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to all "land" therefore should be interpreted logically to mean that the public trust doctrine extends beyond tidewater and includes state-owned uplands *and* resources found thereon, such as fish, wildlife, timber, and water.

Although the precise contours of the public trust doctrine itself are not subject to "bright line" delineation, there is no ambiguity at the bedrock level: the public trust in Alaska is meant to apply to *all* state land and all unappropriated minerals. Thus, in interpreting and applying section 38.05.502, the only interpretive tasks arguably presented for a court to determine are the extent of the state's fiduciary obligations under the public trust and the extent of the resources included within the ambit of the term "land."<sup>33</sup>

To summarize, the public trust doctrine in Alaska, including government's fiduciary role in management of trust resources, is one of the hallowed principles of Alaskan law. This tradition has been vigorously and repeatedly upheld in Alaska by our constitutional framers, by the Alaska Supreme Court, and by the electorate at large.

The Alaska legislature has plenary authority over state-owned natural resources, including lands conveyed to the state under the terms of the express, statutory, or university trusts.<sup>34</sup> The authority of the legislature is not so great, however, as to enable it to ignore or violate its legal responsibilities as fiduciary for the public trust.

The public trust also imposes an affirmative duty on the executive branch of state government. State agencies must thoroughly consider the public trust ramifications of their actions, especially where disposal of state land, forest resources, water, or unappropriated minerals are concerned. Any disposal of trust resources must be strictly construed

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<sup>33</sup> See *Moore v. State*, 553 P.2d 8, 25 (Alaska 1976) (quoting ALASKA STAT. § 38.05.365 (16), renumbered as § 38.05.965 (19)).

Assuming that the word "resources" is not a mere redundancy, the conclusion seems reasonable that land-tied resources, such as timber, come within the ambit of the definition of "lands."

Title 38 of the Alaska Statutes contains an additional definition of "state lands" that reinforces the very broad sweep of the term. Alaska Statute § 38.50.170 defines "state land" as: "including shore, tide, and submerged land or unsevered resources belonging to or acquired by the state excluding interests in land severed or constructively severed from the land."

Thus, a court should logically give an expansive definition to the term "land" as used in section 38.05.502, so that it includes, *inter alia*, state-owned uplands, fish and wildlife habitat, waters, recreation, scientific, educational, scenic, and aesthetic values. The Alaska Supreme Court recently reinforced this premise in *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131 (Alaska 1993).

<sup>34</sup> See ch. 181, 38 Stat. 1214; ch. 181, 45 Stat. 1091 (1959).

pursuant to the obligatory nature of the trust.<sup>35</sup> State agencies must clearly communicate to the Alaskan public the potential impacts of actions that may harm those resources. State agencies should also observe standards of prudent self restraint where disposal or exchange of state resources is at issue, in order to assure protection of public trust resources.

\* All three branches of government have public trust responsibilities. Therefore, the Alaskan courts should sedulously protect the values embodied in the trust. It also means the courts should broadly construe the purposes of the public trust, since a narrow construction would risk the loss, through alienation of the *jus publicum*, of the inherently public resources that constitute the corpus of the trust.

### III

#### THE PURPOSE AND SCOPE OF THE PUBLIC TRUST DOCTRINE

##### A. *The Public Trust Doctrine in the United States*

As defined in the various state courts of the United States, the objectives of the public trust have evolved in concert with changing public perceptions of the values and uses of the trust resources that are managed by state government.

In the context of state-owned lands, the public trust doctrine has most frequently been applied to tidelands.<sup>36</sup> During the nineteenth century, the purposes of the tidelands trust were traditionally defined in terms of navigation, commerce, and access for commercial fisheries.

Yet the public trust doctrine has never been so constricted. The public trust doctrine was never the exclusive creature of littoral states, and the purposes of the public trust have never been limited to the triad of commerce, navigation, and fishing.<sup>37</sup>

As society and its needs have evolved, the scope and purposes of the public trust doctrine have also evolved and expanded. This evolution should be expected to continue:

There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the

<sup>35</sup> Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 394-98 (1892).

<sup>36</sup> See, e.g., Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842); Shively v. Bowlby, 152 U.S. 1 (1894); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988).

<sup>37</sup> As discussed, Alaska's public trust doctrine does not lose its force at the mean high tide line; the scope of the doctrine stretches far beyond the capacious mud flats of Bristol Bay or Cook Inlet.

tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.<sup>38</sup>

What has been the result of this doctrinal evolution? The purposes of the public trust doctrine in the United States have been held to include at least:<sup>39</sup>

- protection of navigational and commercial fishing rights over tidelands;<sup>40</sup>
- recreational fishing, boating, swimming, water skiing, and other related purposes;<sup>41</sup>
- protection of the public's right to hunt;<sup>42</sup>
- protection of fish and wildlife habitat;<sup>43</sup>
- recreational access to the ocean;<sup>44</sup>
- sunbathing, swimming, other shore activities, and access to and use of shorelands and upland dry sand beaches;<sup>45</sup>
- enjoyment of scenic beauty;<sup>46</sup>

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<sup>38</sup> *Hayco v. A.J. Assocs., Inc.*, 846 P.2d 131, 133 (Alaska 1993) (quoting *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971)).

<sup>39</sup> This list does not purport to be complete. The public trust doctrine almost certainly has been held to protect additional resources and uses thereof; the author does not pretend to have exhausted all avenues of research. In addition, the doctrine is likely to be expanded as years go by and public habits and needs change. Nonetheless, this list should provide the reader with an appreciation of the current status of the public trust doctrine as expressed in different states.

<sup>40</sup> *See, e.g.*, *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842).

<sup>41</sup> *See, e.g.*, *Wilbour v. Gallagher*, 462 P.2d 232 (Wa. 1969), *cert. denied*, 400 U.S. 878 (1970); *See also* Act of June 3, 1985, ch. 82, § 1(c), 1985 Alaska Temporary & Special Acts 30.

<sup>42</sup> *See, e.g.*, *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Opinion of Justices to Senate*, 424 N.E.2d 1092 (Mass. 1981); *Delmarva Power & Light Co. v. Eberhard*, 230 A.2d 644 (Md. 1967); *Hartford v. Gilmanton*, 146 A.2d 851 (N.H. 1958); *Swan Island Club Inc. v. White*, 114 F. Supp. 95 (E.D.N.C. 1953), *aff'd sub nom.* *Swan Island Club, Inc. v. Yarborough*, 209 F.2d 698 (4th Cir. 1954).

<sup>43</sup> *See, e.g.*, *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983); *People of Smithtown v. Poveromo*, 336 N.Y.S.2d 764 (N.Y. Dist. Ct. 1972), *rev'd on other grounds*, 359 N.Y.S.2d (N.Y. 1973); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

<sup>44</sup> *See, e.g.*, *County of Haw. v. Sotomura*, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974).

<sup>45</sup> *See, e.g.*, *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

<sup>46</sup> *See, e.g.*, *City of Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957); *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 149-51 (Mich. 1960).

- ✓ conservation of fishery resources;<sup>47</sup>
- ✓ conservation of wildlife resources;<sup>48</sup>
- waters and minerals;<sup>49</sup>and
- ✓ existing and future recreational uses.<sup>50</sup>

### B. Alaska Law and the Public Trust

#### 1. Purposes of the Public Trust in Alaska

Like most common law doctrines, the public trust doctrine in Alaska is flexible.<sup>51</sup> As certain natural resources have become progressively more scarce, the purposes for which the public trust has been judicially invoked in Alaska have expanded. In 1985, the Alaska Legislature recognized the necessity of endowing the public trust doctrine with sufficient flexibility to accommodate future uses in the context of recreational aspects of the public trust.<sup>52</sup>

<sup>47</sup> See, e.g., *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398-99 (Alaska 1990); *McDowell v. State*, 785 P.2d 1, 12-18 (Alaska 1989); *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 492-96 (Alaska 1988); *Nathanson v. State*, 554 P.2d 456, 458 n.9 (Alaska 1976); *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

<sup>48</sup> See, e.g., *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1005 (Alaska 1977); *Owsichek*, 763 P.2d at 492-96; *McDowell*, 785 P.2d at 12-18; *Gilbert*, 803 P.2d at 398-99; *Matthews*, 471 A.2d at 361.

<sup>49</sup> See, e.g., *Herscher*, 568 P.2d at 1003.

<sup>50</sup> See 1985 Alaska Sess. Laws 82 § 1(c). In *Matthews*, the New Jersey Supreme Court found a public trust right of access to all municipally-owned beaches above and below the high tide line. 471 A.2d at 364. The court wrote: "Beaches are a unique resource and are irreplaceable." *Id.* The remaining unlogged, old-growth rainforests of Southeast Alaska are no less unique a resource than the sandy beaches of New Jersey. Given the fact that once an Alaskan old-growth forest is logged, it takes 300 to 500 years to regenerate old-growth conditions, the boreal rain forests of Alaska are clearly "irreplaceable" subsistence and recreational resources.

<sup>51</sup> The Alaska Constitution, which is the source of the public trust doctrine in Alaska, is adaptable to changing circumstances. *Waarwick v. State*, 548 P.2d 384, 391 (Alaska 1976). Thus, Alaska's courts would be likely to agree with this statement: "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" *Matthews*, 471 A.2d at 365 (quoting *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972)).

<sup>52</sup> See 1985 Alaska Sess. Laws 82 § 1(c). Although it is unwise to attempt to create a single statement of the purposes of the public trust doctrine, the need to exercise wise stewardship over Alaska's natural resource patrimony commands, at a minimum, that attention be paid to the public trust purposes enunciated by the California Supreme Court, sitting *en banc*, in *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 719 (Cal. 1983) "The principle values plaintiffs seek to protect . . . are recreational and ecological . . . [I]t is clear that protection of these values is among the purposes of the public trust." *Id.* This same concept was recently embraced by the Alaska Supreme Court. See *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131, 133-34 (Alaska 1993).

It is to be expected that Alaskan courts will continue to recognize that new uses of public trust resources deserve the legal guaranty of the public trust.

Since the trust is only implicit in the "common use" clause of the Alaska Constitution,<sup>53</sup> how can the purposes of the public trust under Alaska law be discerned? In interpreting Article VIII (the Natural Resources Article) of the Alaska Constitution, the Alaska Supreme Court has recognized the value of the three-volume series on constitutional studies prepared by the Public Administration Service on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention.<sup>54</sup> It is useful to refer to this document to discern the purposes of the public trust doctrine as it exists at the state constitutional level in Alaska.<sup>55</sup> The Alaska Supreme Court wrote of the document: "We can envision no more cogent expression of the intent of the drafters and of those voting for ratification of the Constitution."<sup>56</sup>

On a constitutional level, the public trust doctrine in Alaska was intended by the framers to function as a safeguard against inappropriate sales or disposals of public resources.<sup>57</sup> Thus, the portion of the Report cited below has particular poignancy when it is read in the context of Alaska's recurring proposals to dispose of and develop old-growth forest lands at the expense of fish and wildlife which depend on the forest.<sup>58</sup>

The Alaska Constitutional Convention wrote in its Report: "At no point is the need for thoughtful judgment more necessary than in establishing the basic policy for the management *and disposal* of the tremendous resources which have been given him (the Alaskan citizen) as his patrimony."<sup>59</sup> The Report continued:

In the first flush of statehood, the average Alaskan will react, and very justifiably so, against the unnecessary restrictions which have

<sup>53</sup> ALASKA CONST. art. VIII, § 3.

<sup>54</sup> See *State v. Lewis*, 559 P.2d 630, 637-38 (Alaska 1977), *cert denied*, 432 U.S. 901 (1977) (citing A REPORT TO THE PEOPLE OF ALASKA FROM THE ALASKA CONSTITUTIONAL CONVENTION (1955) [hereinafter CONST. REPORT]).

<sup>55</sup> *The State and its Patrimony*, I CONST. REPORT, *supra* note 54, § III, at 54.

<sup>56</sup> *Lewis*, 559 P.2d at 638.

<sup>57</sup> *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493-95 (Alaska 1988).

<sup>58</sup> The following words were directed at private individuals who own forests, but they are just as appropriately applied to the State of Alaska as trustee of the public's forest wealth: "It is a scurvy trick of Fortune when she gives large wealth to a man with no feeling for trees." REV. HUDSON STUCK, TEN THOUSAND MILES WITH A DOG SLED 154 (Wolfe Pub. Co. 1988) (1914) (Stuck was Archdeacon of the Yukon and made the first ascent of Denali).

<sup>59</sup> *The State and its Patrimony*, I CONST. REPORT, *supra* note 54, § III, at 54 (emphasis added).

\* bound him for so many years. He will not take kindly to the substitution of state red tape for federal red tape, nor should he. But the Alaskan will, as he thinks over his situation, be aware that any state control over resources which his judgment tells him is necessary is *his* control, ordained by him through the political process and subject to control and change through the same media.

Psychologically, the emphasis in the first days of statehood, so far as land and resources policy is concerned, will be in the direction of disposing of the patrimony as rapidly as possible, to get it into private hands so that immediate, and long-delayed, development may commence at once. Yet precipitate action could easily result in a situation which the people would have cause to regret in a few years.

This will be the critical point in Alaskan development, not alone for resources policy but for the entire future of the State of Alaska. The stakes are huge, and they will attract persons and corporations interested in them. Some of the ventures will be legitimate, some speculative, and some insidious. If the drive is for slam-bang disposal, without discrimination in the choice of terms of sale or lease, the interests of *all* the people of Alaska will suffer. If disposition of the land and its resources is made at ridiculously low prices, the parable of Jacob, Esau, and the bowl of pottage will be repeated; Alaska's patrimony will have been dissipated for the small-benefit of exploitation, or the non-benefit of fraud.

Lord Acton in a rather indelicate but expressive and oft-quoted statement pointed out that "Where the body is, there will the vultures be gathered." The expression is aptly applied, in part, to the Alaskan resources picture. Fortunately, an alert and enlightened citizenry can serve as a counterbalance; fortunately, too, not all developmental interests operate solely on the exploitative level, but sincerely seek to benefit permanently the society of which they are a part as well as to take the profits which are a basic and recognized part of the American system.

No constitutional provisions can be devised which will present a perfect and complete barrier to the determined commission of land and resources fraud or to "giving away" the resources of the people to interests for the purpose of exploitation rather than orderly development. But provisions can be devised which will make it easier for the public officials of the state to carry their

burdens. If there are constitutional provisions to which they can point when some lobby urges them to take action which they know full well is not to the ultimate benefit of the people, the strain of maintaining moral as well as strictly legal honesty is less.<sup>60</sup>

The foregoing quotation is an important part of the context out of which the "common use" clause, and Alaska's public trust doctrine, arose. It demonstrates that Alaska's public trust doctrine was intended to function as a safeguard against ill-advised sales or disposals of public resources.<sup>61</sup> It also implicitly recognizes the need for close judicial scrutiny of attempted alienation of public resources in order to protect long-term public interests.<sup>62</sup> Courts should look with considerable skepticism on any state conduct calculated to transfer public resources to private hands.<sup>63</sup>

The constitutional history of the "common use" clause of Article VIII, section 3, is by no means the only source to which one can turn to discern the broad contours of the public trust doctrine in Alaska. Much useful case law and judicial gloss also exist. In explication of the clause, the Alaska Supreme Court has favored a broad interpretation of the scope of protection afforded by the public trust doctrine in Alaska, stating that "the common use clause was intended to guarantee broad public access to *natural resources*," not merely to wildlife.<sup>64</sup>

The pivotal importance of guaranteeing the right of public access

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<sup>60</sup> *Id.* at 54-56.

<sup>61</sup> Considering timber sales such as Icy Cape, or the Alaska Department of Natural Resources' plan to trade old-growth forest at Leask Lakes for the stumps at White River, one might argue that, psychologically, Alaska is still in the risky, pro-disposal, stage which the Alaska Constitutional Convention referred to as "the first flush of statehood." *Id.* at 54.

<sup>62</sup> The duties of the public trust require courts to exercise a high level of scrutiny over the actions of the *cestui que trust*. *Metlakatla Indian Community, Annette Island Reservation v. Egan*, 362 P.2d 901, 908 (Alaska 1961). The proposed Leask Lakes exchange (Alaska Div. of Lands (ADL) No. 12,555) demands close judicial scrutiny to prevent permanent loss of important public resources. *See Kootenai Env'tl. Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1091 (Idaho 1983) (cited with approval in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988)).

<sup>63</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

<sup>64</sup> *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493 (Alaska 1988) (emphasis added); *accord Herscher v. State*, 568 P.2d 996, 1003 (Alaska 1977); *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131, 133-36 (Alaska 1993).

[T]he article VIII provisions were designed to ensure to the public the broadest possible access to wildlife. . . . [T]he common use clause impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of *all* the people. . . . [A] minimum requirement of this duty is a prohibition against any . . . special privileges.

to natural resources, and to navigable or public waters in particular, was recognized by the Alaska Legislature in 1985:

Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the State to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public interest.<sup>65</sup>

One key purpose of the public trust doctrine in Alaska, then, is to serve as a safeguard against inappropriate sales, exchanges, or other disposals of public lands, natural resources, or other public trust resources. In particular, permanent impairment of public access to natural resources is forbidden by the public trust.<sup>66</sup>

As trustee, the state stands in a fiduciary relationship to all Alaskans. As a fiduciary, the state must zealously protect the corpus of the public trust from needless attrition. As a fiduciary, the state must also ensure that the options for future generations to use and manage trust resources are not unnecessarily diminished.<sup>67</sup>

What is a fiduciary relationship? The general law of trusts answers that question:

[It is o]ne founded on trust or confidence reposed by one person in the integrity and fidelity of another. Such relationship arises whenever confidence is reposed on one side, and domination and influence result on the other. . . . Out of such a relation, the law raises the rule that neither party may exert influence or pressure

McDowell v. State, 785 P.2d 1, 6 (Alaska 1989) (citations omitted). The public trust's prohibition against "special privileges" is especially important in Alaska at this point in history due to the ongoing allocation battles between subsistence users, commercial users, recreational users, and non-consumptive users.

<sup>65</sup> 1985 Alaska Sess. Laws 82 § 1(c).

