ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9389 HOUSE RESOURCES

25

HB

238

FISCAL NOTE

STATE OF ALASKA **BILL NO. HB238(draft H)**

1997 LEGISLATIVE SESSION

Revision Date: 5-May-97 Dept Affected: Natural Resources

Title: An Act amending the program of exploration incentive credits involving locatable/leaseable minerals..... BRU: Resource Development

Component: Geological Development

Sponsor: Rep. A. Vezey

Requestor: (H)RES Component Serial No. 1031

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES	230.0	233.0	237.0	240.0	244.0	248.0
TRAVEL						
CONTRACTUAL	25.0	26.0	27.0	28.0	29.0	30.0
SUPPLIES						
EQUIPMENT	15.0					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	270.0	259.0	264.0	268.0	273.0	278.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	270.0	259.0	264.0	268.0	273.0	278.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	270.0	259.0	264.0	268.0	273.0	278.0

Estimate of any current year (FY97) cost: $ none

POSITIONS

FULL-TIME	3	3	3	3	3	3
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This fiscal note addresses the financial impact to DNR of implementing the receipt and archiving of mineral-related geologic data from private companies seeking to earn a mineral exploration incentive tax credit. To be of any value to the state of Alaska or to future private sector mining ventures, the geologic data submitted for the tax credit would have to be systematically organized and preserved. The archive system would have to allow for convenient public access at nominal cost to the public. If not maintained, the data submitted would soon be worthless. On the other hand, if adequately supported the database created would continually grow in value and could materially contribute to the creation of new employment opportunities throughout the state.

Minimum costs to implement and maintain a system for receiving and maintaining the mineral-related geologic data referenced in HB 238 is estimated to range from $250,000 to $275,000 per year. This estimate is based upon considerations contained in the attached summary. (See Page 2)

Prepared by: Milton A. Wiltse, Director Phone : 451-5006

Division: Geological & Geophysical Surveys Date : 5-May-97

Approved by Commissioner: Date: 5/5/97

Agency: Natural Resources

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FISCAL NOTE (Continuation)
ANALYSIS: (Exploration Incentive Credits HB238 Draft H)

House Bill 238, as well as the proposed committee work draft will result in the annual submittal of a significant number of maps, cross-sections, drill logs, geochemical analyses, airphotos, and geological reports to DNR. At a minimum, these materials will have to be audited, i.e. peer reviewed to determine whether they qualify for acceptance as a basis for establishing a mineral exploration tax credit. Such an audit is not a trivial exercise. It requires the attention of experienced professional geologists.

In 1996 there were 52 major mineral exploration programs active in Alaska and scores of small scale prospecting efforts that could qualify for the HB238 incentive tax credit. Disregarding the prospector-scale efforts, the 52 major programs represent the generation of a multi-million dollar volume of data. In practice, a large portion of that data volume would have to be audited, organized, and entered into an active database each year. Thereafter, there would be a continually growing volume of data to be actively maintained so that it is readily accessible to the public throughout Alaska.

In 1947 the province of British Columbia started a similar but less ambitious mineral property database. Their system is still in use today and similar systems have been created in the other provinces of Canada.

The British Columbia system requires companies or individuals to file an annual property report or pay $200 per claim for all mineral properties held in good standing. Actual data, maps, drill logs, etc. are optional. The annual reports usually are between 10 -15 type-written pages. Their data base consists of recording the availability of these documents in a PC database, extracting some specific information into the database, and microfilming the occasionally volunteered maps and drill logs. Newfoundland has a similar system but requires that the reports be filed in digital computer format.

British Columbia is maintaining a significantly simpler system of privately contributed data than that which will result from HB238. Nevertheless, the annual maintenance of their system requires[1]:

1. One full time professional geologist auditor to examine the reports and data to determine whether they meet the minimum requirements for acceptance.
2. Two full time professional geologists to organize, and archive the reports and geological data - including maintaining the PC-based database.
3. A quarter to half-time system analyst to maintain the PC-computer database system.
4. A contractor who microfilms the maps and reports. (Alaska would most like digitally scan this material)

As written (including proposed language in the committee work draft) HB 238 would require that these resources be on hand ready to function within, or under contract to, the Department of Natural Resources. One can debate whether more or fewer resources would be needed to implement the review, acceptance and archiving of the data that will be submitted as a result of HB238. As a first approximation, however, it is reasonable to expect that the fewer properties in Alaska versus British Columbia is offset by the more voluminous, non-standard, and therefore more costly, data that will have to be processed by DNR as a result of HB238. One can also debate whether the private sector can implement the system more cost effectively than can DNR. Somewhere, however, funding is going to have to be made available to sustain something like the above roster of resources. Some of those resources must be in DNR even if the majority of them are embodied in outside contractors. From a fiscal standpoint this is merely a shift from the 100-line to the 300-line.

