge Kleinfeld noted that while the question of whether the Park Service or the State had jurisdiction to protect subsistence traplines was a complex and difficult issue, the case had to be dismissed as moot since the fly-in trapper had promised, under oath, not to trap on plaintiff's line. The dismissal was not appealed.

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

This case, formerly captioned in the name of the original plaintiff, Katelnikoff, was brought pursuant to the Marine Mammal Protection Act of 1972 (MMPA). Both Marina Katelnikoff and Didrickson sought the return of a number of articles they had fashioned out of sea otter pelts. The articles were confiscated by federal enforcement agents on the ground that they were not "authentic native articles of handicrafts and clothing" within the meaning of the Native handicraft exemption to the MMPA, 16 U.S.C. § 1371(b), as defined by controlling federal regulations.

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

Plaintiffs argued that the limitation in the regulation was inconsistent with the MMPA in that it focuses on whether the final craft *item* produced was traditional rather

than whether the production *technique* was traditional. Plaintiffs argued that an item ca. be "authentic" even if it was not commonly produced prior to 1972.

In July 1986, Judge Holland rejected these arguments and upheld the validity of the regulation largely based on deference to agency interpretation. Ms. Katelnikoff was dismissed from the lawsuit to pursue her administrative remedies.

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

Didrickson has moved for summary judgment on his constitutional claim. In denying the government's motion to dismiss, Judge Holland indicated that problems with the regulation and its enforcement call for an administrative resolution. In response, the Fish and Wildlife Service instituted a formal rulemaking proceeding, proposing to change its regulatory definition to totally prohibit Native use of sea otter for handicrafts and clothing. This rule is based upon Fish and Wildlife Service's conclusion that there has been no recent use of sea otter by Natives and no recent sales by Natives of sea otter items. The comment period on the proposed rule will continue until November 30, 1989. Public hearings are planned for October, 1989, in several coastal villages.

Meanwhile, Katelnikoff (now by marriage, Beck) lost her administrative hearing as to all items crafted from sea otter pelts except hats. Having exhausted her administrative remedies, she has moved to intervene in the federal court litigation.

7. *Gambell v. Lujan*, __ F.2d __ (9th Cir. 1989), *petition for rehearing pending, on remand*, Nos. 83-3735; 83-3781 (D. Alaska) (von der Heydt)

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

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

Judge von der Heydt granted summary judgment to the government and the intervening oil companies and dismissed the suit. The Ninth Circuit reversed in part and affirmed in part. It held that ANCSA applies to the OCS and operated to extinguish

aboriginal hunting and fishing rights in this area. It also held that ANILCA applied to the OCS and since the Secretary had not complied with Section 810 of ANILCA, the court reversed and remanded for a determination as to whether the sale should be voided. *Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*).

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

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

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

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

On remand, the Court of Appeals reversed the district court's original judgment in *Gambell I*, holding that aboriginal subsistence rights of Alaska Natives in the OCS were not extinguished by ANCSA. It also rejected the Secretary's and the oil companies' arguments that (1) the federal government's paramount interests in the OCS extinguished aboriginal rights; (2) that the United States had not assumed sufficient control over the OCS so as to constitute sovereignty which requires recognition of aboriginal rights; and (3) that recognition of aboriginal rights would be inconsistent with principles of international law. On remand, the district court must decide (1) whether the Villages possess aboriginal rights in the OCS; (2) if so, whether the drilling and other activities by the oil companies will interfere significantly with the Villages' exercise of those rights; and (3) whether the Outer Continental Shelf Lands Act extinguishes aboriginal subsistence rights in the OCS. *Gambell v. Lujan*, __ F.2d __ (9th Cir. 1989) (*Gambell III*).

The oil companies and the Secretary have petitioned for rehearing.

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

This case was filed in July 1988 on behalf of six Native residents of Hoonah and one non-Native resident of Angoon, all of whom hunt near Hoonah. Two of the plaintiffs are chiefs of Hoonah-area Tlingit clans -- all depend on the resources, particularly the deer, of the Tongass National Forest. Their suit attacks a Forest Service decision to authorize four years of logging and roadbuilding near Hoonah without first holding the hearings and making the findings required by § 810 of ANILCA, 16 U.S.C. § 3120. That statute requires Federal agencies to consider the effects on subsistence of major land use decisions. If a proposed action may impose significant restrictions on subsistence uses of the public lands, the Federal agency involved must make specific findings about the necessity of the action and the measures which will be taken to minimize its effect on subsistence uses.

Plaintiffs filed a motion for preliminary injunction. The Alaska Pulp Corporation, the principal beneficiary of the logging program, intervened in the case. Plaintiffs argued that the Forest Service applied the wrong standard in determining that its logging program will not significantly restrict subsistence uses in the Hoonah area. They also asserted that the Forest Service failed to consider the impacts of related actions, and based on the information available to it, should have concluded that its logging program would result in significant restrictions to subsistence uses, thus invoking the procedures outlined in §810 (a) (1) - (3). The plaintiffs also alleged violations of the National Environmental Policy Act, the National Historic Preservation Act, and the Administrative Procedure Act.

On November 14, 1988, the district court denied the plaintiffs' request for a preliminary injunction. Although the court found that the plaintiffs had shown a "near certainty" of success on the merits of three of their five claims, the court found insufficient proof of irreparable harm. Instead of granting an evidentiary hearing, the court denied the injunction and suggested that the parties agree on the formulation of the terms of injunctive relief pending compliance by the Forest Service with its obligations under NEPA and ANILCA. Unable to reach agreement, the plaintiffs filed an appeal and moved the district court for an injunction pending appeal. Prior to the hearing on plaintiffs' motion, the parties agreed to the entry of an injunction.

The injunction requires the Forest Service to conduct the hearings mandated by ANILCA § 810 and to prepare a supplemental environmental impact statement. Pending completion of the hearings and supplemental review, logging and roadbuilding are enjoined in the most critical subsistence use areas, including sixteen cutting units in the Hoonah area. The injunction also prohibits creation of a log dump in Whitestone Harbor. The § 810 hearings are scheduled for June, 1989.

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

This case was filed in December, 1985, by Katie John, Doris Charles, and the Mentasta Village Council. Since 1964, the State limited subsistence fishing in the Copper River Basin to that portion of the Copper River below its confluence with the Slana River. In 1984, Katie John and Doris Charles, residents of Mentasta and Dot Lake, respectively, requested the Board of Fisheries to open a subsistence fishery at the old village site of

Batzulnetas, where the proponents have pending and patented (respectively) Native allotments. The board rejected the proposal, voicing concerns about fishing on stocks of fish at or near their spawning grounds ("terminal fisheries"). This lawsuit followed.

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

Questions are raised regarding what constitutes a "reasonable opportunity" to obtain subsistence salmon and whether this is the applicable standard under ANILCA, what steps the State must take to determine whether a fishery can be conducted without jeopardizing sustained yield, and what standard of review the federal court should apply in reviewing State subsistence regulations, among others. There is also a question of whether the State of Alaska has jurisdiction to regulate fish uses on a Native allotment.

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

In its winter 1987-88 meeting, the board acted on plaintiffs' proposal and found that the existing subsistence fishery for the Copper River provided a "reasonable opportunity" for plaintiffs to meet their subsistence uses; however, the board also found that a subsistence fishery in excess of "reasonable opportunity" could be authorized at Batzulnetas without jeopardizing sustained yield. The board adopted a regulation establishing a subsistence fishery at Batzulnetas and setting the season, methods of take, and scope of this new fishery. Cross motions for summary judgment were filed on whether the new regulations are adequate under ANILCA. Plaintiffs claim that the Board was required to establish a subsistence fishery at Batzulnetas which was not categorized as extra to reasonable opportunity. Those motions are still pending.

