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opinions that try to explicate "arbitrary and capricious" review:

Courts usually substitute judgment on the kind of questions of law that are within their special competence, but on other questions they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction.

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:1, p. 332.

In other words, according to Professor Davis, under the "arbitrary and capricious" standard of review, what a federal District Court judge is really deciding is whether or not the agency has convinced the judge that its rule is "reasonable," as well as whether or not the agency properly followed the statute the agency was seeking to implement. It is hard to imagine a more flexible standard of judicial review. SEE: Id., § 29:7 p. 359.

According to Professor Davis, all the judicial and statutory verbiage purporting to refine the foregoing summary of the middle ground of judicial review is useless embroidery, tantamount to what Shakespeare wrote in King John, IV, ii:

To be possess'd with double pomp,
To guard a title that was rich before,
To gild refined gold, to paint the lily,
To throw a perfume on the violet,
To smooth the ice, or add another hue
Unto the rainbow, or with taper light
To seek the beauteous eye of heaven to garnish,
Is wasteful and ridiculous excess.

Professor Davis adds that:

The most prominent example of such useless embroidery is the confused law about the comparison of the "arbitrary and capricious" standard with the "substantial evidence" standard...

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:1, p. 334; SEE ALSO Id., § 29:7.

- a. The "substantial evidence" standard compared to the "arbitrary and capricious" standard

What is "substantial evidence?"

Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

N.L.R.B. v Columbian E. & S. Co., 306 U.S. 292, 300 (1939).

Addressing the distinction between the "arbitrary and capricious" and "substantial evidence" standards, Professor Davis has asked, rhetorically:

What, then, is the difference between the two standards, or are they the same? The surprising answer: The courts do not know!

The scope of review may vary from one case to another and it may vary with the mood of the writer of the opinion.⁶

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:1, p. 335.

Does the "arbitrary and capricious" standard differ from the "substantial evidence? standard? Professor Davis advises us that:

The best response to this question might be that quibbling about it should be avoided because, whatever the technical answer, courts will go on substituting judgment on the kind of questions of law that are within their special competence and using a reasonableness test on other questions.

⁶ SEE, for example: Office of Communication of the United Church of Christ v F.C.C., 707 F.2d 1413, 1422-1426 (D.C.Cir. 1983):

Over the years, these phrases "arbitrary," "capricious," and "abuse of discretion," as well as the judicial precedent interpreting them have developed a deceptively talismanic quality--the mere mechanistic incantation of the terms is presumed to evoke the appropriate judicial mind-set.

Or Pacific Legal Foundation v Dept. Transportation, 593 F.2d 1338, 1343, n 35 (D.C.Cir. 1971), cert. denied, 444 U.S. 830(1971):

...we agree with the emerging consensus of the Courts of Appeals that the distinction between the arbitrary and capricious standard and substantial evidence review is largely semantic...

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:7 p. 356.⁷

For this reason, we will not examine any of the other expressions used to describe the middle ground of judicial review--"clearly erroneous," "clear error of judgment," or "abuse of discretion."

Instead, we emphasize that in the context of federal common law, the mind-set of the judge before whom a case is heard is probably of far more importance than the particular verbal formula recited in a statute purporting to prescribe the standard of judicial review of agency action, unless the statute specifies the extreme of "de novo" review. Whether a statute specifies "arbitrary and capricious," "substantial evidence," "clearly erroneous," etc., is probably of far more importance to legislators than to judges.

⁷ "The law is, then, all at one time, that the one test requires more than the other, that the other requires more than the one, and that the difference between the two tests is largely semantic! If lawmakers had a malevolent purpose of preventing clarity (as they surely do not), could they accomplish that purpose more effectively?

The answer is yes, for they have made the difficulties still greater. ...

If differences in the three standards exist, the least exacting review is "arbitrary or capricious," the middle one is "substantial evidence," and the most exacting is "clear error of judgment."

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:7 p. 359.

- b. The "arbitrary and capricious" standard of review allows courts to exercise a tremendous level of discretion in reviewing agency action.

The federal APA embodies the basic presumption that agency action is subject to judicial review. SEE: Abbott Laboratories v Gardner, 387 U.S. 136, 140 (1967); Citizens to Preserve Overton Park v Volpe, 401 U.S. 402 (1971).⁸

The proposal of the Governor's Task Force on Subsistence (1997) to amend ANILCA § 807 ensures that the State's decisions implementing the ANILCA subsistence priority will be reviewable. Existing ANILCA § 807 guarantees the right of "aggrieved persons" to challenge any failure to adequately provide for the subsistence priority. (16 U.S.C. § 3117.) (This includes agency inaction.)

Despite all the different verbal formulae that have been brought to bear on the problem, it is generally accepted that judicial review under the "arbitrary and capricious" standard can be just about as searching, or as deferential, as the judge who hears the case wishes the standard to be. There is enough slack in the "arbitrary and capricious" yardstick to accommodate whatever level of rigor a particular judge wishes to bring to the process of review.

Federal judges often write that it is only in the fields of statutory construction, or analysis of legislative history, that courts enjoy "special competence." Consequently, when judicial review is in either of those fields of unique judicial expertise, a court need give no deference to an agency's decision.

In Alaska, however, perhaps one should modify the standard analysis of judicial review by noting that most "true Alaskans" consider themselves to be experts in the fields of wildlife and fisheries management. It is possible that federal judges in Alaska share this common public feeling of special skill. As a consequence, searching judicial inquiries in cases involving Alaskan fish and wildlife should not be presumed to be outside the "special competence" of federal judges in Alaska.

In Alaska, it seems reasonable to predict that where fisheries or wildlife management disputes are concerned, substitution of a court's judgment (federal or state) for that of an agency should

⁸ Under federal administrative law principles, agency inaction, on the other hand, is presumptively unreviewable, but the presumption may be rebutted. Heckler v Chaney, 470 U.S. 821, 833 (1985). BUT COMPARE Sierra Club v Hodel, 848 F.2d 1068 (10th Cir. 1988), and Adams v Richardson, 480 F.2d 1159 (D.C. Cir. en banc 1973).

never come as a surprise.

A judicious approach to the jurisprudence of administrative law will recognize that the scope of judicial review of agency decisions occupies a continuum.

At one end of the continuum lies the field of statutory interpretation, which courts consistently declare to be within their "special competence" and wherein courts consequently do not defer to agency decisions.

Courts are most prone to substitute their judgment for that of an agency when the question in front of the court is one of analyzing a statute or legislative history. SEE, e.g., Watt v Alaska, 101 S.Ct. 1673 (1983); Kenaitze Indian Tribe v Alaska, 860 F.2d 312, 313 (9th Cir. 1988), cert denied, 491 U.S. 905 (1989).⁹

At the other end of the continuum of the scope of judicial review, yet not separated from the first end by a "bright line," lies judicial review of agency findings of fact and policy. It is fair to say that courts are generally less willing to substitute their judgment for that of an agency in these domains, especially where the question involves agency expertise or basic policy.

In conclusion, one could say that in general, statutory standards like "arbitrary and capricious" that purport to limit judicial review of agency decisions are like the outfield fences at the minor league Milwaukee Brewers' ballpark when the team was owned by Bill Veeck: the fences can move in and out from day to day.

⁹ Chevron v N.R.D.C., 467 U.S. 837 (1984), indicated a doctrinal shift by the U.S. Supreme Court in the field of federal administrative common law, and held that reviewing courts must affirm any reasonable interpretation of ambiguous language in an agency-administered statute. Nonetheless, tremendous judicial discretion continues, due in part to the malleability of administrative law doctrines, the large and ideologically diverse federal judiciary, and the inherent limits of appellate review for ensuring consistency.

c. Senator Stevens' version of amended § 807

Senator Stevens has made several changes to Governor Knowles' Subsistence Task Force's (1997) proposals. The following section of this memo discusses Senator Stevens' addition to the Task Force's proposed amendment to ANILCA § 807, adding the clause "or otherwise not in accordance with law" to the formula of "arbitrary and capricious."¹⁰

Mr. Bill Horn has written that Senator Stevens' modification "substantially weakens decisionmaking authority of State agencies." I respectfully disagree for the following reasons.

There is enormous judicial discretion in the application of the "arbitrary and capricious" standard of review under federal administrative common law. It is my opinion that the marginal change caused by the additional language inserted by Senator Stevens would be of minimal effect, not "substantial."

The federal APA specifically allows a reviewing court to declare agency action invalid if it is "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

As a hypothetical, let us consider how a reviewing court would be likely to act in the absence of Senator Stevens' "otherwise not in accordance with law" language. Would a Federal District Judge be likely to refuse to void agency action that was in excess of the agency's statutory jurisdiction, without substantial observance of procedures required by law, or contrary to constitutional rights? I doubt it very much.¹¹

Can any of us reasonably conceive of a statute that forbids a court to void agency action that is "not in accordance with law?"

It is nonetheless true that Senator Stevens' modification of proposed ANILCA § 807 specifically widens the enumerated grounds on which a court could void fish and wildlife regulations adopted by the State under authority of ANILCA. However, for the foregoing

¹⁰ These clauses, recited seriatim by judges and lawyers ever since the federal APA was adopted in 1946, have acquired a mantra-like, incantatory effect by virtue of their long-standing linkage in § 706 of the federal APA. It is possible that they have grown intellectually inseparable for federal judges whose entire career experience with administrative law has involved using these clauses almost interchangeably.

¹¹ SEE ALSO: U.S. v Alexander, 938 F.2d 942, 947 n. 9 (9th Cir. 1991): "Where Congress has meant to preclude us from passing upon the validity of a statute, it has said so explicitly." (citations and quotations omitted.)

reasons, I believe that Senator Stevens' addition is more of a cosmetic change than a substantive one.

d. Current 9th Circuit law on the scope of review

We next look briefly at current practice in the 9th Circuit Court of Appeals interpreting and applying the "arbitrary and capricious" standard.

It is the current judicial cant to write that the function of a reviewing court is merely to determine whether an agency has considered all the relevant factors and articulated a rational connection between the facts found and the choice made. e.g., Washington Crab Producers, Inc., v Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990).

In the context of fact-finding, courts typically state that they cannot substitute their judgment for that of the agency. e.g., Alliance Against IFO's v Brown, 84 F.3d 343, 345, 350 (9th Cir. 1996); cert denied 117 S.Ct. 1467; Alaska Factory Trawler Assn. v Baldrige, 831 F.2d 1456, 1460 (9th Cir. 1987).

Nonetheless, courts can substitute their judgment for that of an agency in the context of fact-finding via the rubric of stating that the agency has failed to articulate a rational connection between the facts and the agency's decision.

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445 (9th Cir. 1996), ("BTCM") is an instructive case to study for purposes of seeking to understand the current state of judicial review of agency actions in the 9th Circuit. The facts involved National Park Service regulations governing the use of bicycles around the Golden Gate Bridge Recreation Area.

The portions of the decision in BTCM excerpted below deal first with judicial review of an agency's interpretation of its own statute, then with judicial review of the agency's findings of facts.¹²

¹² Federal courts recognize a distinction between "interpretive" rules and "substantive" rules.

1) "An interpretive rule expresses the agency's view of what another rule, regulation, or statute means...the scope of judicial review is broad because the interpretation of statutory language does not involve the agency's discretion." Pacific Gas & Electric Co. v FPC, 506 F.2d 33, 37, n. 14 (D.C. Cir. 1974).

2) A "substantive" rule (also known as a "legislative" rule) has been defined as one which "establishes a standard of conduct which has the force of law...A general statement of policy, on the other hand, does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what
(continued...)

In BTCM, the 9th Circuit¹³ wrote that the United States Supreme Court has established a two-step process for reviewing an agency's construction of the statute it administers.

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Chevron U.S.A. v N.R.D.C., 467 U.S. 837, 842-843 (1984).

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1452 (9th Cir. 1996).

Step one in this analysis requires a court to use traditional tools of statutory construction. If Congress had an intention on the precise question at issue, that intent is the law and it must be given effect. Id., citing Chevron at 843, n. 9.

If an agency decision represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, then, at least in theory, courts should not disturb the agency's choice "unless it appears from the statute or its legislative history that the accommodation is not one that Congress

¹²(...continued)

the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future." Pacific Gas & Electric Co. v FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

The scope of review for "substantive" or "legislative" rules is narrower and more deferential than for "interpretive" rules. (SEE generally: Batterton v Francis, 432 U.S. 416, 425 (1977).)

¹³ A recent case from the District of Alaska dealing with an agency's statutory interpretation is Oregon Portland Cement Co. v U.S. Dept. Interior, 590 F. Supp. 52 (D. Alaska 1984). There, the court wrote that a court is obliged to accept the administrative construction of a statute only insofar as it is reasonable...and consistent with the intent of Congress in adopting the statute. Where a statutory mandate is detailed and specific, the amount of deference due an agency decision is "tempered," and deference is less appropriate. Id. at 56.

would have sanctioned." Chevron, 467 U.S. at 845.¹⁴

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996).

At Step two, the court need not conclude that the agency construction of the statute was the only one it permissibly could have adopted to uphold the agency's construction, or even the reading of the statute that the court would have chosen if the question had come up first in a judicial proceeding. Id. at 843 n 10.

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996).

Taken literally, this method translates to judicial deference to an experienced agency's interpretation of the statute it is charged with administering.

Regarding the application of the "arbitrary and capricious" standard to agency findings of fact and policy decisions, the 9th Circuit relied on the current U.S. Supreme Court guideline (Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)), and its own precedents.

An agency decision can be found "arbitrary and capricious" where the agency "entirely failed to consider an important aspect of the problem." Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1460 (9th Cir. 1996), citing Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

In order for an agency decision to be upheld under the arbitrary and capricious standard, a court must find that evidence before the agency provided a rational basis for its decision. Northwest Motorcycle Assn., 18 F.3d 1468, 1471 (9th Cir. 1994), cited in Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1462 (9th Cir. 1996). After considering the relevant data, the [agency] must articulate a satisfactory explanation for its action including a rational connect: n between the facts found and the choice made. Id.

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1462 (9th Cir. 1996).

Translated into plainer English, this method of judicial review of

¹⁴ SEE ALSO: Wilderness Public Rights Fund v Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979), cert denied, 446 U.S. 982 (1980), noting that allocation of a limited use between competing user groups is well within the area of administrative discretion granted to the NPS.

fact-finding and policy-making gives courts broad discretion to determine whether or not the agency's explanation of its action is "satisfactory."

The NPS decision-making process in BTCM was upheld, but why? The court noted, in dictum, that its decision to uphold the NPS regulation was partly because the regulation adoption process took years to complete, it was exceedingly detailed and documented, it included public participation and comments from the major user groups, workshops were held, a detailed, written staff analysis and summary of all public comments was created, the court was able to review the agency's responses in writing to the public comments, and the underlying authorizing statute granted NPS authority to allocate between user groups, rather than mandating a priority.¹⁵

Articulating "a satisfactory explanation" is perhaps the area in which the State of Alaska's Boards of Fisheries and Game will find it the most difficult to comply with the demands of federal administrative law. The Board of Game and Board of Fisheries, along with their support staff within ADF&G, have little experience crafting the kind of detailed, post-decisional documents commonly required by federal courts.

An agency's explanation of its action must be sufficient to permit effective judicial review. S.E.C. v Chenery Corp., 332 U.S. 194, 196-197 (1947). Although Alaska's Board of Game and Board of Fisheries have developed real expertise at the level of notice and comment public hearings, the Boards and their staff are much less adept when it comes to tailoring a post-decisional document that will satisfy federal judicial review.

Several common law maxims typically guide federal courts when they look at an agency's post-decisional document and judge whether or not it offers a "satisfactory explanation" for the agency's action.

The reviewing court should not attempt to make up for deficiencies in the agency's decision. Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983). A court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Id. However, a court can uphold an agency decision "of less than ideal clarity if the agency's path may reasonably be discerned." Id., cited in Northwest Motorcycle Assn., 18 F.3d 1468, 1478 (9th Cir. 1994).

When acting under ANILCA, the Boards will need to create an

¹⁵ Such a ponderous process of agency decision-making may not always be appropriate to the time-driven exigencies of fisheries and wildlife management in Alaska. It is, at a minimum, the polar opposite of management by Emergency Order. (AS 16.05.060.)

adequate administrative record prior to their decisions. The Boards will also need to create post-decisional documents, articulating their findings in a way sufficient to justify to a reviewing court the Boards' decisions.¹⁶

¹⁶ It is beyond the scope of this memo to address the increased paperwork or bureaucracy needed to meet these demands.