Translating the above resources into experienced Alaska-based personnel and contractors leads to an initial estimated maintenance cost of $250,000 to $275,000 per year to accommodate the data handling issues initiated by HB238.

1 Dr. Ron Smyth, Director and Chief Geologist, Geological Survey Branch, British Columbia Division of Energy and Mines

LEGAL SERVICES

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MEMORANDUM April 2, 1997

SUBJECT: Bill to amend the mineral exploration incentive credit program (Work Order No. 0-LS0845\B)

TO: Representative Al Vezey
ATTN: Joseph Easaw

FROM: Jack Chenoweth
Legislative Counsel

When we met to review the then-current draft, I promised a memo of explanation to accompany the next bill draft.

Bill section 1 adds "geological mapping" as an eligible cost upon which the credit may be calculated.

Bill section 2 adds a new subsection, subsection (e), to AS 27.30.010. Subsection (e) specifically addresses the determination of the mineral exploration incentive credit to expenses associated with surveying by geophysical or geochemical methods and by geological mapping "when a mining operation is not initiated based on that mapping or surveying activity"--in other words, when the party conducting the mapping or surveying decides not to go forward to production. The party may still claim the benefit of the credit if, under subparagraph (1)(A), the information or data recovered from the mapping or surveying is made public or if, under subparagraph (1)(B), the party allows the commissioner to release the information to the public, and if, under paragraph (2), the commissioner determines that the exploration activity data meets minimum general or technical standards otherwise applicable to the mapping or surveying of state land. (There are existing regulations on this.) If a party meets these requirements, even though the party determines not to proceed forward to production of the land that has been mapped or surveyed, the party may claim the credit.

The operative provision, for purposes of this bill, in **bill section 3** is the addition of subparagraph (C) at the middle of page 3. I propose, there, to allow the person who maps or surveys and meets the requirements of new AS 27.30.010(e) to claim the credit against the party's tax liability under the Alaska Net Income Tax (AS 43.20). In other words, the incentive to mapping or surveying, providing technologically acceptable reports, and

allowing those reports to be shared with the public even if production is not initiated is the ability to offset part of the mapping or surveying expenses against the one tax that the party is liable to pay--that is not tied to production from the land--the person's income tax liability.

Bill section 4 makes a conforming amendment to pick up the new material set out in AS 27.30.030(a)(1)(C) that relates to claim of the credit for mapping and surveying when the claim is presented to offset the taxpayer's liability under the mining production tax.

Bill section 5 adds an exception for disclosure when authorized by the party under AS 27.30.010(e)(2) (disclosure by the Department of Natural Resources has been authorized).

Bill section 6 extends the definition of "eligible costs" (for purposes of valuing the credit) to cover all expenses incurred in mapping or surveying "without regard to whether a mining operation is initiated based on [those] activities."

Bill section 7 adds "geological mapping" as part of the definition of "exploration activity data"--this is the data that the commissioner considers in evaluating the application for the credit.

Bill sections 8 and 9: On the chance that people wanting to make use of the credit will take action and incur expenses in this calendar year for geological mapping, the bill is made retroactive to January 1, 1997, and has an immediate effective date.

*

Questions? Please contact me.

JBC:jdr
97-236.jdr

Enclosure

Alaska State Legislature

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Representative Al Vezey

SPONSOR STATEMENT

HB 238

"An Act amending the program of exploration incentive credits for activities involving locatable or leasable minerals or coal deposits on certain land in the state; and providing for an effective date."

The State of Alaska currently spends about $300,000 annually for airborne geophysical surveys. The federal government spends a similar amount. This investment in cataloging our resource base has resulted in an economic boom many times greater than the investment.