Meanwhile, plaintiffs have filed a motion for a preliminary injunction which seeks more fishing opportunities for the summer of 1989 at the site than the 2-3 1/2 days currently provided in the regulations.

10. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3689 (U.S. April 18, 1989) (No. 88-1642), *on remand*, No. A86-367 Civ. (D. Alaska) (Holland).

This case was filed on July 15, 1986, under §807 of ANILCA by the Kenaitze Indian Tribe. The plaintiff members consist of the descendants of aboriginal inhabitants of the Cook Inlet area. The Tribe alleged that the State's definition of "rural area" in its 1986 subsistence law, Ch. 52, SLA 1986, was inconsistent with the meaning of the term "rural" in Title VIII of ANILCA. Sections 803 and 804 of ANILCA provide an absolute hunting and fishing priority for rural Alaska residents. The State's definition of "rural area" extends the priority only to those who live in "a community or area of the state in which the

noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area. Plaintiff claimed that the term "rural" had to be given its ordinary meaning -- that of a geographic area with a small population -- and that it could not be defined so as to restrict the priority to only those who live in an area where subsistence activities are a principal component of the economy. It was their position that tribal members living on the Kenai Peninsula are rural residents and their customary and traditional harvests of fish and game for subsistence uses are entitled to preference over competing non-subsistence uses.

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

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

On October 24, 1988, the Court of Appeals reversed the lower court's denial of the Tribe's request for a preliminary injunction. The court first concluded that it owed no deference to the interpretation adopted by the Department of the Interior or the State of Alaska. Interpreting the statute's meaning *de novo*, it found that Congress used the term "rural" in its plain and ordinary sense to refer to areas of Alaska that are "sparsely populated." It noted that adopting the State's "contorted definition" of rural would "materially change the sweep of the statute . . . and lead to an inconsistency within the statute." The court noted that giving the term rural its conventional meaning avoided an internal inconsistency. Relying on *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987), the court refused to resort to the legislative history of ANILCA in search of a contrary meaning. Concluding that the State's definition of rural was inconsistent with ANILCA, the court reversed and remanded the case to the district court for entry of a preliminary injunction.

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

by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA."

The State has petitioned for certiorari and plaintiff's opposition is due to be filed in late May, 1989. Since neither the Court of Appeals nor the Supreme Court would agree to stay the mandate pending review of the case on certiorari, the case has been remanded to the district court for the entry of a preliminary injunction. At the request of the district court, both parties submitted proposals for a preliminary injunction in late March. The State's proposed preliminary injunction was that it be required by May 15, 1990, to either demonstrate that its laws are consistent with ANILCA, or, advise the Department of the Interior that it is withdrawing from its role in administering ANILCA. The Tribe proposed a detailed plan for establishing a subsistence fishery for its members on the Kenai Peninsula.

On April 26, 1989, Judge Holland rejected both proposals and entered a preliminary injunction ordering the State "to elect, on or before May 15, 1989, whether it will or will not afford plaintiff on an interim basis priority over all other consumptive uses for the subsistence use of hooligan and all species of salmon on the Kenai Peninsula." *Preliminary Injunction* at 10. Assuming the State elects to continue to comply with ANILCA, the court ordered the State to afford members of plaintiff tribe a priority over all other consumptive uses, for the subsistence use of hooligan and all species of salmon. To that end, the Board of Fisheries was directed to, on or before May 30, 1989, adopt emergency regulations to effect such priority. The court also gave the parties the alternative of entering into a consent preliminary injunction to the same general effect.

Following the remand of this case for the entry of a preliminary injunction, the State filed a series of motions: motion to dismiss for lack of jurisdiction under the Eleventh Amendment; renewed motion to reconsider denial of its motion to dismiss for lack of jurisdiction under ANILCA §807; motion to dismiss with respect to salmon fishing for lack of standing; and motion to remand the question of whether the Tribe's uses are customary and traditional to the Board of Fisheries. In the event that the jurisdictional motions were denied, the State also moved to have the issues certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On May 4, 1989, Judge Holland denied all of the State's motions.

11. *McDowell v. Collinsworth*, No. 3AN-83-1592 Civ. (Alaska Superior Court) (Serdahely)

This lawsuit was filed in 1983 by Sam McDowell, Dale Bondurant, Harold Eastwood, and Ronald Mahle, challenging the constitutionality of the 1978 State subsistence law. The State's 1978 law had been interpreted by the joint boards of fisheries and game as defining subsistence uses as "customary and traditional uses" by rural residents, although the statutes did not contain the word "rural." AFN intervened on behalf of the State. The State was awarded summary judgment on a number of constitutional allegations, and briefing was about to begin on the remaining equal protection and due process claims when the Alaska Supreme Court decided *Madison v. ADF&G*, 696 P.2d 168 (Alaska 1985).

Madison held that in 1978 the legislature had not limited subsistence uses to rural residents and that the boards had incorrectly interpreted the 1978 law. The *McDowell* lawsuit was put on hold until the legislature enacted a new subsistence law in 1986 (Ch. 56, SLA 1986), because until that occurred, it was not known how or if subsistence uses would be defined in state law or who would constitute the class of people eligible for them.

After the 1986 law was enacted, plaintiffs amended their complaint, again challenging the constitutionality of the new law. (Also, two additional lawsuits, *Bondurant v. State* and *Sims v. State* were filed, raising similar challenges. These two cases were consolidated with *McDowell*). The main issue (from the State's perspective) is whether people who live in rural areas as defined by the law are situated differently (with respect to their use of fish and game) from people in other parts of the state.

On cross motions for summary judgment, Judge Serdahely issued, on January 25, 1988, a 25 page memorandum decision finding for the State on all counts, *viz*, that the State subsistence statute does not violate: Article VIII, Sections 2 and 3 ("maximum benefit" and "common use"); Article VIII, Section 15 ("exclusive right of fishery"); due process, and equal protection provisions of the State Constitution.

An appeal to the Alaska Supreme Court was filed and oral arguments were heard on April 20, 1989.

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

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

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

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

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

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

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

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

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

In 1988, the state filed a motion for summary judgment in *Tanana Chiefs Conference* on the outstanding equal protection and due process claims. At issue is the lack of regulations allowing memorial potlatches. Tanana Chiefs Conference has never asked the Board of Game to authorize that use as a subsistence use. In response to the state's motion, TCC again raised the freedom of religion issue, basically contending that the equal protection and due process arguments must be viewed with strict scrutiny by the court because of the first amendment. The state's position is that plaintiff still has not demonstrated the religious nature and necessity of memorial (as contrasted to funeral) potlaches. Oral argument is scheduled for June, 1989.

13. *Payton v. State*, 3AN-88-12223 Civil (Ripley)

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

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

The court awarded summary judgment to the state on March 15, 1989. A fin. judgment was entered in early April, and the time for an appeal had not run as of thi. writing.

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

This case was filed in the late fall of 1988, challenging the False Pass chum salmon cap which the Board of fisheries had imposed, beginning in June 1988. For the facts and background of this case, see Association of Village Council Presidents, p. 9. Plaintiffs in this case include the intervenors in that case. The chum cap is challenged on a number of grounds. The Yukon-Kuskokwim Fisheries Task Force and 4 residents of western Alaska have intervened on the State's side to support the cap, and have filed a cross claim against the State, arguing for the same reasons put forward in Peninsula Marketing Association that the False Pass fishery should be closed. Cross motions for summary judgment have been filed on plaintiffs' claims (not intervenors), and argument on those motions is scheduled for early June.