2. What is the likely effect of amending ANILCA § 807 to require that federal courts give the State the "same deference" they would accord a comparable federal agency?

What is "deference?" It is a judicial term of art that is so vague and amorphous it does not even appear in Black's Law Dictionary.¹⁷ This memo will not attempt to define "deference" comprehensively or for multiple purposes. For the limited purposes of this memo, we interpret "deference" this way:

When a reviewing court accords some level of acceptance to a decision (or interpretation) offered by an agency that is greater than the intrinsic merits of the agency's decision (or interpretation) itself.

To answer the original question regarding the proposed amendment to ANILCA § 807, it is first necessary to try to understand the purpose of the proposed amendment to ANILCA.¹⁸

My research indicates that it is likely that the impetus for this provision derives from two federal court cases: Kenaitze Indian Tribe v Alaska, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989), and U.S. v Alexander, 938 F.2d 942 (9th Cir. 1991).

These two cases are discussed separately, below. Concluding thoughts on this issue are presented immediately afterwards.

¹⁷ Webster defines "deference" as: respect and esteem due a superior or elder. Webster's Ninth New Collegiate Dictionary. (1984).

¹⁸ To the best of my knowledge, there is not yet anything that would qualify as legislative history for this proposed amendment. Whatever legislative history is eventually created may be of pivotal importance in the interpretation of this provision.

a. Kenaitze

Kenaitze Indian Tribe v Alaska, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989) involved a suit by an Indian tribe seeking to compel the State of Alaska to promulgate regulations defining the term "rural."

Kenaitze is important to this memo insofar as the decision concerns the measure of deference which a reviewing court must pay to a federal agency interpretation of a statute the agency is charged with administering. By outlining that quantum of deference, it should be possible to better understand what advantage--if any--this proposed amendment to ANILCA § 807 may be likely to confer on decisions by the State of Alaska implementing ANILCA.

In Kenaitze, neither the State's definition of "rural," nor the federal agency's definition of "rural", was given any deference by the 9th Circuit Court of Appeals.

In Kenaitze, the State claimed that it "stood in the shoes" of the federal government, by virtue of which the State's interpretation of ANILCA was entitled to the same measure of deference as if the Alaska Board of Game or Board of Fisheries was a comparable federal agency.

The 9th Circuit roundly rejected this argument and wrote:

Deference to a federal agency's interpretation of a statute is based in part on the expertise it possesses in implementing federal policy in the general subject area. (citation omitted) While Alaska has a long history of managing wilderness areas, it lacks the expertise in implementing federal laws and policies and the nationwide perspective characteristic of a federal agency. Federal agencies are also entitled to deference because their activities are subject to continuous congressional supervision by virtue of Congress' powers of advice and consent, appropriation, and oversight. Such direct and continuous congressional supervision is absent when state authorities are doing the regulating.

Most fundamentally, unlike a federal agency, the state is delegated no authority under ANILCA. ...As a separate sovereign, the state is at all times free to refuse to regulate; Congress could not compel it to do so. ...Deference is not appropriate.

Kenaitze, 860 F.2d 312, 316 (9th Cir. 1988) .

To recapitulate, the State definition of "rural" received no deference from the Kenaitze court because the State suffered from four handicaps. The federal court wrote that 1) the State had no expertise in implementing federal laws and policies, 2) the State lacked the nationwide perspective of a federal agency, 3) the State

was not subject to continuing Congressional supervision, and 4) the State is delegated no authority under ANILCA; the State's role is to supplant the federal regulatory scheme rather than to implement it. Id.

The action of the Assistant Secretary of the Interior, purporting to certify the State's compliance with ANILCA, had no legal effect because it was not an exercise of the Secretary of Interior's statutory authority. Kenaitze, at 315.

The federal statutory interpretation fared no better than the State's. Once a state regulatory scheme is in place, the Secretary merely monitors State implementation. (ANILCA § 806.) The court, after considering the Secretary's views, announced that it had given them "due consideration." Kenaitze, n. 6, p. 315. In effect, the federal view received no deference.

Consequently, the court interpreted the meaning of the statutory term "rural" independently (de novo review), paying no heed to either the State of Alaska definition or the federal agency's imprecations that the state definition met the federal law.

b. U.S. v Alexander

U.S. v Alexander, 938 F.2d 942 (9th Cir. 1991) involved two Alaska Natives (Haida Indians) who harvested and attempted to sell herring roe on kelp that had been taken in violation of Alaska State laws. The case was in federal court since it was a federal criminal prosecution under the Lacey Act. (16 U.S.C. § 3372(a)(2)(A).) To sustain a conviction under the Lacey Act, it was necessary to prove the validity of the two, underlying state regulations.

Alexander is important to this memo because it involves the measure of deference which a reviewing court paid to a state agency interpretation of a statute in circumstances where the U.S. Attorney had brought a major criminal prosecution based on a state regulatory interpretation of a federal statute.

In Alexander, the 9th Circuit wrote that in interpreting the meaning of a phrase that appears in a federal statute, a federal court owes no deference to an interpretation by a state regulatory agency. U.S. v Alexander, 938 F.2d 942, 946 n. 6 (9th Cir. 1991), citing Kenaitze Indian Tribe v Alaska, 860 F.2d 312, 315-316 (9th Cir. 1988).¹⁹

c. Conclusion

At least two, distinct situations exist in which the State might claim it is entitled to deference under proposed ANILCA § 807. Those situations are 1) interpretation of ANILCA, and 2) applying federal law to specific facts. Each situation is discussed separately.

¹⁹ The court concluded that to the extent Alaska law may prohibit cash sales of subsistence-caught fish or wildlife, and the cash sales are a part of "customary trade" (which the court defined with sweeping latitude), Alaska's regulations conflicted with ANILCA. Alexander at 946.

U.S. v Skinna, 931 F.2d 530 (9th Cir. 1990), involved a Tlingit who took \$274,000.00 worth of herring roe on kelp in violation of Alaska law and sought to avoid criminal penalties under the guise of the subsistence protections of ANILCA's "customary trade" exemption. Because Skinna failed to raise his defense at trial, and failed to introduce any evidence to show trade of that magnitude was "customary," and waited until his appeal to test his theory of defense, he failed.

i. State Interpretation of Federal Law

It is one, plausible construction of the proposed amendment to ANILCA § 807 that it would strip away the four handicaps to judicial deference to state interpretations of federal laws.

I believe it is equally plausible to foresee that the 9th Circuit may yet find new reasons not to defer to Alaska's ANILCA management decisions. I do not believe courts will be quick to embrace the proposed amendment's principle of vicarious deference.

Deference to a federal agency's interpretation of a statute is based in part on the expertise an agency possesses in implementing federal policy in the general subject area. Aluminum Co. of America v Central Lincoln People's Util. Dist., 467 U.S. 380, 389-90 (1984).²⁰

The Alaska Board of Game and Board of Fisheries patently lack experience implementing federal laws and policies. It is within a court's discretion to decide if USFWS--the comparable federal agency--has created a sufficient track record of ANILCA implementation to be worthy of vicarious judicial deference.

It is important to note that in Kenaitze, the 9th Circuit wrote that deference to an administrative agency's construction of a statute is appropriate only where the agency is entrusted with the administration of the statute. Kenaitze Indian Tribe v Alaska, 860 F.2d 312, 313, (9th Cir. 1988), cert denied, 491 U.S. 905 (1989); citing Chevron U.S.A. v NRDC 467 U.S. 837, 844 (1984); Blum v Bacon, 457 U.S. 132, 141 (1982), and 860 F.2d at 315-316.

Under the 9th Circuit's reasoning announced in Kenaitze, Alaska will at no time be entrusted with the administration of ANILCA. Despite the proposed amendment to ANILCA § 807's directive of vicarious judicial deference, the State will still lack the attributes of an agency that merits federal judicial deference. Alaska will remain "a separate sovereign." Kenaitze, at p. 316.

Nor would USFWS, the "comparable federal agency," likely be entitled to deference, either. In Kenaitze, the federal agency's definition of "rural" was given no deference by the reviewing court. This was because the federal agency was not "charged with administering" ANILCA; it was merely charged with overseeing the State's implementation of the program. (ANILCA § 806.)

ii. State Application of Federal Law to Facts

²⁰ Even where "agency expertise" is involved, the standard for judicial review still involves an immense amount of discretion on behalf of the reviewing court.

In reviewing an agency's application of law to facts, where the question to be decided involves matters within the particular expertise of the agency, the agency's conclusions are supposedly reviewed under the reasonableness or reasonable basis standard. Monex International, Ltd. v Commodity Futures Trading Commn., 83 F.3d 1130, 1133 (9th Cir, 1996), citing Morris v Commodity Futures Trading Commn., 980 F.2d 1289, 1293 (9th Cir. 1992).

Nonetheless, "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." Morris v Commodity Futures Trading Commn., 980 F.2d 1289, 1293 (9th Cir. 1992) (noting that deference is not required in reviewing common law or constitutional law).

The term "deference" is so imprecise that it does not tie the hands of a Judge. No specific measure of deference to the State of Alaska is specified by proposed ANILCA § 807.

As a practical matter, unless a judge expressly states he is giving "no deference" to a State regulatory action, I believe it would be hopelessly difficult to seek appellate review of a Federal District court's action overturning a State of Alaska regulation on the grounds that the court failed to give the State's decision sufficient deference.

The guidelines for judicial deference to agency discretion are so fuzzy that it would be a delusion to look for a "bright line" test with which to compare a state agency's decision before and after the proposed change to ANILCA § 807.²¹

"Different judges often impose inconsistent limits on the same agency. The involvement of a particular judge with any particular agency is far too episodic to permit the judge to obtain a broad perspective on the agency's many initiatives and its methods of allocating its scarce resources to accomplish its goals."

Davis, Pierce. Administrative Law Treatise, § 17.4, p. 115 (3rd ed. 1994).

Even with the proposed amendment to ANILCA § 807 and its grant of conceptual parity to the State of Alaska for purposes of deference, neither the Board of Game nor the Board of Fisheries will qualify as "an agency entrusted with administration of the statute [ANILCA]."

²¹ e.g., Arkansas v Oklahoma, 503 U.S. 91 (1992). (EPA is entitled to discretion to enforce its own regulations and those regulations are entitled to the appropriate level of deference.)

The amendment to § 807 does not alter the status of USFWS, which is the "comparable federal agency." USFWS would once again be charged with oversight of the State's implementation, not "administration."

Only two of the four grounds relied on by the court in Kenaitze inhere in the nature of a state agency. Just like a state agency, a federal agency may also lack experience in implementing the federal law or policy that is before a reviewing court as a result of agency action or inaction. And, as is the case with a state agency, a "comparable federal agency" may not actually be charged with administering a particular federal statute.

In other words, if the "comparable federal agency" or a state lacked expertise in implementing the specific federal law or policies under scrutiny, or was not actually charged with direct administration of a statute, it would be a simple matter for a reviewing court to note that defect, and then declare for the record that it was treating the state agency's decision "with the same deference it would give the same decision of a comparable federal agency." This would dictate application of a minimally deferential standard of review.

The judicial branch is generally reluctant to accept legislative constraints on judicial discretion.²² Perhaps this is an inherent problem in a government organized under principles of the separation of powers, with coordinate branches.

In my opinion, the impact of the provision in proposed ANILCA § 807 according the State of Alaska "the same deference" as a "comparable federal agency" allows the federal district court to be deferential to a decision by the Board of Game or Board of Fisheries if, in its discretion, the federal court chooses to do so, but it is unlikely that the principle of vicarious deference would be enforceable through appellate review.

²² c.f. Yakus v United States, 321 U.S.414, 429 (1944) (investing an emergency court with exclusive jurisdiction to consider certain regulations); Adamo Wrecking Co. v United States, 434 U.S. 275, 277 (1978) (statute expressly precluding judicial review of certain regulations).

THE POSSIBILITY OF REDUCING FEDERAL INTERVENTION

II. QUESTION PRESENTED: Can the chances of federal court intervention in State management within the framework of ANILCA and ongoing federal oversight be reduced?

SHORT ANSWER: Yes, within limits.

As long as ANILCA generously provides for judicial review in federal court (ANILCA § 807), periodic legal challenges are a certainty. Inherent in the American judicial process is broad discretion on the part of a reviewing judge.

The first issue addressed in this memo was the standard of review that federal courts will bring to bear in their review of federal oversight of the State of Alaska's implementation of ANILCA. We have strongly suggested that the "arbitrary and capricious" standard allows a reviewing federal court immense discretion to void State of Alaska actions that do not meet a particular judge's perception of "reasonableness."

We have also strongly suggested that for reasons that inhere in the separation and balance of powers of the three coordinate branches of government in a republican system, it is no easy matter for the legislative branch to shackle the judicial branch. With that caveat in mind, perhaps the State could be given greater authority by changing ANILCA § 807 to alternative language:

The decision in Kenaitze Indian Tribe v Alaska, 860 F.2d 312 (9th Cir. 1988) is expressly rejected, and reviewing courts are directed to give substantial deference to state agency interpretations of ANILCA, and to state agency findings of fact, and to state agency decisions involving complex issues that require agency expertise, applying to judicial review under this section the Alaska case of Kelly v Zamarello, 486 P.2d 906 (Alaska 1971). No injunctive relief shall be available in federal court.²³

We express no opinion in this memo on the political feasibility of the foregoing changes, nor do we address the normative issues raised by the alternative language set out above.

One of the principal issues discussed in this memo has been the measure of deference which a court should pay to State of Alaska

²³ It would be helpful, also, to revise proposed AS 16.05.261 to allow the Boards to reject Regional Council recommendations that are "not in the broad public interest."

interpretations of ANILCA. We have suggested that the proposed language of the Governor's Subsistence Task Force (1997) may be inadequate to effectively require federal courts to defer to State interpretations of ANILCA.

If Congress truly wishes to legislatively overrule the effect of Kenaitze and Alexander, that intent must appear explicitly and unambiguously in the legislative history or in the statute itself.

If the complex of State Constitutional and statutory changes, plus federal statutory changes becomes law, and if as a result of those changes, the State regains management authority for fish and wildlife on federal public lands in Alaska, then the "comparable federal agency" will once again merely be charged with monitoring the State's implementation, as was the case at the time of Kenaitze. (ANILCA § 806.) It is thus at least conceptually possible that the language proposed in the (1997) Task Force's package of amendments may be of no effect at all.

In fairness, it is also possible that a reviewing court could interpret the proposed amendment to require judicial deference to State of Alaska interpretations of Congressional intent, where the intent of the statute is ambiguous.

My best guess, which is all anyone can do at this point, is this: courts quite properly consider themselves to be more adept at interpreting statutes than administrative agencies. Courts defer to agencies' interpretations of statutes only when the court finds the agency interpretation to be reasonably close to what the court itself would have said independently of the agency's interpretation.

Neither the Board of Fisheries nor the Board of Game will ever be possessed of the essential characteristics that comprise the rationale for the policy of judicial deference to agency decisions. SEE: Kenaitze, 860 F.2d 312, 316 (9th Cir. 1988), and cases cited therein.

Consequently, I believe it is unlikely (though not impossible) that the proposed statutory language in the second sentence of ANILCA § 807 will be of much practical effect in inducing federal courts to defer to interpretations of federal law (ANILCA) by the State of Alaska.

The State will need to devote substantial additional resources to its administrative procedures. In particular, as a preventive measure, the Boards will need to receive more and firmer legal counsel during their deliberations in order to comply with ANILCA. Additionally, the Boards will need additional staff assistance crafting post-decisional documents that can pass muster under the scrutiny of a federal judge.

A federal Court of Appeals will generally uphold an administrative agency's decision if, but only if, the court can discern a reasoned path from the facts and considerations before the agency to the decision reached. United Distribution Companies v FERC, 88 F.3d 1105 (D.C. Cir. 1996); cert denied, 117 S.Ct. 1723.

For example, under principles of federal administrative law, an agency's view of what is in the public's interest may change, either with or without a change in circumstances, but a federal agency changing its course must supply a reasoned analysis of why it is doing so. Motor Vehicle Manufacturers Assn. v State Farm Mutual Insurance Co., 463 U.S. 29, 57 (1983); SEE ALSO Northwest Motorcycle Assn. v U.S.D.A., 18 F.3d 1468, 1480 (9th Cir. 1994) (upholding an agency's change of policy based on a rational and principled reason.)