<sup>66</sup> "[A] state has constitutional power to insist that its natural advantages shall remain unimpaired . . . ." *Obrecht v. National Gypsum Co* 105 N.W.2d 143, 150 (Mich. 1960).

In *Owsichek*, the Alaska Supreme Court, in dictum, stated that leases and exclusive concessions on state land do not violate the public trust. The Court premised its dictum on the principle that leases and concessions are of finite duration and subject to competitive bidding. 763 P.2d at 496-97. In contrast to *Owsichek*, exchanges of state land bear *neither* of those indicia. Therefore, the constitutionality of Alaska's state land exchange program, ALASKA STAT. § 38.50 (1992), may very well violate the public trust.

<sup>67</sup> *Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 557 (Alaska 1983) (Rabinowitz, J., dissenting).

upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other . . . .<sup>68</sup>

Impairment of the corpus of the public trust would be a violation of the most fundamental of the state's fiduciary duties. Any disposal of state-owned natural resources must be closely scrutinized by courts to ensure that short-term, "small-benefit" resource exploitation is not the net result.<sup>69</sup> If the alienation of state resources results in a significant diminution of the public's patrimony, the state has failed to fulfill its fiduciary duties as trustee.

This is not to imply that every violation of the public trust will be judicially enjoined. Courts will always apply traditional equitable principles to weigh the advisability of judicial invalidation of the legislative or executive act at issue. Constitutional provisions, including the public trust, are "given a reasonable and practical interpretation in accordance with common sense."<sup>70</sup>

Although the public trust doctrine in Alaska has strong constitutional underpinnings, the potential for tension exists within the Alaska Constitution between the public trust provisions and other provisions of Article VIII. This is particularly true with regard to provisions for minerals in Alaska's statutes<sup>71</sup> and Constitution.<sup>72</sup> The different provisions of Article VIII should be interpreted in a manner that makes

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<sup>68</sup> BLACK'S LAW DICTIONARY 626 (6th ed. 1990).

<sup>69</sup> I CONST. REPORT, *supra* note 54, § III, at 54-56.

Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. . . . [T]his court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action. In making such a determination the court will examine, among other things, such factors as the degree of effect of the project on public trust uses . . . ; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e., commerce, navigation, fishing, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

*Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1092-93 (Idaho 1983). *See also* *Stone Creek Channel Improvements v. N.D. Wildlife Soc'y*, 424 N.W.2d 894, 902-03 (N.D. 1988).

<sup>70</sup> *Kochutin v. State*, 739 P.2d 170, 171 (Alaska 1987) (citing *Warren v. Thomas*, 568 P.2d 400, 401 (Alaska 1977)).

<sup>71</sup> ALASKA STAT. § 38.05.502 (1992).

<sup>72</sup> ALASKA CONST. art. VIII, §§ 11, 12.

them consistent with one another.<sup>73</sup> Nonetheless, the following sections of Article VIII might be viewed as having the potential to conflict with the public trust obligations of the "common use" clause of Article VIII, section 3:

**SECTION 8. *Leases.*** The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

**SECTION 9. *Sales and Grants.*** Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

**SECTION 10. *Public Notice.*** No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

**SECTION 11. *Mineral Rights.*** Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these materials and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface use of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress.

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<sup>73</sup> *Abrams v. State*, 534 P.2d 91, 95 (Alaska 1975).

The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

**SECTION 12. *Mineral Leases and Permits.*** The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.

**SECTION 13. *Water Rights.*** All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.<sup>74</sup>

These provisions indicate that the framers of Alaska's Constitution clearly anticipated that state-owned land could legitimately be conveyed out of the public domain by lease, sale, or grant, and that development of state resources was high on the list of reasons for statehood. Yet, at the same time, the framers provided that conveyances by lease must be "subject to reasonable concurrent uses."<sup>75</sup>

The framers of [Alaska's] constitution were united in the view that the lands and other natural resources of this abundant state are among its most prized assets. Although favoring productive use of these resources, the framers believed that development should proceed only when it benefitted the people of the state and only in compliance with applicable constitutional and statutory processes.<sup>76</sup>

In leasing land pursuant to Article VIII, section 8, the State of Alaska must ensure that this will not prevent public use of those lands for } \*

<sup>74</sup> ALASKA CONST. art. VIII, §§ 8-13.

<sup>75</sup> *Id.* § 8.

<sup>76</sup> *Moore v. State*, 553 P.2d 8, 30 (Alaska 1976) (Rabinowitz, J., dissenting).

purposes of navigation, fishing, and hunting, by retaining easements for those public uses. It is unclear to what extent the framers intended public trust uses to be subsumed within section 8's "reasonable concurrent uses" provision, but there is certainly no inherent conflict between the power to lease and the duty to safeguard trust resources.

The framers also clearly authorized the legislature to sell or grant state land, pursuant to section 9.<sup>77</sup> Yet, that power is limited. All conveyances by sale or grant "shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources."<sup>78</sup> On its surface, this provision appears to accommodate the public trust doctrine rather than to diminish it.

Section 10 provides for procedural protections against rash disposals or leases of state lands and interests in land.<sup>79</sup> The state must give prior public notice, and the legislature is expressly authorized to require "other safeguards of the public interest."<sup>80</sup> The purpose of this mandate is "to safeguard the public's interest in the disposition of state natural resources."<sup>81</sup> The constitutional history of section 10 does not explicitly tie it to the "common use" clause of section 3. The only explicit purpose of the public notice provisions was to ensure that the new state would receive top dollar for its land, timber, mineral, water, and other resources if they were sold.<sup>82</sup>

The constitutional requirement of prior public notice could, however, easily complement the goals of the public trust if it is used to protect the public's beneficial interest in state lands and resources. To comply with the state's fiduciary responsibilities, the public notices given under section 10 should include, among other things, discussions of the degree of effect of the project on public trust uses; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, e.g., commerce, navigation, fisheries, wildlife, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.<sup>83</sup>

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<sup>77</sup> ALASKA CONST. art. VIII, § 9.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, § 10.

<sup>80</sup> *Id.*

<sup>81</sup> *Moore*, 553 P.2d at 25.

<sup>82</sup> CONVENTION PROCEEDINGS, *supra* note 12, at 2469-70.

<sup>83</sup> *Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1092 (Idaho 1983).

Meaningful public participation in the land disposal or exchange process is thwarted where citizens lack key factual information.<sup>84</sup> The state's failure to provide the information outlined in the preceding paragraph could be interpreted as a violation of the Alaska Constitution.

Water rights in Alaska's Constitution are shaped around the western states' common principle of prior appropriation.<sup>85</sup> Yet section 13 expressly subordinates private appropriation of water to "the general reservation of fish and wildlife."<sup>86</sup> There seems to be no reasonable debate as to whether this provision was intended to augment the power of the public trust doctrine or diminish it: it reinforces the public trust doctrine.

In conclusion, it seems fair to say that although there is a potential for conflict between the public trust responsibilities imposed by the "common use" clause of Article VIII, section 3, and several of the other provisions of that Article, it is also possible to interpret the different clauses of Article VIII synergistically and to harmonize those sections so that they complement one another.

## 2. The Scope of the Public Trust in Alaska: What Resources and Uses Are Protected?

The public trust was confined to tidelands and tidewaters in the original thirteen states during the early days of our Republic. Today, it is well settled in the United States generally that "the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams."<sup>87</sup>

In Alaska, the scope of the resources covered by the umbrella of the public trust doctrine is far broader than in most other states; it is *not* limited to tidelands and submerged lands. As befits their prerogative,<sup>88</sup> the people of Alaska have broadly defined Alaska's trust resources to

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<sup>84</sup> *Alaska Survival v. State, Dept. Natural Resources*, 723 P.2d 1281, 1291 (Alaska 1986).

<sup>85</sup> ALASKA CONST. art. VIII, § 13.

<sup>86</sup> *Id.*

<sup>87</sup> *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719-720 (Cal. 1983) (citations omitted).

<sup>88</sup> The rights of the public in trust resources is a question of property law, and it is the general principle that "the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring). Thus, states "have the authority to define the limits of the lands held in public trust and to recognize such private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (citations omitted).

include all state land and all unappropriated minerals.<sup>89</sup> Perhaps the Alaskan electorate's decision to extend the protection of the public trust doctrine in Alaska to all state land is due to the fact that Alaska is radically different from most other states in the Union in the extent of the natural resource wealth that is held by the state as sovereign.

In any event, in Alaska the resources protected by the public trust include, at a minimum:

- ✓ a) Wildlife and fish (*ferae naturae*), plus the habitat that supports those resources, and navigable and non-navigable waters, wherever occurring in the natural state;<sup>90</sup>
- ✓ b) All state-owned land — including both tidelands and uplands — and all minerals not previously appropriated;<sup>91</sup>
- ✓ c) Recreational uses of navigable or public waters or any other public purpose for which the water is used or is capable of being used consistent with the public trust, e.g., wildlife habitat, fishery habitat, scientific or educational value, or scenic beauty.<sup>92</sup>

In all likelihood, the aegis of the public trust doctrine in Alaska extends beyond the foregoing list of resources. The resources cited above are only the bare minimum corpus of the *jus publicum* in Alaska, and the Alaska Supreme Court may eventually interpret the Alaska Constitution and statutes as providing protection for additional resources.

Other state supreme courts have extended the scope of the public trust doctrine to include protection for activities considered by those courts necessary and proper to the use and enjoyment of trust resources which have yet to be considered by the Alaska Supreme Court. Those

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<sup>89</sup> See ALASKA STAT. § 38.05.502 (1992).

<sup>90</sup> ALASKA CONST. art. VIII, § 3; *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131, 133 (Alaska 1993); *Gilbert v. State, Dept. Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398-99 (Alaska 1990); *Owsichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 492-96 (Alaska 1988); *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

<sup>91</sup> ALASKA STAT. § 38.05.502; *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1119 (Alaska 1988); *Op. Alaska Att'y Gen.*, No. 566-230-85, at 7 (Apr. 25, 1985). The Alaska Supreme Court, referring to ALASKA CONST., art. VIII, § 10, has noted several times the high value the framers of the Alaska Constitution placed on the state's land resources. See *Alaska Survival v. State, Dept. Natural Resources*, 723 P.2d 1281, 1289 (Alaska 1986); *North Slope Borough v. Leresche*, 581 P.2d 1112, 1114 (Alaska 1978); *Moore v. State*, 553 P.2d 8, 30-32 (Alaska 1976); *McCarrey v. Comm'r of Natural Resources*, 526 P.2d 1353, 1357 (Alaska 1974); *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1011 (Alaska 1967).

<sup>92</sup> 1985 Alaska Sess. Laws 82, § 1(c). *Hayes*, 846 P.2d at 133 n.6.

state supreme courts have found public trust protection for such resources and uses as sunbathing,<sup>93</sup> and dry sand beach use and access.<sup>94</sup>

### 3. Duties of the State as Trustee for the Use and Benefit of the Public

#### a. General Principles of Trust Law Define State Obligations as Trustee

Courts historically have exercised equitable jurisdiction over trusts.<sup>95</sup> Within this historic context, courts will decree the scope and extent of equitable rights and duties appurtenant to the public trust doctrine. Courts may also define the nature of the state's fiduciary duties, and may create any remedy that furthers the cause of justice.<sup>96</sup> As with other aspects of the public trust doctrine, each state, including Alaska, is free to develop its own unique body of law regarding the obligations of the state as trustee.<sup>97</sup>

Alaska's Supreme Court, however, has yet to articulate the standard of care owed by the state as trustee in the context of the public trust doctrine. Fundamental questions have not yet been decided in Alaska, such as whether and how the state's fiduciary duties as trustee overseeing public resources differ from those of an ordinary trustee who oversees private resources.<sup>98</sup> "The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined."<sup>99</sup>

Decisions from other jurisdictions may help define the obligations of the state as trustee of the public trust in Alaska. In *Slocum v. Borough of Belmar*,<sup>100</sup> a New Jersey court considered a municipality's delegated duties as trustee over its beach area, and held that in the absence of a trust document specifying the duties of a trustee, "[a] public trustee is endowed with the same duties and obligations as an

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<sup>93</sup> *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

<sup>94</sup> *State ex rel. Thorton v. Hay*, 462 P.2d 671 (Or. 1969).

<sup>95</sup> *See Clews v. Jamieson*, 182 U.S. 461, 479 (1901).

<sup>96</sup> *Alaska State Employees Ass'n v. Alaska Public Employees Ass'n*, 825 P.2d 451, 455 (Alaska 1991).

<sup>97</sup> *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988).

<sup>98</sup> The law of private trusts has, however, been applied in Alaska to funds derived from lands held by the state in trust for schools and university lands. *See State v. University of Alaska*, 624 P.2d 807, 813 n.6 (Alaska 1981). The Alaska Supreme Court also has applied the general law of private trusts to federally-designated trust lands in Alaska. *See State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985).

<sup>99</sup> *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 495 (Alaska 1988).

<sup>100</sup> 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989).

ordinary trustee."<sup>101</sup>

Also helpful is the large body of common law on the traditional, equitable role of the judicial branch in supervising a fiduciary's performance of his trust duties. It seems probable that the common law traditions of equity would provide the framework Alaska's Court would be most likely to adopt.

In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice. . . . Where a new condition exists, and the legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, . . . for that purpose.<sup>102</sup>

Briefly summarized, a trustee owes the following duties to the beneficiaries of the trust:

1. A duty of loyalty, that is, the duty not to engage in self-dealing;
2. A duty not to delegate;
3. A duty to furnish information;
4. A duty to maintain control of trust corpus property;
5. A duty to preserve the trust property;
6. A duty to deal impartially with beneficiaries;
7. A duty to enforce the claims of beneficiaries;
8. A duty to make trust property productive.

Each of these duties is discussed separately below.

*Loyalty:* "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."<sup>103</sup>

For example, if a state exercises its authority as trustee for the benefit of the state itself by selling public trust lands primarily to increase tax revenues, or for the benefit of an individual or a small group of individuals, or by exchanging land or timber principally to benefit a private corporation, the state's action could be seen as violating the trustee's fiduciary duty of loyalty.

*Non-delegation:* A fundamental duty owed by the trustee to the beneficiaries of the trust is the duty not to delegate to others the job

<sup>101</sup> *Id.* at 317.

<sup>102</sup> *Alaska State Employees Ass'n v. Alaska Pub. Employees Ass'n*, 825 P.2d 451, 455 (Alaska 1991) (quoting JOSEPH STORY, 1 STORY'S EQUITY JURISPRUDENCE § 4 (14th ed. 1918)).

<sup>103</sup> RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).

of administering the trust.<sup>104</sup> This duty is not absolute, however; certain, limited duties may properly be delegated by a trustee.<sup>105</sup>

Under general principles of constitutional and administrative law, a legislature may not delegate its functions to an agency without establishing reasonably clear standards for the agency to follow.<sup>106</sup> Nor may a legislature delegate powers it does not possess, or delegate certain "non-delegable" powers intended by the Constitution to be exercised only by the legislature itself.<sup>107</sup>

While the legislature may properly delegate administration of the public trust to executive branch agencies, it must do so with clear guidelines. Where the guidelines are insufficiently clear, or contravene the mandates of the public trust doctrine, a court of equity could intervene to clarify the trustee's obligations pursuant to the public trust.<sup>108</sup>

*Productivity:* "The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."<sup>109</sup> While this responsibility competes to some extent with the trustee's duty of preservation,<sup>110</sup> these duties are not mutually exclusive, and the duty of productivity does not diminish the trustee's obligations of resource conservation under the public trust doctrine.<sup>111</sup>

*Preservation:* "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property."<sup>112</sup> Where loss to the estate is the result of the trustee's failure to use proper care or skill, or is due to the trustee's negligence, the trustee is liable to the beneficiaries for the loss.<sup>113</sup> This "black letter" duty is similar to the public trust's mandate of "equitable and wise" management of public trust resources.<sup>114</sup>

*Information:* "The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the adminis-

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<sup>104</sup> AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 171 (4th ed. 1987).

<sup>105</sup> *Id.*

<sup>106</sup> *Indust. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 675 (1980).

<sup>107</sup> See generally Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 5-17 (1978).

<sup>108</sup> *Am. Petroleum Inst.*, 448 U.S. at 675.

<sup>109</sup> RESTATEMENT (SECOND) OF TRUSTS § 181 (1959).

<sup>110</sup> See *infra* notes 112-14 and accompanying text.

<sup>111</sup> See ALASKA STAT. §§ 38.04.005-.015 (1989) (setting forth Alaska policy to balance land available for public and private uses).

<sup>112</sup> RESTATEMENT (SECOND) OF TRUSTS § 176 (1959); see also *State v. Weiss*, 706 P.2d 681, 683 (Alaska 1985); SCOTT, *supra* note 104, § 176.

<sup>113</sup> RESTATEMENT (SECOND) OF TRUSTS §§ 197-99 (1959).

<sup>114</sup> See *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

tration of the trust."<sup>115</sup> The trustee must supply beneficiaries with complete and accurate information regarding the administration of the trust upon request and within a reasonable time.<sup>116</sup>

The state's duty as trustee to provide information to the public is an area where substantial legal activity may reasonably be expected in the future. Although Alaska case law on fiduciary duties is still a bit sparse, the Alaska Supreme Court might well follow the track taken by the Supreme Court of Washington:

\* { [T]he trustee's fiduciary duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests . . . . If the beneficiaries are [to be] able to hold the trustee to proper standards of care and honesty and procure the benefits to which they are entitled, they must know of what the trust property consists and how it is being managed.<sup>117</sup>

One interpretation of the scope of the state's fiduciary duty to provide information could be that the State of Alaska must provide the Alaskan public with regular reports assessing the extent, current status, and future of public trust resources. This would possibly require extensive information-gathering, whereby the state would compile benchmark data upon which future public reports could be made. Pending compilation of that information, most disposals and exchanges of public trust resources should probably be held in abeyance. A "rule of reason" would likely provide limits to the state's duty to compile and disseminate information on trust resources.