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

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

a) *Subsistence Reviews Must Evaluate Cumulative Impacts*

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

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

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

In a subsequent unpublished decision of November 6, 1987, the court invalidated 1983 amendments to BLM's mining regulations because, among other reasons, the

amendments were promulgated without a § 810 evaluation. *Memorandum and Order* . 31-34 (Nov. 6, 1987). These amendments had the effect of allowing mines on "withdraw lands" (lands closed to new mineral entry) to operate under "notices" without subsistence review if the mines kept their operations under five acres.

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

c) *Village Councils Have Parens Patriae Standing*

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

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

Following the Court of Appeals decision, BLM completed its final Environmental Impact Statements for all four drainages and then moved to lift the injunctions. At plaintiff's request, the district court agreed to delay its ruling on the motion until BLM issued its final decisions. Final decisions have now been issued for all but the Minto Flats drainage, and plaintiff is evaluating the adequacy of the EIS's and the final decisions before deciding whether to oppose the government's motion to lift the injunctions.

16. *Tanana Fish and Game Association v. State of Alaska*, No. F88-04 Civ. (D. Alaska) (Kleinfeld), *on appeal*, No. 88-4112 (9th Circuit).

This case was filed on February 10, 1988 by the Tanana Fish and Game Association, an unincorporated association organized to represent and advance the interests of users of fish and wildlife resources in and around the Village of Tanana. Plaintiff alleges that its members have been selling the roe from their subsistence harvests of Yukon River (fall chum) for at least 20 years. Currently the sale of roe from subsistence taken salmon is illegal under 5 AAC 1.010 (d). Plaintiff asserts that the regulation violates

Section 804 of ANILCA, which mandates that customary and traditional subsistence use including customary trade, be given priority over competing non-subsistence uses. Based on the fact that the definition of "subsistence uses" in both state and federal law contains a "customary trade" component which has been interpreted to mean limited exchanges for cash not amounting to a significant commercial enterprise, plaintiff seeks to have the State recognize the right of the residents of Fishing District 5 of the Yukon River to engage in customary trade of Yukon River salmon roe.

The State moved to dismiss the case, arguing that plaintiff had not exhausted its administrative remedies since it had never asked the Board of Fisheries to authorize the sale of subsistence salmon roe in Fishing District 5 of the Yukon River. On April 29, 1988, the day after the Board had scheduled a special Memorial-Day weekend meeting in Fairbanks to consider changing the management plan for commercial fishing on the Tanana River (District 6), plaintiff petitioned the Board to schedule its subsistence-roe-sale proposal for a hearing at the same meeting. The Board rejected the petition. Subsequently, the Tanana local fish and game advisory committee unanimously endorsed the proposal.

Meanwhile, on June 6, plaintiff filed a motion for a preliminary injunction and summary judgment. Plaintiff sought a preliminary order allowing its roe-sale proposal to take effect for the fall-chum season beginning August 15, and to restrain the State from bringing criminal charges against any of its members. (Plaintiff later withdrew its motion to enjoin criminal prosecutions when it became clear that no such charges were likely to be filed). Plaintiff also moved for expedited consideration of the motion for a preliminary injunction.

The court refused to expedite consideration of plaintiff's request for preliminary relief, and proceeded instead with a hearing on the State's motion to dismiss. Following arguments on August 4, 1988, Judge Kleinfeld granted the State's motion to dismiss on the ground that plaintiff failed to exhaust administrative remedies. The court ruled that exhaustion of the State's rulemaking process -- both the normal proposal process and the local advisory committee/regional council process -- were jurisdictional prerequisites to a suit pursuant to §807 of ANILCA challenging the validity of a previously promulgated regulation. Plaintiff appealed the decision. Briefing was completed in mid-February, but oral argument has yet to be scheduled.

In the meantime, plaintiff presented its customary roe-trade proposal to the Board of Fisheries for consideration at its regular fall meeting. Following hearings in December, 1989 in Anchorage, the Board rejected the proposal.

17. *Tarnai v. Fisher & Patton*, No. F87-68 (D. Alaska) (Kleinfeld)

Alex Tarnai is a trapper who is the sole permanent resident of the Nowitna National Wildlife Refuge. His residency on the Refuge area predates ANILCA and the creation of the Refuge. He holds cabin permits from the Fish and Wildlife Service for one cabin which is his residence and two other "line" cabins for his traplines. In January 1986, Tarnai invited a friend to visit and stay with him at his home. Prior to the friend's arrival, defendants Fisher and Patton (the refuge manager and assistant manager) informed the

friend that she would not be allowed to stay with Tarnai in his home. Fisher went to Tarnai's home in late December and informed Tarnai that the friend would not be allowed to stay with Tarnai in his cabin.

Plaintiff's friend was forced to spend her visit in a wall tent near Tarnai's cabin until she could be moved off the Refuge. Tarnai's subsistence trapping work was disrupted and his friend had to spend the rest of her visit off the Refuge. During her visit, the defendant Fish and Wildlife Service officials conducted and/or caused to be conducted an intensive aerial surveillance of Tarnai's cabins and traplines on the Refuge, and on at least three occasions the Fish and Wildlife Service officials and/or persons acting at their direction conducted warrantless searches of Tarnai's cabins, including his home, without his permission.

The plaintiff is suing for declaratory relief and compensatory and punitive damages. He seeks a declaration that he enjoys the same constitutional rights with respect to his home on the Refuge that apply to any person who does not reside there, including association, privacy, to be secure from unreasonable and warrantless searches and seizures, and procedural and substantive due process of law; that Section 1303 of ANILCA which gives individuals living in the Refuge the right to five year renewable permits to continue to live in the Refuge further protects these rights; and that these rights were violated by the actions of the defendants.

Discovery is virtually complete. The government has filed a motion for summary judgment and the plaintiff has moved for partial summary judgment against the government officials in their official capacity. The judgment would declare that the plaintiff enjoys the same constitutional freedoms of association and privacy in the use and occupancy of his home and trapline cabins as persons who do not live in a National Wildlife Refuge. The court has scheduled a hearing on the motions for July 6, 1989.

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

This case involves a challenge to the Forest Service approval in 1980 of a 5-year timber harvest and road construction plan by Alaska Pulp Corp. on Chichagof, Baranof and Kuiu Islands. The plaintiffs in the case are the Sierra Club, Southeast Alaska Conservation Council, the Wilderness Society, and the City of Tenakee Springs. In addition to claims relating to NEPA compliance, the plaintiffs also claimed that the Forest Service failed to comply with Section 810 when it determined to "withdraw, reserve, lease or otherwise permit the use, occupancy, or disposal" of public lands.

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

The federal government argued that state-created municipalities could not su *parens patriae*, therefore the City of Tenakee Springs had no standing to bring Section 81(actions. The plaintiffs, relying upon cases giving municipalities standing in NEPA cases, claimed they had standing by virtue of Section 802(3) which declares that it shall be a policy of Congress for federal land managing agencies to cooperate with adjacent land owners. They also argued that the City had standing because it performed land planning functions relating to subsistence with which the Forest Service actions conflicted.

Judge von der Heydt (decision June 26, 1987) agreed with the federal government and ruled that the City of Tenakee Springs had no standing to raise a cause of action under § 810. Citing *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), the court reasoned that the City does not engage in subsistence and its indirect interest in the economic well-being of the taxpayer base was not sufficient to confer standing. The court made no finding as to whether the Forest Service had complied with §810, but cautioned "[s]ince other plaintiffs not now parties to this suit could raise the Section 810 issue at a later time, prudence would dictate that the Forest Service reevaluate whether it has complied with the section."

On the NEPA issues, the court enjoined further roading and harvest beyond the existing roads in a given area pending preparation of a supplemental EIS. Completion of the Supplemental EIS -- originally projected for May, 1989 -- has been delayed because of the *Hanlon* litigation. (*See Hanlon*, p. 15.)