Another example of the more rigorous judicial review common under principles of federal administrative law involves predictive models. Under federal law, an agency may use a predictive model, PROVIDED it explains the assumptions and methodologies used in preparing the model. If the model is challenged, the agency must provide a full analytical defense. Eagle-Picher Industries, Inc. v EPA, 759 F.2d 905, 921-922 (D.C. Cir. 1985). Given the frequency with which scientific models are used in fisheries and wildlife management regulatory actions, this principle provides an abundant storehouse of federal court challenges to state regulatory actions.

Under federal common law, when specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, the court might find contrary views more persuasive. Southwest Center for Biological Diversity v Glickman, 932 F. Supp. 1189 (D.Ariz. 1996); affirmed, 100 F.3d 1443.

In the usual Alaska state law situation, findings of fact are required even in the absence of a statutory duty. Mobil Oil Corp. v Local Boundary Commission, 518 P.2d 92, 97 n. 11 (Alaska 1974), cited with approval in Faulk v Board of Equalization, 934 P.2d 750, 751 (Alaska 1997). However, in certain cases, the issues are such that, based on the record, detailed findings are not necessary for the court to understand the agency's reasoning process. Fields v Kodiak City Council, 628 P.2d 927, 932 (Alaska 1981), cited with approval in Faulk v Board of Equalization, 934 P.2d 750, 751 (Alaska 1997).

This court has consistently stressed the importance of decisional documents when asked to review action taken by an administrative body. Trustees for Alaska v State, 795 P.2d 805, 809 (Alaska 1990); Alaska Survival v State, 723 P.2d 1281, 1287 (Alaska 1986) (decisional document should disclose that the agency has taken a hard look at factors, and engaged in reasoned decision making); Ship Creek Hydraulic Syndicate

v State, 685 P.2d 715, 717-718 (Alaska 1984) ("...if a statute requires reasoned decisions, and the legislature has not expressly or by implication limited judicial authority to decide how to review administrative actions, courts may and should require agencies to explain their decisions."

HALO v Anchorage, 927 P.2d 728, 744-745 (Alaska 1996), (C.J. Compton, dissenting).

Despite this general rule, Alaska courts generally exempt the Board of Fisheries and Board of Game from any requirement of producing a written document containing Finding of Facts and Conclusions of Law to support each regulation adopted. The Alaska Supreme Court has nonetheless written that "it is vital that the agency clearly voice the grounds upon which the regulation was based in its discussions of the regulation or in a document articulating its decision." Alaska Fish Spotters Assn v ADF&G, 838 P.2d 798, 801 (Alaska 1992).

It is fair to say that federal courts are generally more demanding than State of Alaska courts when it comes to requiring an agency to make written findings clearly articulating all of the evidence heard and the reasons for an agency's final decision.²⁴

²⁴ In Alaska, the challenger of an administrative regulation has the burden of proving its invalidity. State v Cosio, 858 P.2d 621, 624 (Alaska 1993).

Under Alaska law, State courts often show substantial deference to Board of Fisheries, and Board of Game decisions. e.g., Stepovak-Shumagin Set Net Assn. v Board of Fisheries, 886 P.2d 632 637 (Alaska 1994). SEE ALSO: Kelso v Rybachek, 912 P.2d 536 (Alaska 1996) (DEC regulations).

Under Alaska law, judicial deference to the expertise of the Boards is appropriate in light of the complexity of the subject matter, the Boards' long-standing track record of responsible exercise of its regulatory authority, and the need for the Boards to hear and consider complex biological staff reports, public testimony, and other information when making regulatory decisions. State v Tanana Valley Sportsmen's Association, 583 P.2d 854, 859 (Alaska 1978).

The Boards were given extremely broad statutory authority to make conservation and allocation decisions partly because of the perceived impossibility of the legislative or judicial branches finding the time to do so.

Courts are ill-equipped, and do not have the resources, to serve as the forum for complex, highly dynamic, wildlife and fishery management decisions that are based on months of testimony assessed by agency members with many years of expertise in the field. Formulation of fishery management policies and implementation of conservation and development goals are properly left to the Board process. If a regulation appears reasonable,
(continued...)

The Boards will need to adopt regulations that will guide their discretion in applying the sustained yield principle. Such regulations may be extremely difficult to craft. It is very unlikely that a reviewing federal court will defer to State action premised on an unarticulated concept of "sustained yield," applied in an *ad hoc* manner. SEE: Kwethluk IRA Council v State of Alaska, 740 F. Supp. 765 (D. Alaska 1990).

In conclusion, there is nothing reasonably plausible the State can do to guarantee itself immunity from federal court challenges to State management within the framework of ANILCA.

²⁴(...continued).

then a court is not to substitute its judgment for a Board's. SEE: Meier v State, 739 P.2d 172, 174-75 (Alaska 1987).

In Alaska, a reviewing court applies the "reasonable basis" test when reviewing administrative decisions involving complex issues that require agency expertise. Kelly v Zamarello, 486 P.2d 906, 917 (Alaska 1971); Ellis v State 944 P.2d 491, 493 (Alaska 1997). Under the reasonable basis test, the court gives deference to the agency determination "so long as it is reasonable, supported by the evidence in the record as a whole, and there is no abuse of discretion." Kodiak Western Alaska Airlines, Inc., v Bob Harris Flying Service, Inc., 592 P.2d 1200, 1203 n. 7 (Alaska 1979).

Alaska courts exercise "independent judgment" when determining whether an agency complied with procedural requirements. Mcore v State, 553 P.2d 8, 33 (Alaska 1976).

The test of the validity of a Board of Game or Board of Fisheries regulation should generally be simple and deferential: was the regulation adopted in accordance with APA [Administrative Procedure Act] procedures; is the regulation within the discretion vested in the agency by the legislature; is the regulation consistent with the statute and reasonably necessary to its purpose; is the regulation reasonable and not arbitrary.

State v Morry, 836 P. 2d 358, 362, fn.3, (Alaska 1992), citing Kelly v Zamarello, 486 P.2d 906, 910-911 (Alaska 1971).

THE CONFUSING REQUIREMENT OF "DEFERENCE"

IN PROPOSED AS 16.05.261(h). AND (i)

III. QUESTION PRESENTED: What is the import of the "deference" standard contained in Governor Knowles' proposed AS 16.05.261(h), (i)?

SHORT ANSWER: The proposed Regional Subsistence Councils are given very significant advisory authority. The Boards retain final, regulatory authority. The Boards' need for staff support is likely to increase in order to cope with the demand for creating post-decisional documents.

A. Summary Description of the Proposed Statutory Framework

Governor Knowles' Subsistence Task Force (1997) has proposed a change to Alaska's Local Fish and Game Advisory Committee system. The Task Force proposes a new statute to create six "Alaska Regional Subsistence Councils." (proposed AS 16.05.261.)

Under the Governor's proposal, each Regional Subsistence Council is to have ten members. All members are appointed by the Governor. Four members must be selected from nominees submitted by tribal councils in the region; the remaining six members are selected from nominees submitted by local governments and local advisory committees.

The primary task of the proposed Regional Councils overlaps with and duplicates the existing task of Local Advisory Committees. The Regional Councils are to review, evaluate, and make recommendations to the Boards on regulations relating to subsistence, sport, personal use, and commercial fishing and hunting. Other tasks are also assigned to the Regional Councils, including identifying and evaluating subsistence needs and recommending a management strategy to accommodate the identified subsistence needs.

B. Proposed AS 16.05.261(h)

This proposed statute is quite convoluted. It is necessary to analyze it one sentence at a time. The analysis below will follow that approach.

The Regional Subsistence Councils will be a new creature, to my knowledge unprecedented in Alaska law. The Councils will be quasi-regulatory agencies. Since the Regional Councils will not possess actual regulatory authority, they will be less powerful than the Boards.

The authority of the Regional Councils will somewhat diminish the independent authority of the two, regulatory Boards. It seems likely that the cumulative recommendations from six, separate Regional Councils will very substantially add to the two Boards' workload. Yet, as shown below, although the Regional Councils will have vastly more authority than a Local Advisory Committee, the two Boards will retain their regulatory authority.

1. The first sentence of proposed AS 16.05.261(h) provides:

(h) The appropriate board shall consider the reports and recommendations of the regional subsistence councils and shall give deference to their subsistence recommendations.

First, it is appropriate to list the "subsistence recommendations" to which the Board of Fisheries and Board of Game must defer. Regional Councils have authority to make five distinct categories of recommendations. The Councils' recommendations may involve:

1) any existing or proposed regulation, policy, or management plan, or any other matter directly relating to the subsistence use of fish and wildlife within its region.
(AS 16.05.261(d)(3).)

2) permits provided in AS 16.05.330(d) and .405(g). (These statutes refer to other parts of the Task Force's package of amendments. They involve subsistence permits for areas, villages, communities, groups, or individuals.)²⁵

²⁵ Without an amendment to the Alaska Constitution, place-of-residence-oriented permits would be *ultra vires*.

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, 642 n. 21 (Alaska 1995).

Under existing Alaska law, people who reside near a fish or game population do not have a higher claim to that population than state residents whose domiciles are more distant:

Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation.

(continued...)

(AS 16.05.261(d)(5).)

3) strategies for the management of fish and wildlife populations within the region to accommodate the fish and wildlife uses and needs identified by the Regional Councils in an annual report to be submitted to the Secretary of Interior and Secretary of Agriculture.²⁶

(AS 16.05.261(d)(6)(C).)

4) policies, standards, guidelines, and regulations to implement the foregoing subsistence management strategies.

(AS 16.05.261(d)(6)(D).)

5) inter-regional proposals and issues.

(AS 16.05.261(g).)

Under proposed AS 16.05.261(h), the Boards are required to "give deference" to all five types of recommendations. No specific level of deference is specified in the statute.

Unless a unanimous recommendation of a Regional Council is involved, the Boards would not be any more obligated to follow a Regional Council's recommendation than they are currently obligated to follow an Advisory Committee's recommendation.²⁷

²⁵(...continued)

Kenaitze, supra, at 638, citing McDowell, 785 P.2d 1, at 12 (Alaska 1989) (quoting Lewis v. State, 110 Ark. 204, 161 S.W. 154, 155-56 (1913)) (emphasis added by the court in McDowell).

²⁶ Given the parlous state of ADF&G's budget, one cannot help wondering where sufficient funds will come from for the staff time necessary to create these reports.

²⁷ AS 16.05.260 requires the Boards to state their reasons for not following the recommendations of an Advisory Committee. This is the functional equivalent of the last sentence of proposed AS 16.05.261(h).

2. The second sentence of proposed AS 16.05.261(h) provides:

If the [Regional] council recommendation is unanimous, there is a presumption in favor of adoption by the board.

The negative implication of this provision is that whenever a recommendation of a Regional Council is less than unanimous, there is no presumption in favor of adoption by the appropriate Board.

When a Regional Council makes a unanimous recommendation, and the appropriate Board wishes to make a contrary decision, the Board will need to create a "written statement of the factual basis and reasons for its decision" (proposed AS 16.05.261(h).)

Thus, it seems appropriate to presume that a reviewing court would hesitate to overturn a Board decision that was contrary to a non-unanimous recommendation of a Regional Council.

3. The third sentence of proposed AS 16.05.261(h) provides five, alternative reasons on which the Board may rely to reject a Regional Council's recommendation:

...the board may decide not to adopt any recommendation which it determines violates the sustained yield principle, is not supported by substantial evidence, is detrimental to subsistence uses, involves an unresolved statewide or inter-regional subsistence management issue, or is contrary to an overriding statewide fish or wildlife management interest.

Use of the disjunctive "or" makes each one of these five reasons sufficient in itself for a Board to reject a Regional Council recommendation.²⁸ Each reason will be examined briefly below.

The first reason does very little to affect the Boards' discretion. It would be unconstitutional for one of the Boards to approve an action in violation of the sustained yield principle. (Alaska Const., Art. VIII, § 2.)

Perhaps this first reason for which the Board may reject a Regional Council's recommendation is less significant for mentioning the sustained yield principle, and is more significant for what it omits? For example, if a Regional Council recommendation violated principles of equal protection, or due process, would the Boards be precluded from rejecting the recommendation?

²⁸ This litany of reasons is not necessarily an exclusive list of the reasons for which the Board can reject a Regional Council's recommendation.

It is curious that proposed AS 16.05.261(h) does not include a provision allowing the Boards to reject a Regional Council recommendation that is not "otherwise not in accordance with law or that is contrary to the broad public interest."

Even permitting the Board to reject a Regional Council recommendation if it violates the sustained yield principle may be merely a chimerical grant of authority.

In Kwethluk IRA Council v State of Alaska, 740 F. Supp. 765 (D.Alaska 1990), a group of Native Alaskans sought a TRO and preliminary injunction under authority of ANILCA (16 U.S.C. § 3117). The plaintiffs sought an emergency caribou hunt. The Alaska Board of Game had previously denied their request. The Board had reasoned that creating the hunt would violate the sustained yield principle. (SEE: AS 16.05.258(b).)

Federal District Court Judge Holland reversed the Board of Game's decision and granted the Natives the relief they had requested. Kwethluk, 740 F.Supp. 765, 767 (D. Alaska 1990).

The Board of Game's rejection of the Kwethluk petition for an emergency caribou hunt had been premised on a Board policy decision that the Kilbuck caribou herd should be allowed to continue to grow before any hunting was reinstated. (All hunting on the Kwethluk caribou herd had been suspended since 1985.)

The District Court Judge in Kwethluk found it significant that there is no State statutory or regulatory definition for "sustained yield" in the context of wildlife management. Kwethluk, at 766; SEE ALSO: G. Cock, "The Sustained Yield Principle of Article VIII, § 4," Colloquy on the Natural Resources Article of the Alaska Constitution (WAFI: 1991).

The court concludes that the term "sustained yield" is potentially broad enough to include authority in the game board to restrict even subsistence hunting in order to rebuild a damaged game population. However, the board does not have absolute discretion in this area. There must be a balance of minimum adverse impact upon rural residents who depend upon subsistence use of resources and recognized scientific principles of game management. 16 U.S.C. § 3112(1) and (2).

The board having put in place neither a game management plan for the Kilbuck herd nor an articulated and evenly applicable definition of sustained yield, the board and, in its turn, this court have no meaningful standard against which to measure plaintiff's application for a subsistence hunt. The game board appears to have acted not on the basis of a formulate policy, but rather in ad hoc fashion, as though it had unfettered discretion to decide what meaning it would attribute to the sustained yield issue in any particular case.

Kwethluk IRA Council v State of Alaska, 740 F.Supp. 765, 766-767 (D.Alaska 1990).

It does the State little good for ANILCA to statutorily grant the State the right to reject recommendations on the basis of violation of the sustained yield principle unless the State can first articulate a definition of "sustained yield" for wildlife and fishery management²⁹ and show that it applies that elusive definition fairly enough and consistently enough to satisfy a reviewing court.

Until the State adequately defines "sustained yield" in the context of wildlife and fisheries management, it is unlikely that any reviewing federal court will defer to State action premised on an unarticulated concept of "sustained yield," applied in an *ad hoc* manner.

Regarding the second of the five alternative reasons, we have discussed, *supra*, the vagueness of the "substantial evidence" standard.

The final three alternative reasons are also quite broad. It would be a mistake, however, to assume that mere recitation by either Board of one of these reasons will suffice to insulate from judicial scrutiny either Board's rejection of a Regional Council's recommendation. The Boards' post-decisional documents will need to comprehensively address the issues presented and must clearly articulate a rational decision.

4. The fourth sentence of proposed AS 16.05.261(h) provides:

The (fourth) final sentence of proposed AS 16.05.261(h) states what the Boards must do in the event they reject a Regional Council recommendation:

If a recommendation is not adopted by the board, the board shall provide a written statement of the factual basis and reasons for its decision and shall remand the recommendation to the regional subsistence council for further consideration.

This requirement will apply to all recommendations of Regional Councils, regardless of whether or not the recommendation is unanimous.

In addition to this post-decisional document, the necessities of judicial review will require that the Board create an adequate

²⁹ c.f. AS 38.04.910(11).

administrative record at the time of its deliberations that demonstrates it has given careful consideration to the Regional Council's recommendation, and considered all of the supporting factual material adduced by the Regional Councils.

- C. Conclusion: the impact of the "deference" standard contained in Governor Knowles' proposed AS 16.05.261(h) will primarily be to increase public participation in the fish and game regulatory process and increase ADF&G's workload (providing the Councils with staff support and providing the Boards with staff support).