The propose of this bill is to increase the amount of basic geological survey data that is available to the public by greatly leveraging the state's investment dollars. HB 238 accomplishes this by expanding our existing Mineral Exploration Incentive Program to include geological survey data that is released to the public regardless of whether the property is actually put into production.

Under existing laws, a person may deduct explorations expenses only to the extent that it applies to a property put into production. This bill will result in an increased amount of geological survey data in the public domain by giving incentives to private parties to allow the DNR to release the information to the public.

Direct state investment in this program will be zero as the incentive is a credit on taxes due. Credits are limited to a maximum of 50% of taxes owed for any one year.

April 15, 1997

0-LS0845\K
Chenoweth
5/5/97

CS FOR HOUSE BILL NO. 238( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES VEZEY, Foster, Ivan

A BILL

FOR AN ACT ENTITLED

"An Act amending the program of exploration incentive credits for activities involving locatable or leasable minerals or coal deposits on certain land in the state; and providing for an effective date."

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

* Section 1. AS 27.30.010(a) is amended to read:

(a) Except as provided in AS 27.30.012, the [THE] commissioner shall grant to a person described in (d) of this section an exploration incentive credit for the eligible costs of each of the following exploration activities that are performed on or for the benefit of land in the state for the purpose of determining the existence, location, extent, or quality of a locatable or leasable mineral or coal deposit, regardless of whether the land is state-owned land:

(1) surveying by geophysical or geochemical methods;

(2) drilling exploration holes;

(3) conducting underground exploration;

(4) surface trenching and bulk sampling; [OR]

(5) **geological mapping; or**

(6) performing other exploratory work, including aerial photographs, geological and geophysical logging, sample analysis, and metallurgical testing.

* **Sec. 2.** AS 27.30 is amended by adding a new section to read:

Sec. 27.30.012. Credit for certain additional mapping or surveying activities. (a) For the eligible costs incurred in conducting geological mapping or geophysical or geochemical surveying when a mining operation is not initiated based on that mapping or surveying activity, an exploration incentive credit may not be certified for the eligible costs of an exploration activity set out in AS 27.30.010(a)(1) or (5)

(1) unless the person requesting the taking of the credit has first obtained a determination that

(A) the surveying information described under AS 27.30.010(a)(1) and the results of the geological mapping described under AS 27.30.010(a)(5), as appropriate, are of value to the state because they do not duplicate existing data and meet appropriate general or technical standards applicable to mapping or surveying of state land; the determination of value to the state and of compliance with standards under this subparagraph may be made on the basis of a review made

(i) by the department; or

(ii) at the discretion of the department, by a professional geologist certified or eligible for certification under AS 08.02.011, functioning as a consultant to the department; if a review is to be made by a professional geologist, the geologist must be a person acceptable to both the department and the person requesting the taking of the credit, and the geologist's services shall be retained under a contract entered into by the person requesting the taking of the credit that is approved by the department;

(B) the surveying information recovered and geological mapping obtained were first recovered or obtained after the effective date of this Act or,

if earlier first recovered or obtained, the department determines that the value of the data to the public is substantial and that the data is specifically eligible for a credit under this chapter; and

(C) the surveying information described under AS 27.30.010(a)(1) and the results of the geological mapping described under AS 27.30.010(a)(5) have been made available to the public or will be made available to the public

(i) by publication in a recognized professional journal acceptable to the department;

(ii) by publication by the person seeking the credit in a manner and at a price acceptable to the department; or

(iii) in a manner that is otherwise acceptable to the department; or

(2) if, based on material submitted to the commissioner, the commissioner determines that the state will not accept the exploration activity data obtained from the mapping or surveying because that data duplicates existing data, does not conform to appropriate general or technical standards applicable to mapping or surveying of state land, does not comply with the standard of (1)(B) of this subsection, or cannot be made available to the public under (1)(C) of this subsection.

(b) The deadlines set out in AS 27.30.020 for the submission of requests for an exploration incentive credit, for certification of expenditures relating to an application for the credit, and for approval or disapproval of the taking of the credit do not apply to a credit based solely on activity that qualifies for a credit authorized by this section.