\*\* { The wisdom of delaying alienation of Alaska's public trust resources until full information can be disclosed to the public and digested by Alaska is simple: how can we know what we are giving away if we are unaware of what the public resources are worth? A trustee has the duty to determine, usually through appraisal, the fair market value of trust assets before any sale or other transfer of those trust assets.<sup>118</sup> To prevent impairment of the corpus of the trust, it is essential that no alienation of trust resources be permitted in the absence of a full and complete public disclosure of the full value of the trust resources involved.<sup>119</sup>

Yet in Alaska, there is a general paucity of information that would

<sup>115</sup> RESTATEMENT (SECOND) OF TRUSTS § 172 (1959).

<sup>116</sup> AUSTIN WAKEMAN SCOTT, 2A SCOTT ON TRUSTS § 173 (4th ed. 1987).

<sup>117</sup> *Allard v. Pacific Nat'l Bank*, 663 P.2d 104, 110 (Wash. 1983) (citations omitted); see also GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES § 961 (2d ed. 1962).

<sup>118</sup> *Hatcher v. U.S. Nat'l Bank*, 643 P.2d 359, 364-65 (Or. App.), *rev. denied*, 648 P.2d 854 (Or. 1982).

<sup>119</sup> *Allard*, 663 P.2d at 110-11; *Hatcher*, 643 P.2d at 364-66; BOGERT, *supra* note 117, § 961.

constitute a fair and complete appraisal or inventory of all the public assets involved in a land sale or timber sale.<sup>120</sup> Under these legal principles, the State of Alaska, through its Natural Resources and Fish and Game Departments, should make periodic reports to the Alaskan public regarding the value and extent of public trust resources. The state also must work sedulously to ensure that it knows and discloses the full extent and value of all of the resources involved in a land sale, land exchange, timber sale, or other transfer of public trust resources. Facets such as cumulative impacts of land disposals should logically be part of this process.

In addition to avoiding impairment of the trust, this full disclosure process would enable the Alaskan public to enforce its rights as beneficiary of the public trust. It would also be in the state's best interests to gather and disseminate this information, to avoid charges of fraud and breach of fiduciary duty.<sup>121</sup>

*Impartiality:* "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."<sup>122</sup>

The state thus cannot prefer the interests of one segment of its population over those of another segment. The state's fiduciary duties require it at all times to act in favor of the interests of the state as a whole, not for the discrete advantage of one geographic region, ethnic group, or other faction.

This includes the fiduciary duty to avoid actions whose primary motivation is to benefit state government.

[T]he power or control lodged in the state . . . is to be exercised . . . as a trust for the benefit of the people and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.<sup>123</sup>

<sup>120</sup> Wildlife and fishery values are rarely assessed, in monetary or other terms, in the same detail paid to land, mineral or timber values.

<sup>121</sup> "Fraud can be established by silence or non-disclosure when a fiduciary relationship exists between the parties . . . . The fiduciary has a duty to fully disclose information which might affect the other persons's rights and influence his action." *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988) (citations omitted). "The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests." *Greater Arca Inc. v. Brookman*, 657 P.2d 828, 830 (Alaska 1982).

<sup>122</sup> RESTATEMENT (SECOND) OF TRUSTS § 183 (1959).

<sup>123</sup> *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979). Although *Hughes* overruled *Geer*, the Alaska Supreme Court noted that "[a]fter *Hughes*, the statements in the Alaska Constitution regarding sovereign ownership . . . are *technically* incorrect. Nevertheless, the trust responsibility that accompanie[s] state ownership remains." *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 495 n.12 (Alaska 1988) (emphasis added).

b. Common Law Obligations of the State of Alaska as Trustee

The essence of judicial enforcement of the public trust doctrine is to guarantee that state government fulfills its fiduciary duties to current and future generations of Alaskans. The fiduciary duties of trustees have been defined over centuries of experience by courts of equity, and they provide safeguards that should protect against dissipation of the natural resource wealth Alaskans are privileged to enjoy.<sup>124</sup> The state's fiduciary duties as a trustee define the legal standard of wise stewardship over Alaska's common property resources.<sup>125</sup> The Alaska Supreme Court has not yet given detailed attention to the state's common law obligations as trustee in the context of the public trust, but it has given some general guidance in this area.

What the law has labeled the "fiduciary duties" of trustees is, in many respects, nothing more than an attempt to codify some basic rules of common sense. The paramount duty of the state is to "equitably and wisely" regulate the harvest of Alaska's wildlife and fisheries resources.<sup>126</sup> An inescapable corollary of this mandate is the state's obligation to maintain the habitat it controls and on which the vitality and abundance of many public trust resources depend. The importance of habitat protection is, unfortunately, too often underrated.

When game begins to get scarce, people generally think and act in the order of (1) preservation of breeding stock by means of game laws restricting the harvest; (2) artificial stocking; and (3) habitat improvement, which is sometimes unfortunate, since the third item is often more important than the first two. If suitable habitat is lacking, . . . protection or stocking is useless.<sup>127</sup>

The state is obligated to "equitably and wisely" manage Alaska's wildlife and fisheries resources at all times, not merely during the public's limited harvest opportunities. The state must also manage fish and wildlife for the benefit of "all the people of the state."<sup>128</sup>

Although the Alaska Supreme Court has not yet directly addressed the issue, it seems reasonable to anticipate that it would apply the standard of "equitable and wise" management beyond the sphere of fish and wildlife to include all of the other resources within the pro-

<sup>124</sup> See *supra* notes 5-8 and accompanying text.

<sup>125</sup> See *supra* note 8 and accompanying text.

<sup>126</sup> *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

<sup>127</sup> EUGENE P. ODUM, *FUNDAMENTALS OF ECOLOGY* 433 (1959). See also PETER MATTHIESSEN, *WILDLIFE IN AMERICA* 205 (1977).

<sup>128</sup> *Metlakatla*, 362 P.2d at 915.

tection of the public trust doctrine in Alaska.<sup>129</sup> Whenever the state deals with fish, wildlife, timber, state land (regardless of whether or not the lands are washed by the tides), waters that occur in the natural state, or unappropriated minerals, the state owes public trust fiduciary duties of equitable and wise management.

What is meant by "equitable and wise management?" Although the Alaska Supreme Court's choice of terminology was probably deliberately general and not susceptible of precise definition, some fundamental management principles can reasonably be imputed to the state as trustee under those broad standards. Perhaps the most useful guidance is found in the following statements: "[F]ish and game resources are permitted to be harvested, but at the same time must be conserved to avoid depletion and extinction,"<sup>130</sup> and

Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation or annihilation of one of the greatest natural food resources known to mankind, to equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity.<sup>131</sup>

The Alaska Supreme Court has held that, as a trustee, the state does not have the right to manage natural resources as if it were a private, individual owner, seeking to maximize the income it can derive as quickly as possible.<sup>132</sup> Rather, the state as trustee must manage its resources for the benefit of the beneficiary of the trust: *all the people Alaska.*

Alaskans will not want, and above all else do not need, a resources policy which will prevent orderly development of the great treasures which will be theirs. But they will want, and demand, effective safeguards against the exploitation of the heritage by persons and corporations whose only aim is to skim the gravy and get out, leaving nothing that is permanent to the new state except, perhaps, a few scars in the earth which can never be healed.<sup>133</sup>

<sup>129</sup> See *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131, 133 (Alaska 1993).

<sup>130</sup> *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1005 (Alaska 1977).

<sup>131</sup> *Metlakatla*, 362 P.2d at 932; see also *City of Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957) (addressing potential permanent impairment of Lake Monona).

<sup>132</sup> *Metlakatla*, 362 P.2d at 915; see also *Organized Village of Kake v. Egan*, 174 F. Supp. 500, 529 (D. Alaska 1959); *Herscher*, 568 P.2d at 1003, 1005; *Gilbert v. State, Dep't of Fish & Game, Bd. Fisheries*, 803 P.2d 391, 398-399 (Alaska 1990); *McDowell v. State*, 785 P.2d 1, 12, 16, 18 (Alaska 1989); *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 492-96 (Alaska 1988); *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988).

<sup>133</sup> E.L. Bartlett, Address to the Delegates of the Alaska Constitutional Convention, in VI CONVENTION PROCEEDINGS, *supra* note 54, App. II.

The power to manage public trust resources lies with the state, as sovereign, but "like all other powers of government as a trust for the benefit of the people."<sup>134</sup> In a case nullifying a grant of a license to construct a hydroelectric power plant on the Snake River, the United States Supreme Court held:

The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including further power demand and supply, alternative sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.<sup>135</sup>

Similar considerations could be relied upon by the Alaska Supreme Court to evaluate the propriety of state action in the public trust context. Although it arose in the context of discussion of the Alaska Constitution's sustained yield requirement in Article VIII, § 4, rather than the common use clause of Article VIII, § 3, the duty to prevent erosion of the quality of Alaska's public trust resources was well-expressed by Alaska Supreme Court Chief Justice Rabinowitz: "Quality as well as quantity of available resources must be considered in determining whether sustained yield requirements have been met. The framers and legislature must have intended that the level of timber available to future generations . . . be undiminished."<sup>136</sup> Governor Jay Hammond, the foremost conservationist among all Alaska's Governors, aptly stated the importance of considering the needs of future generations of Alaskans regarding public trust resources: "While a particular species of . . . wildlife may have little relative value now, the future may find it suddenly in great demand. If the land is incapable of producing it to the demand level, an important land management option is lost, to the detriment of the public welfare."<sup>137</sup>

\* { c. Who Are the Beneficiaries of the Public Trust in Alaska?

The beneficiaries of Alaska's public trust doctrine are all the people of the State of Alaska, including future generations.<sup>138</sup> The state has

<sup>134</sup> *Owsichuk*, 763 P.2d at 494 (citing *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)).

<sup>135</sup> *Udall v. Fed. Power Comm'n*, 387 U.S. 428, 450 (1967).

<sup>136</sup> *Southeast Alaska Conservation Council v. State*, 665 P.2d 544, 557 (Alaska 1983) (Rabinowitz, J., dissenting).

<sup>137</sup> *Id.* (quoting Gov. Jay Hammond).

<sup>138</sup> *Id.*; *Shively v. Bowlby*, 152 U.S. 1, 16 (1894) ("a public trust for the benefit of the whole community.").

a fiduciary obligation to manage public trust resources for the benefit of "all the people of the state" of Alaska.<sup>139</sup> "[T]he public trust doctrine dictates that . . . [public trust resources] must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."<sup>140</sup> "The public trust doctrine maintains that government holds untaken wildlife in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary."<sup>141</sup>

d. Exchange or Disposal of State Land and the Continuing Obligations of the Public Trust

Can the State of Alaska free itself of its obligations under the public trust doctrine by selling or exchanging public trust resources to private parties? The answer in almost all circumstances is "No." The public trust entails governmental responsibilities that cannot be disregarded, delegated, sold, or otherwise alienated. "The public trust doctrine . . . requires the state to maintain its dominion in trust for the people."<sup>142</sup>

"The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of peace."<sup>143</sup> Although the state may convey a *jus privatum* interest in trust resources, the public's *jus publicum* (public trust) interest cannot ordinarily be alienated.<sup>144</sup>

The state has an affirmative fiduciary obligation to prevent unnecessary diminutions in the corpus of the public trust, and must ensure that there is no avoidable, significant reduction of the rights of the public to resources held by the state in trust for the benefit of the

<sup>139</sup> *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

<sup>140</sup> *Slocum v. Borough of Belmar*, 569 A.2d 312, 316 (N.J. Super. Ct. Law Div. 1989) (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 59 (N.J. 1972)).

<sup>141</sup> *McDowell v. State*, 785 P.2d 1, 16, n 9 (Alaska 1989) (Rabinowitz J., dissenting) (quoting *Owsichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493-95 (Alaska 1988)); *see also* *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398 (Alaska 1990).

<sup>142</sup> *Orion Corp. v. State*, 747 P.2d 1062, 1072 (Wash. 1987) (*en banc*), *cert. denied*, 486 U.S. 1022 (1988); *see also* *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988).

<sup>143</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

<sup>144</sup> *Id.*; *Brusco Towboat Co. v. State*, 567 P.2d 1037, 1043-44 (Or. 1978); *see also* *State v. Superior Court of Lake County*, 625 P.2d 239, 248 (Cal. 1981) ("It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust.").

public.<sup>145</sup> "Under the public trust doctrine, the State . . . [has] the right and the duty to protect and preserve the public's interest in wildlife resources."<sup>146</sup>

Priefly summarized, the public trust imposes the following limitations on the power of the state to convey public trust resources free of the public trust:

1. Clear legislative authority and intent are required. Conveyances of public trust resources are interpreted strictly against the grantee.
2. The conveyance should not be made to further private interests; it should further the public's trust interests.
3. There should be no substantial impairment of the public's use of the remaining trust resources.
4. A private owner's use of trust resources may be restricted or prohibited in order to protect public uses of public trust resources.
5. Conveyances of public trust resources are revocable by the state.

In Alaska there are many procedural safeguards regarding the disposal, sale, or lease of state land.<sup>147</sup> Special, additional, protections govern disposal of state-owned timber resources.<sup>148</sup>

In accordance with the mandate of the Alaska Constitution, Article VIII, section 10, the first Alaska Legislature enacted the Alaska Land Act, Alaska Statutes section 38.05, which contains at least two provisions — sections 38.05.035 and 38.05.285 — requiring that any disposition of state-owned land must be consistent with the best interests of current *and future generations* of Alaskans. One of the procedural prerequisites of a best interests finding is "a reasoned evaluation of the wisdom of a proposed disposition of land . . . ." <sup>149</sup> The Alaska Department of Natural Resources' record of decision for any land disposal or land exchange must demonstrate that the agency made a reasoned evaluation of the available evidence; otherwise its decision will be arbitrary and capricious.<sup>150</sup>

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<sup>145</sup> BEAN, *supra* note 5, at 41.

<sup>146</sup> *In re Stewart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

<sup>147</sup> See *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1014 (Alaska 1967); *Moore v. State*, 553 P.2d 8, 30 (Alaska 1976); ALASKA CONST., art. VIII, § 10.

<sup>148</sup> See ALASKA STAT. tit. 38 (1992).

<sup>149</sup> *Moore*, 553 P.2d at 31.

<sup>150</sup> *Id.* at 36.

The Alaska Supreme Court has not yet applied a public trust analysis to a state land disposal or exchange. In the seminal public trust case *Illinois Central Railroad Co. v. Illinois*, the U.S. Supreme Court stated that "the ownership and dominion and sovereignty over lands . . . within the limits of the several States, belong to the respective states . . . to use or dispose of any portion thereof, when that can be done *without substantial impairment of the interest of the public . . .*"<sup>151</sup> The Court explained that "this follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested."<sup>152</sup> The Court further stated that "there can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."<sup>153</sup>

Many state supreme courts that have considered the effect of the public trust doctrine on attempts by a state to alienate public lands have concluded that the state has continuing obligations from which it can be freed only under rare circumstances.<sup>154</sup> For example, the Hawaii Supreme Court wrote:

Under public trust principles, the state as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.<sup>155</sup>

The Minnesota Supreme Court similarly stated:

[I]n the exercise of . . . [the public] trust the state may dispose of a partial interest in such lands, in the interest of all the people

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<sup>151</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892) (emphasis added). The proposed conveyance of public trust resources at Leask Lakes (ADL No. 12,555) would violate the rule of "no substantial impairment." The proposed conveyance would result in a substantial net loss and impairment of wildlife habitat by trading unlogged land for largely cut-over land and stumps nearby at White River. The proposed exchange would promote fragmentation of wildlife habitat and substantially reduce the wildlife habitat value of public trust land at George River, adjacent to the Leask Lakes tract. See Memorandum from Richard Reed, Alaska Dept. of Fish & Game, to Andy Pekovich, Dept. of Natural Resources (May 14, 1991); Memorandum from Matt Kirchoff, Dept. of Fish & Game, to Dave Anderson (Sept. 17, 1991).

<sup>152</sup> *Illinois Cent. R.R. Co.*, 146 U.S. at 456.

<sup>153</sup> *Id.* at 460.

<sup>154</sup> As with most aspects of the public trust doctrine, individual states are free to formulate the rule they deem most appropriate. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-81 (1988).

<sup>155</sup> *State ex rel. Kobayashi v. Zimring*, 566 P.2d 725, 735 (Haw. 1977) (footnotes omitted).

of the state, provided the primary purposes of the trust are not unduly abridged or burdened thereby . . . . [The state] . . . cannot parcel or alienate them or otherwise interfere with the public purposes of the trust in which they are held.<sup>156</sup>

These principles have been stated by the Michigan Supreme Court as well:

When lands are owned by the State for the public trust, it is the State's duty to protect the trust and not surrender the rights thereto. It is thus the public policy of this State with respect to [public trust] submerged lands . . . that they may be disposed of only when the Department of Conservation determines that such lands are of no substantial public value for hunting, fishing, swimming, pleasure boating, or navigation, and that the general public interest will not be impaired.<sup>157</sup>

The formulation of the state's public trust duties in Michigan was based on interpretation of the public trust set forth in Michigan's State Constitution.<sup>158</sup> The Alaska Constitution's public trust, augmented by the Sagebrush Initiative, cannot reasonably be said to impose obligations that are any weaker than Michigan's.

A decision by the state to trade public lands cannot stand unless the trade is clearly in the public interest. A determination that a land exchange pursuant to Alaska Statutes section 38.50 is in the public interest can only be made after evaluating and making known to the public a reasonable quantum of information so the public may reach rational conclusions about the value of the respective parcels of land to be exchanged.<sup>159</sup>

One of the fundamental obligations of a trustee is that he or she must not permit the wasting away of the corpus of the trust.<sup>160</sup> The trustee must exercise discretion in making day-to-day management decisions,

<sup>156</sup> *State v. Longyear Holding Co.*, 29 N.W.2d 657, 669-70 (Minn. 1947) (footnotes omitted). Cf. *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 121-23 (Mass. 1966) (public trust land is not to be diverted to inconsistent uses without plain and explicit legislation).

<sup>157</sup> *People ex rel. MacMullan v. Babcock*, 196 N.W.2d 489, 497 (Mich. 1972) (citations omitted).