It seems beyond doubt that the new Regional Council system will allow for increased public participation in the fish and game regulatory process. Whether or not this will be qualitatively superior to the current system, or be cost-effective, is impossible to predict.

Similarly, it is not possible at this time to predict whether the administrative burdens of adequately responding to recommendations from six, separate Regional Councils will eventually overwhelm the Boards with an excess of work that requires fundamental changes to Alaska's system of regulatory Boards.

Under Governor Knowles' proposed AS 16.05.261(h), the Boards are obligated to "consider" the reports and recommendations of the Regional Subsistence Councils. No deference is required for the Councils' reports. Only recommendations are accorded deference.

In my opinion, it is primarily when a Regional Council's recommendations are unanimous that a Board will need to show a meaningful measure of "deference" to a Regional Council recommendation. In those instances, the Board will have to create a defensible administrative record during its deliberations. Afterwards, the Board and staff will need to carefully craft a written decisional document that rationally explains the Board's actions in a manner that will meet federal judicial approval.

The statewide Boards retain full regulatory authority. The reasons enumerated in the third sentence of proposed AS 16.05.261(h) and which will suffice for a Board to reject a Regional Council recommendation are very similar to the reasons which the two Boards presently adduce when they reject a recommendation of a Local Advisory Committee.

The main impact of the "deference" requirement appears to be that

it can serve as a subject of litigation.³⁰ In order to pre-empt most legal challenges, the Boards will need to spend a great deal of time crafting post-decisional documents explaining their actions.

The Boards' post-decisional documents must be drafted with the knowledge that they may be subjected to judicial review under the broad rubric of "arbitrary and capricious" review, which, as a practical matter, generally will mean the broad concept of "reasonableness."

D. The deference requirement of proposed AS 16.05.261(I)

This short provision provides:

(I) A regional subsistence council shall give deference to proposals from local governments, tribal councils, and local advisory committees, which identify local subsistence needs and uses, the methods, means, seasons, and other issues related to local subsistence management.³¹

At the outset, we reiterate the vagueness of the concept of "deference." We note, additionally, that when the word "deference" stands alone, unmodified by adjectives, it generally denotes a relatively low level of deference is necessary for compliance.

As a practical matter, it is hard to imagine this provision being provocative of litigation. The principal parties comprising Regional Councils will be the same parties to whom this proposed statute accords deference.

Members of the general public who are unaffiliated with the foregoing entities, and representatives of government agencies, will not be entitled to deference before the Regional Councils.

My opinion is that AS 16.05.261(I) 's a toothless and insignificant provision.

³⁰ It is beyond the scope of this memo to assess how, in light of the presence on the Regional Councils of tribal nominees, the deference requirement may affect the issue of tribal sovereignty in Alaska.

³¹ It is beyond the scope of this memo to consider the impact on tribal sovereignty in Alaska of this proposal. It should suffice to note that it involves governmental recognition of some role for tribal governments in the fish and game regulatory process.

PLAIN ENGLISH SUMMARY

1. FEDERAL JUDICIAL REVIEW OF THE DECISIONS OF ADMINISTRATIVE AGENCIES INVOLVES IMMENSE DISCRETION ON THE PART OF THE INDIVIDUAL REVIEWING JUDGE.³²
2. THE SCOPE OF JUDICIAL REVIEW OF THE ACTIONS OF FEDERAL AGENCIES IS SO BROAD, AND THE MEASURE OF JUDICIAL DISCRETION IN REVIEWING THOSE DECISIONS IS SO GREAT, THAT IT IS OF LITTLE IMPORTANCE (AND ALSO PROBABLY UNENFORCEABLE) FOR ANILCA § 807 TO DECLARE THAT STATE AND FEDERAL AGENCY DECISIONS SHALL BE GIVEN EQUAL DEFERENCE. IT IS LIKELY THAT COURTS WILL CONTINUE TO ACCORD WHATEVER MEASURE OF DEFERENCE THE JUDGES, IN THEIR RESPECTIVE WISDOM, DEEM APPROPRIATE.
3. REGARDLESS OF THE STATUTORY STANDARD OF REVIEW, AN AGENCY MAY SEEK TO DISGUISE AN ACTION THAT IS BASED ON IMPROPER MOTIVES. THE AGENCY CAN 1) RELY ON PLAUSIBLE REASONS THAT DIFFER FROM ITS ACTUAL, UNSTATED MOTIVES; 2) DISTORT ITS FACT FINDING PROCESS TO ACHIEVE RESULTS IN ACCORD WITH ITS UNSTATED, REAL MOTIVES; OR 3) ENGAGE IN SELECTIVE INSPECTION, INVESTIGATION, AND ENFORCEMENT.³³
4. WHEN THE SCOPE AND EFFECT OF A STATUTORY LIMIT ON JUDICIAL REVIEW IS AMBIGUOUS, COURTS TYPICALLY STRAIN TO NARROWLY INTERPRET THE LIMIT ON THE SCOPE OF REVIEW.³⁴ THE PROPOSED AMENDMENT TO ANILCA § 807 DOES NOT APPEAR TO SET UP ANY GENUINE BARRIER TO PENETRATING FEDERAL COURT REVIEW OF STATE AGENCY ACTIONS IMPLEMENTING ANILCA.

³² The foremost treatise on administrative law notes that judicial review can, in itself, be a source of excessive discretion.

"...to the extent that administrative law doctrines have the effect of conferring on reviewing courts discretion to resolve identical cases in different ways, the problem of discretion is simply transferred from agency heads to judges."

K.C. Davis, Pierce. Administrative Law Treatise, § 17.3, p. 106 (3rd ed. 1994).

³³ SEE: Davis, Pierce. Administrative Law Treatise, §17.2, p. 105 (3rd ed. 1994).

³⁴ SEE: Adamo Wrecking Co. v United States, 434 U.S. 275 (1978); Bowen v Michigan Academy of Family Physicians, 476 U.S. 667 (1986).

SUBSIST-
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OUTLINE

GOVERNOR HICKEL'S SUBSISTENCE COUNCIL'S PROPOSAL

2/2/98

- A. Definition of subsistence - altered to emphasize "taking and uses of fish and game by a resident in a subsistence use area..."
- B. Subsistence limited to qualified users.
- C. Qualification based on point system applied across the state with three different levels of presumption. The seven criteria are:
 - 1. The quantity of fish and game consumed by the person in the preceding 12 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 12 months, with a mandatory minimum set by the boards by region.
 - 3. The number of days in the preceding 12 months that the person engaged in taking fish or game in the subsistence use area or spent processing that fish or game, with a mandatory minimum of 30 days.
 - 4. The number of months in the preceding 12 months in which the applicant engaged in taking fish or game in the subsistence use area, with a mandatory minimum of four months.
 - 5. The number of week, in the preceding 12 months, during which the taking or processing of fish and game was the applicant's principal work effort, to a maximum of 26 weeks.
 - 6. The number of households, other than the person's household, with which the person shared or received fish and game in the preceding 12 months, with a maximum of 10 households.
 - 7. Whether the person's taking of fish and game occurred solely in the subsistence use area for which they are qualifying.

D. Communities and areas of state classified into three groups:

Group 1 - Areas where population of each community is less than 2,500 and subsistence is a principal characteristic of the economy, culture, and way of life. A person is presumed to meet the subsistence eligibility standard.

Group 2 - Consists of communities where the population is 2,500 to 7,000 and subsistence is a principal characteristic of the economy, culture, and way of life. A person is rebuttably presumed to meet the eligibility standard upon signing an affidavit.

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.

E. Provides 13 criteria for determining whether dependence on subsistence is a principal characteristic of the economy, culture and way of life of an area or community.

F. Retains tiered system and may require elimination of "proximity to resource" criterion.

G. Constitutional Amendment requirements unclear.

H. Emphasis on providing reasonable opportunity for subsistence

I. Defines "customary and traditional", "customary trade", "reasonable opportunity" and "sustained yield."

Voice of The Times

Murkowski: Legislature must act this year

Following is an excerpt of Sen. Frank Murkowski's address before the Alaska State Legislature on Jan. 22.

By SEN. FRANK MURKOWSKI

The challenge for the Legislature is to come to a resolution on subsistence before the moratorium on the federal government's take-over of our fisheries ends.

The federal government is already managing game on federal lands in Alaska and they intend to control our fisheries — and more — by year-end.

This Legislature has the opportunity to provide me with recommendations on amendments to ANILCA.

As chairman of the Energy and Natural Resources Committee, my intention, after Alaska lawmakers complete their work and make their recommendations, is to conduct hearings and to legislate any additional changes to ANILCA.

However, a full repeal of Title 8 is politically unrealistic, because it would face a certain presidential veto. The Legislature has a decision to make if we are going to avoid the federal takeover of our fish and return management of our game to our state.



Murkowski

We all have a fundamental responsibility to the people of Alaska. The time to act is now! Do not, do not — by your failure to act — allow Secretary Bruce Babbitt on Dec. 1 to take control of our fish and game. We fought hard to become a state. Do not, by your inaction, turn the clock back 40 years to territorial days.

Indian Country

Last month, the Supreme Court heard the state's appeal of the Venetie decision. What is at stake is whether tribal governments will replace the authority of the state on over 40 million acres of Native lands. If the lower court decision is not reversed, what will follow is a resurgence of the authority of the BIA and other federal agencies that will become intimately involved in the lives of Alaskans.

How this is resolved is fundamental to our future.

While we wait for the court's decision, we need to act on the needs of rural Alaskans. Clean water, safe sanitation, education and economic opportunities, health care, law enforcement — all are in need of vast improvement. Residents of

I LOST THE WAR. NOW,
I DICTATE WHAT I WILL
ALLOW AND NOT ALLOW
THE VICTORS TO DO.



Long live George Orwell

Upper and Lower Kalskag are entitled to the same life opportunities as residents of Anchorage or Juneau.

You know that a state is only as strong as its communities, and the best way to make Alaska's rural communities stronger is to increase the amount of control local residents have over the decisions that affect their lives. We need to empower village Alaska with more self-determination — morally, legally, and economically.

Whether it be greater local powers to handle misdemeanor offenses, setting educational curriculum, control of alcohol, or encouraging job training and economic development, a workable government structure must be set in place in rural Alaska with emphasis on real jobs that use the latest technology for resource development in their areas.

Also, we must hold the secretary of Interior accountable for his trust responsibility for the welfare of Alaska Natives. This secretary has an on-going conflict between his desire to appease environmentalists and his responsibility to enhance the welfare of Alaska Natives through the development and preservation of their lands.

This has been evident in the secretary's aggressive attempts to use the Exxon-Valdez oil spill fund to acquire Native-owned lands and put them under the control of his department. Already, more than \$380 million of the available \$900 million has been committed to buy up to 750,000 acres of Alaska land — more land than the entire state of Rhode Island!

Future generations of Alaska Natives

have lost their land heritage as a result of these sales with no guarantee that they will benefit from these cash payments in the future.

Alaska resources at crossroads

Today, I see our Alaska economy in a state of transition — a transition that blends our gift of abundant natural resources with the skills, discipline, and scientific capabilities of our hard-working people.

Soon we will be dedicating the new international Arctic Research Center at the University of Alaska, a partnership with the government of Japan, that will study the planet and our global environment as never before.

We're building a spaceport in Kodiak that could become the Cape Canaveral of the North for commercial satellites. We have built air cargo transshipment points in Anchorage and Fairbanks that are the gateways between Europe, the Orient and North America.

These are new and exciting opportunities for our future. But Alaska cannot ignore its traditional base for economic development — energy, mining, timber, fishing and our growing tourism industry. Our great strength is the development of our abundant natural resources.

And in Alaska we have shown that with the application of science and advanced technology, we can do it right — preserving and protecting our natural bounty for our children and future generations. I have the greatest faith that the people of Alaska can meet any challenge and overcome what others may think are near-impossible obstacles.

I share with you a vision of Alaska where every child can grow and prosper without the fear of abuse, neglect or the scourge of drugs, alcohol and tobacco. Where a mother does not fear for her child's health because she lacks proper sanitation, safe drinking water, or health coverage.

- An Alaska, where every citizen has the opportunity for a first-class education that enables every Alaskan to get a good job and build a family. Alaskans must come first. "Local hire" is the watchword.

- An Alaska where Alaskans make decisions for themselves; not let far away bureaucrats dictate our lifestyles.

You in the Legislature know the issues that you must address this year. I know you will put aside your differences and provide the leadership that all Alaskans expect of you.

Alaska State Legislature

House Resources Committee

Co-Chair Scott Ogan
(907) 465-3715
FAX (907) 465-3265
Capitol Building, Room 124
Juneau, Alaska 99801



Co-Chair Bill Hudson
(907) 465-6820
FAX (907) 465-2273
Committee Meetings
T/Th 1 - 4 p.m.

Vice Chair: Beverly Masek.

Representatives Ramona Barnes, Fred Dyson, Joe Green, Reggie Joule, Irene Nicholia, William Williams

RESOURCES COMMITTEE SCHEDULE

1:00 PM - 4:00 PM

Capitol Room 124

Noticed: January 29, 1998

Tuesday, February 3:

***SUBSISTENCE WORK SESSION:**

Overview of subsistence proposals past and present.
(Teleconference - Listen Only)

-Bills previously scheduled or heard in committee

Thursday, February 5:

*+HB 168: Traditional Access for Traditional Activities

*+SCR 2: Management of Wildlife Resources

- Bills previously scheduled or heard in committee

Saturday, February 7:

NO MEETING SCHEDULED

*First Hearing

+Teleconference

AMENDMENT TO BE OFFERED BY SENATOR STEVENS TO H.R. 2107

VIZ: Insert at the appropriate place in the bill:

TITLE ___--SUBSISTENCE HUNTING AND FISHING IN ALASKA**SEC. __01. MORATORIUM ON FEDERAL MANAGEMENT.**

None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act hereafter enacted may be used prior to December 1, 1998 to issue or implement final regulations, rules, or policies pursuant to Title VIII of the Alaska National Interest Lands Conservation Act to assert jurisdiction, management, or control over the navigable waters transferred to the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act of 1959.

SEC. __02. AMENDMENTS TO ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT.

(a) AMENDMENT OF ANILCA.--Except as otherwise expressly provided, whenever in this section an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.).

(b) DEFINITIONS.--Section 102(2) (16 U.S.C. 3102(2)) is amended to read as follows:

"(2) The term 'Federal land' means lands the title to which is in the United States after December 2, 1980. 'Federal land' does not include lands the title to which is in the State, a Native Corporation, or other private ownership."

(c) FINDINGS.— Section 801 (16 U.S.C. 3111) is amended—

(1) by inserting: "(a)" immediately before "The Congress finds and declares"; and

(2) by inserting at the end the following new subsection:

"(b) The Congress finds and declares further that—

"(1) subsequent to the enactment of this Act in 1980, the subsistence law of the State of Alaska (AS 16.05) accomplished the goals of Congress and requirements of this Act in providing subsistence use opportunities for rural residents of Alaska, both Native and non-Native;

"(2) the Alaska subsistence law was challenged in Alaska courts, and the rural preference requirement in the law was found in 1989 by the Alaska Supreme Court in *McDowell v. State of Alaska* (785 P.2d 1, 1989) to violate the Alaska Constitution;

"(3) since that time, repeated attempts to restore the validity of the State law through an amendment to the Alaska Constitution have failed, and the people of Alaska have not been given the opportunity to vote on such an amendment;

"(4) in accordance with title VIII of this Act, the Secretary of the Interior is required to manage fish and wildlife for subsistence uses on all public lands in Alaska because of the failure of State law to provide a rural preference;

"(5) the Ninth Circuit Court of Appeals determined in 1995 in *State of Alaska v. Babbitt* (73 F.3d 698) that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior;

"(6) management of fish and wildlife resources by State governments has

proven successful in all 50 states, including Alaska, and the State of Alaska should have the opportunity to continue to manage such resources on all lands, including public lands, in Alaska in accordance with this Act, as amended; and

"(7) it is necessary to amend portions of this Act to restore the original intent of Congress to protect and provide for the continued opportunity for subsistence uses on public lands for Native and non-Native rural residents through the management of the State of Alaska."