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

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

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

On October 17, 1989, Judge Holland granted in part plaintiffs' motion for partial summary judgment on their NEPA and ANILCA claims. He found that BLM's conclusion not to prepare an EIS or to comply with the full ANILCA section 810 procedures was not reasonable, due to a failure to analyze fully the downstream impacts of the mining operation; but instead of ordering an EIS or compliance with Section 810, he remanded the matter to BLM to analyze those impacts and decide whether to prepare an EIS or comply with the Section 810 procedures. At the same time, he granted defendants' motion for

partial summary judgment as to the remaining counts, which seems to have in effect uphe BLM's permit on the merits. Plaintiffs moved to amend the judgment to vacate th decision in favor of defendants, which the Court denied on January 9, 1989. Plaintiffs have filed an appeal of the grant of summary judgment to defendants in the Ninth Circuit; defendants have moved to dismiss for lack of jurisdiction.

20. *Western Alaska Salmon Coalition v. Baldrige*, A85-536 Civ. (D. Alaska) (Kleinfeld)

This suit was brought by a coalition of Yupik commercial and subsistence salmon fishermen challenging the incidental take of salmon by Japanese and U.S. - Japanese joint venture ground fisheries operations in the American 200 mile Fisheries Conservation zone. Plaintiff argued that the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq.*, prohibits salmon take by foreign or joint venture fishermen regardless of whether the take is incidental or targeted. Therefore, plaintiff argued there can be no ground fishery unless it can be done with no incidental take of salmon. The government takes the position that salmon may not be a targeted species and that any incidental take must be returned. However, the government believes that nothing in the Magnuson Act requires the prohibition of the ground fishery because of the incidental take. The government also takes the position that the American component of joint ventures should not be treated as a foreign fisher.

The government moved to dismiss the case on a number of procedural grounds, including estoppel, failure to exhaust administrative remedies, and more significantly, the 30-day statute of limitations in the Magnuson Act. Judge Kleinfeld heard oral arguments on the motions in 1987, and re-arguments on May 31, 1988. The case was dismissed following the re-arguments. The Court found that the Magnuson Act did not require prohibition of the ground fishery because of the incidental take of salmon. The decisi was not appealed.

ENCLOSURE 6

Development and Implementation of Tier II Hunting Regulations 1985

A Report to the Joint Boards of Fisheries and Game
November 1985

Alaska Department of Fish and Game

Contents

Introduction

At its June, 1985 emergency meeting the Game Board adopted regulations (5 AAC 92.054, 92.056, 92.058, 92.060) for implementing the "Tier II" provisions of the state's subsistence statute. The board requested a report on the effects of the Tier II regulations for this meeting. This report has three parts. The first reviews the factors the board considered in developing the Tier II regulation, and the associated application form. The second part describes the Department of Fish and Game's administration of this fall's Tier II hunts, and offers recommendations for improving the Tier II process if it is to be used in the future. The third part of the report describes the results of the Tier II system in allocation of permits.

Game Board's Development of the Tier II Regulation

Overview

During the June emergency Game Board meeting, a number of hunts were identified as being at "tier II." The board spent several days determining how to apply the three criteria in AS 16.05.251(a) and AS 16.05.255(b) and explored various options for interpreting and weighting the criteria. The board was assisted by a report prepared by the Department of Fish and Game which listed some possible factors which might correlate to the three criteria. Other factors emerged during the board discussion. In determining which factors to use, the board was hampered by lack of public testimony (because of the emergency nature of the meeting), and the short time until the fall hunting seasons.

In evaluating possible factors to employ, the board had to balance several competing values. Because of the short time period, and because of a desire not to unduly burden the public, the board felt that the application should be kept as simple as possible. On the other hand, the factors chosen needed to actually correlate to the criteria being measured, and the board could not make the regulations too simplistic without sacrificing that correlation. For example, the board initially considered income level as a fairly simple measure of alternative non-wild resources. However, because of complexities such as differences in cost of living, and the unknown variables such as an applicant's other financial assets and liabilities, the board determined that this seemingly straight-forward option was not useful.

A similar tension arose between having questions which were verifiable and questions which were meaningful in light of the three criteria. Location of residency, under the local residency criteria, was an objective and verifiable factor. This contrasts with an applicant's own assessment of whether his or her financial circumstances are adequate to purchase non-wild resources as a reasonable alternative to the taking of game. That correlates well with the alternative resources criteria -- as opposed to using income level, but it is not particularly verifiable.

The board also had to decide whether to craft one set of factors to

measure the three criteria which would be used on a statewide basis, or whether instead to have a number of different ways of measuring, tailored to the circumstances of each hunt. Partly because of the time constraints before the fall hunts, the board chose a statewide approach. The board eventually adopted regulations implementing "Tier II". 5 AAC 92.054, 056, 058, and 060; attachment A. An application for "tier II" hunts was developed, based on those regulations. Attachment B.

The following sections outline some of the options the Game Board considered in developing the tier II regulations, and summarize the factors ultimately chosen. The Board of Game recognized that these emergency regulations would not be the final word on the subject, and anticipated that if the statutory framework remains unchanged the regulations governing tier II hunts would be modified over time.

"Customary and direct dependence upon the resource as the mainstay of one's livelihood."

This criterion appears to relate to the degree to which people have relied on specific fish stocks or game populations in particular geographic areas in the past, and how important this resource has been to their livelihood.

This criterion therefore seems to require at least two sets of standards, one to measure how consistently people have depended on the resource over time, and another to measure how important the resource has been relative to other aspects of their economic situation. Some of the possible indicators considered by the board included:

1. Percentage of diet from wild fish and game, as a general indication of dependence.

2. A history of hunting only in the area where the resource is in short supply as one indication that a person has customary and direct dependence on the resources of that area.

3. Size of the community the applicant resides in, since in larger communities there appears to be relatively less dependency on fish and wildlife than in smaller places.

4. Whether applicant has ever hunted or used the resource in the area.

5. Number of years the applicant has hunted or used the resource, a longer history of use indicating a greater degree of dependence.

6. Amounts of the resource ever harvested or used by the applicant or members of the applicant's household, larger amounts indicating a more consistent customary and direct dependence.

The board ultimately chose two measures, one more verifiable than the

other, for customary and direct dependence. 5 AAC 92.056(a); attachment A. Applicants were given one point for each year they had harvested an animal from the population, up to a maximum of 10 points. Further, applicants could receive up to 20 points for direct dependence on the noncommercial harvest of that population for the principle means of support (primary food source), with the applicant placing himself in the category of great, moderate, slight, or no dependence, and receiving 20, 15, 10, and 0 points respectively.

Because some game populations have only been hunted on a permit drawing system, the board determined that for those hunts no individual could be more dependent than any other individual, and awarded all applicants 30 points for this criterion for those hunts. 5 AAC 92.056(b); attachment A.

One of the problems the board discussed in connection with this criterion was that people could have been directly dependent upon a game population by virtue of harvest accomplished by another member of the individual's family. Thus, the dependent individual would never have actually harvested that population. It proved very difficult to craft an objective, verifiable factor to measure this criterion.

"Local Residency"

Distance greatly affects Alaskans' uses of fish and wildlife. People who live closest to a fish stock or game population are most likely to rely most consistently on that resource. With the criterion of "local residency," the legislature apparently intended that if a resource is in short supply in one area, then all other things being equal, people who live closest to it should have a preference over those who live further away.

The board considered several possible ways of identifying "local residency," including:

1. Distance of each applicant's residence from the resource in miles.

2. Travel costs for the applicant to harvest the resource.

3. Basing the definition on a series of zones defined by increasing distance from the resource; discussed as possibilities were the range of the resource, game management units, and the regions which the joint boards adopted as the basis of the six regional council jurisdictions.