<sup>158</sup> *Id.*

<sup>159</sup> Examples of the type of information that should be made public prior to a § 38.50 land exchange would include (but would not necessarily be limited to) supply and demand data, including current value, for all of the timber, fisheries, wildlife, water, recreational, and other resources present on the lands to be exchanged. This is a hefty burden, but making a decision to trade away state land and resources in the absence of this sort of fundamental information would certainly be a breach of the state's fiduciary duties to manage the public lands.

<sup>160</sup> RESTATEMENT (SECOND) OF TRUSTS §§ 176, 181 (1989).

and must base decisions on reliable and reasonably complete information.<sup>161</sup>

Although a modicum of impairment of public trust uses is probably permissible when it is appurtenant to a land transfer, courts should apply the "hard look" doctrine in assessing infringements of public trust values. "Hard look" judicial review of state efforts to alienate public trust resources ensures that arbitrary decisions will not be permitted, and will ensure the agency has "genuinely engaged in reasoned decision making" of all the salient issues.<sup>162</sup>

One key purpose of the public trust doctrine is to police attempted dispositions of public lands by state legislatures. If courts simply rubber-stamp legislative determinations that proposed dispositions are in the public interest, the public trust doctrine will have no teeth. Consequently, there is a longstanding judicial policy of closely scrutinizing legislative declarations that a proposed disposition of public land is "in the public interest."<sup>163</sup> "[T]he self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such a purpose."<sup>164</sup> Alaskan courts should adopt this salutary policy of judicial skepticism and should strictly scrutinize all proposed exchanges and disposals of public trust resources.

A state normally may not convey public trust land if the disposal will substantially impair the public's trust rights.<sup>165</sup> A trustee is at all times accountable to the beneficiaries of the trust.<sup>166</sup> A decision to alienate public trust resources, including land, should be preceded by a thorough governmental assessment of all the public values affected. Public notice should include the degree of effect of the project on public trust uses; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which

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<sup>161</sup> *Hatcher v. U.S. Nat'l Bank*, 643 P.2d 359, 364-66 (1982).

<sup>162</sup> *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398 (Alaska 1990) (citations omitted).

<sup>163</sup> *Martin v. Waddell*, 41 U.S. 366, 411 (1842).

<sup>164</sup> *People ex rel. Salem v. McMackin*, 291 N.E.2d 807, 812 (Ill. 1972). See also Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, *supra* note 5, at 489-91.

<sup>165</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 428-50 (1892); *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1119 (Alaska 1988); *Morse v. Oregon Div. of State Lands*, 590 P.2d 709, 709-11 (Or. 1979); *Mannor Marine Realty v. Wachtler*, 232 N.E.2d 657 (N.Y. 1968); *Riviera Ass'n v. North Hempstead*, 52 Misc.2d 575 (N.Y. 1967).

<sup>166</sup> RESTATEMENT (SECOND) OF TRUSTS, §§ 172, 176, 181 (1959).

the resource is suited (e.g., commerce, navigation, fishing, etc.); the degree to which broad public uses are set aside in favor of more limited or private ones; and clear, advance public disclosure of the pertinent facts and data.<sup>167</sup>

For example, a decision to exchange public for private land pursuant to section 38.50 must be based on reasonably complete information about the range, quantity, and quality of resources wrapped up in the parcels to be exchanged. All such information must be timely communicated to the public, in a manner satisfying the safeguards of the Alaska Constitution.<sup>168</sup> A state may not trade public lands unless the trade is clearly in the public interest. Before determining whether the trade is in the public's interest, the state must first evaluate and disclose to the public supply and demand data, arguably including current economic and non-economic values for all of the timber, fisheries, wildlife, water, recreational, and other resources present on the lands to be exchanged.

A grantee may acquire a right to use former trust property free from trust restrictions only in rare cases.<sup>169</sup> According to the Alaska Supreme Court, the key factor to consider in determining the significance of a conveyance is not the size or location of the particular parcel, but the scope of the authorizing legislation and the potential for *all* conveyances made pursuant to those statutes.<sup>170</sup>

<sup>167</sup> CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988) (citing Kootenai Env'tl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1091 (Idaho 1983)).

<sup>168</sup> The Alaska Constitution provides:

Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. *All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservations of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.*

ALASKA CONST. art. VIII, § 9 (emphasis added). It also provides: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." *Id.*, § 10; see also Hatcher v. U.S. Nat'l Bank, 643 P.2d 359, 364-66 (Or. 1982) (trustee has duty to determine fair market-value of corporate stock before selling); Alland v. Pacific Nat'l Bank, 663 P.2d 104 (Wash. 1983) (trustee must inform beneficiaries of all material facts in connection with transfer which significantly effects the trust estate and interests of the beneficiaries); BOGERT, *supra* note 117, § 961.

<sup>169</sup> See, e.g., Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 723 (Cal. 1983) (en banc) (the state retains continuing supervisory control over its navigable waters).

<sup>170</sup> The federal rule is somewhat more lenient. It allows transfers of small parcels that advance public trust purposes, such as the small amount needed for piers, wharves, docks, etc. See Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

In *CWC Fisheries, Inc. v. Bunker*, the Alaska Supreme Court announced a twofold test for permitting alienation of land subject to the public trust, free of trust duties:

[W]e must ask, first, whether the conveyance was made in furtherance of some specific public trust purpose and, second, whether the conveyance can be made without substantial impairment of the public's interest . . . . If either of these questions can be answered in the affirmative, conveyance free of the public trust would be permissible.<sup>171</sup>

In applying this test, the court specifically rejected the argument made by CWC that since the state's conveyance was made in furtherance of navigation and commerce, the conveyance should be free of the public trust.<sup>172</sup>

Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.<sup>173</sup>

In evaluating a proposed conveyance of state-owned resources subject to the public trust to determine whether or not the conveyance may be made free of the burdens of the public trust, one must also apply the second prong of the CWC test: can the property be disposed of without any substantial impairment of the public interest?<sup>174</sup>

The Alaska Legislature has not clearly indicated that the trust is *not* to be considered in land exchanges.<sup>175</sup> Section 38.50 provides the authority under which the Department of Natural Resources effects land exchanges.<sup>176</sup> The Alaska Legislature clearly did *not* authorize land exchanges free of the public trust; it merely authorized exchanges:

Subject to the requirements of this chapter, the director, with the concurrence of the commissioner, is authorized to dispose of state land or interest in land by exchanging it for land, interest in land,

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<sup>171</sup> *CWC Fisheries*, 755 P.2d at 1119 (citations omitted).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (citations omitted).

<sup>174</sup> *Id.*

<sup>175</sup> *But see* ALASKA STAT. § 38.08.060(a) (legislature specified conveyance of "unencumbered title").

<sup>176</sup> *Id.*, § 38.50.010.

or other consideration. Exchanges shall be for the purpose of consolidating state land holdings, creating land ownership and use patterns which will permit more effective administration of the state public domain, facilitating the objectives of state programs, or other public purposes.<sup>177</sup>

It can reasonably be argued, by implication, the legislature intended that the public trust be integrated into land exchanges. When the Alaska Legislature adopted section 38.50.060, it provided general authority for reservation of public trust easements, stating: "Conveyances . . . by the state under this chapter are subject to valid existing rights . . ."<sup>178</sup> The public trust is certainly a set of "valid existing rights" for which easements should be retained.

\* \* \* Any exchange of state lands should include an explicit retention of public trust easements for *jus publicum* purposes, including but not limited to fishing, hunting, recreation, and wildlife viewing. As a result of the public trust doctrine, however, the public retains those rights by implication even if the state fails to make an express reservation.

The public trust doctrine does not prevent the state from making policy choices between trust uses.<sup>179</sup> In Alaska, the legislature will generally be afforded broad authority to favor one trust use over another.<sup>180</sup> The exception for legislative policy decisions, however, is not intended to swallow the rule of non-impairment of public trust uses. An overly broad conception of state authority would result in an absence of practical restrictions on the state's ability to alienate public trust property, so long as the state could articulate *some* public trust-related benefit associated with a proposed conveyance.

No authority supports such broad governmental discretion, even if the proposed conveyance is alleged to produce some alternative public trust benefit. The California Supreme Court has held:

[N]o one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use.

\* [ Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*, § 38.50.070.

<sup>179</sup> *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1121 n. 15 (Alaska 1988) (citing *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 723 (Cal. 1983) (en banc)).

<sup>180</sup> *CWC Fisheries*, 755 P.2d at 1121.

the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.<sup>181</sup> }

This reasoning is equally applicable to land exchanges under section 38.50. Thus, the state may not exchange uplands or minerals to any private grantee free of the public trust merely because the exchange may serve "some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use."<sup>182</sup> For example, where the principal "public benefit" supporting a land exchange is a benefit to private, commercial logging, no valid public purpose would support the exchange, nor would fostering private, commercial logging generally be a purpose consistent with the state's trust responsibilities.<sup>183</sup>

The public trust includes the state's duty to protect the common heritage of all Alaskans in ancient, old-growth forests, together with the wildlife, fisheries, waters, and mineral resources found thereon.<sup>184</sup> The state may not surrender the public's right to the preservation of old-growth forest lands of high value to fish and wildlife if the land to be received in exchange is of substantially inferior quality from the standpoints of wildlife habitat, fishery habitat, scenic value, and recreational potential. The Alaska Supreme Court, in *CWC Fisheries Inc., v. Bunker*, held these public trust values cannot be abandoned without specific legislative language of cession.<sup>185</sup> In other words, before a conveyance of state-owned land will fall into the exception for transfers "in furtherance of some specific public trust purpose," there must be clear evidence that the legislature intended to take action which, on its face, would be inconsistent with the plain wording of the Alaska Constitution's mandate regarding "common use" and the public trust.<sup>186</sup> Arguably, it is only where state-owned land, subject to the public trust, is more or less useless to the public, small in area,

<sup>181</sup> Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983) (en banc).

<sup>182</sup> *Id.*

<sup>183</sup> The primary motive articulated by the State Department of Natural Resources (DNR), in support of its proposal to convey the old growth forest of Leask Lakes to the Cape Fox Corporation, is that it will directly benefit the Ketchikan timber industry and thereby increase local tax revenues. The DNR also states that local recreation will benefit, since ten years after the exchange, a road may be built at White River that would allow public access. See ADL No. 12,555, *supra* note 62.

<sup>184</sup> ALASKA STAT. § 38.05.502.

<sup>185</sup> See *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1120 (Alaska 1988).

<sup>186</sup> *Id.*; see also ALASKA CONST. art. VIII, § 3.

and part of an overall scheme dominated by a true "public purpose" that the legislature may remove the public trust burdens.<sup>187</sup>

The executive branch of government in Alaska, through the Department of Law, reached a similar conclusion prior to the Alaska Supreme Court's holding in *CWC Fisheries*.

[I]t is clear that any state agency with the power to dispose of land must attempt to secure as consideration for such disposal the maximum benefit for the citizens of the state as a whole. A transfer which may benefit the citizens of one community may nevertheless violate the public trust doctrine where the state receives less than adequate consideration on behalf of the citizens of the state as a whole. Absent some showing that a land transfer would benefit the state as a whole, even legislation authorizing a transfer would be invalid. On the other hand, a transfer which may specifically benefit citizens of a particular area will not be invalid if it is also demonstrated that the transfer represents the "most desirable and advantageous solution to multiple issues confronting the state as a whole."<sup>188</sup>

The Oregon Court of Appeals, discussing state-owned land, reasoned that public trust resources "can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee."<sup>189</sup>

Judicial protection of the public trust certainly extends to old growth forest lands.<sup>190</sup> Ancient, old-growth forest lands "can only be spent once." Their value as extraordinarily productive wildlife habitat depends on unique properties which a southeastern Alaska forest only begins to acquire after approximately three hundred years.<sup>191</sup> To actively promote private clearcutting of old growth forests would, for all practical purposes, destroy their unique value to the public as wildlife habitat. This result would be diametrically opposed to the

<sup>187</sup> See, e.g., *City of Long Beach v. Mansell*, 476 P.2d 423 (Cal. 1970).

<sup>188</sup> *State v. Lewis*, 559 P.2d 630 (Alaska 1977), cert. denied, 432 U.S. 901. Accord *Op. Alaska Att'y Gen.* 566-230-85, at 4-5 (Apr. 25, 1985). "Opinions of the Attorney General, while not controlling on matters of statutory interpretation, are entitled to some deference." *State v. City of Haines*, 627 P.2d 1047, 1049, nn.6-7 (Alaska 1981); see also *Carney v. State*, 785 P.2d 544, 548 (Alaska 1990).

<sup>189</sup> *Morse v. Oregon Div. of State Lands*, 581 P.2d 520, 524 (Or. App. 1978).

<sup>190</sup> See *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131, 133 (Alaska 1993).

<sup>191</sup> *Wildlife and Old Growth Forests in Southeastern Alaska*, 8 NATURAL AREAS J. 138-45 (1988).

public trust doctrine.

In summary, before the State of Alaska may make any substantial disposition of its public trust resources, the state must meet a stiff, two-pronged test. First, the state must show that the lands it wishes to dispose of are of no substantial value for Alaskan public trust purposes. Second, the state must show that the disposition will not impair the general public interest.

It is important to keep in mind, however, that a grant of state land is probably not automatically illegal merely because it causes a reduction in traditional, public trust uses. Instead, this author believes that courts facing public trust doctrine issues retain considerable discretion, within the historical context of courts of equity, to decide how significant an impairment of public trust uses must be present to require judicial invalidation of the state's land grant or other land use decision.<sup>192</sup>

e. The Public Is Entitled to an Easement Protecting Public Trust Rights in Alienated State Lands

The public trust resembles "a covenant running with the land (or lake or marsh or shore) for the benefit of the public *and the land's dependent wildlife*."<sup>193</sup> The United States Supreme Court has noted that lands which a state holds in trust can be conveyed to private parties, free of the public trust, only under very limited circumstances. The Court in *Illinois Central* stated:

The control of the state for the purposes of the trust *can never be lost*, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.<sup>194</sup>

If the public trust doctrine forbids alienating public trust resources of an entire harbor, bay, or lake, as in *Illinois Central*, it just as surely

<sup>192</sup> For example, the Alaska Constitution requires the Alaska Legislature to utilize, develop, and maintain all "replenishable resources belonging to the State . . . on the sustained yield principle, *subject to preferences among beneficial uses*." ALASKA CONST. art. VIII, § 4 (emphasis added). There is an inherent tension among competing beneficial uses, which necessarily requires payment of some opportunity cost almost every time a resource use decision is made. It would be absurd to posit that no legally valid diminution of public trust uses or resources could occur in light of Article VIII, § 4.

<sup>193</sup> Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986) (emphasis added) (cited with approval in *Orion Corp. v. State*, 747 P.2d 1062, 1072-73 (Wash. 1987) (en banc)).

<sup>194</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892), quoted in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988).

forbids alienating public trust resources of an entire drainage. "The rights of the private owner extend only as far as will allow the public to have full benefit of its trust uses of the privately held land."<sup>195</sup>

The Alaska Supreme Court, in *CWC Fisheries, Inc. v. Bunker*, adopted the federal rule regarding conveyances of public trust property and the enduring rights of the public that emanate from the public trust.<sup>196</sup> *CWC Fisheries* involved a conveyance by the state of tidelands, which are held by the state subject to the public trust.<sup>197</sup> The *CWC Fisheries* Court held that "any state tidelands conveyance which fails to satisfy the requirements of *Illinois Central*, will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce, and fishery."<sup>198</sup>

Unless there is specific legislative language abjuring the public trust in a conveyance of public land, the State of Alaska may not convey public land — tideland or upland — free of continuing public easements that protect and guarantee the exercise of the full bundle of public rights appropriate to the qualities of the land in question. This conclusion follows from examining Title 38 of the Alaskan Statutes,<sup>199</sup> which contains no explicit language freeing such conveyances from ongoing public trust easements.<sup>200</sup> Without such legislative language, the grantee will hold the property subject to the public trust. While the grantee may assert a vested right of use, and to any improvements he may erect, these rights are subject to the public trust. The grantee can claim no vested right to bar state action to carry out the purposes of the public trust.<sup>201</sup> Nor can a recipient of state-owned land enjoin the public from utilizing the property for public trust purposes.<sup>202</sup>

The Alaska Supreme Court has not yet considered the impact of the public trust doctrine on uplands or minerals, but there is no clear reason for the court to rule that a conveyance of uplands or minerals may be made free of the dominant public trust responsibilities the state owes its citizens. Allowing uplands or minerals to be conveyed free of the public trust would probably be analyzed similar to a conveyance of

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<sup>195</sup> *Marks v. Whitney*, 491 P.2d 374, 385 (Cal. 1971).

<sup>196</sup> 755 P.2d 1115, 1118 (Alaska 1988).

<sup>197</sup> *Id.*; see also ALASKA STAT. § 38.05.502 (1992).

<sup>198</sup> *CWC Fisheries*, 755 P.2d at 1118.

<sup>199</sup> ALASKA STAT. § 38.50 (land exchanges); ALASKA STAT. § 38.05 (Alaska Land Act).

<sup>200</sup> *CWC Fisheries*, 755 P.2d at 1119-20.

<sup>201</sup> See *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 723 (Cal.), *cert denied*, 464 U.S. 977 (1983).

<sup>202</sup> *CWC Fisheries*, 755 P.2d at 1118 (citing *People v. California Fish Co.*, 138 P.2d 79, 88 (Cal. 1913); *Orion Corp. v. State*, 747 P.2d 1062, 1072-73 (Wash. 1987)).

tideland.

There is no reason for courts to treat uplands differently from tidelands insofar as the burdens of the public trust are concerned. All state-owned land in Alaska tideland and upland is subject to the public trust.<sup>203</sup> Similarly, the argument that a conveyance of land is so small as to be *de minimis* has been expressly rejected by the Alaska Supreme Court.<sup>204</sup>

Thus, any state conveyance of land—uplands as well as tidelands—must include a reservation of public easements of use and enjoyment of the *jus publicum*. In fact, the public's rights in uplands, deriving from the public trust, will necessarily be broader than its rights appurtenant to tidelands. The public trust on uplands extends beyond purposes of navigation, commerce, and fishery, to include protection of public use of and access to the wildlife, recreation, minerals, and waters occurring on the public lands.