(d) TITLE VIII DEFINITIONS.—Section 803 (16 U.S.C. 3113) is amended—

(1) by striking "and" at the end of paragraph (1);

(2) by striking the period and inserting a semicolon at the end of paragraph (2); and

(3) by inserting at the end the following new paragraphs:

"(3) 'customary and traditional uses' means the noncommercial, long-term, and consistent taking of, use of, or reliance upon fish and wildlife in a specific area and the patterns and practices of taking or use of that fish and wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish and wildlife;

"(4) 'customary trade' means, except for money sales of furs and furbearers, the limited noncommercial exchange for money of fish and wildlife or their parts in minimal quantities; and

"(5) 'rural Alaska resident' means a resident of a rural community or area. A 'rural community or area' means a community or area substantially dependent on fish and wildlife for nutritional and other subsistence uses."

(e) PREFERENCE FOR SUBSISTENCE USES.—Section 804 (16 U.S.C. 3114) is amended—

(1) by inserting "(a)" immediately before the first sentence; and

(2) by inserting at the end the following new subsection:

"(b) The priority granted by this section is for a reasonable opportunity to take fish and wildlife. For the purposes of this subsection, the term 'reasonable opportunity' means an opportunity, consistent with customary and traditional uses (as defined in section 803(3)), to participate in a subsistence hunt or fishery with a reasonable expectation of success, and does not mean a guarantee that fish and wildlife will be taken."

(f) LOCAL AND REGIONAL PARTICIPATION.—Section 805 (16 U.S.C. 3115) is amended—

(1) In subsection (a) by striking "one year after the date of enactment of this Act,"; and

(2) by amending subsection (d) to read as follows:

"(d)(1) Upon certification by the Secretary that the State has enacted and implemented laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in sections 803, 804, and 805, the Secretary shall not implement subsections (a), (b), and (c) of this section, and the State may immediately assume management for the taking of fish and wildlife on the public lands for subsistence uses pursuant to this title. Upon assumption of such management by the State, the Secretary shall not implement subsections (a), (b), and (c) of this section unless a court of competent jurisdiction determines that such laws have been repealed, modified, or implemented in way that is inconsistent with, or does not provide for, the definition, preference, and participation specified in sections 803, 804, and 805, or that the State has failed to cure any such inconsistency after such determination. The State laws shall otherwise supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. The Secretary may bring a judicial

action to enforce this subsection.

"(2)(A) Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

"(B) The members of each regional advisory council established under this subsection shall be appointed by the Governor of Alaska. Each council shall have ten members, four of whom shall be selected from nominees who reside in the region submitted by tribal councils in the region, and six of whom shall be selected from nominees submitted by local governments and local advisory committees. Three of these six shall be subsistence users who reside in the subsistence resource region and three shall be sport or commercial users who may be residents of any subsistence resource region. Regional council members shall have staggered terms of three years in length, with no limit on the number of terms a member may serve. A quorum shall be a majority of the members of the council."

(g) JUDICIAL ENFORCEMENT.--Section 807 (16 U.S.C. 3117) is amended by inserting the following as subsection (b):

"(b) State agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. When reviewing any action within the specialized knowledge of a State agency, the court shall give the decision of the State agency the same deference it would give the same decision of a comparable federal agency."

(h) REGULATIONS.--Section 814 (16 U.S.C. 3124) is amended--

(1) by inserting ", and the State at any time the State has complied with section 805(d)" after "Secretary"; and

(2) by adding at the end the following new sentence: "During any time that the State has complied with section 805(d), the Secretary shall not make or enforce regulations implementing sections 805(a), (b), or (c)."

(i) LIMITATIONS, SAVINGS CLAUSES.--Section 815 (16 U.S.C. 3125) is amended--

(1) by striking "or" at the end of paragraph (3);

(2) by striking the period at the end of paragraph (4) and inserting in lieu thereof a semicolon and "or"; and

(3) by inserting at the end the following new paragraph:

"(5) prohibiting the Secretary or the State from entering into co-management agreements with Native organizations or other local or regional entities when either is managing fish and wildlife on public lands in Alaska for subsistence uses."

SEC. 03. SAVINGS CLAUSE.

No provision of this title, amendment made by this title, or exercise of authority pursuant to this title may be construed to validate, invalidate, or in any way affect--

(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant

to the Act of June 18, 1934 (25 U.S.C. 461 et seq.), as amended) has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the boundaries of the State of Alaska;

(2) any assertion that Indian country, as defined in section 1151 of title 18, United States Code, exists or does not exist within the boundaries of the State of Alaska;

(3) any assertion that the Alaska National Interest Lands Conservation Act, as amended, (16 U.S.C. 3101 et seq.) is or is not Indian law; or

(4) the authority of the Secretary of the Interior under section 1314(c) of the Alaskan National Interest Lands Conservation Act (16 U.S.C. 3202(c)).

SEC. _04. EFFECTIVE DATE.

Unless and until laws are adopted in the State of Alaska which provide for the definition, preference, and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3111 et seq.), the amendments made by section _02 of this title shall be effective only for the purposes of determining whether the State's laws provide for such definition, preference, and participation. The Secretary shall certify before December 1, 1998 if such laws have been adopted in the State of Alaska. Section _02 shall be repealed on such date if such laws have not been adopted.

STEVENS AMENDMENTS TO ANILCA UNDER H.R. 2107**Sec __02 Definitions**

Definition of "Federal Lands": Simply repeats the definition of federal lands found elsewhere in ANILCA. Does nothing to address the problems raised in Katie John. Does nothing to affect Interior's asserted powers of extraterritorial expansion onto state and private lands where necessary to regulate subsistence priority on federal lands.

Findings

(4): This section codifies and presumably validates an issue strenuously opposed by the State Legislature, mainly that the Department of Interior is legally authorized to manage fish and wildlife for subsistence purposes on federal lands in Alaska. In the Babbitt litigation and elsewhere, the State has vigorously opposed the Secretary's legal authority to manage fish and wildlife in Alaska. Yet here the statutory amendment runs the substantial risk of further foreclosing the argument for the State, and consequently strengthening Interior's position. This provision is a further expansion of Title VIII completely unnecessary to achieve Congress' purposes.

(5): This section codifies as a Congressional finding the Ninth Circuit's determination that public land includes navigable waters for purposes of federal management. Again, it is unnecessary and runs the risk of weakening the State's ability to challenge this assertion in subsequent litigation.

(d) Title VIII Definitions--Sec. 803

(3) "Customary and Traditional Uses" uses word "or" instead of original Task Force suggestion and current State law of "and" in Line 16. This significantly broadens the current definition beyond what is necessary to achieve the Congressional purposes asserted.

(f) Local and Regional Participation--Sec. 805

(d)(1): Note that State will be out of compliance if a court of competent jurisdiction determines that the State has implemented subsections (a), (b), and (c) in a way inconsistent with Sec.'s 803, 804, and 805. Federal courts will make that determination, and there is no language setting any standard whatever for the court's determination that the State's implementation is inconsistent. (i.e. Could have stated that court must determine that State has "substantially failed" to implement provisions, or some similar language.)

(2)(B): Nominees for Regional Advisory Councils must come from Tribal Councils. This statutory mandate to effectively co-manage with Tribal groups threatens to invalidate the neutrality provisions contained in Sec. __03. This mandate could be construed at some later date as an additional federal and state recognition of Tribal Councils as sovereign governmental entities. That interpretation is dangerous considering the State's current litigation position before the Supreme Court in Venerie. It could also be used in the future to bolster an argument that ANILCA is Indian legislation, and therefore should be construed differently when an issue is in doubt.

(g) Judicial Enforcement--Sec. 807

(b): Language has been added to Task Force's proposed language regarding deference to State agencies by federal courts. Under this draft, State agency decisions may be overturned if "arbitrary, capricious, or an abuse of discretion, *or otherwise not in accordance with law.*" This phrase is ambiguous and extremely broad. It effectively nullifies the standard set forth immediately preceding it, and instead may permit a court of law to use any law, state or federal, to overrule state agency decisions. The original intent behind this amendment was to strengthen State agency decisions. This added language achieves the opposite result in weakening agency decisionmaking authority. It fails to reduce federal oversight in any appreciable way.

(i) Limitations, Savings Clauses--Sec. 815

(5): Explicitly recognizes that the State and federal government may enter co-management agreements with Native organizations or other local entities. This is new language, not contemplated by the Task Force. The decision to co-manage will be made Administratively. Local or Native entities with co-management authority will presumably have full authority to set subsistence regulations both on federal lands, and under interior's asserted powers to do so, on state and private lands where necessary to protect subsistence uses on federal lands.

Note that any attempted co-management arrangement may fail under the Alaska Constitution. Once it is determined that the State has the authority to manage fish and game, whether under authority of Title VIII or its own Constitution, a co-management arrangement may constitute an improper delegation of Legislative and/or Executive authority, whether this section is added to ANILCA or not. A court will likely find that only the Legislature or Executive may manage, and that delegation of that power to local entities, especially those not recognized as official government subunits, is improper. The State would then have to amend its Constitution yet again to permit co-management with local entities.

Additionally, further statutory recognition of Native entities poses same threats discussed *Supra* at Sec 805 (2)(B).

Sec __04 Effective Date

Ostensibly requires that State pass a constitutional amendment and state statutory reforms consistent with Title VIII before the amendments to ANILCA become effective. Sec. __02 amendments will be effective, however, for determining whether State has complied with Sec.'s 803, 804, and 805. Note that Sec. __03 Savings Clause is not included as effective for determining whether State has complied. Thus, there is no effective date for Sec. __03. Its status is therefore unknown, as distinct from Sec. __02. It is unclear whether this section will remain effective if the State does not comply.

SUBSTANTIVE TASK FORCE CHANGES TO ANILCA VS. STEVENS CHANGES

TASK FORCE

SENATOR STEVENS

Sec. __01--Moratorium--
Not included

Sec. __01--Moratorium--
Extended until December
1, 1998

Sec. 801--Findings--
No proposed changes

(b)(1) through (7)--
Recognizes McDowell,
Babbitt, and other historical
events relating to subsistence
in Alaska

Note that Sec.'s (4) and
(5) recognize and potentially
validate issues of major
contention for Alaska, mainly
the Secretary's authority to
manage in Alaska and those
rights over navigable waters.
Statutory validation could
weaken State's ability to
successfully raise those issues
later

Sec. 803--Defines "customary and traditional";
"customary trade"; and "rural Alaska resident"

Essentially the same; under
definition of "rural",
however, word "or" used in
line 2, page 4 of Stevens
version. Changed from "and"
in Task Force version

Sec. 804--Amended to grant only a "reasonable
opportunity" to take fish or wildlife

Essentially the same

16 U.S.C. 3102(2)--Definition of "Federal
land"

Leaves out "selections" which
may put lands selected but
not yet conveyed under
questionable jurisdiction

Sec. 805/806--Regional Advisory Council
provisions to match state law

Council provisions essentially
the same

(d)(1) differs from Task Force

TASK FORCE

SENATOR STEVENS

/ Sec. 807--Judicial Enforcement--
Agency decisions to be overturned
only if "arbitrary, capricious, or
an abuse of discretion." Designed to
strengthen State agency decisions

plan in that a court of
competent jurisdiction may
determine that State is out of
compliance by finding that the
new law has not been
implemented in a way
consistent with Title VIII.
Under Task Force plan, court
must determine that State has
"substantially failed" to
implement operative sections.
Under Stevens Plan, much
easier for courts to find State
out of compliance

/ Sec. 814--Regulations--

Adds the term "or otherwise
not in accordance with law."
Means courts could use any
law, state or federal, to
overturn State agency
decisions. Substantially
weakens decisionmaking
authority of State agencies

Sec. 815--Limitations--
No changes suggested by
Task Force proposal.

Essentially the same

/ Sec. 816--Savings Clause--
Essentially a neutrality provision
on sovereignty, Indian country,
and construal as Indian law

(5) explicitly recognizes that
nothing in this title shall
prohibit the Secretary or the
State from entering into co-
management arrangements
with Native organizations or
other local entities

/ Linkage Section--
As currently written, does not
require that all amendments to
ANILCA be passed before
constitutional amendment goes

Sec. 03--Adds (4) stating this
will not in any way affect
the authority of the Secretary
of Interior under section
1314(c) of ANILCA. This
ambiguous provision may
invalidate proposed changes
to Sec.'s 804, 805, 814, and
others which arguably do in
fact affect the Secretary's
powers under ANILCA

Sec. __04--Effective Date--
Amendments not effective
unless and until state law is
changed to provide for the
definition, preference, and

TASK FORCE

on the ballot

SENATOR STEVENS

participation specified in ANILCA, except that they are effective for determining whether State has complied

Note that Sec. __03 Savings Clause is not included as effective for determining whether State has complied. Thus, there is no effective date for Sec. __03. It is unclear whether that section will remain effective if the State does not comply

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

State of Alaska
Office of the Governor
March 3, 1992

Contents:

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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;

(3) the number of days in the preceding twelve months that the person engaged in taking fish or game in the subsistence use area or spent processing that fish or game, with a mandatory minimum of 30 days;

(4) the number of months in the preceding twelve months in which the applicant engaged in taking fish or game in the subsistence use area, with a mandatory minimum of four months;

(5) the number of weeks, in the preceding twelve months, during which the taking or processing of fish and game was the applicant's principal work effort, to a maximum of 26 weeks;

(6) the number of households, other than the person's household, with which the person shared or received fish and game in the preceding twelve months, with a maximum of 10 households; and

(7) whether the person's taking of fish and game occurred solely in the subsistence use area for which they are qualifying.

As indicated above, in group 3 communities a person must fill out an application and score sufficient points to demonstrate his or her eligibility; in group 2 communities, signature of a statement affirming the person's qualification creates a rebuttable presumption that the person is qualified; and in group 1 areas, no paper work is required and the presumption is that all persons who hunt or fish meet the minimum standards.

Where would people be able to go for subsistence hunting and fishing?

People would normally qualify for the subsistence use area in which they live, but could qualify for another area by application. Subsistence use would be on fish stocks and animal populations that have customarily and traditionally been used for subsistence. This would allow qualified subsistence users to hunt and fish as they have in the past. Group 3 areas would be closed to subsistence hunting and fishing, but urban residents who qualify as subsistence users would be able to subsistence hunt and fish in portions of the subsistence use area in which they live that are not classified in group 3 and thus closed to subsistence taking.

What are the advantages of this approach?

It protects the resource. It does not divide villages. It protects residents of regional centers from growing out of subsistence, and it allows the small minority of urban residents who are subsistence users to participate. It complies with our constitution. Most importantly, because this legislation has been worked out with the help of all sides, it will protect subsistence and subsistence users while reducing the division and political instability that has plagued this issue.

SENATE BILL NO. 443

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the taking of fish and game for subsistence; and providing for an
2 effective date."

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

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

5 (1) there are Alaskans, both Native and non-Native, who have a traditional, social, or
6 cultural relationship to and dependence upon the wild renewable resources produced by Alaska's land
7 and water; the harvest and use of fish and game for personal and group consumption is an integral part
8 of those relationships;

9 (2) although customs, traditions, and beliefs vary, these Alaskans share ideals of respect
10 for nature, the importance of using resources wisely, and the value and dignity of a way of life in which
11 they use Alaska's fish and game for a substantial portion of their sustenance; this way of life is
12 recognized as "subsistence";

13 (3) customary and traditional uses of Alaska's fish and game originated with Alaska
14 Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses.

1 among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of
2 identity for many subsistence users;

3 (4) while Alaska's fish and game are generally still plentiful, these resources are not
4 unlimited and cannot provide for every desired use, now or in the future; competition for and the level
5 of effort on these resources have required the legislature and the Board of Fisheries and Board of Game
6 to establish a preference for subsistence among the various beneficial uses of fish and game in Alaska;

7 (5) in most areas of the state, a preference for subsistence can be provided without an
8 overly burdensome intrusion upon other consumptive uses of fish and game;

9 (6) among persons who take fish and game, a large majority of those living in areas
10 described in AS 16.05.268(f)(1); a majority of those living in areas described in AS 16.05.268(f)(2); and
11 a small minority of those living in areas described in AS 16.05.268(f)(3), depend upon the subsistence
12 taking of fish and game;

13 (7) in determining dependence upon the subsistence taking of fish and game, the
14 application of different levels of presumptions based on categories is logical; does not deny any person
15 the opportunity to demonstrate dependence on subsistence use; focuses on persons who depend on
16 subsistence use; is administratively efficient; and is compatible with existing management measures
17 without needlessly interfering with other uses of fish and game resources; and

18 (8) the application of presumptions, based on areas of domicile, to facilitate
19 determinations of a person's qualifications as a subsistence user will maximize the state's management
20 efforts.