One problem that the board encountered in dealing with the seemingly straight-forward local residency criterion involved how to measure the distance from the resource. Straight line distance was the simplest in some ways, but did not take into account mountain ranges and other physical barriers, nor distance along travel routes, such as rivers and highways. It would also have been very difficult to administer.

The board eventually decided to use a zone approach and to award up to 30 points depending on the applicant's residency zone. 5 AAC 92.058 (a); attachment A. The first zone consisted of the area in which the relevant hunt occurred; the second zone was outside of that area but within the game management unit or units containing the hunting area; the third zone was game management units adjacent to the unit or units containing the hunting area; the fourth zone was any other game management unit. 5 AAC 92.058(b); attachment A.

The board realized that these standardized measures might not always be appropriate, and built into the regulation an ability to modify the boundaries if the standard zones would either treat a specific concentration of similarly located individuals differently, or would be inappropriate due to the range and distribution of the resource. 5 AAC 92.058(c): attachment A. Since public testimony was not taken at the emergency Game Board meeting, the board realized it may not have identified all of the instances where boundary modifications might have been appropriate, but it was anticipated that corrections could be made as problems were discovered in the future.

"Availability of Alternative Resources"

The board discussed two different ways of viewing "availability of alternative resources." The first dealt with whether other fish or game resources are available to offset dependence on the resource in short supply. This could either mean other types of resources available in the same geographic area, or similar resources actually available in other geographic areas. These alternative resources are likely to be differentially available to people, due to differences in transportation, for example.

Timing can also influence availability of alternative resources. If the resource in short supply is customarily harvested in the spring, a resource which can be harvested only in the fall may or may not be an "available alternative."

A second way of viewing "alternative resources" discussed was to consider not just wild resources, but all alternative foods. From this perspective, people with access to fewer stores and foodstuffs, or who must pay higher prices for food, would have fewer alternative resources, and therefore should rank higher on this criterion.

Because of the great range of possible interpretations and approaches to this criterion, it was difficult for the board to develop a simple approach. The following possible indicators were considered:

1. A history of frequent use of fish and wildlife resources in other geographic areas as indicating a greater availability of alternative resources.

2. The use of aircraft to harvest resources as an indicator that a person has other alternatives available, since he or she could choose to hunt in many different areas of the state.

3. Living in a place with relatively few stores and substantially higher relative prices of food as an indicator of fewer alternatives.

4. Whether other fish and game resources are nearby, accessible, and useful as substitutes for the resource in short supply.

5. Whether the applicant's financial circumstances are adequate to allow purchase of alternative resources.

The board ultimately adopted two measures for this criterion. 5 AAC 92.060; attachment A. One was designed to correlate to the availability of fish and game resources and the other to measure the availability of non-wild resources. An applicant could receive up to 15 points depending on the availability of fish and game resources in the hunting area or other area reasonably accessible to the applicant. Additionally, 15 points were awarded to an applicant whose financial circumstance was not adequate to purchase non-wild resources as a reasonable alternative to the taking of game.

The first question is subjective to some extent. The board determined that availability of wild resources was in some degree dependent on an individual's circumstances, such as ownership of a car, an airplane, or a boat. The question on financial circumstances is necessarily subjective, since the board determined that other more objective and seemingly simple factors such as income level alone, or size of community, did not necessarily correlate to the availability of those non-wild resources to the applicant.

Summary

The Board of Game found it very difficult to develop standard measures to apply the three statutory criteria on a statewide basis. Time constraints and lack of public input made the board's task harder, but they were not the only factors. It was difficult to identify measures that would both correlate to fish and wildlife use and be verifiable. Any attempt to distinguish among individuals based on three criteria will involve the same fundamental problem of correlation and verification faced by the board at its June meeting.

Implementation

As occurs with all permit hunt processes adopted by the Board of Game, The Division of Game was responsible for implementing the Tier I and Tier II hunts adopted in the June 1985 emergency board meeting. Prior to the June meeting, the Board of Game held its annual spring (March-April) regulatory meeting and confirmed the 1985-86 hunting regulations, including the normal registration and permit drawing hunts. Immediately after the spring board meeting ended (April 8), Game Division staff produced the drawing hunt supplements and the registration hunt supplements, and began drafting the hunting and trapping regulation booklets. Both the drawing hunt supplements and registration hunt supplements were produced in record time and were made available to the public beginning April 16. The public was given 45 days (until May 31) to apply for fall drawing hunts, with results to be available on July 13 or shortly thereafter. There were 45,366 applicants for the 117 fall drawing hunts; $275,670 in application fees were received.

The establishment of Tier I and Tier II hunts necessitated major changes in the administrative procedures of permit information and issuance. For the most part, Tier I and II hunts were developed from the previously mentioned permit drawing (lottery) hunts and registration hunts. A total of 54 Tier II hunts were authorized (See Attachment C).

Scheduling

New applications and newsprint supplements had to be quickly designed and produced for public distribution. In view of certain changes and limitations to permit hunts available to nonresidents, it was assumed that fewer hunters would participate in the Tier II permit hunt application process as did under the drawing system. In scheduling events and redirecting staff time to administer the Tier II hunt application process, we assumed a "worst case situation" and planned for receipt of up to 30,000 applications. Also, being aware that sheep seasons must start earlier than other hunts or essentially not at all, a separate schedule of events was designed for sheep which resulted in the creation and distribution of a separate supplement for this species.

For all other species, and based upon the "worst case" assumption, it was apparent that many of the seasons would need to have delayed opening dates. The following schedule of events were developed in late June:

Sheep

Hunt supplement ready for printing	July 5
News release on sheep hunts	July 8
5,000 supplements (4 pages each) ready for mailing	July 10
Mail/deliver to all ADF&G offices and selected vendors	July 20
Available to public - 9 days	July 29
Deadline for receipt by ADF&G	August 5
Additional time to score applications	August 6
Select winners	August 7-8
List of permit winners sent to Fairbanks, Tok, Glennaller, Delta, Palmer, Soldotna	August 8
Mail permits	August 9
Hunters receive permits	August 12-19

Season opens - August 20

All Other Species

Tier I and II newspaper and applications ready for printing	July 9
50,000 papers, 110,000 applications ready for mailing	July 15
Mail/deliver to all vendors and ADF&G offices	July 24
Available to public - 10 days	August 5
Deadline for receipt by ADF&G	August 12
Additional time to sort and process	August 17
Additional time to score	August 22
Select winners	August 26
Print permits and mail	Sept. 5
Hunters should receive permits no later than	Sept. 15

Information and Application Distribution

The original permit hunt supplements were withdrawn and two new supplements produced. One contained information on the "nonsubsistence" drawing hunts for the 1986 spring season. The second subsistence hunt supplement contained three types of hunts: (1) general registration hunts where any hunter including nonresidents could apply; (2) a subsistence registration hunt where only Alaskans (or some hunts where only individuals residing in specific geographic areas) could apply; and (3) a Tier II subsistence application where only those with highest application scores were given permits, or a drawing was held among those with the lowest tie-scores if only a limited number of permits were left.

The new hunt supplements and applications went out to the public on schedule. However, given the requirement of a short deadline for the application period, potential applicants had at best about two weeks to obtain the forms, complete them, and return them to the department or have them postmarked by August 5. Within the limited schedule, distribution of the applications to remote areas was particularly burdensome. In some cases, due to mail flight schedules and delays, applications were available to local residents only a few days before the deadline.

The hunting regulation booklet was significantly modified and reorganized into subsistence and general hunting sections. There were delays in printing and the books were not available at regional offices until September 3; 6-8 weeks later than normal and three weeks after some seasons had already begun.