(c) A credit may not be

(1) obtained under this section for eligible costs that are paid for or reimbursed to the person by the federal government or the state; or

(2) applied for and obtained under this section for eligible costs that are eligible for the credit authorized by AS 27.30.010, whether or not the credit authorized by that section is requested or whether or not the credit authorized by that section is denied by the commissioner or taken by the person.

* Sec. 3. AS 27.30.030(a) is amended to read:

(a) In a tax year or royalty payment period, subject to (c) of this section and the respective limitations of this subsection, the person may apply the credit, the taking of which was approved under AS 27.30.020(2), against

(1) taxes payable by the person

(A) under AS 43.65; application of the credit under this subparagraph may not exceed the lesser of

(i) 50 percent of the person's tax liability under AS 43.65 for the tax year that is related to production from the mining operation at which the exploration activities occurred, as shown under (b) of this section; or

(ii) 50 percent of the person's total tax liability under AS 43.65 for the tax year;

(B) under AS 43.20; **when the claim of the credit does not contain eligible costs of surveying information described under AS 27.30.010(a)(1) or the results of geological mapping described under AS 27.30.010(a)(5), or when the claim of the credit contains eligible costs of surveying information described under AS 27.30.010(a)(1) or the results of geological mapping described under AS 29.30.010(a)(5) and the surveying information or results of geological mapping cannot be certified by the commissioner as eligible costs under AS 27.30.012,** application of the credit under this subparagraph may not exceed the lesser of

(i) an amount equal to the amount determined under (A)(i) of this paragraph; or

(ii) 50 percent of the person's total tax liability under AS 43.20 for the tax year; [AND]

(C) under AS 43.20; when the claim of the credit contains eligible costs of either surveying information described under AS 27.30.010(a)(1) or the results of geological mapping described under AS 27.30.010(a)(5) and the surveying information or results of geological mapping are certified as eligible costs by the commissioner under

AS 27.30.012, application of the credit under this subparagraph may not exceed the greater of

(i) an amount equal to the amount determined under (A)(i) of this paragraph; or

(ii) 50 percent of the person's total tax liability under AS 43.20 for the tax year; and

(2) mineral production royalty payments payable by the person under AS 38.05.135 - 38.05.175 and 38.05.212 for production from the mining operation at which the exploration activities occurred; application of the credit under this paragraph may not exceed 50 percent of the person's mineral production royalty payment liability from the mining operation at which the exploration activities occurred.

* Sec. 4. AS 27.30.030(b) is amended to read:

(b) If the person applies the credit against the person's tax liability under (a)(1)(A)(i), [OR] (a)(1)(B)(i), or (a)(1)(C)(i) of this section, the commissioner of revenue shall disallow application of the credit under that provision unless the person files with the person's tax return an accounting of the person's mining operation activities for each mining operation that is included in the tax return and as to which the credit is being applied. The accounting of mining operation activities required by this subsection shall be made

(1) on a form prescribed by the Department of Revenue; on the form, the person shall

(A) identify the mining operations for which the credit is claimed; and

(B) set out the gross income attributable to the mining operations and other information about the mining operations that the Department of Revenue may require;

(2) without regard to an exemption to which the person may be entitled under AS 43.65.010(a).

* Sec. 5. AS 27.30.050 is amended to read:

Sec. 27.30.050. Limit on application of credit. (a) The grant of all exploration incentive credits for a mining operation under AS 27.30.010, including

credits authorized by AS 27.30.012 for geological mapping or geophysical or geochemical surveying when a mining operation is not initiated, made to a person described in AS 27.30.010(d) may not exceed $20,000,000.

(b) An exploration incentive credit for a mining operation [MAY NOT EXCEED $20,000,000 AND] must be applied within 15 tax years or royalty payment periods after the taking of the credit is approved under AS 27.30.020(2), but the tax years or royalty payment periods in which the credit is applied need not be

(1) the tax year or royalty payment period in which the person first incurs liability for payment of tax or royalty based on the person's activity that is the basis of the claim of the exploration incentive credit; or

(2) consecutive periods.

* Sec. 6. AS 27.30.090(a) is amended to read:

(a) Except as to information the disclosure of which has been authorized by AS 27.30.012, the [THE] commissioner shall keep the exploration activity data provided under AS 27.30.020 confidential for 36 months after receipt by the department.