21 (b) It is the purpose of this Act

22 (1) to develop and maintain healthy fish stocks and game populations through
23 management on the sustained yield principle;

24 (2) to provide for a preference for subsistence use over other consumptive uses of fish
25 and game resources;

26 (3) to provide for the participation in the subsistence taking of fish and game by those
27 Alaskans who actually and substantially depend upon that subsistence taking;

28 (4) to maximize the state's management efforts by applying presumptions based on
29 subsistence characteristics of areas to reduce the need for case-by-case individual determinations of
30 dependence on subsistence in those areas of the state which have a high proportion of subsistence users
31 who meet the qualifications of this Act.

1 (c) It is the intent of the legislature

2 (1) that subsistence uses of Alaska's fish and game resources are given the highest
3 preference, in order to accommodate and perpetuate those uses;

4 (2) to clarify the statutory protection for actual, substantial dependence on fish and game
5 for subsistence; and

6 (3) that this Act not result in significant reallocations of fish and game in Alaska.

7 * Sec. 2. AS 16.05 is amended by adding a new section to read:

8 Sec. 16.05.268. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a)

9 The Board of Fisheries and the Board of Game shall identify the fish stocks and game
10 populations, or portions of stocks or populations, that are customarily and traditionally used for
11 subsistence in the areas of the state identified by the boards under (f)(1) and (f)(2) of this section.

12 The commissioner shall provide recommendations to the boards on the identifications. The
13 boards shall make identifications required under this subsection after receipt of the
14 commissioner's recommendations.

15 (b) The appropriate board shall determine whether a portion of a stock or population
16 identified under (a) of this section can be harvested consistent with sustained yield, and

17 (1) if the harvestable portion of the stock or population is sufficient to provide
18 for all consumptive uses, the appropriate board

19 (A) shall adopt regulations that provide a reasonable opportunity to
20 participate in the subsistence uses of those stocks or populations;

21 (B) shall adopt regulations that provide for other consumptive uses of
22 those stocks or populations, subject to preferences among beneficial uses; and

23 (C) may adopt regulations to differentiate among consumptive uses;

24 (2) if the harvestable portion of the stock or population is sufficient to provide
25 for subsistence uses and some, but not all, other consumptive uses, the appropriate board

26 (A) shall adopt regulations that provide a reasonable opportunity to
27 participate in the subsistence uses of those stocks or population.

28 (B) may adopt regulations that provide for other consumptive use of those
29 stocks or populations; and

30 (C) shall adopt regulations to differentiate among consumptive uses and
31 provide for a preference for the subsistence uses, if regulations are adopted under (B) of

1 this paragraph:

2 (3) if the harvestable portion of the stock or population is sufficient to provide
3 for subsistence uses, but no other consumptive uses, the appropriate board shall adopt regulations
4 that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence
5 uses; and

6 (4) if the harvestable portion of the stock or population is not sufficient to provide
7 for all subsistence uses, the appropriate board

8 (A) shall adopt regulations eliminating all consumptive uses, other than
9 subsistence uses;

10 (B) shall distinguish among subsistence users, through limitations based
11 on

12 (i) the customary and direct dependence on the fish stock or game
13 population by the subsistence user for human consumption as a mainstay of life;

14 (ii) the proximity of the domicile of the subsistence user to the
15 stock or population; and

16 (iii) the ability of the subsistence user to obtain food if subsistence
17 use is restricted or eliminated.

18 (c) If the harvestable portion of a stock or population is insufficient to provide for both
19 subsistence and other consumptive uses, the department shall analyze and prepare a plan to
20 facilitate the recovery of that stock or population to allow for increased consumptive uses as soon
21 as possible. The department shall provide recommendations to the appropriate board for
22 necessary regulatory changes. If subsistence use of a stock or population has been eliminated
23 to achieve sustained yield, the appropriate board shall adopt regulations to allow subsistence uses
24 when that board determines that the stock or population has recovered sufficiently to allow the
25 taking for any consumptive use, consistent with sustained yield.

26 (d) The subsistence use area for a stock or population is the subunit of a game
27 management unit in which fish or game may be taken under subsistence regulations adopted
28 under (b) of this section, together with contiguous game management subunits, unless the
29 appropriate board identifies and delineates a subsistence use area with different boundaries for
30 a particular fish stock or game population under (e) of this section.

31 (e) Each board shall consider subsistence use area boundaries described in (d) of this

1 section. Each board shall delineate a different boundary for a particular stock or population if
2 the appropriate board determines that the boundary of a subsistence use area is inconsistent with
3 established patterns of taking and use of that fish stock or game population for subsistence, or
4 is inconsistent with the efficiency and economy of effort, cost, and transportation inherent in the
5 customary and traditional taking and use of fish and game for subsistence.

6 (f) The boards shall, by regulation, for the state, jointly identify and delineate areas, using
7 game management units, portions of game management units, or communities, into the following
8 categories:

9 (1) category 1, an area where the human population of each community in the
10 area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is
11 a principal characteristic of the economy, culture, and way of life of the area;

12 (2) category 2, an area that consists of a single community that has a human
13 population of 2,500 to 6,999, is not part of an urban area, and where dependence upon
14 subsistence is a principal characteristic of the economy, culture, and way of life of the
15 community;

16 (3) category 3, an area that

17 (A) is an urban area or a single community where the human population
18 is 7,000 or greater; or

19 (B) is an area or community where dependence upon subsistence is not
20 a principal characteristic of the economy, culture, and way of life of the area or
21 community.

22 (g) In determining whether dependence upon subsistence is a principal characteristic of
23 the economy, culture, and way of life of an area under (f) of this section, the boards shall jointly
24 consider the relative importance of subsistence compared to the totality of the following socio-
25 economic characteristics of the area:

26 (1) the social and economic structure;

27 (2) the stability of the economy;

28 (3) the extent and the kinds of employment for wages, including full-time, part-
29 time, temporary, and seasonal employment;

30 (4) the amount and distribution of cash income among those domiciled in the
31 area;

- 1 (5) the cost and availability of goods and services to those domiciled in the area;
2 (6) the variety of fish and wildlife species used by those domiciled in the area;
3 (7) the seasonal cycle of economic activity;
4 (8) the percentage of those domiciled in the area participating in hunting and
5 fishing activities or using wild fish and game;
6 (9) the harvest levels of fish and game by those domiciled in the area;
7 (10) the cultural, social, and economic values associated with the taking and use
8 of fish and game;
9 (11) the geographic locations where those domiciled in the area hunt and fish;
10 (12) the extent of sharing and exchange of fish and game by those domiciled in
11 the area;
12 (13) additional similar factors the boards establish in regulation to be relevant to
13 their determinations under this subsection.

14 (h) Participation in a subsistence harvest in a subsistence use area is limited to persons
15 who meet the requirements for qualification under (i) of this section for that subsistence use area,
16 with the following presumptions and requirements:

17 (1) a person who is domiciled in the subsistence use area in an area identified
18 under (f)(1) of this section, and who intends to take fish or game for subsistence purposes is
19 presumed to meet the requirements for qualification under (i) of this section for that subsistence
20 use area; this presumption may be rebutted only by clear and convincing evidence, and the boards
21 may not require a permit or filing of a statement affirming that the person meets the requirements
22 for qualification under (i) of this section;

23 (2) a person who is domiciled in the subsistence use area in an area identified
24 under (f)(2) of this section, and who intends to take fish or game for subsistence purposes is
25 rebuttably presumed to meet the requirements for qualification under (i) of this section for that
26 subsistence use area upon that person's signing a statement, on a form provided by the
27 department, affirming that the person meets those requirements; the department may rebut this
28 presumption by a preponderance of the evidence that the person does not meet those qualification
29 requirements;

30 (3) a person domiciled in an area identified under (f)(3) of this section or who
31 is domiciled outside of the subsistence use area is qualified to participate in a subsistence fishery

1 or hunt in that subsistence use area only upon certification by the commissioner that the person
2 meets the requirements for qualification under (i) of this section.

3 (i) The boards shall jointly, by regulation, adopt procedures by which the commissioner
4 shall determine the qualification of a person to subsistence fish or hunt in a specific subsistence
5 use area. The commissioner shall provide recommendations to the boards on qualification
6 procedures. The boards shall jointly adopt the regulations required by this subsection after the
7 receipt of the commissioner's recommendations. The boards shall adopt, by regulation, a
8 weighted point system to determine a person's eligibility. The boards shall structure the point
9 system so that the minimum points required for qualification exceed the total points received for
10 meeting the mandatory minimum requirements in (1) - (4) of this subsection. The point system
11 shall be based on the following criteria and restrictions:

12 (1) the quantity of fish and game consumed by the person in the preceding 12
13 months, with a mandatory minimum of 125 pounds consumed in that period;

14 (2) the number of species and groups of species of fish and game from the
15 subsistence area consumed by the person in the preceding 12 months, with a mandatory minimum
16 number of species, or groups of species, as determined jointly by the boards by regulation; the
17 mandatory minimum number, and any grouping of species, may vary by geographical region of
18 the state, based on the diversity of species in a region;

19 (3) the number of days in the preceding 12 months that the person engaged in the
20 taking of fish or game in the subsistence use area, or the processing of that fish or game, with
21 a mandatory minimum of 30 days in that period;

22 (4) the number of months in the preceding 12 months in which the person
23 engaged in the taking of fish or game in the subsistence use area, with a mandatory minimum
24 of four months in that period;

25 (5) the number of weeks in the preceding 12 months during which the taking or
26 processing of fish or game was the person's principal work effort, with no additional
27 consideration given beyond a maximum of 26 weeks;

28 (6) the number of households, other than the person's household, with which the
29 person shared or from which the person received fish and game in the preceding 12 months, with
30 no additional consideration given beyond a maximum of 10 households; and

31 (7) whether the person's taking of fish and game occurred solely in the

1 subsistence use area.

2 (j) A person who does not meet the mandatory minimum requirements of each of (i) (1) -
3 (4) of this section does not meet the requirements for qualification under (i) of this section.

4 (k) For the purposes of (h) and (i) of this section, the taking or processing of the fish and
5 game must have been legal, noncommercial, and characterized by efficiency and economy of
6 effort, cost, and transportation. For the purposes of (i)(1), (2), and (6) of this section, the fish
7 and game may not have been purchased for money. The boards shall jointly adopt regulations
8 allowing a person who has been unable to meet the criteria of (h) or (i) of this section because
9 of hospitalization, or military service or full-term attendance at an educational institution outside
10 the relevant subsistence use area to base responses on the 12 months immediately preceding the
11 commencement of the circumstance.

12 (l) The commissioner shall provide, by regulation, for an expedited review procedure for
13 a person who is determined by the department not to meet the qualifications as a subsistence
14 user.

15 (m) Fish stocks and game populations, or portions of fish stocks and game populations
16 not identified under (a) of this section may be taken only under nonsubsistence regulations.

17 (n) Taking and use of fish and game authorized under this section are subject to
18 regulations regarding open and closed areas, seasons, methods and means, marking and
19 identifications requirements, quotas, bag limits, harvest levels, and sex, age, and size limitans.
20 Takings and uses of resources authorized under this section are subject to AS 16.05.831 and
21 AS 16.30.010.

22 (o) For purposes of

23 (i) subsection (b) of this section, "reasonable opportunity" is an opportunity, as
24 determined by the appropriate board,

25 (A) allowing a subsistence user to participate in a subsistence hunt or
26 fishery that provides a normally diligent participant with a reasonable expectation of
27 success of taking of fish or game, but does not guarantee the taking of fish or game: the
28 conditions of the hunt or fishery; or the taking of all the fish and game that the participant
29 wants or needs; and

30 (B) based on the findings of the appropriate board on each of the
31 following factors:

- 1 (i) resource population and management objectives;
2 (ii) estimated harvest per unit of effort by participants in the
3 fishery or hunt;
4 (iii) patterns and levels of customary and traditional taking and use
5 of the fish or game;
6 (iv) migratory patterns and availability of fish or game;
7 (v) competition for the fish or game from other subsistence and
8 nonsubsistence uses; and
9 (vi) other factors that the appropriate board considers relevant.

10 (2) subsection (i) of this section, "preceding 12 months" means

11 (A) for a person described in (h)(1) of this section, the 12 months
12 preceding the taking of the fish or game resource;

13 (B) for a person described in (h)(2) of this section, the 12 months
14 preceding the date of signing of the required statement;

15 (C) for a person described in (h)(3) of this section, the 12 months
16 preceding the date of signing the application to the commissioner.

17 * Sec. 3. AS 16.05.940(29) is amended to read:

18 (29) "subsistence fishing" means the taking [OF, FISHING FOR.] or possession,
19 by a qualified resident, of fish, shellfish, or other fisheries resources [BY A RESIDENT
20 DOMICILED] in a subsistence use [RURAL] area of the state, in accordance with regulations
21 adopted under AS 16.05.268, for subsistence uses with gill net, seine, fish wheel, long line, or
22 other means defined by the Board of Fisheries, except for rod and reel;

23 * Sec. 4. AS 16.05.940(30) is amended to read:

24 (30) "subsistence hunting" means the taking [OF, HUNTING FOR.] or possession,
25 by a qualified resident, of game [BY A RESIDENT DOMICILED] in a subsistence use
26 [RURAL] area of the state, in accordance with regulations adopted under AS 16.05.268, for
27 subsistence uses by means defined by the Board of Game;

28 * Sec. 5. AS 16.05.940(31) is amended to read:

29 (31) "subsistence [USES]" means the noncommercial, customary and traditional
30 taking and uses of fish and game [WILD, RENEWABLE RESOURCES] by a resident
31 [DOMICILED] in a subsistence use [RURAL] area of the state for direct personal or family

1 consumption as food[, SHELTER, FUEL], clothing, [TOOLS,] or transportation, for the making
2 and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken
3 for personal or family consumption, for sharing, and for barter and [THE] customary trade of
4 a portion of fish or game resources harvested primarily [, BARTER, OR SHARING] for
5 personal or family consumption; in this paragraph, "family" means persons related by blood,
6 marriage, or adoption, and a person living in the same household on a permanent basis;

7 * **Sec. 6.** AS 16.05.940 is amended by adding new paragraphs to read:

8 (36) "customary and traditional" means the noncommercial, long term, consistent,
9 and ongoing dependence on the taking and use of fish or game in a specific area and the use
10 patterns and harvest levels of that fish or game that have been established over at least one
11 preceding generation of users;

12 (37) "customary trade" means the limited, noncommercial exchange, for minimal
13 amounts of cash, as restricted by the appropriate board, of fish or game resources harvested
14 primarily for personal or family consumption; "customary trade" does not include sales in
15 commercial channels; the terms of this paragraph do not apply to money sales of furs or
16 furbearers;

17 (38) "game management unit" means a management area of the state established
18 by the Board of Game under AS 16.05.255;

19 (39) "sustained yield" means the management principle of utilization,
20 development, and maintenance, applied to naturally occurring fish and game resources, that
21 provides beneficial consumptive uses in perpetuity, subject to preferences among such uses, and
22 seeks to provide for desired population increases and prevent undesired declines, for the purpose
23 of maintaining healthy, self-perpetuating stocks or populations.

24 * **Sec. 7.** AS 16.05.258 and AS 16.05.940(26) are repealed.

25 * **Sec. 8. REGULATIONS.** Notwithstanding the provisions of AS 16.05.258, the Board of Fisheries,
26 Board of Game, and Department of Fish and Game may adopt regulations necessary to implement the
27 provisions of this Act.

28 * **Sec. 9. TRANSITION.** (a) It is the intent of the legislature that the Board of Fisheries and the
29 Board of Game expeditiously adopt regulations necessary to implement this Act.

30 (b) Any regulations adopted by the Board of Fisheries, Board of Game, or Department of Fish
31 and Game after June 1, 1992, may not be inconsistent with the provisions of this Act.

1 (c) Regardless of whether regulations adopted under the authority of AS 16.05.251, 16.05.255,
2 or 16.05.258 and in effect on June 1, 1992 are inconsistent with the provisions of this Act, they may
3 continue to be implemented and enforced until the effective date of this Act.

4 * Sec. 10. REVIEW. (a) The legislature acknowledges and recognizes that this Act deals with a
5 subject of vital concern and that the subject merits review. Therefore, it is the intent of the legislature
6 that the operation of this Act and the regulations adopted under this Act be fully reviewed by the
7 governor no later than June 1, 1994.