In the context of tideland grants, the Alaska Supreme Court, in *CWC Fisheries*, clearly stated that the state may not easily escape the duties of the public trust:

Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.<sup>205</sup>

Since the public trust applies equally to tidelands, submerged lands, uplands, and their fish, wildlife, and mineral resources, any conveyance by the state of uplands, including timber and water, is "impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein."<sup>206</sup> The *CWC Fisheries* Court based its holding on the broad public trust requirements of the Alaska Constitution:

At least in the absence of some clear evidence to the contrary, we will not presume that the legislature intended to take action which would, on its face, appear inconsistent with the plain wording of

<sup>203</sup> ALASKA STAT. § 38.05.502 (1992).

<sup>204</sup> *CWC Fisheries*, 755 P.2d at 1120.

<sup>205</sup> *CWC Fisheries*, 755 P.2d at 1119 (citations omitted).

<sup>206</sup> *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (1972).

this constitutional mandate [Art. VIII, § 3, "common use" clause].

....

... To hold that persons receiving title ... hold the fee free of any public trust obligations would, we believe, amount to a substantial impairment of the public's interest in state tidelands as a whole.<sup>207</sup>

It is critical for the state to maintain public rights of *access* for the continued exercise of public trust purposes whenever the state exchanges, sells, or otherwise disposes of the alienable portion of its interest in public trust lands.<sup>208</sup> This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied by "reasonable access."<sup>209</sup>

There is clearly a tension, if not an irreconcilable conflict, between Alaska Statute sections 38.50.050 and 38.05.502 regarding the state's responsibilities in attempted disposal of publicly-owned mineral resources. According to the canon of statutory construction that the more recently-adopted of two "irreconcilably conflicting" statutes will control,<sup>210</sup> the public trust responsibilities of section 38.05.502 must take precedence. Thus, the Department of Natural Resources' ability to alienate publicly-owned, unappropriated mineral resources is far more limited than appears from section 38.50.050.<sup>211</sup>

### C. Principles of Republican Government and Enforcement of the Public Trust

As with any trust, the strength of the public trust is largely a function of the vigilance, good judgment, and integrity of the trustee. When a trustee behaves in a manner inimical to the interests of the beneficiaries, courts of equity are historically summoned to intervene in the management of trusts.

The effectiveness of the public trust doctrine requires that the judiciary be willing to vigorously assert its traditional role in equity as supervisor of trusts and, consequently, as an overseer of the legislative and executive branches' administration of the common property

<sup>207</sup> *CWC Fisheries*, 755 P.2d at 1120 (footnotes omitted).

<sup>208</sup> *Id.* at 1118; *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

<sup>209</sup> *Matthews*, 471 A.2d at 364.

<sup>210</sup> *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981).

<sup>211</sup> Assuming, *arguendo*, that the State of Alaska has no legal ability to alienate publicly-owned mineral resources in the face of its trust responsibilities.

resources comprising the public trust. Without strong judicial oversight, the public trust is a sham. There is a tendency in current American political rhetoric to decry "judicial activism."<sup>212</sup> The current cant holds that the judiciary should be subordinate to the legislative and executive branches. Such a political perspective would minimize or deny the judicial branch's duty to grant relief from infringement of the public's beneficial interest in public trust resources.

Examination of the roots of republican political philosophy in America indicate that the appropriate role for the judicial branch is one of coequal importance with the legislative and executive branches of government.<sup>213</sup> The Framers of the U.S. Constitution saw the republican form of government as requiring a blending of powers between the different branches of government so that each branch could serve as a check on the others. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>214</sup>

Like all powers, the power of the executive and legislative branches to transfer common property resources is limited. The practical limits to this power are defined principally through our common law heritage; they are enforced by the judicial branch in response to citizens' formal complaints. The supervisory power of the judicial branch exercised in the name of the public trust doctrine is firmly within the classic mold of American separation of powers philosophy. "[T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others."<sup>215</sup> Members of the legislative and executive branches who complain of judicial interference in their management of Alaska's resources may complain that unelected judges have no place in a republican government, but such a complaint flies in the face of history.<sup>216</sup>

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<sup>212</sup> See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 17 (1990).

<sup>213</sup> The need for the judicial branch to act as a "check," "balance," or "brake" on the legislative and executive branches is a recurring theme in *The Federalist Papers*. "And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . Enlightened statesmen will not always be at the helm." *THE FEDERALIST* No. 10, at 124-25 (James Madison) (Isaac Kramnick ed., 1987).

<sup>214</sup> *Id.*, No. 47, at 303; see also *id.*, No. 48 (James Madison) & Nos. 49-51 (Alexander Hamilton & James Madison).

<sup>215</sup> THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 113 (Harper & Row 1964) (1787).

<sup>216</sup> See *THE FEDERALIST*, *supra* note 213, No. 39, at 256 (James Madison).

America's founding fathers did not intend to create a system of government in which the three branches of government would be absolutely separate and distinct. The system of Montesquieu, which served as our founders' model, provided for each branch of government to have a partial agency in and control over the acts of the others. It is fundamental to the American system of government that there be a partial mixture of powers among the coordinate branches.<sup>217</sup>

[T]he political apothegm [of separation of powers] does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other . . . . [U]nless these departments be so far connected and blended as to give *each* a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.<sup>218</sup>

The judicial branch historically has been seen as the most effective bulwark against excess by the legislative and executive branches of government.<sup>219</sup> The more transient tenure of legislators and members of the executive branch naturally makes those officials subject to different interests, more focused on short-term benefits, and more easily affected by the risk of a diminution in their emoluments by way of political retaliation for failure to take a particular action. It is the duty of the courts to "declare all acts contrary to the manifest tenor of the Constitution void."<sup>220</sup> Our founders recognized that judges are less likely to be swayed by the winds of politics than are legislators or members of the executive.

Constitutional principles, like Alaska's public trust doctrine, should not be overridden by the legislature or the executive branch.

[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.<sup>221</sup>

<sup>217</sup> See *id.*, No. 47 (James Madison) & No. 51 (Alexander Hamilton & James Madison).

<sup>218</sup> *Id.*, No. 48, at 308 (James Madison) (emphasis added).

<sup>219</sup> *Id.*, No. 68 (Alexander Hamilton).

<sup>220</sup> *Id.* at 438.

<sup>221</sup> *Id.*, No. 78, at 439 (Alexander Hamilton); see also *id.*, No.81 (Alexander Hamilton).

IV  
CONCLUSION

No individual and no branch of government enjoys a monopoly on wisdom or foresight. It is necessary and proper that the American system of checks and balances, in which the courts are the final arbiters, should apply to and restrain transfer of Alaska's publicly-owned wealth into private hands. In its purest essence, this is the meaning of the public trust doctrine.

The public trust doctrine is merely the name given to the rationale relied on by a republican government to limit the power of those who temporarily occupy the seats of governmental power when the governors seek to transfer the common wealth of the governed into private hands.<sup>222</sup> Properly understood, the public trust doctrine should act as a restraining influence on the executive and legislative branches of government. By appreciating their fiduciary duties as guardians of the long-term public interest, the legislative and executive branches should voluntarily moderate their behavior and make decisions which are procedurally and substantively proper.

It is human nature to tend to exaggerate the importance of current events and thoughts. For example, there are many people today who believe that the "owner state" philosophy is essential to the economic and spiritual development of Alaska.<sup>223</sup> There are perhaps an equal number who abhor the "owner state" and claim it suffers from a monomaniacal obsession with development that ignores the long-term effects on renewable resources.<sup>224</sup>

The purpose of this article is not to embrace either of those positions in the current political spectrum. Rather, its purpose has been to explain the legal foundation of the public trust doctrine in Alaska. In particular, the author has sought to demonstrate that the principles of the public trust doctrine in Alaska are so important that they have been enshrined in our state constitution, in our statutes, and in the decisions of our Supreme Court. These principles of conservation and wise use have been handed down to us since the Magna Carta, and should not be casually discarded in the course of popular political

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<sup>222</sup> The sovereignty of the state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments.

Spoooner v. McConnel, 22 F. Cas. 939, 943 (C.C.D. Ohio 1838).

<sup>223</sup> See generally WALTER HICKEL, WHO OWNS AMERICA (1971).

<sup>224</sup> *Id.*

debate over how to achieve the chimera of permanent material wealth.

In large measure, the judicial branch must serve as trustee of the public resources subsumed within the rubric of the public trust doctrine, because of the longer duration of the tenure of the judiciary and its relative insulation from political pressures. Since the persons who serve in the executive and legislative branches are generally present in government for fewer years, the focus of their outlook is often shorter. A short-term outlook has something to offer in a democratic system, but the leavening effect of a long-term view is just as necessary to the health and welfare of society. There is political boldness in advocating the rapid placement of Alaska's public wealth into private hands. Yet there is also an unknown opportunity cost incurred by such transfers.

Viewed in the context of the never-ending debate over the advisability of transferring publicly-owned resources into private hands, the public trust doctrine is the polestar that enables the judicial branch to keep the course of government a moderate one, and to prevent extremism.<sup>225</sup> "Private rights and interests are in constant danger if the judicial power does not grow more extensive and stronger to keep pace with the growing equality of conditions."<sup>226</sup>

The best protection which the public enjoys against improvident transfer of public resources into private hands is the power of the judicial branch to void actions that violate the public trust. Imperfect though it may be, we must rely on the collective wisdom, experience, and procedural safeguards of the judicial process to protect the vast and multifarious natural wealth constituting Alaska's patrimony from being sold or traded for short-term advantages that will leave all Alaskans poorer.

A free and adequate flow of information regarding the extent and value of public trust resources between state agencies and the public is crucial. Without this information, the state will be unable to preserve the public's trust assets. Without this information, the state will also be unable to assure that it obtains full value for any sale, lease, or exchange of trust assets. Full information is critical to enable the public, as beneficiaries, to enforce its rights and hold the state to the appropriate and highest standard of care — the duty of a fiduciary.

The public trust explicitly and implicitly limits the power of the State

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<sup>225</sup> See 1 NICOLO MACHIAVELLI, *THE DISCOURSES* § 53 (Routledge & Kegan 1975) (1531) ("The populace, misled by the false appearance of advantage, often seeks its own ruin, and is easily moved by splendid hopes and rash promises.").

<sup>226</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, bk. 4, at 343 (Henry Reeve ed., rev. by Francis Bowen & Phyllis Bradley 1945) (1841).

of Alaska to dispose of public lands and resources. Many of the requirements of the public trust doctrine that have been described in this article have not yet been recognized by the executive branch. It is hoped that in the future, the considerations set forth here will help state government more effectively perform its job as trustee. The state and all Alaskans will benefit from improving the quality and quantity of information exchanged regarding the extent and value of Alaska's public trust resources. The public trust doctrine will be most effective when it serves as a rule of self-restraint whereby state government checks its plans *before* acting to ensure that the mandates of the public trust are met and the state fulfills its fiduciary duties.

The public trust doctrine offers a legal framework to enhance the quality of state government by establishing management standards for various public resources. The doctrine provides the best safeguard yet known to preserve the natural resources and quality of life that make Alaska unique. All three branches of government, together with the public at large, must cooperate in good faith to ensure that the public trust doctrine is used with success for the benefit of current and future generations of Alaskans.

UPDATE: Public Trust case law in Alaska from 1992-1997

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I. INTRODUCTION

Most of the cases decided by the Alaska Supreme Court and involving a discussion of the "common use" clause (Alaska Constitution, Article VIII, §3) tend to involve disputes over the allocation of fish and wildlife among competing groups of users.

It seems reasonable to anticipate that fish and wildlife allocation disputes will continue to work their way up through the courts, and that the Public Trust doctrine will continue to work its way into the argument and resolution of those disputes.

In Alaska, it is rare that one sees the Public Trust Doctrine enter into a dispute in which one party seeks to vindicate truly public rights. Instead, the interests that are advocated in courtrooms tend to be those of a particular user group, e.g., sport, commercial, subsistence.

To the best of my knowledge, none of the Public Trust "common use" cases that have reached the Alaska Supreme Court

have sought to obtain conservation-oriented goals with results intended to benefit the resource; courtroom advocacy has been in favor of the resource user, instead.

The cases that follow and which have been synopsized here show, at a minimum, the ongoing vitality and importance in Alaska law of the Public Trust Doctrine and the "common use" clause of our state Constitution.

## II. PUBLIC TRUST CASE LAW

A. Alaska Fish Spotters v ADF&G, 838 P.2d 798 (Alaska 1992).

Alaska Fish Spotters v ADF&G, 838 P.2d 798 (Alaska 1992), involved a claim that a regulation of the Alaska Board of Fisheries prohibiting use of airplanes to spot schools of salmon in Bristol Bay was invalid. The Alaska Supreme Court UPHELD the regulation as a valid limit on methods and means of harvest.

The Court's decision included a discussion of the Alaska Constitution, Article VIII, § 3, the "common use" clause. The Court analyzed the regulation in light of the appellants' claim that the law improperly infringed on the Public Trust.

In Fish Spotters, the Alaska Supreme Court wrote that the common use clause does not obligate the State "to guarantee access to a natural resource by a person's preferred means or method." Alaska Fish Spotters v ADF&G, 838 P.2d 798, 801 (Alaska

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1992). Consequently, fishermen who would like to rely on airplanes to spot schools of salmon for them have no constitutionally-protected right to this assistance.

In other words, it is one thing to protect a legitimate Public Trust use; it is quite another thing to protect a specific method or means of harvest, or a manner of gaining access to the Public Trust resource being used.

B. Hayes v. A.J. Associates, Inc., 846 P.2d 131 (Alaska 1993).

Hayes v. A.J. Associates, Inc., 846 P.2d 131 (Alaska 1993), involved a mining claim on tidelands that had been filled near Juneau. The mining claim was on land that had been, but was no longer, subject to tidal influence.

The appellant (Hayes) argued, among other things, that mining activity was protected under the Public Trust Doctrine because mining was a form of "commerce." Hayes further argued that since mining was "commerce" and protected by the Public Trust, he could not be enjoined or ejected from utilizing the property for mining purposes.

The Alaska Supreme Court disagreed with Mr. Hayes.

The Court wrote that "commerce" in the context of the Public Trust Doctrine means "trade, traffic or transportation of goods over navigable waters, a meaning which does not include mining." Hayes v. A.J. Associates, Inc., 846 P.2d 131, 133

(Alaska 1993).

To further clarify the spirit of the Public Trust Doctrine, the Court provided additional gloss describing the public, non-wasting nature of uses that come under the aegis of the Trust.

Most importantly, a mining claim is not a "public use," but rather an exclusive, depleting use of a non-renewable resource for private profit. We believe that even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises. (footnote omitted)

Hayes v. A.J. Associates, Inc., 846 P.2d 131, 133 (Alaska 1993).

C. Tongass Sport Fishing Ass'n v State, 866 P.2d 1314 (Alaska, 1994).

Tongass Sport Fishing Ass'n v State, 866 P.2d 1314 (Alaska, 1994) involved a challenge to a regulation of the Alaska Board of Fisheries allocating the number of chinook (king) salmon to be harvested by commercial seiners and gillnetters, commercial trollers, and sport fishers in Southeast Alaska. The Board's allocation was made within the framework of the ceiling set by the Pacific Salmon Commission and the Pacific Salmon Treaty.

In Tongass, the Alaska Supreme Court held that the Board's

king salmon allocation between the sport and commercial fleets did not violate the Alaska Constitution's "common use" clause because the Board's action did not place any limits on admission to the competing (commercial or sport) user groups. Tongass, 866 P.2d at 1318.

From the perspective of understanding Alaska's Public Trust Doctrine, the paramount feature of Tongass is its reiteration of the principle articulated in McDowell that the common use clause is implicated when a law seeks to limit admission to a user group, rather than when an allocation of a harvestable resource is made.<sup>1</sup>

Tongass is also important for its discussion of the Board of Fisheries' and Board of Game's powers to allocate fish and wildlife among diverse user groups and sub-groups. The Court wrote:

The Board of Fisheries was created for the purposes of conservation and development of the state's fishery resources. AS 16.05.221(a). In Kenai Peninsula Fisherman's Cooperative Ass'n v. State, 628 P.2d 897, 903 (Alaska 1981), we held that concepts of "conserving" and "developing" fishery resources necessarily include the concepts of managed utilization and thus allocation of these resources. See also Alaska Fish Spotters v. State, Dep't of Fish & Game, 838 P.2d 798, 800 (Alaska 1992). In Meier v. State, Board of Fisheries, 739 P.2d 172, 174 (Alaska 1987), we stated that the Board's "duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users." We also held that the Board's authority encompasses the power to allocate a fishery resource between two competing

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<sup>1</sup> "The state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group." Tongass, 866 P.2d 1320, fn 11, citing McDowell v State, 785 P.2d at 8.

subgroups of commercial users. Id. at 174 (upholding Board allocation of salmon between setnet and driftnet fishers). Subsequently, in Gilbert v. State, Department of Fish & Game, 803 P.2d 391, 399 (Alaska 1990), we recognized that the Board possessed authority to allocate among different fisheries.

We have held that the "common use" clause of article VIII, section 3, the "no exclusive right of fishery" clause of section 15, and the "uniform application" clause of section 17 are not implicated unless limits are placed on the admission to resource user groups. McDowell v. State, 785 P.2d 1, 8 & n. 14 (Alaska 1989); see also Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492 (Alaska 1988). Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users. (FN11) In Kenai Peninsula, we said:

While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of the section. 628 P.2d at 904.

Tongass, 866 P.2d at 1317-1318.

D. State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995).

State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995), involved whether the Alaska Constitution is violated by a statute which (1) requires the creation of areas in which permits for subsistence hunting and fishing may not be granted, and (2) grants priority hunting and fishing rights to a preferred class of subsistence users based on where they reside.

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The Alaska Supreme Court resolved Kenaitze primarily by reference to its decision in McDowell v State, 785 P.2d 1 (Alaska 1989) and the prohibition of Alaska's "common use" clause against granting preferences for the taking of fish or wildlife based on the location of an Alaskan's residence.<sup>2</sup>

The creation of "nonsubsistence areas" was upheld in Kenaitze and the importance of the "common use" clause in assuring that location of residence within Alaska be a neutral factor was emphasized.