Processing and Scoring

A total of only 9,382 applications were received. Of these, 595 were deemed invalid and rejected for the following reasons:

Reason	Number
Duplicate or 2 in household	80
Failure to certify that the application was the only one (or two for caribou) for the household	85
Domicile blank or invalid	71
Hunt number blank or invalid	125
Late application or cancelled hunt	5
Failure to submit application fee	195
Failure to certify that applicant was an Alaskan resident 12 years or older	15
Failure to sign application	22
	595

Since the number of applications was substantially less than originally anticipated, the overall processing time was shortened considerably and resulted in the Tier II permits being mailed out earlier than expected. This year it took an average of 4 minutes to score each application by hand. Computer processing (software was not available this year for Tier II applications) could reduce scoring time by 50 to 75% per application. If in future years, we received the same number of Tier II applications as was normally received on permit drawing hunts (approximately 50,000), an estimated 245 person days would be required to process the applications.

As noted above, applications were scored manually using a template score sheet. Scores were assigned in accordance with the point system established by the Board of Game. We have reviewed all applications and determined that we had a scoring error rate of 1.7%.

General Problems

Because of the emergency situation in which Tier II hunts were established and Tier II applications developed, instructions for answering the questionnaires did not precisely match the permit supplement (newspaper) instructions. This caused considerable confusion among staff and the public. For example, Question No. 9 in the permit supplement paper spoke to the degree of availability of alternative resources (including big game and salmon) which are at least as accessible as the Tier II animal for which one applied. It did not specify "in your usual hunt area" as did the application. Therefore, a person could have ignored alternative resources such as salmon and caribou that were readily accessible when applying for a Tok sheep permit, since he/she may have viewed "usual hunt area" as the actual Tok Management Area. If he/she viewed the "usual hunt area" as Zone 1, then all Zone 1 residents should have scored the same, as the same meat resources were available to all.

The application format and many of the questions confused many people and resulted in several thousand inquiries to staff via phone calls, letters, and visits to the various regional and area offices. Although scoring of the "point system" was explained in the regulation book, no explanation of terms in the application was provided to the public (except by staff) when they were completing their applications. The intent of not providing this information was to receive objective answers from the applicants, but the public soon recognized which answers would receive higher scores.

The short application period created significant problems for both the public and the department. Applicants at best had about two weeks to obtain the forms, complete them, and return them to the department or get them postmarked before August 5.

The process was particularly burdensome in remote areas. In some cases, due to mail flight schedules and delays, applications were available in communities for only a few days before the deadline.

Overall there was a tremendous negative reaction by the public to the establishment of Tier II hunts. Departmental staff, particularly Game Division staff in regional and area offices, were targets for verbal and written frustration and anger expressed by a confused and disenchanted hunting public. Hundreds of staff hours were spent trying to explain the reasons for the changes, how to participate in the new system, and generally trying to reestablish credibility with a public that was very unhappy.

Monetary costs to the department were high. About $265,000 in application fees for the original 1985 permit hunts were refunded. We are currently determining extra costs expended in personnel and operating funds to administer the emergency Tier II hunts.

Recommendations

The permit system established under the emergency regulations worked in that Tier II hunts were held. However, there were numerous administrative difficulties that should be minimized or eliminated if the existing Tier II system is used in future years. It is also important that appropriate revisions be made so that: (1) confusion by the public can be minimized to the greatest extent possible; and (2) the system is not easily abused. Modifications to the present Tier II system would, of course, have to be made in a manner which results in correlation of the measured factors to the 3 statutory criteria. Specific recommendations are listed below.

Tier II Application

1. The current application form should have the following major revisions, if they can be made in a manner which results in correlation of the measured factors with the three statutory criteria:

   a. all questions should be verifiable and quantified if at all possible (presently questions 8, 9, and 10 are not verifiable but carry large point values);

   b. all ambiguous terms (e.g., "greatly dependent") should be defined on the form;

   c. questions should be simplified and reduced to two possible answers (e.g., yes or no) where possible;

   d. the applications should have a clause which states that the information provided on the application is not confidential and subject to public disclosure;

   e. question 5 should be deleted (we received numerous erroneous application requests for hunts that did not exist);

   f. if question 9 remains, the board should predetermine how available alternative resources are in the hunt area;

   g. questions 11, 12, and 13 should be deleted and replaced with statements of fact (e.g., "to apply for a Tier II hunt, you must be at least 12 years old and a resident of Alaska"); and

   h. the point value of each question should be shown on the form (this would save hundreds of staff hours answering calls regarding scores).

2. Standard procedures for scoring and rejecting applications for all hunts should be established and reviewed by the board prior to the application process and made available to the public.

3. Unlike lottery permits in the past, the Tier II permits are on the basis of household rather than an individual. The board needs to determine whether or not a permit can be transferred between members of the same household.

4. If at all possible, the application period should be a minimum of one month duration.

5. A more comprehensive public information program should be conducted regarding future Tier II hunts, schedules, and procedures.

6. As harvest returns become available, all hunts and corresponding numbers of permits should be analyzed and adjusted where necessary to meet management objectives.

The Allocation Effects of the Tier II System

The purpose of this section is to describe the performance of the Tier II system in allocating permits. The section has two parts. First, general characteristics of all Tier II hunts statewide are described, including number of hunts, location of hunts, number of applicants, number of winners, cut-off scores for winners, and other characteristics. Second, the allocation of permits among applicants is described by comparing the Tier II system in 1985 with the previous allocation systems in 1984 for particular hunts. Several questions are answered by these comparisons:

1. Who applied for the permits?
2. What were the criteria that mattered for obtaining permits?
3. What changes occurred in allocations compared to previous years?

General Characteristics of the Tier II System

Number of Tier II Hunts

There were 54 authorized Tier II hunts in 1985 (53 hunts were held) offering a total of 4,856 hunting permits for five types of game animals (see Table 1). Moose (26 hunts) and sheep (12 hunts) accounted for the largest number of hunts, while caribou (2,690 permits) and moose (1,611 permits) accounted for the largest number of permit opportunities.

Table 1
Tier II Hunts and Applicants

Species	No. of Tier II Hunts	Available Permits	Valid Applicants	Permits Awarded	Award Rate
Bison	4	107	826	107	13%
Caribou	5	2,690	3,528	2,504	71%
Moose	26	1,611	3,567	1,484	42%
Mt. Goat	6	36	93	36	39%
Sheep	12	412	662	404	61%
Totals	53	4,856	8,676	4,535	52%

Location of Tier II Hunts

Most Tier II hunts were located near the large population centers of Anchorage, the Matanuska Valley, Fairbanks, and Juneau in road-accessible areas (see Figure 1). The three GMUs surrounding Anchorage (GMUs 7, 14, and 15) accounted for 30 of the 53 hunts. The relatively easy access created by roads in these areas accounts for the high levels of participation and demand which resulted in these hunts being designated as Tier II. Only 10 hunts were designated in areas not connected by roads to large population centers.

As discussed below, the location of hunts accounts for the origin of most applicants. The great majority of applicants came from the large population centers.

Applicants and Winners

As shown in Table 1, there were 8,676 valid applicants for the 53 Tier II hunts, of which 4,535 (or 53%) were awarded permits. Award rates varied considerably between species and hunts (Table 1, Appendix Tables 1-6). The lowest award rate was for bison (13%) and the highest for caribou (71%). For certain caribou, moose, and sheep hunts, all applicants received permits (321 permits were not awarded because of undersubscription, see Appendix Tables 1 - 6).

Over 40 percent of permit winners came from the Anchorage-Matsu area due to the location of the hunts and the large population concentrations in these areas. As shown in Table 2, of all permits awarded, Anchorage residents won 24.3 percent and Matsu residents 20.4 percent.