* Sec. 7. AS 27.30.099(2) is amended to read:

(2) "eligible costs" means all expenses incurred by a person described in AS 27.30.010(d) in conducting geological mapping or geophysical and geochemical surveying without regard to whether a mining operation is initiated based on the mapping or surveying activities and, in addition, [MEAN] the costs incurred for activities in direct support of exploration activity conducted at the mining operation of the exploration activity for the purpose of determining the existence, location, extent, or quality of a mineral or coal deposit; when used with reference to activities in direct support of exploration activity conducted at the mining operation, the term

(A) includes

(i) the costs of obtaining the approvals, permits, licenses, and certificates for an exploration activity set out in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

(ii) direct labor costs and the cost of benefits for

employees directly associated with work described in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

(iii) the cost of renting or leasing equipment from parties not affiliated with the person requesting and taking the credit;

(iv) the reasonable costs of owning, maintaining, and operating equipment;

(v) insurance and bond premiums associated with the activities set out in (i) - (iv) of this subparagraph;

(vi) payments to consultants and independent contractors; and

(vii) the general expense of operating the person's business, including the costs of materials and supplies, if those expenses and costs are directly attributable to the work described in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

(B) does not include return on investment, insurance or bond premiums not covered under (A)(v) of this paragraph, or any other expense that the person has not incurred to complete work described in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

* Sec. 8. AS 27.30.099(3) is amended to read:

(3) "exploration activity data" includes, as applicable,

(A) a representative skeleton core for each hole cored or a representative set of cuttings for each hole rotary drilled;

(B) chemical analytical data, [AND] noninterpretive geophysical data, and geological mapping;

(C) aerial photographs or a topographic or geologic map showing the location of the drill holes, sample locations, or the other exploration activities undertaken;

* Sec. 9. This Act is retroactive to January 1, 1997, and applies to activities that qualify for the exploration incentive credit authorized by AS 27.30.012, added by sec. 2 of this Act, that are undertaken after December 31, 1996.

* Sec. 10. This Act takes effect immediately under AS 01.10.070(c).

0-LS0845\F
Chenoweth
4/21/97

CS FOR HOUSE BILL NO. 238( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE VEZEY

A BILL

FOR AN ACT ENTITLED

"An Act amending the program of exploration incentive credits for activities involving locatable or leasable minerals or coal deposits on certain land in the state; and providing for an effective date."

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

* **Section 1.** AS 27.30.010(a) is amended to read:

(a) <u>Except as provided in AS 27.30.012, the</u> [THE] commissioner shall grant to a person described in (d) of this section an exploration incentive credit for the eligible costs of each of the following exploration activities that are performed on or for the benefit of land in the state for the purpose of determining the existence, location, extent, or quality of a locatable or leasable mineral or coal deposit, regardless of whether the land is state-owned land:

(1) surveying by geophysical or geochemical methods;

(2) drilling exploration holes;

(3) conducting underground exploration;

(4) surface trenching and bulk sampling; [OR]

(5) **geological mapping; or**

(6) performing other exploratory work, including aerial photographs, geological and geophysical logging, sample analysis, and metallurgical testing.

* Sec. 2. AS 27.30 is amended by adding a new section to read:

Sec. 27.30.012. Credit for certain additional mapping or surveying activities. (a) For the eligible costs incurred in conducting geological mapping or geophysical and geochemical surveying when a mining operation is not initiated based on that mapping or surveying activity, an exploration incentive credit may not be certified for the eligible costs of an exploration activity set out in AS 27.30.010(a)(1) or (5)

(1) unless the person requesting the taking of the credit has first obtained a determination that

(A) the surveying information described under AS 27.30.010(a)(1) and the results of the geological mapping described under AS 27.30.010(a)(5), as appropriate, are of value to the state because they do not duplicate existing data and meet appropriate general or technical standards applicable to mapping or surveying of state land; the determination of value to the state and of compliance with standards under this subparagraph may be made on the basis of a review by

(i) the department; or

(ii) a professional geologist certified or eligible for certification under AS 08.02.011, functioning as a consultant to the department, whose services have been retained by the person requesting the taking of the credit;

(B) the surveying information recovered and geological mapping obtained were first recovered or obtained after the effective date of this Act or, if earlier first recovered or obtained, the department determines that the value of the data to the public is substantial and that the data is specifically eligible for a credit under this chapter; and