The Alaska Constitution, Article VIII, § 3, "is particularly strong in requiring that proximity to the resource be a neutral factor. It reserves 'to the people for common use' wild fish and game 'w]herever occurring.'" (Emphasis in original. State v Kenaitze, 894 P.2d 632, 640, fn 21 (Alaska 1995)).

Inconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses.

State v Kenaitze, 894 P.2d 632, 640 (Alaska 1995).

The fact that residents of nonsubsistence areas must travel in order to utilize subsistence permits is not a limitation to their admission to a subsistence user group. (footnote omitted) Further, just as the fact that a certain species is made available for sport fishing in a given area does not mean that the same species must be made available for commercial fishing in the same area, the fact that a certain species is made available for sport or commercial use in a given area does not mean that the constitution commands that the same species be made available in the same area for priority subsistence use.

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<sup>2</sup> Kenaitze, 894 P.2d at 838, and fn 21.

Kenaitze, 894 P.2d at 641.

The Alaska Supreme Court has held that where entry into a user class is restricted, it will employ a "least restrictive alternative" test. Kenaitze, 894 P.2d at 641-642, citing McDowell, 755 P.2d 1 at 10, Owsichek, 763 P.2d at 498, n. 17, and Johns 758 P.2d 1266. In contrast, allocation decisions of the Boards "...are so complex and multi-faceted that they are not amenable to analysis under such a test." Id., citing Tongass, 866 P.2d at 1319, Gilbert, 803 P.2d at 399, and Meier, 739 P.2d at 175.

E. Shepherd v. State, Dept. of Fish and Game, 897 P.2d 33 (Alaska 1995).

Shepherd v. State, Dept. of Fish and Game, 897 P.2d 33 (Alaska 1995), involved a challenge to the constitutionality of AS 16.05.255(d), and regulations of the Board of Game adopted thereunder, which granted a preference to resident Alaskans over non-Alaskans in the harvest of certain species of wildlife.

The Alaska Supreme Court upheld the statute and regulations. The Court wrote that under the federal and state constitutions the state has a special interest in the fish and wildlife within its boundaries and is entitled to grant allocational preferences to state resident recreational users. Shepherd, 897 P.2d at 39.

There is no conflict with the "common use" clause when

Alaska favors its own residents over non-residents. The state may completely exclude non-residents from harvest opportunities.

Although the Alaska Supreme Court cited many venerable authorities<sup>3</sup> in support of the power to prefer Alaska residents, it relied primarily on State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed, 340 U.S. 923, 71 S.Ct. 498, 95 L.Ed. 667 (1951). In Kemp, South Dakota had proved that there was a real danger that the flyways, breeding grounds, and nursery for ducks and geese would be subject to excessive hunting and possible destruction by nonresident hunters lured to the State by an abundance of pheasants.<sup>4</sup> 44 N.W.2d at 217.

Our Court reasoned that:

As the trustee of those resources for the people of the state, the state [of Alaska] is required to maximize for state residents the benefits of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of nonresidents. In such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents, except when such preferences are in

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<sup>3</sup> viz., Montana Outfitters Action Group v. Fish & Game Commission, 417 F.Supp. 1005 (D.Mont.1976), aff'd sub nom., Baldwin v. Fish & Game Commission, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); Geer v. Connecticut, 161 U.S. 519, 530, 16 S.Ct. 600, 604-05, 40 L.Ed. 793 (1896); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1877); Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D.Pa.1825) (No. 3,230).

<sup>4</sup> State v Kemp is a case that had been rarely cited until it surfaced in a footnote in Montana Outfitters Action Group v. Fish & Game Commission, 417 F.Supp. 1005 (D.Mont.1976), aff'd sub nom., Baldwin v. Fish & Game Commission, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

conflict with paramount federal interests. Shepherd, 897 P.2d at 40-41.

F. Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996).

Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996), also known as "the F.I.S.H. Initiative case," involved a challenge to an exercise of the Constitutional procedure of the Initiative in which a proposed law is submitted to a public vote by the electorate instead of the Legislature. The F.I.S.H. Initiative would have established a statutory system for allocating salmon harvests among certain user groups.

The majority opinion in Pullen held that the Initiative was void because it would have worked an unconstitutional appropriation. The majority also recognized the state's Public Trust obligation to manage fish, wildlife, and waters.

Pullen, 923 P.2d at 60.

The majority opinion in Pullen recognizes and cites the Public Trust as a powerful factor in Alaska law. The majority opinion expressly declined to address the argument that management of Alaska's salmon resources falls exclusively within the power of the state legislature as trustee of Alaska's wildlife, and therefore is not a proper subject of an initiative. (Pullen, fn 18.)

Chief Justice Allen Compton concurred in the majority holding and result of Pullen, but for entirely different

reasons than the "improper appropriation" grounds relied on by the majority of the Alaska Supreme Court. The Chief Justice would have found the Initiative invalid as prohibited by the trust relationship between the State and its citizens.<sup>5</sup> In his concurring opinion, the Chief Justice reviewed several of the most important decisions of the Alaska Supreme Court that recognize, elaborate upon, and affirm the Public Trust Doctrine. Selected key passages from the majority holding are excerpted below, followed by excerpts from the Chief Justice's concurring opinion.

In Owsichek v. State, Guide Licensing, 763 P.2d 488 (Alaska 1988), we had occasion to analyze the common use clause found in article VIII, section 3 of Alaska's Constitution. After noting that the framers of our constitution apparently intended to constitutionalize historic common law principles governing the sovereign's authority over management of fish, wildlife, and water resources, we said:

Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people. We have twice recognized this duty in our prior decisions. In Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961) aff'd 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962), we stated:

These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.

(Emphasis added.) Similarly, in Herscher v. State Department of Commerce, 568 P.2d 996, 1003 (Alaska 1977), we noted that the state acts "as trustee of the natural resources for the benefit of its citizens."

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<sup>5</sup> Pullen, Compton, C.J., concurring, 923 P.2d at 66.

Id. at 495.

In a footnote to this text, we stated:

The Court overruled Geer's state ownership doctrine in Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). That case involved facts almost identical to Geer. The Oklahoma statute at issue forbade the export of minnows taken from the waters of the state. See id. at 323, 99 S.Ct. at 1729, 60 L.Ed.2d at 254. The Court struck down the statute as violative of the commerce clause. Id. at 338, 99 S.Ct. at 1737, 60 L.Ed.2d at 263. The Court found the state ownership doctrine to be a legal fiction that created anomalies and did not conform to "practical realities." Id. at 335, 99 S.Ct. at 1735, 60 L.Ed.2d at 261. Nothing in the opinion, however, indicated any retreat from the state's public trust duty discussed in Geer. Indeed, the Court stated, "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." Id. at 335-36, 99 S.Ct. at 1735-36, 60 L.Ed.2d at 261.

....

After Hughes, the statements in the Alaska Constitutional Convention regarding sovereign ownership, quoted supra, are technically incorrect. Nevertheless, the trust responsibility that accompanied state ownership remains.

Id. at 495 n. 12.

These important themes have been consistently reaffirmed. See Gilbert v. State, Dep't of Fish and Game, 803 P.2d 391, 399 (Alaska 1990); Shepherd v. State, Dep't of Fish and Game, 897 P.2d 33, 40 (Alaska 1995).

Given the above, we think there is merit in Pullen's contention that the public trust responsibilities imposed on the state by the provisions of article VIII of our constitution compel the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities.

In short, we are in agreement with Pullen's position

that

[i]t is the authority to control naturally occurring fish which gives the state property-like interests in these resources. For that reason, naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people.

We hold that the state's interest in salmon migrating in state and inland waters is sufficiently strong to warrant characterizing such salmon as assets of the state which may not be appropriated by initiative. Thus we conclude that the superior court correctly reasoned that salmon are public assets of the state which may not be appropriated by initiative.

The Public Trust Doctrine is more directly addressed at 923 P.2d 65, Chief Justice Compton concurring:

The trust relationship derives generally from article VIII of the Alaska Constitution, and in this case specifically from article VIII, section 3, which provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." This section, generally referred to as the "common use clause," can be amended by the people of the State, for that right is guaranteed them by article XIII, section 1 of the Alaska Constitution. However, it cannot be amended by the legislature, only implemented within the narrow confines of the limitations of the common use clause, which has created the trust relationship between the State and its people.

Chief Justice Compton's concurring opinion, which rejects the majority's conclusion that fish and wildlife are state assets, relies entirely on the Public Trust Doctrine and the Alaska Constitution's exclusion of certain topics as "clearly inapplicable" to adoption by Initiative to find that the F.I.S.H. Initiative was invalid:

The people, as beneficiaries of this trust, cannot dictate to the trustee the manner in which the trust is

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to be administered.<sup>6</sup>

To me, the majority opinion's reliance on Alaska constitutional law concerning what does or does not constitute an invalid "appropriation" appears just as strained as it struck Chief Justice Compton. Nevertheless, it was that view of the law that garnered a majority of votes on our Supreme Court. Consequently, one should expect practitioners in Alaska to tailor future legal arguments to fit the "improper appropriation" rubric.

Practitioners in Alaska are likely to look at this situation and conclude that both legal theories--improper appropriation and violation of the trust relationship--should be elaborated in future challenges of a similar ilk.

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<sup>6</sup> Pullen, 923 P.2d at 66.

### III. CONCLUSION

As the Public Trust jurisprudence of Alaska's "common use" clause continues to evolve and develop, what changes may be anticipated?

Arguably, the Alaska Supreme Court lost its foremost authority on natural resource issues with the retirement of Justice Jay Rabinowitz in early 1997. Justice Rabinowitz' successor as the natural resources dean of the Alaska Supreme Court appears to be Justice Compton. Justice Compton's concurring opinion in Pullen shows, beyond any doubt, his familiarity with and concern for the Public Trust Doctrine, so we may be assured that any legal argument standing on the Public Trust Doctrine will find a certain measure of receptivity and a well of understanding.

The relatively recent elevation of Justices Fabe and Eastaugh to the Alaska Supreme Court have not yet shown their significance in natural resources jurisprudence.

My personal hope is that a good fact situation will present itself to an able barrister who is also blessed with good luck, and that this will combine to provide the vehicle for Alaska's "common use" clause and the Public Trust Doctrine to be used for straightforward resource conservation reasons. In other words, I hope to see the Public Trust Doctrine used to vindicate public rights, not merely used as a prybar in an allocation dispute.

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On the other hand, I feel confident that allocation disputes among competing groups of resource users will continue to dominate litigation that turns on, or simply includes, arguments based on Alaska's "common use" clause. Competition among competing groups of users of wildlife and fish is certain to intensify, and it is natural to see user groups turn to the "common use" clause.

Alaska's human population is almost certain to increase. The pressures for increased exploitation of Alaska's natural resources--especially oil and natural gas--are almost certain to increase, too, with collateral effects on some fish and wildlife. Together, these factors should heighten competition for scarce fish, wildlife, and water resources.

State-federal jurisdictional conflicts and confusion in Alaska will not disappear. Nor will internecine acrimony, even in the event of an amendment to the Alaska Constitution that seeks to resolve "The Subsistence Question" by allowing discrimination among Alaska residents based on where within Alaska they may live.

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Utermohle  
2/21/98

**CS FOR HOUSE BILL NO. 406(RES)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTIETH LEGISLATURE - SECOND SESSION**

**BY THE HOUSE RESOURCES COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): HOUSE RESOURCES COMMITTEE**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to fish and game."**

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

3 **\* Section 1. FINDINGS AND INTENT. (a) The legislature finds that**

4 (1) the ability to take fish and game for personal and family use for sustenance  
5 is a fundamental right under the Constitution of the State of Alaska;

6 (2) the common use clause of the Constitution of the State of Alaska imposes  
7 on the state a trust duty to manage the fish, game, and water resources of the state for the  
8 benefit of all the people;

9 (3) the harvest of fish and game for personal and family use for sustenance is  
10 the highest and best use of fish and game;

11 (4) the fish and game resources of Alaska have adequate biological and  
12 reproductive capacity to provide an abundance of fish and game for all users;

13 (5) the harvest of fish and game for personal and family use for sustenance  
14 does not constitute or affect interstate commerce and is not subject to regulation under the  
15 commerce clause of the Constitution of the United States.

1 (b) It is the intent of the legislature to provide

2 (1) a preference for personal and family use of fish and game for sustenance  
3 that parallels the Congressional intent underlying the subsistence preference under Title VIII  
4 of the Alaska National Interest Lands Conservation Act (P.L. 96-487) but does not violate the  
5 fundamental constitutional rights of Alaskans to sustenance, equal protection, and common use  
6 of fish and game under the Constitution of the State of Alaska;

7 (2) a greater role for local fish and game advisory committees and regional fish  
8 and game management boards in the review and approval of regulations governing the use of  
9 fish and game resources;

10 (3) for a greater abundance of fish and game resources to serve as a source of  
11 food for persons who are dependent on fish and game for personal and family use for  
12 sustenance.

13 \* **Sec. 2.** AS 16 is amended by adding a new chapter to read:

14 **Chapter 16. Use of Fish and Game for Sustenance.**

15 **Sec. 16.16.010. Preferred use of fish and game.** The harvest of fish and  
16 game for personal and family use for sustenance by residents is the highest and best  
17 use of fish and game. The Board of Fisheries, the Board of Game, and the department  
18 shall adopt regulations, policies, and management plans to implement a preference for  
19 consumptive use of fish and game for personal and family use for sustenance over  
20 other uses of fish and game.

21 **Sec. 16.16.020. Dependence on fish and game for sustenance.** (a) The  
22 Board of Fisheries and the Board of Game acting jointly shall identify and define areas  
23 of the state where fish and game dependent uses exist. A fish and game dependent use  
24 area is an area where dependence on fish and game for personal and family use for  
25 sustenance is the principal characteristic of the economy and way of life of the area.  
26 In determining whether dependence on fish and game for personal and family use for  
27 sustenance is the principal characteristic of the economy and way of life of an area,  
28 the Board of Fisheries and the Board of Game shall jointly consider the relative  
29 importance of dependence on fish and game in the context of the totality of the  
30 following socioeconomic characteristics of the area:

31 (1) the social and economic structure;

- 1 (2) the stability of the economy;
- 2 (3) the extent and kinds of employment for wages, including full-time,
- 3 part-time, temporary, and seasonal employment;
- 4 (4) the amount and distribution of cash income among those who live
- 5 in the area;
- 6 (5) the cost and availability of goods and services to those who live in
- 7 the area;
- 8 (6) the variety of fish and game species used by those who live in the
- 9 area;
- 10 (7) the seasonal cycle of economic activity;
- 11 (8) the percentage of those who live in the area participating in hunting
- 12 and fishing activities or using wild fish and game;
- 13 (9) the harvest levels of fish and game by those who live in the area;
- 14 (10) the historical, social, and economic values associated with the
- 15 taking and use of fish and game;
- 16 (11) the geographic locations where those who live in the area hunt and
- 17 fish;
- 18 (12) the extent of sharing and exchange of fish and game by those who
- 19 live in the area;
- 20 (13) the other sources of direct and indirect economic support available
- 21 in the area;
- 22 (14) additional similar factors the boards establish by regulation to be
- 23 relevant to a determination under this subsection.

24 (b) If the Board of Fisheries or the Board of Game, as appropriate, determines  
25 that a shortage of fish or game resources available for harvest in a fish and game  
26 dependent use area exists, the board may establish a preference for fish or game  
27 dependent uses and, consistent with sustained yield, reserve a sufficient portion of the  
28 resource to provide a reasonable opportunity to satisfy the need for fish and game  
29 dependent uses of the resource. A board shall make its determination of whether  
30 sufficient fish or game resources exist in an area to provide a reasonable opportunity  
31 to satisfy fish and game dependent uses of the resource based on the recommendations

1 of the department's area management biologist for the area, the regional fish and game  
2 board for the area, and the advisory committees for the area. The preference  
3 established under this subsection shall be extended to a person who is determined to  
4 be dependent on fish and game for personal and family use for sustenance under (c) -  
5 (g) of this section. In a time of shortage of fish or game resources, the appropriate  
6 board may adopt a regional preference among beneficial uses of fish and game by  
7 requiring that the flesh or meat of fish and game be consumed within the region where  
8 the fish or game was taken.

9 (c) A person is dependent on fish and game for personal and family use for  
10 sustenance if the person

11 (1) possesses a \$5 resident hunting, trapping, and sport fishing license  
12 issued under AS 16.05.340(a)(6); and

13 (2) submits to the local fish and game advisory committee for the area  
14 in which the person lives a signed written statement that the person

15 (A) is dependent on fish and game for personal and family use  
16 for sustenance or has no alternate means of sustenance as the result of the  
17 absence of a cash-based economy in the area where the person lives or as the  
18 result of the person's decision to adopt a fish and game dependent life style;

19 (B) has consumed in the preceding 12 months a minimum  
20 number of species or groups of species of fish and game, as determined by the  
21 Board of Fisheries and the Board of Game acting jointly; the minimum number  
22 of species or groups of species or the groups of species may vary among the  
23 fish and game management regions of the state in accordance with the diversity  
24 of fish and game species in each region; and

25 (C) has shared fish and game resources taken by the person  
26 with a minimum number of households, as determined by the Board of  
27 Fisheries and the Board of Game acting jointly, or received fish and game  
28 resources taken by members of a minimum number of other households, as  
29 determined by the Board of Fisheries and the Board of Game acting jointly.

30 (d) Each local fish and game advisory committee shall review the written  
31 statements submitted by persons asserting a dependence on fish and game for personal

1 and family use for sustenance and make recommendations as to whether the person is  
2 entitled to a preference under (b) of this section. An advisory committee may hold a  
3 hearing to gather additional information regarding whether a person is dependent on  
4 fish and game for personal and family use for sustenance. Each advisory committee  
5 shall forward its recommendations regarding each person's eligibility for a preference,  
6 all written statements received by the advisory committee, and all additional  
7 information collected by the advisory committee to the regional fish and game board  
8 for the region in which the advisory committee is located. The regional board shall  
9 defer to a recommendation made by an advisory committee unless a person disputes  
10 the recommendation of the advisory committee under (e) of this section.