Table 2
Permit Winners by Residency

Residency	Bison	Caribou	Moose	Mt. Goat	Sheep	Total
Anchorage Area	2 (1.9)	573 (22.9)	383 (25.7)	5 (13.9)	138 (34.2)	1,101 (24.3)
Mat-Su Area	0 (0.0)	503 (20.1)	395 (26.5)	1 (2.8)	27 (6.7)	926 (20.4)
Kenai Peninsula	1 (0.9)	171 (6.8)	58 (3.9)	8 (22.2)	4 (1.0)	242 (5.3)
Juneau Area	0 (0.0)	4 (0.2)	53 (3.6)	0 (0.0)	2 (0.5)	59 (1.3)
Fairbanks Area	1 (0.9)	128 (5.1)	20 (1.3)	0 (0.0)	75 (18.6)	224 (4.9)
Other	103 (96.3)	1,124 (44.9)	582 (39.0)	22 (61.1)	158 (39.1)	1,989 (43.8)
Total	107	2,503	1,491	36	404	4,539

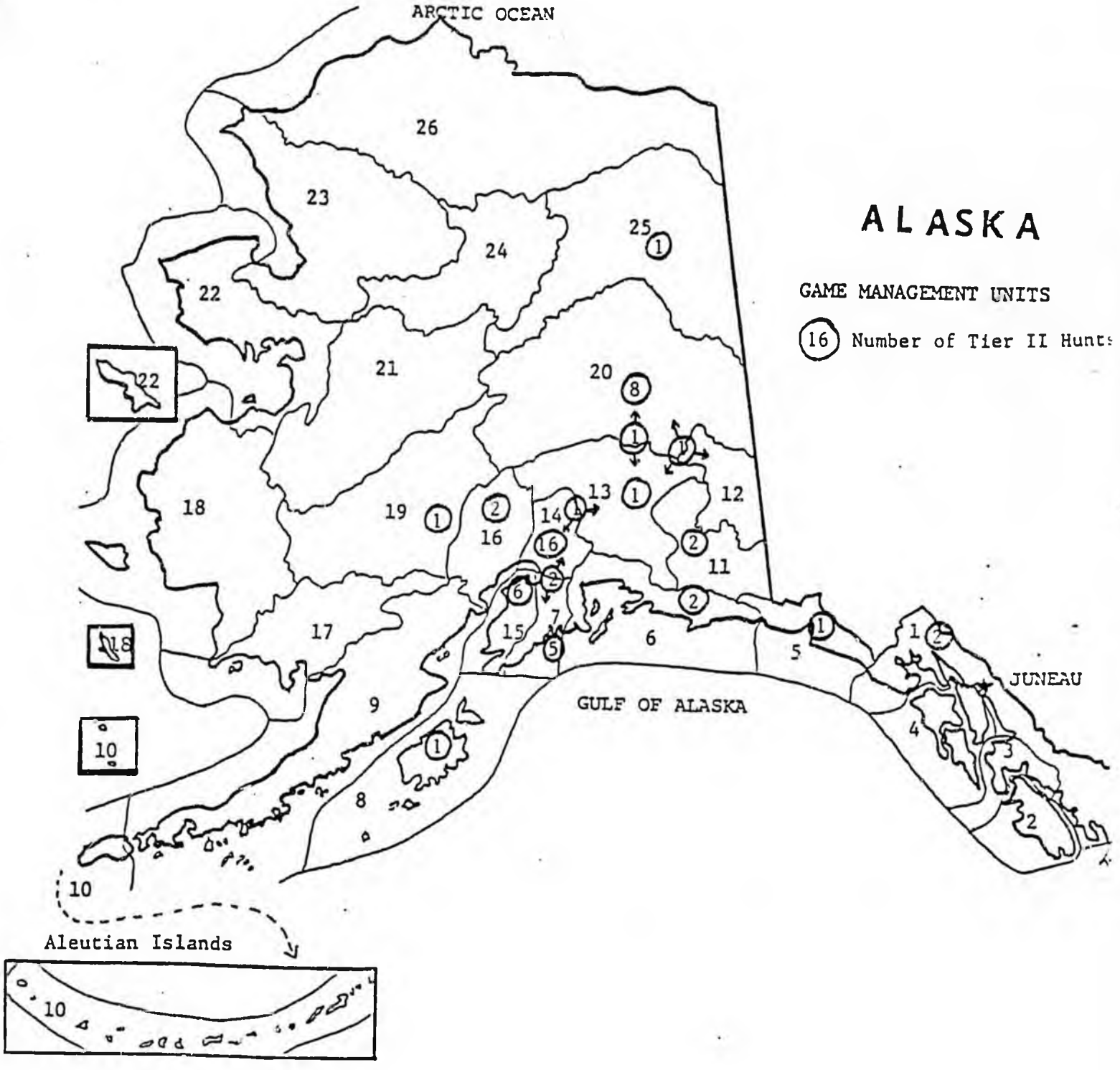


FIGURE 1. Locations of the 53 Tier II hunts in 1985. The greatest numbers occurred around population centers (Anchorage, Matanuska Valley, and Fairbanks).

Cut-off Scores of Winners

The cut-off scores between winners and non-winners varied considerably between hunts (Appendix Table 2-6). The lowest winning score ranged from only 5 points (Yakutat Forelands Moose Hunt 0961, GMU 5A) up to 90 points, the highest possible (Tanana Bison Hunts 0403, 0404, GMU 20D). In general, the larger the number of applicants relative to available permits, the higher the cut-off score. It can be expected that cut-off scores will increase in the future if the applicant pool size increases.

Performance of the System in Allocating Permits

How did the Tier II system allocate hunting opportunities in comparison with previous years? The answer is that it depended upon the particular hunt. To illustrate the performance of the survey in allocating hunting opportunities, five cases are discussed below. They suggest three major conclusions:

1. Shifts occurred in the allocation of permits between hunters residing in different areas for particular hunts. For the hunts described below, the changes were not large in comparison with the previous year's allocation system.

2. Which questions were most important in determining who received permits varied between hunts. For some hunts, "residency" was the question most highly related to a hunter receiving a permit; for other hunts, "residency" made no difference, or was of secondary influence in comparison with other factors like "income" or "dependency." Similarly, for some hunts, the "income" question was most highly related to a hunter receiving a permit, while it was of no or secondary influence in other hunts. Whether a question mattered in receiving a permit was greatly affected by the size and location of the applicant pool relative to the number of permits and location of the hunt.

3. For hunts which previously were on random draw (see Case 5 below), the Tier II system changed the basis of allocation away from chance to a selection procedure based on the individual characteristics of a hunter in comparison with all other applicants. For hunts which previously were permit registration (see Case 1 below) or permit award based on residency and dependency criteria (see Case 2 below), the Tier II system increased the applicant pool but did not substantially alter the basis of allocation.

Case 1. Hunt 0985: GMU 20B Moose (Minto Flats)

Area

The 20B Minto Flats Management Area is located about 60 miles west of Fairbanks. The community of Minto (population 178 people) is located in the management area. Residents of Minto, Nenana, and Fairbanks have hunted in this area in the recent past.

Former Allocation System

Seasons and bag limits were substantially decreased in the Minto Management area beginning about 1976. In 1984-85, 30 registration permits were available for a 5-day fall moose hunt, and 50 permits for a 45-day January-February moose hunt, issued in Minto. An additional 20 fall permits were available, 10 issued in Anchorage and 10 in Fairbanks (see Table 3). The harvest quotas were seven fall bull moose and eight winter bull moose.