(C) the surveying information described under

AS 27.30.010(a)(1) and the results of the geological mapping described under AS 27.30.010(a)(5) have been made available to the public or will be made available to the public

(i) by publication in a recognized professional journal acceptable to the department;

(ii) by publication by the person seeking the credit in a manner and at a price acceptable to the department; or

(iii) in a manner that is otherwise acceptable to the department; or

(2) if, based on material submitted to the commissioner, the commissioner determines that the state will not accept the exploration activity data obtained from the mapping or surveying because that data duplicates existing data, does not conform to appropriate general or technical standards applicable to mapping or surveying of state land, does not comply with the standard of (1)(B) of this subsection, or cannot be made available to the public under (1)(C) of this subsection.

(b) A credit may not be obtained under this section for eligible costs that are

(1) paid for or reimbursed to the person by the federal government or the state; or

(2) eligible for the credit authorized by AS 27.30.010, whether or not the credit authorized by that section is requested or whether or not the credit authorized by that section is denied by the commissioner or taken by the person.

* **Sec. 3.** AS 27.30.020 is amended to read:

Sec. 27.30.020. Procedure for requesting and taking the credit. To obtain the credit authorized by this chapter,

(1) a person shall submit a request for the credit as follows:

(A) the person shall submit a request and a statement of expenditures for the previous calendar year not later than 60 days after the close of that calendar year; **however, if a request for the credit is based solely on activity that may qualify for the credit under AS 27.30.012, the deadline set out in this subparagraph does not apply;**

(B) the request must

(i) describe the work accomplished during the previous year, the number of employees, and the names and number of consultants; and

(ii) provide a detailed list or ledger of expenditures of the accomplishments described in (i) of this subparagraph and a list of exploration activity data that in the future will be made available to the commissioner under (2)(A) of this section;

(C) the person submitting the request is not required to transmit copies of receipts with the request, but the statement of expenditures is subject to audit in the discretion of the commissioner;

(D) if the commissioner determines to audit the statement of expenditures, the commissioner may require the person submitting the request to justify claims of expenditures with receipts and other reliable information;

(E) the commissioner shall respond to the request by September 30 by certifying or not certifying the person's expenditures; if the commissioner

(i) does not certify expenditures, the commissioner shall state the reasons for denial of certification and give the person making the request an opportunity to correct any problems or to provide additional information;

(ii) certifies expenditures, the commissioner shall specify the exploration activity data requirements for that year that must be presented to the department at the time of the taking of the credit;

(F) if the commissioner neither certifies nor denies certification of expenditures by September 30, the expenditures are certified as submitted;

(2) the person whose expenditures have been certified under (1) of this subsection may thereafter request the taking of the credit for the certified expenditures as follows:

(A) the person shall deliver to the commissioner the exploration activity data identified by the commissioner under (1)(E)(ii) of this section, and shall request the commissioner's approval of the taking of the credit;

(B) the commissioner shall approve or disapprove the taking of the credit within six months after receipt of the request for taking of the credit; if the

(i) exploration activity data complies with the requirements identified by the commissioner under (1)(E)(ii) of this section, the commissioner shall approve the taking of the credit;

(ii) request is disapproved, the commissioner shall state the reasons for disapproval and offer the person seeking to take the credit an opportunity to correct any problems or to provide additional exploration activity data or other information;

(C) if the commissioner neither approves nor disapproves the request to take the credit within six months after submission of the request, the taking of the credit is approved.

* Sec. 4. AS 27.30.030(a) is amended to read:

(a) In a tax year or royalty payment period, subject to (c) of this section and the respective limitations of this subsection, the person may apply the credit, the taking of which was approved under AS 27.30.020(2), against

(1) taxes payable by the person

(A) under AS 43.65; application of the credit under this subparagraph may not exceed the lesser of

(i) 50 percent of the person's tax liability under AS 43.65 for the tax year that is related to production from the mining operation at which the exploration activities occurred, as shown under (b) of this section; or

(ii) 50 percent of the person's total tax liability under AS 43.65 for the tax year;