11 (e) A person who disputes the recommendation of the advisory committee as  
12 to the person's eligibility for the preference may appeal the recommendation to the  
13 regional fish and game board for the region in which the person lives. The regional  
14 board shall make a determination as to whether the person is dependent on fish and  
15 game for personal and family use for sustenance and should be recommended to the  
16 Board of Fisheries and the Board of Game to receive the preference authorized under  
17 (b) of this section. Proceedings of a regional board under this subsection are subject  
18 to AS 44.62.330 - 44.62.630.

19 (f) Each regional fish and game board shall forward all recommendations,  
20 written statements, and additional information received from the advisory committees  
21 in the region, together with recommendations made by the regional board under (e) of  
22 this section and additional information collected by the regional board, to the Board  
23 of Fisheries and the Board of Game. The Board of Fisheries and the Board of Game,  
24 acting jointly, shall make the final determination as to who is entitled to the preference  
25 authorized under (b) of this section. The boards shall defer to the recommendations  
26 of the advisory committees and the regional fish and game boards unless a person  
27 disputes the recommendation made by an advisory committee or a regional board. The  
28 boards shall hold a hearing subject to AS 44.62.330 - 44.62.630 to make a final  
29 determination of whether the person is dependent on fish and game for personal and  
30 family use for sustenance.

31 (g) A person who is determined by the Board of Fisheries and the Board of

1 Game to be dependent on fish and game for personal and family use for sustenance  
2 may take fish and game in any location in the state where a preference for the harvest  
3 of fish or game for personal and family use for sustenance has been established under  
4 (b) of this section.

5 (h) The Board of Fisheries and the Board of Game shall adopt regulations  
6 governing the allowable level of noncommercial barter and sharing of fish and game  
7 resources taken for personal and family use for sustenance. The boards shall set the  
8 level of allowable noncommercial barter at a documented historical level that does not  
9 subject barter of fish and game taken for personal and family use for sustenance to  
10 federal regulation under the commerce clause of the Constitution of the United States.

11 **Sec. 16.16.095. Definitions.** In this chapter,

12 (1) "principal" means more than 50 percent;

13 (2) "reasonable opportunity" means an opportunity, as determined by  
14 the Board of Fisheries or the Board of Game, as appropriate, that allows a person to  
15 participate in a fishery or hunt that provides a normally diligent participant with a  
16 reasonable expectation of success of taking of fish or game; "reasonable opportunity"  
17 does not mean a guarantee of taking fish or game;

18 (3) "shortage" means the amount of fish or game resources available  
19 for harvest is not sufficient to reasonably provide for the sustenance needs of persons  
20 who are dependent upon fish and game for personal and family use for sustenance;

21 (4) "sustained yield" means a level of utilization of a fish or game  
22 population for consumptive uses by humans that is capable of being maintained in  
23 perpetuity.

24 \* Sec. 3. AS 16.05.090(c) is amended to read:

25 (c) There is established in the department a section of fish and game  
26 dependent use [SUBSISTENCE HUNTING AND FISHING].

27 \* Sec. 4. AS 16.05.094 is amended to read:

28 **Sec. 16.05.094. Duties of section of fish and game dependent use**  
29 **[SUBSISTENCE HUNTING AND FISHING].** The section of fish and game  
30 dependent use [SUBSISTENCE HUNTING AND FISHING] shall

31 (1) compile existing data and conduct studies to gather information,

1 including data from persons dependent upon fish and game for personal and family  
2 use for sustenance [SUBSISTENCE USERS], on all aspects of the role of  
3 [SUBSISTENCE] hunting and fishing for fish and game dependent use in the lives  
4 of the residents of the state;

5 (2) quantify the amount, nutritional value, and extent of dependence on  
6 food acquired through [SUBSISTENCE] hunting and fishing for fish and game  
7 dependent use;

8 (3) make information gathered available to the public, appropriate  
9 agencies, and other organized bodies;

10 (4) assist the department, the Board of Fisheries, and the Board of  
11 Game in determining what uses of fish and game, as well as which users and what  
12 methods, should be termed fish and game dependent [SUBSISTENCE] uses, users,  
13 and methods;

14 (5) evaluate the impact of state and federal laws and regulations on  
15 [SUBSISTENCE] hunting and fishing for fish and game dependent use and, when  
16 corrective action is indicated, make recommendations to the department;

17 (6) make recommendations to the Board of Game and the Board of  
18 Fisheries regarding adoption, amendment, and repeal of regulations affecting  
19 [SUBSISTENCE] hunting and fishing for fish and game dependent use;

20 (7) participate with other divisions in the preparation of statewide and  
21 regional management plans so that those plans recognize and incorporate the needs of  
22 [SUBSISTENCE] users of fish and game for fish and game dependent use.

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

24 Sec. 16.05.245. Review of regulatory proposals. (a) Notwithstanding  
25 AS 44.62, each proposal for a regulation to be adopted by the Board of Fisheries or  
26 the Board of Game shall be submitted to local fish and game advisory committees and  
27 regional fish and game boards that may be affected by the proposal. Each advisory  
28 committee and regional board may review the proposed regulation and submit  
29 comments and recommendations regarding the proposal to the Board of Fisheries or  
30 the Board of Game, as appropriate. This subsection does not apply to emergency  
31 regulations considered by either the Board of Fisheries or the Board of Game.

1 (b) The Board of Fisheries and the Board of Game shall carefully review each  
2 recommendation made by a regional fish and game board and shall defer to the  
3 recommendation of the regional board, unless

4 (1) there is a contrary recommendation from another regional board;

5 (2) the recommendation is not consistent with the conservation of the  
6 fish or game resource;

7 (3) the recommendation involves issues of statewide significance; or

8 (4) the recommendation involves conflicts between regional boards.

9 (c) If the Board of Fisheries or the Board of Game chooses not to follow the  
10 recommendation of an advisory committee or a regional board, the appropriate  
11 statewide board shall inform the advisory committee or regional board of the action  
12 and state the reasons for not following the recommendation.

13 (d) Subject to (a) and (b) of this section, the Board of Fisheries and the Board  
14 of Game may consider and adopt any proposal for a regulation that is submitted for  
15 adoption, even if comments or recommendations regarding the proposal are not  
16 received from an advisory committee or a regional board.

17 \* Sec. 6. AS 16.05.251(a) is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (B) will not unduly disrupt the fishery;

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

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

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

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

5 (15) regulating resident or nonresident sport fishermen as needed for  
6 the conservation, development, and utilization of fishery resources;

7 (16) requiring unlicensed fishing vessels present in or transiting the  
8 waters of the state to report to the department the quantity, species, and origin of fish  
9 on board; in this paragraph, "unlicensed fishing vessel" means a fishing vessel that is  
10 not licensed under AS 16.05.490 - 16.05.530.

11 \* Sec. 7. AS 16.05.251(d) is amended to read:

12 (d) Regulations adopted under (a) of this section must, consistent with  
13 sustained yield and the provisions of AS 16.16.020 [AS 16.05.258], provide a fair and  
14 reasonable opportunity for the taking of fishery resources by personal use, sport, and  
15 commercial fishermen.

16 \* Sec. 8. AS 16.05.255(a) is amended to read:

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

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

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

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

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

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

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

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

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

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

10 (10) regulating sport hunting and [SUBSISTENCE] hunting for  
11 personal and family use for sustenance as needed for the conservation, development,  
12 and utilization of game;

13 (11) taking game to ensure public safety.

14 \* Sec. 9. AS 16.05.255(d) is amended to read:

15 (d) Regulations adopted under (a) of this section must provide that, consistent  
16 with the provisions of AS 16.16.020 [AS 16.05.258], the taking of moose, deer, elk,  
17 and caribou by residents for personal or family consumption has preference over taking  
18 by nonresidents.

19 \* Sec. 10. AS 16.05.255(f) is amended to read:

20 (f) The Board of Game may not significantly reduce the taking of an identified  
21 big game prey population by adopting regulations relating to restrictions on harvest or  
22 access to the population, or to management of the population by customary  
23 adjustments in seasons, bag limits, open and closed areas, methods and means, or by  
24 other customary means authorized under (a) of this section, unless the board has  
25 adopted regulations, or has scheduled for adoption at the next regularly scheduled  
26 meeting of the board regulations, that provide for intensive management to increase  
27 the take of the population for human harvest consistent with (e) of this section. This  
28 subsection does not apply if the board

29 (1) determines that intensive management would be

30 (A) ineffective, based on scientific information;

31 (B) inappropriate due to land ownership patterns; or

1 (C) against the best interest of persons who take game for  
2 personal and family use for sustenance [SUBSISTENCE USES]; or

3 (2) declares that a biological emergency exists and takes immediate  
4 action to protect or maintain the big game prey population in conjunction with the  
5 scheduling for adoption of those regulations that are necessary to implement (e) of this  
6 section.

7 \* Sec. 11. AS 16.05.259 is amended to read:

8 Sec. 16.05.259. No personal and family use [SUBSISTENCE] defense. In  
9 a prosecution for the taking of fish or game in violation of a statute or regulation, it  
10 is not a defense that the taking was done for personal and family use for sustenance  
11 [SUBSISTENCE USES].

12 \* Sec. 12. AS 16.05.260 is repealed and reenacted to read:

13 Sec. 16.05.260. Local advisory committees and regional boards. (a) The  
14 Board of Fisheries and the Board of Game, acting jointly, shall establish a maximum  
15 of five fish and game management regions in the state.

16 (b) The Board of Fisheries and the Board of Game, acting jointly, shall adopt  
17 regulations establishing a maximum of nine fish and game areas in each fish and game  
18 management region established under (a) of this section that together comprise the  
19 whole of the region and shall establish a local fish and game advisory committee for  
20 each area. The advisory committees shall be composed of persons well informed on  
21 the fish or game resources of the area. The boards shall set the number of members  
22 and the terms of each of the members of the advisory committees and shall designate  
23 one member of each committee as chair.

24 (c) A local fish and game advisory committee may

25 (1) hold public hearings on fish or game matters;

26 (2) make recommendations regarding fish and game matters and fish  
27 and game regulatory proposals to the regional fish and game board for the region in  
28 which the committee is located and to the Board of Fisheries, the Board of Game, and  
29 the department;

30 (3) advise the Board of Fisheries and the Board of Game as to the  
31 appropriate criteria for determining whether a person is dependent on fish and game

1 for personal and family use for sustenance under AS 16.16.020.

2 (d) Recommendations from the local fish and game advisory committees on  
3 regulatory proposals and other fish and game matters shall be forwarded to the  
4 appropriate regional and statewide boards for consideration.

5 (e) For each fish and game management region established under (a) of this  
6 section, there is established a regional fish and game board. Each board consists of  
7 nine members appointed by the governor from a list of names submitted by the fish  
8 and game advisory committees within the region of the board. The governor may  
9 reject one or more names submitted by the advisory committees and may ask for  
10 additional names. The governor shall appoint each member on the basis of interest in  
11 public affairs, good judgment, knowledge, and ability, and with a view to providing  
12 diversity of interest and points of view in the membership. The members shall be  
13 residents of the state and shall be appointed without regard to political affiliation or  
14 geographical location of residence. The members of the boards appointed by the  
15 governor are subject to confirmation by the legislature in joint session. The members  
16 of the boards serve staggered terms of three years. The terms of members of the  
17 boards begin on July 1. Notwithstanding AS 39.05.080(1), by April 1 of the calendar  
18 year in which the term expires, the governor shall appoint a person to fill the vacancy  
19 that will arise on a board due to expiration of the term of a member of the board and  
20 submit the name of the person to the legislature for confirmation. If a vacancy arises  
21 on the board, the governor shall, within 30 days after the vacancy arises, appoint a  
22 person to serve the balance of the unexpired term and submit the name of the person  
23 to the legislature for confirmation. A person appointed to fill the balance of an  
24 unexpired term shall serve on the board from the date of appointment until the earlier  
25 of the expiration of the term or the failure of the legislature to confirm the person  
26 under AS 39.05.080. Members of a regional fish and game board serve without  
27 compensation but are entitled to per diem and travel expenses authorized for boards  
28 and commissions under AS 39.20.180.

29 (f) The governor may only remove a member of a regional fish and game  
30 board for inefficiency, neglect of duty, or misconduct in office, or because the  
31 member, while serving on the regional board, is convicted of a misdemeanor for

1 violating a statute or regulation related to fish or game or is convicted of a felony.  
2 The governor shall deliver to the member a written copy of the charges and give the  
3 member an opportunity to be heard in person or through counsel at a public hearing  
4 before the governor or a designee upon at least 10 days' notice by registered mail.  
5 The member may confront and cross-examine adverse witnesses. Upon removal, the  
6 governor or a designee shall file in the proper state office the findings and a complete  
7 statement of all charges made against the member.

8 (g) A majority of the members of a regional fish and game board constitutes  
9 a quorum for the transaction of business, for the performance of any duty, and for the  
10 exercise of any power. A majority of the full board membership is required to carry  
11 all motions, regulations, and resolutions.

12 (h) Each regional fish and game board may

13 (1) exercise authority delegated to it by the Board of Fisheries, the  
14 Board of Game, or the commissioner;

15 (2) hear appeals from recommendations of a local fish and game  
16 advisory committee under AS 16.16.020;

17 (3) hold public hearings on fish and game matters;

18 (4) make recommendations regarding fish and game matters and fish  
19 and game regulatory proposals to the Board of Fisheries, the Board of Game, and the  
20 department;

21 (5) advise the Board of Fisheries and the Board of Game as to the  
22 appropriate criteria for determining whether a person is dependent on fish and game  
23 for personal and family use for sustenance under AS 16.16.020.

24 (i) The regional fish and game boards shall carefully review each  
25 recommendation made by a local fish and game advisory committee within its region  
26 regarding regulatory proposals and other fish and game matters. The regional board  
27 shall defer to the recommendation of the advisory committee, unless there is a contrary  
28 recommendation from another advisory committee, the recommendation is not  
29 consistent with the conservation of the fish or game resource, the recommendation  
30 involves issues of regional significance, or the recommendation involves conflicts  
31 between advisory committees. If the regional board does not adopt or concur in the

1 proposal of the advisory committee, the board shall inform the advisory committee of  
2 its decision and state the reasons for its action.

3 (j) The commissioner shall delegate authority to a regional board for  
4 emergency closures during established seasons. The appropriate statewide board shall  
5 adopt the necessary regulations governing these closures. The commissioner may set  
6 aside and void only opening of seasons set by a regional board under this subsection.

7 \* Sec. 13. AS 16.05.270 is amended to read:

8 Sec. 16.05.270. Delegation of authority to commissioner or to a regional  
9 fish and game management board. (a) For the purpose of administering  
10 AS 16.05.251 and 16.05.255, each board may delegate authority to the commissioner  
11 or to a regional fish and game board to act in its behalf.

12 (b) If there is a conflict between the board and the commissioner on proposed  
13 regulations, public hearings shall be held concerning the issues in question. If, after  
14 the public hearings, the board and the commissioner continue to disagree, the issue  
15 shall be certified in writing by the board and the commissioner to the governor who  
16 shall make a decision. The decision of the governor is final.

17 \* Sec. 14. AS 16.05.403 is amended to read:

18 Sec. 16.05.403. Special licenses and permits. (a) A resident hunting license,  
19 a resident sport fishing license, a resident [SUBSISTENCE] fishing permit for  
20 personal and family use for sustenance, or a resident personal use fishing permit  
21 indicating that the purchaser is blind may be obtained from the department upon  
22 payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon presentation of  
23 either an affidavit of the applicant stating that the applicant cannot distinguish light  
24 from darkness or an affidavit signed by a licensed physician or a licensed optometrist  
25 stating that the applicant's central visual acuity does not exceed 20/200 in the better  
26 eye with correcting lenses or that the applicant's widest diameter of visual field  
27 subtends an angle no greater than 20 degrees.

28 (b) A resident who is a person with physical disabilities may obtain from the  
29 department upon payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon  
30 submission of satisfactory proof of physical disabilities a resident hunting license, a  
31 resident sport fishing license, a resident [SUBSISTENCE] fishing permit for personal

1 and family use for sustenance, or a resident personal use fishing permit indicating  
2 that the purchaser is a person with physical disabilities.

3 (c) A resident who is 65 years of age or older may obtain from the department  
4 upon payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon submission  
5 of satisfactory proof of age a resident hunting license, a resident sport fishing license,  
6 a resident [SUBSISTENCE] fishing permit for personal and family use for  
7 sustenance, or a resident personal use fishing permit indicating that the purchaser is  
8 a person who is 65 years of age or older. This subsection does not limit the right of  
9 a resident person who is 65 years of age or older to claim an exemption from hunting  
10 or sport fishing license requirements under AS 16.05.400(b).

11 \* Sec. 15. A 16.05.405(c) is amended to read:

12 (c) Notwithstanding AS 16.05.420(c), a resident holding a valid noncommercial  
13 fishing license may take fish on behalf of a person who is blind, a person with  
14 physical disabilities, or a person who is 65 years of age or older if the resident  
15 possesses on the resident's person

16 (1) a document signed by the person on whose behalf the fish is taken,  
17 stating that the resident possesses the person's sport fishing license, [SUBSISTENCE]  
18 fishing permit for personal and family use for sustenance, personal use fishing  
19 permit, or permanent identification card in order to take fish on behalf of that person;

20 (2) the person's

21 (A) resident sport fishing license issued under AS 16.05.403 or  
22 permanent identification card issued under AS 16.05.400(b);

23 (B) resident [SUBSISTENCE] fishing permit for personal and  
24 family use for sustenance issued under AS 16.05.403; or

25 (C) resident personal use fishing permit issued under  
26 AS 16.05.403; and

27 (3) all other documents issued to the person that are required by law  
28 as a condition of taking the fish being pursued.