The Tier II Allocation System

The 1985 Tier II system provided for 60 permits issued to the top scoring applicants. In 1985, there were 68 applications received by mail within the deadline. Thus, almost all applicants were awarded permits (60 of 68; 88 percent successful). Of successful applicants, 31 were from Minto, 3 from Nenana, and 20 from Fairbanks-North Pole, with 6 winners from other places. Half the applicants had never killed a moose in this hunt previously; 31 percent had killed a moose 10 or more years.

Performance

The 1985 Tier II system resulted in a reallocation of permits (Table 3). Minto residents' permits decreased from 30 fall and 50 winter permits in 1984 to 31 permits in 1985. Fairbanks residents' permits increased from 10 fall permits to 20 permits. Nenana residents' permits decreased from 10 fall permits to 3 permits. Thus, a greater percentage of permits went to persons outside the hunt zone in 1985 than the previous year. The reallocation resulted primarily from the low number of hunter applicants from Minto and Nenana. There were numerous problems making applications available in the hunt zone: local vendors received permits only 2 days before the mailing deadline, and many residents were dispersed to fishcamps away from the community at that time. These problems resulted in the low application rate.

TABLE 3 MINTO FLATS MANAGEMENT AREA, PERMIT AND HARVEST SUMMARY, 1979-1985.[1]

Regulatory Year	Number Permits Allocated Fbks.	Minto	Nenana	Number Issued Fbks.	Minto	Nenana	Harvest Fbks.	Minto	Nenana	Non-Res.	Unknown
1979-80	--	--	--	113	65[2]	10	4	2	0		
1980-81	25	50	25	25	28	25	2	0	0		3
1981-82	25	50	25	25	34	25	5	2	0		
1982-83	25	50	25	25	41	25	4	2	0	1	
1983-84	25	50	25	25	50	25	8	7	1		
1984-85 fall	10	30	10	10	29	10	4	6	1		
winter		50		10	30	10		1			
1985-85	60 Total			20	31	3	6 other				

[1] This information is derived from the Big Game Data Index Files, Alaska Department of Fish and Game, 1979-1985.

[2] 48 listed Minto as their residence.

Case 2. Hunt 515: GMU 13 Caribou (Nelchina herd)

Area

The range of the Nelchina and Mentasta caribou herds lies within the Copper Basin, a 29,520 square mile area about 180 miles east of Anchorage. The area is accessible by road to population centers in Anchorage, the Mat-Su Valley, and Fairbanks. There are about 3,310 people living in the "hunt zone" of the Copper Basin, in 1,057 households, and 22 communities or areas.

Former Allocation System

Hunting permits for the Nelchina caribou herd have been issued by random drawing since 1977. From 1981 through 1984, a separate subsistence permit drawing was held for qualified residents of a specified zone, most recently GMUs 11, 13, and a portion of GMU 12 along the Nabesna Road (see Table 4). Permits not awarded during the subsistence drawing were available by registration beginning December 1. As shown in Table 4, the number of applicants for subsistence permits rose steadily until demand exceeded supply by 218 in 1984.

The Tier II Allocation System

For the 1985 Tier II hunt, there were 2,718 valid applications, 711 (26 percent) from the Copper Basin and 2,007 (74 percent) from outside the basin. Of the 1,800 permits awarded, Copper Basin residents received 677 (38 percent) and non-basin residents received 1,123 (62 percent). Sixty-six percent of all applicants received permits. There were 34 unsuccessful Copper Basin applicants, including 20 from Glennallen and 9 from Copper Center. Fifty-one percent of the Anchorage applicants (351 of 690) and 55 percent of Eagle River applicants (92 of 168) received permits.

Performance

The 1985 Tier II system resulted in a reallocation of permits to residents of the Copper Basin in comparison with 1984. In 1984, 738 Copper Basin applicants received 500 permits, whereas in 1985 711 Copper Basin applicants received 677 permits. Non-basin applicants outside the hunt zone were the majority of winners in 1985 (1,123 permits) as in 1984, so the overall reallocation was small. The survey questions most highly correlated with receiving permits were household income and dependency. Only one percent of persons answering "no" to the income question received a permit; and only 12 percent answering "slight or no" dependence received a permit.

Table 4
Nelchina Caribou (GMU 13) Permit Applications

Year	General Hunt		Subsistence Hunt			Total	
	Permits	Applicants	Permits	Applicants	Registration	Permits	Applicants
1981-82	1,546	6,764	150	55	---	1,696	6,819
1982-83	1,300	8,877	450	233	217	1,750	9,110
1983-84	1,300	9,265	450	438	17	1,750	9,703
1984-85	1,400	11,798	500	718	0	1,900	12,516
1985-86 (Tier II)	---	---	1,800	2,718	---	1,800	2,718

Case 3. 913W: Unit 13 Moose (Copper Basin)

Area

The area of the Copper Basin is described in Case 2 above.

Former Allocation System

Most of GMU 13 has been open to general moose hunting, with a one-bull moose limit with an antler spread of 36 inches. To increase hunting opportunities for subsistence use, since 1983 an additional 100 subsistence permits were available by drawing for GMU residents. In 1983, 230 people applied; in 1984, 372 people applied.

Tier II Allocation System

In 1985, the Tier II system provided 200 antlerless moose permits available to all Alaskan residents. There were 506 valid applications. Of these, 391 (77 percent) were GMU 13 residents. Of the 200 permits awarded in 1985, 182 (91 percent) went to Copper Basin residents.

Performance

The Tier II system resulted in an extra 100 permits being made available for antlerless moose in 1985 over 1984 due to an increase in the allowed harvest. Almost all these additional permits were allocated to hunt zone residents of the Copper Basin by the scoring system, primarily because of the residency question. Because there were more hunt zone applicants than available permits, the questions on income and dependency also were important in determining permit winners.

Case 4. Hunt 510: GMU 11 Caribou (Mentasta Herd)

Area

The Mentasta Caribou herd ranges in the Mentasta and Wrangell Mountains in the eastern part of the Copper River Basin. Unlike the Nelchina Caribou Herd (Case 2), the Mentasta herd is not easily accessible by road from population centers.

Former Allocation System

Hunting permits for the Mentasta caribou herd have been issued by random draw since 1977. Until 1985, there were no subsistence permits issued. As shown in Table 5, the number of applicants has grown since 1977, leveling off in 1983 and 1984.

Tier II Allocation System

The 1985 Tier II hunt offered 350 permits to the top scoring applicants. However, only 170 people applied, leaving 180 permits unissued. Consequently, all applicants received permits. Fifty-five applicants (32%) were from the Copper Basin (Chitina 2; Chistochina 1; Copper Center 10; Gakona 7; Glennallen 14; Nabesna 4; Tazlina 1; Slana 15); while 115 were from outside the basin. Thirty-five applicants were from Anchorage, 36 from Valdez, and 3 from Fairbanks.

Performance

That more people did not apply for this hunt can be explained in part as a response to the announced change in season to September 21- September 30. August 10 - September 30 had been the season in 1984. As evidenced by advisory committee comments, many people felt that caribou taken at the end of September would be in rut and the meat would not be useable. Also, the later season meant that due to herd movements, the caribou would not be in accessible locations. In contrast, the Nelchina caribou GMU 13 hunt is open January - March. The season for Unit 11 caribou was finally altered to September 10 - 30, but this was well after the deadline for submitting permit applications.

Table 5
Number of Applicants, Mentasta Caribou Herd

			Residency of Winners	
Year	Applicants	Permits	Copper Basin	Non-Copper Basin
1977	277	150	---	---
1978	363	350	---	---
1979	408	350	---	---
1980	421	350	---	---
1981	619	350	148 (43%)	202 (57%)
1982	732	350	128 (37%)	220 (63%)
1983	757	350	---	---
1984	731	350	---	---
1985 (Tier II)	170	350	55 (32%)	115 (68%)