8 (b) This review period is intended to allow for further research and to gain experience in
9 implementing the Act and regulations adopted under it. It is the intent of the legislature that the
10 governor convene a representative group to provide recommendations to the governor before the end of
11 the review period. It is the intent of the legislature that representatives of the legislature and persons
12 with a history in the formulation of subsistence legislation in this state participate in the group.

13 (c) It is the intent of the legislature that the review under this section occur with public input
14 and participation.

15 (d) No later than September 1, 1994, the governor shall provide a report to the legislature on
16 the results of the review and any proposed recommendations for statutory amendments.

17 * Sec. 11. Sections 8 and 9 of this Act take effect immediately under AS 01.10.070(c).

18 * Sec. 12. Sections 1 - 7 and 10 of this Act take effect on the effective date of regulations first
19 adopted under this Act by the Board of Fisheries and the Board of Game, acting jointly.

GOVERNOR'S SUBSISTENCE BILL

SECTION-BY-SECTION DESCRIPTION

February 21, 1992

Section 1

Section 1 of the bill sets out findings for, and the purpose and intent of the proposed new law.

Section 2

Section 2 sets out proposed new AS 16.05.268, which contains the crux of the new subsistence law. An analysis of the proposed new statute, by subsection, follows.

Proposed AS 16.05.268(a):

This subsection is very similar to existing AS 16.05.258(a). Under this new subsection, the Board of Fisheries and the Board of Game are to identify fish stocks and game populations that have been subject to customary and traditional subsistence use. The term "customary and traditional" is defined in proposed AS 16.05.940(36) (sec. 6 of the bill). The commissioner is to make recommendations to the boards concerning the identification of stocks and populations and whether they have been subject to customary and traditional subsistence use.

There are definitions of "fish stock" and "game population" in existing law; those definitions are left unchanged. Existing law also already requires the boards to identify the stocks and population used for subsistence.

The identification of fish stocks and game populations subject to subsistence regulations is a situation where all groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that the subsistence preference is protected.

The identification of subsistence stocks leaves those that are not identified to be harvested by all Alaskans under nonsubsistence regulations. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and recently transplanted (not reestablished) game; and some steelhead and trout stocks and brown bear populations. There are also fish stocks and game populations in areas of the state so remote from any village or community that there is no established use of them. As in existing

law, whether or not fish or game are or are not subsistence stocks and populations is a factual determination made by the boards.

Fish stocks and game populations in urban areas of the state or in areas where dependence upon subsistence is not a principal part of the economy, culture, and way of life of the area will not be subject to subsistence hunting under the statute. (See the discussion of subsecs. (f) and (g), below.) Fish and game in nonsubsistence areas will continue to be available under general hunting regulations and sport, personal use, and commercial fishing regulations. The subsection does not affect where subsistence users may live. They can live anywhere in the state. Subsistence use areas overlap areas closed to subsistence taking. Qualified subsistence users who live in an area of the state where there is no taking for subsistence in the immediate area would continue to have access to fish and game under subsistence regulations in areas proximate to the closed area and other areas of the state.

Proposed AS 16.05.268(b):

This proposed subsection is very similar to existing AS 16.05.258(b)(1). That existing statute requires the boards to determine "what portion" of the resource can be harvested consistent with sustained yield. Some had interpreted this as a requirement for an exact determination of the number of animals that could be harvested. Such an exact number is normally beyond calculation with the biological information that is available. The language in proposed AS 16.05.268(b) is designed to conform to the actual capabilities of the boards and the ability of the Department of Fish and Game to provide information to the boards, and omits language that could be interpreted to require a determination of exact numbers.

As in existing law, this subsection requires the boards to provide a preference for subsistence uses, although even subsistence use may be curtailed to protect stocks or populations and achieve sustained yield. Subsistence hunting and fishing regulations must provide a reasonable opportunity to participate. "Reasonable opportunity" is defined in proposed AS 16.05.268(o), discussed later.

The subsistence preference does not work like the Endangered Species Act, mandating limitation or closure of any other fishery or hunt that is believed to contain even a single member of the subsistence stock or population. The subsistence preference applies when a stock becomes a stock, in other words, wherever it becomes manageable as a unit. While this point may seem self-evident from the existing definitions of stock and populations, some have argued that the courts should eliminate all downriver and marine fisheries on certain fish stocks that spawn, for example, in

the headwaters of the Yukon. Management of mixed stocks and populations is far better left to the boards than to the courts.

Subsection (b) authorizes the boards to also adopt regulations allowing other consumptive uses of stocks and populations identified as subject to subsistence, after subsistence uses have been provided for. These regulations would provide for nonsubsistence harvest of the stock or population to the extent that the harvest does not interfere with reasonable opportunity for subsistence uses.

AS 16.05.268(b) (1):

Paragraph (b) (1) addresses the happy situation where fish and game is so plentiful that all subsistence uses and all other consumptive uses can be allowed. The board would provide for a reasonable opportunity for subsistence uses, and is permitted but not required to adopt separate subsistence regulations that differentiate subsistence uses from other consumptive uses. For example, if caribou in a subsistence use area were plentiful and the existing general bag limit was five caribou per hunter during a year-round season, and the Board of Game determined that such a bag limit and season provided a reasonable opportunity for subsistence use of caribou, no separate subsistence regulation would be required. If, at some time in the future, the general season or bag limit was changed by the board, the board would need to consider whether the change impinged on the reasonable opportunity for subsistence, and if so, would need to create a separate subsistence regulation at that time.

AS 16.05.268(b) (2):

This paragraph addresses the situation where a stock or population is sufficient to provide for all subsistence uses, but not all other consumptive uses. This is commonly known as "Tier I," and is the most common situation across the state. In this situation, the appropriate board would be required to adopt separate subsistence regulations that differentiate between consumptive uses and provide a preference for subsistence.

AS 16.05.268(b) (3):

This paragraph deals with the situation where a stock or population is sufficient to provide for all subsistence uses, but no other consumptive uses. In that case, this paragraph makes it clear that the appropriate board must eliminate all nonsubsistence uses in order to protect the subsistence preference.

AS 16.05.268(b)(4):

Paragraph (b)(4) describes what is commonly known as the "Tier II" situation, in which, to protect sustained yield, it is necessary to limit the harvest of a stock or population to a level that does not provide a reasonable opportunity for subsistence for all qualified subsistence users. This paragraph is very similar to language in existing AS 16.05.258(c), with several modifications to make it clearer.

This paragraph makes it explicit that other consumptive uses of a particular stock or population must be prohibited in a "Tier II" situation. If a board has eliminated all consumptive uses other than subsistence uses, and it is still necessary to reduce the subsistence harvest, then the board has to limit the number of subsistence users who may hunt or fish on the affected stock or population by applying three criteria: (1) customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of life; (2) the proximity of the domicile of the subsistence user to the resource; and (3) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

The three criteria are taken from existing AS 16.05.258(c)(1) - (3), but have been modified for clarity. Existing AS 16.05.258(c)(3) and Title VIII of ANILCA (Alaska National Interest Lands Conservation Act; P.L. 96-487) both use the phrase "availability of alternative resources" as the third criteria. Some have tried to interpret this as a question only of whether or not a person has access to a similar animal from a different population. The new language makes the intent and meaning clear.

Several additional points need to be made about this subsection. First, most of the Tier II hunts that occurred after the decision in McDowell v. State, 785 P.2d 1 (Alaska 1989) will no longer be in Tier II status. The need for most Tier II hunts will be eliminated by dramatically reducing the number of hunters eligible to participate in subsistence hunts. The effect of this will be to leave more game available under general hunting regulations.

Second, as in existing AS 16.05.258 and the federal law, the subsistence preference is only a preference over other consumptive uses. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence.

Both the 1986 state law (AS 16.05.258) and Title VIII of ANILCA give a preference that is stock and population specific (Title VIII uses population to describe fish as well as game). This legislation is also stock or population specific. The state

definitions of fish stock, AS 16.05.940(15), and game population, AS 16.05.940(18), were enacted in 1978 and 1975 respectively, and both refer to species, subgroup, etc., that are "manageable as a unit." This bill is not intended to further limit the discretion the boards have in defining what fish or game is manageable as a unit.

Proposed AS 16.05.268(c):

Subsection (c) requires additional affirmative action from the department and the appropriate board in situations where a stock or population is not sufficient to provide for both subsistence and nonsubsistence uses. The department is instructed to formulate a plan for the recovery of the stock or population to provide for increased consumptive uses. There may be cases where the habitat of the particular stock or population or other limitations make an increase impossible. In those cases, the department would simply report those facts in the plan. However, in cases where increases are feasible, the department would be required to develop a plan for achieving increased levels of the stock or population and to make recommendations to the appropriate board for regulations necessary to implement the plan.

The last sentence of subsec. (c) addresses the extreme situation, where stock or population levels are so low that all uses, including subsistence uses, have been eliminated to try to achieve sustained yield of the stock or population. When population levels begin to rise again, the appropriate board is to allocate to subsistence uses when there are enough animals to allow a hunt or fishery, and not ignore the subsistence preference by keeping the seasons closed until there are enough animals to provide for every kind of use. This does not mean that the boards must allow taking as soon as a minimal sustained yield is reached; the definition of "sustained yield" in this bill makes that clear. Subsection (c) is intended to prevent disregard of the subsistence preference in favor of other consumptive uses.

Proposed AS 16.05.268(d):

Subsection (d) establishes a game management subunit (GMSU) and its contiguous GMSU's as the subsistence use area for fish or game to be taken under subsistence regulations in that GMSU, unless the appropriate board establishes a different area. GMSU's are based on natural drainages and tend to fit natural travel and use patterns of most fish stocks and game populations.

The Department of Fish and Game has examined a large number of specific hunts and fisheries and the associated patterns of subsistence use. In general, a GMSU and the surrounding subunits provide an area properly sized to be consistent with the definition

of subsistence. Game management units and subunits tend to be larger in remote parts of the state, but that is consistent because, in those parts of the state, subsistence users have historically been able to travel farther in pursuit of resources without coming into conflict with other established groups of users.

GMSU-based subsistence use areas are large enough to provide access to subsistence resources even for subsistence users who live in areas closed to subsistence taking under subsection (a). The use of GMSU based subsistence use areas provides use areas that can be immediately implemented while the board examines use areas throughout the state and make adjustments as necessary. GMSU's which touch only in marine waters should not be considered contiguous.

Proposed AS 16.05.268(e):

For some specific fish stocks or game populations, the appropriate board may decide that a subsistence use area established by GMSU is too small or is otherwise inconsistent with established patterns of taking and use of a particular fish stock or game population, or is too large and is inconsistent with travel limits and means inherent with the efficient and economical nature of subsistence. If the use pattern for a particular fish stock or game population changes over time, the board could adjust the boundaries of the use area.

In these cases the appropriate board should establish different boundaries for the particular stock or population which are large enough to include both where a particular stock or population is normally taken and where it is normally used, but not so large as to violate the definition of subsistence. The Board of Fisheries may wish to use fish districts to describe areas for specific fish stocks if a GMSU based area is not appropriate.

Proposed AS 16.05.268(f), (g), and (h):

These subsections all deal with the classifying of areas and communities to facilitate the administrative determination of a person's qualification to subsistence hunt and fish. Residence in a particular community or area of the state does not determine a person's qualification to subsistence hunt and fish. It does, however, determine the amount of administrative paperwork the person will be required to submit.

AS 16.05.268(f):

This subsection requires the boards jointly to look at all areas and communities in the state and to classify them, using communities and game management units or subunits, into one of three categories. Under subsec. (f) (1), the boards would identify areas where the population of each community in the area is less than 2,500 people. The 2,500 population figure came from information collected by the Department of Fish and Game and will include most rural villages and towns in Alaska. The population figures in this subsection also mesh with population breaks used by the federal government. In addition to the population requirement, the boards would also evaluate all the information it had about the communities and area, to determine whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area. To make this determination, the communities and area would be tested under the criteria set out in subsec. (g), which will be discussed in more detail below. The boards also must determine that the area is not part of an urban area. An area or community that is a suburb of a larger city or is so close to a larger city that there is little characteristic difference from the larger city will not qualify as a subsec. (f) (1) area. The status of such an area will be determined along with the boards' consideration of the larger city under subsec. (f) (2) or (f) (3).

It is anticipated that, as the boards evaluate the subsistence dependency of various areas, they will identify communities of under 2,500 in population that are not significantly dependent on subsistence. A community that is within a larger area of subsistence dependence may be specifically excluded from the otherwise qualified area. For example, if the boards identify a remote military installation that, as a community, does not depend on subsistence hunting and fishing, it would be excluded from classification under subsec. (f) (1) and would fit into the (f) (3) category.

Under subsec. (f) (2), the boards would identify communities with a population of 2,500 to 6,999 and then determine whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community, again using the criteria in subsec. (g). If a community does not meet the subsistence dependence standards of subsec. (g), it will be classified under subsec. (f) (3). The non-urban requirement would also apply to these communities. For example, if a community of 3,500 in population were part of or a suburb of a city of 7,000 or more in population, the smaller community would be classified under subsec. (f) (3).

Communities with a population of at least 7,000 and smaller communities that do not qualify under subsec. (f) (1) or (f) (2) because they do not meet the subsistence dependence standards of subsec. (g) will be classified under subsec. (f) (3). Communities of at least 7,000 in population have a large enough population to

support more business enterprises and services that tend to change the character of the community away from subsistence dependence.

It should be remembered that the classification of an area or community under subsecs. (f) and (g) does not determine the subsistence qualification of the individuals who reside in those areas or communities.

Proposed AS 16.05.268(a):

Under subsec. (g), the boards are given criteria to use in determining whether dependence upon subsistence use of fish and game is a principal characteristic of the economy, culture, and way of life of an area or community. The boards are to use these criteria to evaluate the subsistence dependence of the area or community in light of all the socio-economic characteristics of the area or community. The boards will evaluate all of the listed characteristics of the community, including characteristics they may add to the list under subsec. (g)(13), and decide whether dependence on subsistence is a principal defining characteristic of the community. Any factors added by the boards must be adopted as regulations and must be similar in spirit to the characteristics listed by the legislature. The authority to add new characteristics is permissive. The boards are not required to add new factors.

The use of the words "a principal characteristic" may be somewhat unusual, as "principal" is often used to signify the first or highest in rank. The language here is somewhat similar to the earlier language in the definition of "rural area" in AS 16.05.940(26), but that does not mean that the boards should make determinations under (g) as they did under the "rural" statutory definition and interpreting regulation, the former 5 AAC 99.012. While some of the criteria are similar to those in the former 5 AAC 99.012, the criteria are not the same and should be evaluated independently.

By using the phrase "a principal characteristic" as opposed to "the principal characteristic," it is intended that dependence on subsistence need not be the one dominant characteristic, but should be a very important, major, and substantial characteristic, and more than merely significant. Some communities that might have a more dominant characteristic, such as commercial fishing, might still meet the criteria if, in the boards' judgment, subsistence dependence is also a very important characteristic.

To qualify under subsec. (f)(1) or (f)(2) as a subsistence-dependent community or area, subsistence must be a principal characteristic of all three listed aspects of the community or area: (1) economy, (2) culture, and (3) way of life of the community or area. While the term "culture" is often associated in

Alaska with Alaska Natives, the term is to be interpreted more broadly in this case. A community or area need not be predominantly Native to be classified as subsistence dependent. A dictionary definition such as the following might be helpful: "The totality of socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought characteristic of a community or population." The American Heritage Dictionary, New College Edition, at 321. The term "way of life" is included to emphasize the broadness of culture and also to require ongoing subsistence hunting and fishing. Having hunting and fishing enshrined in the culture of a community will not be sufficient without an ongoing actual dependence on fish and game.

Dependence on subsistence must also be a principal characteristic of the economy of the community or area.

Proposed AS 16.05.268(h):

Subsection (h) establishes the significance of the identification of communities under subsecs. (f) and (g). It establishes presumptions in the law that direct and focus the management and enforcement efforts at those areas of highest concern.

A person who lives in a subsec. (f)(1) area is presumed to individually qualify for subsistence hunting and fishing for the subsistence use area in which the person lives; no application or signed statement need be submitted before subsistence hunting or fishing. The presumption is not conclusive and can be challenged by the state, but the person will be allowed to subsistence hunt and fish in the subsistence area in which they live unless and until the state demonstrates, by clear and convincing evidence, that the person is not qualified. Proof by clear and convincing evidence is a civil evidentiary standard commonly used by the courts, and is a higher standard than "preponderance of the evidence" but lower than the criminal standard of "beyond a reasonable doubt." It is expected that many, if not most, clearly unqualified persons living in a subsec. (f)(1) area will voluntarily refrain from subsistence hunting or fishing, especially as, in most areas of the state, there will be general, sport, and personal use hunts and fisheries available for nonsubsistence users. In those cases where clearly unqualified persons choose to subsistence hunt or fish, the state will be able legally to take steps to stop them.