29 \* Sec. 16. AS 16.05.930(e) is amended to read:

30 (e) This chapter does not prevent the limited noncommercial  
31 [TRADITIONAL] barter of fish and game taken for personal and family use for

1        sustenance [BY SUBSISTENCE HUNTING OR FISHING], except that the  
2        commissioner may prohibit the barter of [SUBSISTENCE-TAKEN] fish and game by  
3        regulation, emergency or otherwise, if a determination on the record is made that the  
4        barter is resulting in a waste of the resource, damage to fish stocks or game  
5        populations, or circumvention of fish or game management programs.

6        \* Sec. 17. AS 16.05.940(2) is amended to read:

7                (2) "barter" means the exchange or trade of fish or game, or their parts,  
8        taken for personal and family use for sustenance [SUBSISTENCE USES]

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

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

12        \* Sec. 18. AS 16.05.940(5) is amended to read:

13                (5) "commercial fishing" means the taking, fishing for, or possession  
14        of fish, shellfish, or other fishery resources with the intent of disposing of them for  
15        profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid  
16        fishing [SUBSISTENCE] permit for personal and family use for sustenance in  
17        possession, if required by statute or regulation, is considered prima facie evidence of  
18        commercial fishing if commercial fishing gear as specified by regulation is involved  
19        in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

20        \* Sec. 19. AS 16.05.940 is amended by adding a new paragraph to read:

21                (37) "fish and game dependent uses" means the noncommercial,  
22        historical uses of fish and game by a resident for direct personal or family  
23        consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and  
24        selling of handicraft articles out of nonedible by-products of fish and game resources  
25        taken for personal or family consumption, and for the limited noncommercial barter  
26        or sharing for personal or family use for sustenance; in this paragraph, "family" means  
27        persons related by blood, marriage, or adoption, and a person living in the household  
28        on a permanent basis.

29        \* Sec. 20. AS 16.10.380(b) is amended to read:

30                (b) In this section "user group" includes [, BUT IS NOT LIMITED TO,] sport  
31        fishermen, processors, commercial fishermen, persons who fish for personal and

1 family use for sustenance [SUBSISTENCE FISHERMEN], and representatives of  
2 local communities.

3 \* Sec. 21. AS 16.10.750(a) is amended to read:

4 (a) The legislature finds that

5 (1) the salmon fishing industry is among the state's largest industries  
6 and generates hundreds of millions of dollars and thousands of jobs each year; the  
7 salmon fishery is vitally important to commercial, [SUBSISTENCE,] personal use, and  
8 sport fishing interests, to persons who fish for personal and family use for  
9 sustenance, and to the state's developing tourist industry;

10 (2) the state is committed to maintaining and enhancing its wild stocks  
11 of salmon by careful management, by initiating a 20-year rebuilding program, and by  
12 investing in the fishing industry;

13 (3) millions of Alaska salmon are being caught and injured by high  
14 seas fisheries that intercept salmon contrary to state, federal, or international law; the  
15 high seas interception of Alaska salmon defeats the state's management and rebuilding  
16 programs, deprives the state of a return on its investment in the fishing industry, and  
17 detrimentally affects personal and family uses of Alaska salmon for sustenance  
18 [SUBSISTENCE] and sport fishing uses of Alaska salmon;

19 (4) vessels that engage in the high seas interception of salmon can  
20 move relatively freely and undetected from region to region in the North Pacific and  
21 thus are able to harvest whatever species is most readily available or most valuable;  
22 by moving farther westward, a greater proportion of the take is Asian salmon; moving  
23 eastward results in a greater proportion of the take being Alaska salmon; although  
24 there is intermixing of Asian and North American salmon stocks, scientific evidence  
25 proves that even a minimal harvest of salmon within the migratory range of each  
26 species will contain Alaska salmon;

27 (5) the illegal taking of salmon detrimentally affects the Alaska fishing  
28 industry; the illegal taking of Alaska salmon is of primary concern because of the  
29 direct and immediate effect on the state; in addition, the illegal taking of Asian salmon  
30 is also of concern because depletion of those stocks will ultimately result in a shifting  
31 of high seas fishing efforts, both legal and illegal, to Alaska salmon;

1 (6) high seas interception of salmon occurs beyond the exclusive  
2 economic zone of the United States, or through incursion within the exclusive  
3 economic zone and the state's territorial sea, by vessels that are usually not registered  
4 in this state; moreover, these vessels are not based in Alaska and can thus avoid  
5 detection more easily than Alaska-based vessels; as a practical matter, it is extremely  
6 difficult to directly or indirectly regulate the vessels themselves; it is therefore  
7 necessary to prohibit activities within the state that give aid, comfort, and financial  
8 incentives to high seas interception of salmon.

9 \* Sec. 22. AS 16.10.800(1) is amended to read:

10 (1) "high seas interception," "interception," or a similar term means the  
11 unauthorized catching, taking, or harvesting of salmon for other than sport, personal  
12 and family use for sustenance [SUBSISTENCE], or personal use purposes [.]

13 (A) throughout the migratory range of each species by a vessel  
14 not registered under the laws of this state; or

15 (B) beyond the territorial sea of the state by a vessel registered  
16 under the laws of the state;

17 \* Sec. 23. AS 16.20.033(b) is amended to read:

18 (b) The Yakataga State Game Refuge is established to protect the

19 (1) fish and wildlife habitat and populations, including salmon  
20 spawning and rearing habitat and critical goat and moose winter habitat;

21 (2) public uses of fish and wildlife and their habitat, particularly  
22 commercial fishing, fishing for personal and family use for sustenance, and [.] sport  
23 [., AND SUBSISTENCE] fishing, hunting, viewing, photography, and general public  
24 recreation in a high quality environment; and

25 (3) the use and disposition of other resources when the activities are  
26 not inconsistent with (1) and (2) of this subsection.

27 \* Sec. 24. AS 16.20.033(f) is amended to read:

28 (f) The department shall allow commercial fishing, sport fishing, [AND  
29 SUBSISTENCE] fishing for personal and family use for sustenance, and hunting  
30 within the Yakataga State Game Refuge under regulations of the Board of Fisheries  
31 and the Board of Game. The department shall also permit associated support activities

1 when necessary and consistent with AS 16.20.010 - 16.20.080 to support fishing and  
2 hunting permitted under this section, including fish buying operations, aircraft support  
3 including landing strips, and off-road vehicle use.

4 \* Sec. 25. AS 16.20.090(a) is amended to read:

5 (a) The legislature recognizes that

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

10 (2) the Walrus Islands are uninhabited, and the walrus frequenting  
11 them are not required by the state for personal and family use for sustenance  
12 [SUBSISTENCE UTILIZATION];

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

15 (4) the Department of Natural Resources has taken appropriate action  
16 to achieve transfer of title in the Walrus Islands to the state.

17 \* Sec. 26. AS 16.20.615(d) is amended to read:

18 (d) The department shall permit existing [EXTING] cabins to remain,  
19 personal and family use of fish and game for sustenance to continue,  
20 [SUBSISTENCE AND] recreational uses to continue, and commercial uses such as  
21 seal hunting and placer mining to continue, if appropriate under the management plan  
22 adopted under (c) of this section to the extent that the activities are compatible with  
23 the establishment of the Tugidak Island Critical Habitat Area.

24 \* Sec. 27. AS 16.20.625(e) is amended to read:

25 (e) The department shall permit uses of the Redoubt Bay Critical Habitat Area  
26 in a manner that is compatible with the purposes for which the critical habitat area is  
27 established. The department shall permit the following public uses to continue without  
28 further approval by the department unless the department determines that the use is not  
29 compatible with the purposes for which the Redoubt Bay Critical Habitat Area is  
30 established:

31 (1) hunting, including [SUBSISTENCE] hunting for personal and

1 family use for sustenance, trapping, fishing for personal and family use for  
2 sustenance [AND SUBSISTENCE], commercial fishing, and sport fishing, including  
3 the continued use of cabins for the purpose of hunting, trapping, and fishing;

4 (2) hiking, backpacking, and camping, including the use of campfires;

5 (3) cross-country skiing, snowmachining, boating, and the landing of  
6 aircraft; and

7 (4) other related uses that are temporary in duration and have no  
8 foreseeable adverse effects on vegetation, drainage, soil stability, or fish and game and  
9 their habitat.

10 \* Sec. 28. AS 16.40.120(c) is amended to read:

11 (c) The commissioner shall specify the expiration date of an acquisition permit  
12 and may attach conditions to an acquisition permit, including conditions relating to the  
13 time, place, and manner of harvest. Size, gear, place, time, licensing, and other  
14 limitations applicable to sport harvest, commercial harvest, or [SUBSISTENCE]  
15 harvest for personal and family use for sustenance of aquatic plants and shellfish do  
16 not apply to a harvest with a permit issued under this section. The commissioner of  
17 fish and game shall issue or deny a permit within 30 days after receiving an  
18 application.

19 \* Sec. 29. AS 16.40.120(d) is amended to read:

20 (d) The commissioner shall deny or restrict a permit under this section upon  
21 finding that the proposed harvest will impair sustained yield of the species or will  
22 unreasonably disrupt established uses of the resources by commercial, sport, or  
23 personal use [, OR SUBSISTENCE] users and by persons who use the resources for  
24 personal and family use for sustenance. The commissioner shall inform the Board  
25 of Fisheries of any action taken on permit applications for species that support  
26 commercial fisheries subject to limited entry under AS 16.43 and of any permits  
27 denied because of unreasonable disruption of an established use. A denial of the permit  
28 by the commissioner must contain the factual basis for the findings.

29 \* Sec. 30. AS 16.40.120(f) is amended to read:

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

- 1 (1) wild stock is necessary to meet the initial needs of farm or hatchery  
2 stock;
- 3 (2) there are technological limitations on the propagation of culture  
4 stock for the species sought;
- 5 (3) wild stock sought is not fully utilized by commercial fisheries,  
6 sport fisheries, personal use [, OR SUBSISTENCE] fisheries, or by persons engaged  
7 in personal and family use for sustenance; or
- 8 (4) wild stock is needed to maintain the gene pool of a hatchery or  
9 aquatic farm.

10 \* Sec. 31. AS 41.21.625(b) is amended to read:

11 (b) The governor shall appoint individuals to the Alaska Chilkat Bald Eagle  
12 Preserve Advisory Council representing the following interests for a two-year term:

- 13 (1) a resident of the Haines Borough representing a conservation  
14 organization;
- 15 (2) a representative of the United States Fish and Wildlife Service; and
- 16 (3) a member of the local [UPPER LYNN CANAL] fish and game  
17 advisory committee for the area.

18 \* Sec. 32. AS 16.05.258, 16.05.330(c), 16.05.940(8), 16.05.940(30), 16.05.940(31), and  
19 16.05.940(32) are repealed.

20 \* Sec. 33. Sections 3 and 5, ch. 1, SSSLA 1992, are repealed.

21 \* Sec. 34. TRANSITION. (a) Notwithstanding the repeal of AS 16.05.258, by sec. 32 of  
22 this Act, the areas outside of the nonsubsistence areas established by the Board of Fisheries  
23 and the Board of Game shall constitute fish and game dependent use areas under  
24 AS 16.16.020. added by sec. 2 of this Act, until the earlier of either the effective date of  
25 regulations adopted by the Board of Fisheries and the Board of Game acting jointly to identify  
26 fish and game dependent use areas under AS 16.16.020, added by sec. 2 of this Act, or two  
27 years from the effective date of this Act.

28 (b) Notwithstanding the repeal and reenactment of AS 16.05.260 by sec. 12 of this  
29 Act, a local fish and game advisory committee established before the effective date of this Act  
30 that is active on the day before the effective date of this Act shall continue to operate under  
31 the former provisions of AS 16.05.260 until the effective date of regulations adopted by the

1 Board of Fisheries and the Board of Game, acting jointly, that establish the local fish and  
2 game advisory committees described in AS 16.05.260, as repealed and reenacted by sec. 12  
3 of this Act. The Board of Fisheries and the Board of Game, acting jointly, shall appoint  
4 persons to serve on the local fish and game advisory committees established under  
5 AS 16.05.260, as repealed and reenacted by sec. 12 of this Act, immediately upon adoption  
6 of regulations establishing the local fish and game advisory committees described in  
7 AS 16.05.260, as repealed and reenacted by sec. 12 of this Act.

8 \* Sec. 35. INITIAL APPOINTMENT OF MEMBERS TO THE REGIONAL FISH AND  
9 GAME BOARDS. (a) Notwithstanding AS 16.05.260, as repealed and reenacted by sec. 12  
10 of this Act, immediately upon the adoption of regulations by the Board of Fisheries and the  
11 Board of Game, acting jointly, to define the boundaries of fish and game management regions  
12 in the state, the governor shall solicit nominations from local fish and game advisory  
13 committees in existence at that time for persons to serve on each of the regional fish and game  
14 boards established under AS 16.05.260, as repealed and reenacted by sec. 12 of this Act.

15 (b) Notwithstanding AS 16.05.260(e), as repealed and reenacted by sec. 12 of this Act,  
16 the governor shall appoint the initial members of each of the regional fish and game boards  
17 to staggered terms in accordance with AS 39.05.055(7).

18 \* Sec. 36. REVISOR'S BILL. The revisor of statutes shall prepare a bill for consideration  
19 of the resource committees of the House of Representatives and the Senate of the Alaska State  
20 Legislature that amends references to subsistence uses of fish and game outside of Title 16  
21 of the Alaska Statutes to conform to the provisions of this Act. The bill shall be presented  
22 to the resource committees by the 20th legislative day of the First Regular Session of the  
23 Twenty-First Alaska State Legislature.

SB 443  
HB 552

**An Act Relating to the Taking of Fish and Game for Subsistence;  
and Providing For an Effective Date**



*Prepared by:*  
The Governor's Subsistence Advisory Council

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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 21, 1992

The Honorable Richard I. Eliason  
President of the Senate  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to subsistence.

Among the fifty states, only Alaska has a significant portion of its population who, in large part, live off the land. Subsistence is unique and special to Alaska. Because of the importance of subsistence to Alaska, both the United States Congress and past Alaska legislatures, have passed laws giving a preference to subsistence over other consumptive uses of the same resources.

Despite the general agreement that subsistence should have a preference, there has been monumental disagreement on how that preference should be implemented. For too many years, Alaskans on different sides of the subsistence issue have talked about each other, but never to each other. The effect of conflicting court opinions, federal Alaska National Interest Lands Conservation Act mandates, and legislative gridlock have produced a crisis in the management of our fish and game. We have a current situation where everyone loses.

For the past year, an outstanding group of citizens has been meeting steadily to try to resolve this problem. There are nine members of the Governor's Subsistence Advisory Council and all of Alaska owes a debt to them. The members are:

The Honorable Jay S. Hammond, Port Alsworth  
Mr. Dick Bishop, Fairbanks  
Mr. John James Burns, Fairbanks  
Mr. Mitch Demientieff, Nenana  
Mr. Eric Forrer, Juneau  
Mr. Matthew Iya, Nome  
Mr. Byron Mallott, Juneau  
Mr. Theo Matthews, Kenai  
Mr. Gene Peltola, Bethel

These nine members represent all sides of the subsistence issue. While some members were nominated by specific groups, I asked each member to participate as an individual.

The Honorable Richard Eliason  
February 21, 1992  
Page 2

The group had a goal that is simple to define, but very difficult to achieve: it was to find the best possible subsistence solution for Alaska. Many observers thought that was an impossible dream, that the members could never agree. There were times during meetings, when that appeared to be true, but the council members did not give up. Today I am introducing subsistence legislation that the council drafted. Every part of this legislation is the result of consensus among the members.

The legislation is not what any one member, any one group, nor I, by myself, would have drafted. It is legislation that protects the resource, the interests of every group, and can pass. In designing this statute, great emphasis has been placed on how it will actually work. Extensive time has been spent with the Alaska Departments of Fish and Game (ADF&G) and Law.

The legislation is designed for species protection, to function with a minimum of disruption for users, for ease of administration by the Board of Fisheries and the Board of Game, for management by the ADF&G, enforceability by the Department of Public Safety, and defensibility in court. The legislation will reduce the constant barrage of subsistence court cases by making the state's actions more defensible, but, much more importantly, by laying out clear guidelines for the boards and reducing the problems which caused people to sue.

A packet of material describing and explaining the bill will be provided to the Senate Secretary and Chief Clerk.

I realize the legislature has a constitutional responsibility to consider and, if necessary, amend bills to make them the best possible legislation. Neither I nor the council make any claim that this legislation is perfect, but every word in it has been the subject of hours or days of debate. The two things I ask of the legislature, are to maintain the goal of the advisory council by passing the best possible piece of subsistence legislation, and to act swiftly to solve the subsistence crisis and help heal Alaska.

Sincerely,

S/S Walter J. Hickel  
Walter J. Hickel  
Governor

## A Brief Introduction to HB 552 and SB 443 (Subsistence)

### **How would the new law work?**

Participation would be limited to qualified subsistence users. Qualification is based on a point system applied across the state with three different levels of presumption. The new system would provide that communities and areas in the state be classified into one of three groups, and apply presumptions as follows:

**Group 1** consists of areas where the population of each community in the area is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.

A person who hunts or fishes and lives in an area identified under group 1 is presumed to meet the subsistence eligibility standards. No permit or filing of a statement affirming the person's compliance with the standards is required.

**Group 2** consists of communities where the population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.

A person who hunts or fishes and lives in a community identified under group 2 is rebuttably presumed to meet the standards upon signing a statement affirming his or her compliance with the standards.

**Group 3** consists of communities or urban areas where the population is 7,000 or greater or communities where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life.

A person who lives in a community or in an area identified under group 3 may qualify by applying to the Department of Fish and Game and demonstrating that he or she meets the qualification standards.

### **What are the qualification standards?**

Qualification will be based on a weighted point system of 7 criteria. The boards will adopt the point system by regulation. Qualification requires more points than just meeting the minimums in the first four criteria, but anyone who fails to meet each of the minimums would be disqualified. The last three criteria do not have minimums. The seven criteria are:

- (1) the quantity of fish and game consumed by the person in the preceding twelve months, with a mandatory minimum of 125 pounds;
- (2) the number of species and groups of species of fish and game from the subsistence use area consumed by the person in the preceding twelve months, with a mandatory minimum set by the boards by region;