A person living in a subsec. (f)(2) community who wishes to subsistence hunt or fish must first sign a statement, in a form to be supplied by the department, averring that the person meets the individual qualification standards of subsec. (i). Once a person signs such a statement, the person is rebuttably presumed to qualify to subsistence hunt and fish in the subsistence use area in which the person lives. This presumption can be rebutted by the

normal civil evidentiary standard of "proof by a preponderance of the evidence." It is anticipated that a work-sheet will be furnished so that the person can satisfy himself or herself that the person does, in fact, qualify. The person will be able to hunt or fish upon signing the statement. Just as in signing a hunting or fishing license, by signing the statement the person subjects himself or herself to prosecution for unsworn falsification if the statement of professed qualification is in fact false.

A person living in a subsec. (f)(3) area (a larger city or urban area, or a smaller community that does not have a demonstrated dependence on subsistence) must qualify to subsistence hunt and fish under an application procedure. The burden of proof rests upon the applicant. Such a person may not subsistence hunt or fish until the person is certified, by the commissioner of fish and game, to be qualified. The procedures, point system, and criteria for qualification are provided for in subsec. (i).

This system of differing presumptions amounts to an administrative scheme to focus the state's efforts to weed out unqualified users onto those areas where most of the unqualified reside. Based on the information collected by the Department of Fish and Game, use of the three sets of standards will result in identifying communities or areas with a large majority of residents that would individually qualify as subsistence users under subsec. (f)(1); communities with a majority of qualified subsistence users under subsec. (f)(2), and communities with a very a small minority of qualifying individuals under (f)(3). Statutory findings based upon this information are contained in sec. 1 of the bill.

It would be very burdensome for the state to implement a statewide application system. Under this statutory scheme, only residents of urban areas and nonsubsistence communities would be required to submit applications. Evidence collected by the Department of Fish and Game indicates that relatively few such people actually and substantially rely on subsistence hunting and fishing. Although there are more people living in urban areas than in rural areas in the state, it is improbable that a large percentage of urban residents will apply for qualification to subsistence hunt and fish, given past history. The department will have a "relatively" small number of applications to review and adjudicate. It is anticipated that most of the applications will be filed in urban centers, where department staff are concentrated.

On the other hand, if applications were required for those living in subsec. (f)(1) communities, a very large majority would undoubtedly apply, and a very large majority would undoubtedly qualify, according to the department's information. The department would have to review and adjudicate thousands of applications collected from all over the state, to little effect. The same would be true, to a lesser degree, in subsec. (f)(2) communities.

The signed statement requirement should deter many unqualified users in those communities.

The presumptions established in subsec. (h) are reasonable and have a strong factual basis. The presumptions will not exclude any person who qualifies as a subsistence user under subsec. (i) from participating in subsistence fishing or hunting.

Proposed AS 16.05.268(i):

This subsection sets out the criteria the Board of Fisheries and Board of Game are to use in jointly setting up a system for individual qualification. Although the language of this subsection is itself fairly specific, the boards will have to adopt regulations setting out procedures and establishing a weighted point system based on criteria set out in this subsection.

Because the Department of Fish and Game is charged with implementing the procedures and making the determinations of individual qualification, this subsection directs the commissioner of the Department of Fish and Game to make recommendations for the procedures to be adopted by the boards.

Under the procedures and point system, an individual's qualification to subsistence hunt and fish in a specific subsistence use area will be determined. The statute does not provide for qualification on a statewide basis; hunting and fishing in one subsistence use area will not qualify the user to subsistence hunt and fish in another area. While it may be technically possible for a person to qualify in more than one subsistence use area under this subsection, it is generally contemplated that the vast majority of users will qualify for only one area. The criteria are designed to protect use that has concentrated in one area.

After receiving the commissioner's recommendations, the boards jointly will adopt regulations that will assign weights to the points earned under the various criteria and will designate the total number of points required to qualify. It is expected that this threshold should be set at a number that will be likely to match the characteristics of a large majority of users living in areas identified under (f)(1), a majority of users living in communities identified under (f)(2), and a small minority of those living in communities identified under (f)(3).

The statute contemplates that a person living in a subsec. (f)(1) community who wishes to subsistence hunt or fish will apply for qualification, and the application will be evaluated by the Department of Fish and Game. It is anticipated that a person living in a subsec. (f)(2) community who wishes to subsistence hunt or fish will be provided a form to use to calculate the person's

qualifications before signing the statement required under subsec. (h) (2).

Most of the criteria focus on a person's activities in the preceding 12 months. The one-year period is a reasonable measure because all fishing and hunting seasons are covered, and it is a reasonable time period for gauging bona fide reliance, as opposed to temporary ventures. The effect of the mandatory minimums in subsec. (i) (1) - (4) is explained in the discussion on subsec. (j). Just meeting each of the minimums, however, will not give a person enough points to qualify unless points are earned in the other three categories. Alternatively, a person might qualify if he or she just meets the minimum in one or two categories, but substantially exceeds the minimums in the others. The categories in subsec. (i) (5) - (7) do not contain minimums; a person could still qualify if he or she earns zero points in one or more of these categories but has high numbers in the other categories. The maximums in subsec. (i) (5) and (6) are included to keep the criteria meaningful and to prevent abuse of any one particular criterion.

Under subsec. (i) (1), a person receives points for the pounds of fish and game eaten by the user in the preceding 12 months. The taking of that fish and game must have been noncommercial. Fish and game taken in a subsistence use area other than the area for which qualification is sought could be counted if the fish or game was received as a gift or bartered for, but not if it was purchased for money. Fish and game used for purposes other than personal consumption by the applicant would not be counted. The mandatory minimum of 125 pounds is a reasonable threshold for demonstrating actual and substantial reliance on fish and game.

The subsistence division of the Department of Fish and Game has done extensive research on pounds of consumption of various wild resources. The average yearly per capita consumption of meat, fish, and fowl in western states is 222 pounds. The average yearly per capita consumption of meat, fish, and fowl by subsistence-reliant users in Alaska in the past has been much higher, because alternate protein sources such as milk and dairy products are not as readily available, and subsistence users tend to consume fish and game for caloric value as well.

The 125-pound minimum was selected as a threshold that would not arbitrarily exclude subsistence-reliant users, but would provide a meaningful filter. Consumption, in both the western states figures and the division of subsistence research, is defined as pounds brought into the kitchen. Pounds of consumption should be measured similarly for the purposes of this statute.

Under subsec. (i) (2), a person receives points for the number of species from the subsistence use area for which qualification is sought that are consumed by the person. The taking of the fish and

game must have been noncommercial, and the fish and game may not have been purchased for money. Dependence on a wide variety of fish and game species indicates a higher reliance on wild fish and game to meet a wider spectrum of nutritional needs. The boards, by regulation, jointly will set the mandatory minimum number of species or groups of species that must be consumed, and may consider regional diversity of species in setting the minimum. To avoid situations where the number of species of an animal or fish is so high that this criterion would become meaningless, the boards are allowed to group some species together for the purposes of determining points under the criterion. For example, the boards may decide to group species in a manner such as the following:

- all species of upland birds,
- all species of water fowl,
- all species of fresh water fish,
- all species of salmon,
- all species of non-salmon salt water fish,
- all species of crab,
- all species of other marine invertebrates,
- all species of small game,
- each individual species of big game, furbearers, or marine mammals.

These are only possibilities; the boards are not required to make such groupings.

Under subsec. (i)(3), a person earns points for the days spent taking fish or game in the subsistence use area for which qualification is sought. Points are also earned for days spent processing that fish and game, although the processing, as opposed to taking, need not take place in the subsistence use area. It is not necessary that the person spend the entire day engaged in taking or processing for that day to count toward points, but at least part of the day must be spent in those activities. The mandatory minimum of 30 days engaged in taking or processing fish or game is a reasonable indicator of actual and substantial reliance on fish and game.

Under subsec. (i)(4), a person receives points for the number of months during which he or she hunts or fishes in the subsistence use area for which qualification is sought. This criterion is intended to reward use that occurs throughout the year, as opposed to use in only one or two forays. Year-round use ties in with a wide diversity of use and tends to reflect a higher degree of reliance on fish and game resources. The mandatory minimum of four months is considered a basic threshold and could be easily met by a person hunting or fishing only once in each season of the year. There is no requirement that the hunting, fishing, or processing occur in any specific month.

Under subsec. (i) (5), a person earns points for the number of weeks during which his or her work effort is principally directed toward hunting and fishing activity, rather than other work such as employment or other business activity. Work effort is to be distinguished from the value of income received during the week. It is not necessary that the market value of fish or game taken be higher than cash income received during the week; it is necessary that the user exert more effort on harvesting fish and game resources than on pursuing any other work effort.

Under subsec. (i) (6), a person scores points for the number of households with which he or she shares, or from which he or she receives, fish or game. The taking of the fish and game must have been noncommercial, and the fish and game may not have been purchased for money. This criterion recognizes that a person may well rely on the fish and game he or she takes to meet family and social obligations. The reliance of the person and those who receive the shared resources should be recognized and protected. The 10-household maximum is designed to prevent abuse of this criterion through minimal sharing with many households.

Under subsec. (i) (7), a person will score a set number of points if all of the fish and game taken by that person comes from the subsistence use area for which qualification is sought. This criterion indicates whether the person has a higher degree of reliance on fish and game in that area than does a person who relies on fish and game from other areas of the state as well.

Proposed AS 16.05.268(i):

The criteria in subsections. (i) (1) - (i) (4) set out mandatory minimums. Subsection (j) specifies that all of those minimums must be met in order for a person to meet the requirements for qualification to subsistence hunt and fish in a particular subsistence use area. Failure to meet any one of the minimums disqualifies the person, regardless of the number of points that might be earned in other categories. The minimums are considered to be so basic that anyone who does not meet them could not have the actual and substantial reliance on subsistence hunting and fishing protected by this proposed statute.

Proposed AS 16.05.268(k):

Subsection (k) authorizes the boards to develop the procedures and any forms in such a way as to ensure that hunting and fishing activity used to satisfy the criteria of subsec. (i) was legal, noncommercial, and efficient and economical. This does not rule out a person's ability to count activity that involves airplane travel to reach the subsistence use area for which qualification is sought, or that involves use of specific types of gear such as rods

and reel for fishing, if the use is efficient and economical. It does mean that the boards may include questions on an application form which will exclude certain methods or means for certain species, because of the clear inefficiency. Questions may also exclude activity involving certain types of travel and equipment that clearly show reliance is not efficient or economical.

If hospitalization during the relevant time period has prevented a person from meeting the qualification requirements of subsec. (i), or if military service or full-term attendance at an educational institution outside the subsistence use area for which qualification is sought has made it impossible to meet the criteria, the person may rely on activity during the 12 months immediately preceding the hospitalization or absence.

Proposed AS 16.05.268(l):

The department's regulations are to provide for an expedited review procedure, most likely by way of an appeal to the commissioner for a decision within 30 days, for persons who have been denied qualification. If the commissioner affirms the original denial, the decision would be final for the department and the person could appeal to the superior court under the Alaska Rules of Appellate Procedure. This subsection contemplates that the person will be given a meaningful opportunity to present relevant evidence supporting qualification. It does not require an adjudication of individual qualification under the Administrative Procedure Act (AS 44.62), which applies only to Department of Fish and Game functions relating to the protection of fish habitat under AS 16.05.870. (See AS 44.62.330(a)(48)).

Proposed AS 16.05.268(m):

Subsection (l) provides that fish stocks and game populations that are not identified as subsistence stocks and populations under subsec. (a) may be harvested only under nonsubsistence regulations. This subsection would apply to all fish stocks and game populations in areas identified by the boards under subsec. (f)(3), as well as fish stocks and game populations in subsec. (f)(1) and (f)(2) areas which are not identified by the boards under subsec. (a) as subsistence stock and populations.

Proposed AS 16.05.268(n):

Subsection (n) is similar to existing AS 16.05.258(f), but it adds a reference to all the major regulatory tools available to the Board of Fisheries under AS 16.05.251 and to the Board of Game under AS 16.05.255. Existing AS 16.05.258(f) specifically lists only "seasons, catch or bag limits, and methods and means." The

language of proposed subsec. (n) clarifies that the boards may also use marking and identification requirements, quotas, harvest levels, and sex, age and size limitations in regulating subsistence. The reference to wanton waste statutes is identical to the existing statute.

Proposed AS 16.05.268(o):
Paragraph (1):

The lack of a definition of "reasonable opportunity" has been a continuing source of controversy in the administration of subsistence law under existing AS 16.05.258. The new definition in subsec. (o) (1), in connection with new AS 16.05.268(b), establishes the legal standard for the boards in adopting fish and game regulations to provide a preference for subsistence uses.

The Board of Fisheries and Board of Game are composed of individuals who are picked in part because they are particularly knowledgeable in matters relating to fish and game. When they make their decisions, they usually have the benefit of testimony and advice from the local and regional advisory boards, the Department of Fish and Game, and the public. This provision allows them to apply that knowledge to make good management decisions.

The standard of a "normally diligent participant" is used to clarify that the boards do not have to tailor hunts or fisheries to satisfy the requirements of inefficient users. This concept ties back to the terms of "efficiency and economy of effort, cost, and transportation" expressed in subsec. (k) and inherent in subsistence hunting and fishing. The hunting or fishing permitted by the board should provide a normally diligent hunter or fisher with a "reasonable expectation of success," but the language goes on to explain that there is no guarantee of taking fish or game, the conditions of the hunt or fishery, or taking all that the user wants or even needs. These qualifications may seem self-evident, but clarity is needed to avoid contrary court interpretations.

The boards are required to make findings when they make reasonable opportunity determinations. These findings need not be in writing, but should be evident on the record of the proceedings of each board. In making its findings, a board considers the factors listed in subsec. (o) (1) (B). These are the factors believed to be important in providing a reasonable opportunity. The criteria listed in subsec. (o) (1) (B) (iii) are not intended to require the boards to match any historic use. While it is expected that the boards will provide hunts and fisheries that correspond generally with customary and traditional seasons and harvest levels, as long as the season is long enough to provide a normally diligent hunter or fisher with a reasonable chance of success, it need not last the entire season of the year. For example, if data shows that hunts have historically occurred both in the fall and winter, with at least a few animals taken in every month, the board is not required

to keep the season open during all fall and winter months. A hunt of reasonable duration during the fall and another hunt of reasonable duration during the winter would generally be sufficient.

Competition from other subsistence and nonsubsistence users is listed as a factor in subsec. (o)(1)(B)(v). This provision is included to allow the board to create seasons separate from general or sport seasons if necessary to provide a reasonable opportunity for subsistence users. Competition for subsistence users might be a reason to lengthen a season or structure it in such a way as to spread the hunting or fishing effort out over time or place.

Paragraph (2):

This paragraph provides a definition of the term "preceding 12 months," which is used in the qualification criteria in subsec. (i).

Sections 3 and 4:

These sections set out the definitions of subsistence fishing and hunting. Both existing definitions are amended to delete "domiciled in a rural area of the state," consistent with the ruling by the Alaska Supreme Court in McDowell.

The use of the terms "qualified resident" and "in accordance with AS 16.05.268 and regulations adopted under that statute" are to clarify that subsistence taking is authorized only under state regulations. The subsistence statutes do not of themselves authorize any hunting or fishing. They authorize and guide the boards' actions in providing for subsistence hunts and fisheries. Hunting or fishing may occur only in accordance with those board regulations. This language reaffirms the intent of existing AS 16.05.259 and the holding in State v. Eluska, 724 P.2d 514 (Alaska 1986) that subsistence not be used as a defense to hunt contrary to regulations. This bill does not create individual rights to hunt or fish absent regulation. It is not intended that any of the provisions of this bill be used as a defense in a criminal prosecution for taking fish or game. A person who is dissatisfied with a board regulation should submit a proposal to the appropriate board, or may challenge the regulation under AS 44.62.300.

In 1986, the legislature extensively debated and rejected the idea of use of rod and reel as a means of subsistence fishing. Section 3 of the bill includes that distinction.