(B) under AS 43.20; **when the claim of the credit does not contain eligible costs of surveying information described under AS 27.30.010(a)(1) or the results of geological mapping described under AS 27.30.010(a)(5), or when the claim of the credit contains eligible costs of surveying information described under AS 27.30.010(a)(1) or the results**

of geological mapping described under AS 29.30.010(a)(5) and the surveying information or results of geological mapping cannot be certified by the commissioner as eligible costs under AS 27.30.012, application of the credit under this subparagraph may not exceed the lesser of

(i) an amount equal to the amount determined under (A)(i) of this paragraph; or

(ii) 50 percent of the person's total tax liability under AS 43.20 for the tax year; [AND]

(C) under AS 43.20; when the claim of the credit contains eligible costs of either surveying information described under AS 27.30.010(a)(1) or the results of geological mapping described under AS 27.30.010(a)(5) and the surveying information or results of geological mapping are certified as eligible costs by the commissioner under AS 27.30.012, application of the credit under this subparagraph may not exceed the greater of

(i) an amount equal to the amount determined under (A)(i) of this paragraph; or

(ii) 50 percent of the person's total tax liability under AS 43.20 for the tax year; and

(2) mineral production royalty payments payable by the person under AS 38.05.135 - 38.05.175 and 38.05.212 for production from the mining operation at which the exploration activities occurred; application of the credit under this paragraph may not exceed 50 percent of the person's mineral production royalty payment liability from the mining operation at which the exploration activities occurred.

* Sec. 5. AS 27.30.030(b) is amended to read:

(b) If the person applies the credit against the person's tax liability under (a)(1)(A)(i), [OR] (a)(1)(B)(i), or (a)(1)(C)(i) of this section, the commissioner of revenue shall disallow application of the credit under that provision unless the person files with the person's tax return an accounting of the person's mining operation activities for each mining operation that is included in the tax return and as to which the credit is being applied. The accounting of mining operation activities required by

this subsection shall be made

(1) on a form prescribed by the Department of Revenue; on the form, the person shall

(A) identify the mining operations for which the credit is claimed; and

(B) set out the gross income attributable to the mining operations and other information about the mining operations that the Department of Revenue may require;

(2) without regard to an exemption to which the person may be entitled under AS 43.65.010(a).

* Sec. 6. AS 27.30.050 is amended to read:

Sec. 27.30.050. Limit on application of credit. **(a) The grant of all exploration incentive credits for a mining operation under AS 27.30.010, including credits authorized by AS 27.30.012 for geological mapping or geophysical or geochemical surveying when a mining operation is not initiated, made to a person described in AS 27.30.010(d) may not exceed $20,000,000.**

(b) An exploration incentive credit for a mining operation [MAY NOT EXCEED $20,000,000 AND] must be applied within 15 tax years or royalty payment periods after the taking of the credit is approved under AS 27.30.020(2), but the tax years or royalty payment periods in which the credit is applied need not be

(1) the tax year or royalty payment period in which the person first incurs liability for payment of tax or royalty based on the person's activity that is the basis of the claim of the exploration incentive credit; or

(2) consecutive periods.

* Sec. 7. AS 27.30.090(a) is amended to read:

(a) **Except as to information the disclosure of which has been authorized by AS 27.30.012, the** [THE] commissioner shall keep the exploration activity data provided under AS 27.30.020 confidential for 36 months after receipt by the department.

* Sec. 8. AS 27.30.099(2) is amended to read:

(2) "eligible costs" **means all expenses incurred by a person**

described in AS 27.30.010(d) in conducting geological mapping or geophysical and geochemical surveying without regard to whether a mining operation is initiated based on the mapping or surveying activities and, in addition, [MEAN] the costs incurred for activities in direct support of exploration activity conducted at the mining operation of the exploration activity for the purpose of determining the existence, location, extent, or quality of a mineral or coal deposit; when used with reference to activities in direct support of exploration activity conducted at the mining operation, the term

(A) includes

(i) the costs of obtaining the approvals, permits, licenses, and certificates for an exploration activity set out in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

(ii) direct labor costs and the cost of benefits for employees directly associated with work described in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

(iii) the cost of renting or leasing equipment from parties not affiliated with the person requesting and taking the credit;

(iv) the reasonable costs of owning, maintaining, and operating equipment;

(v) insurance and bond premiums associated with the activities set out in (i) - (iv) of this subparagraph;

(vi) payments to consultants and independent contractors; and

(vii) the general expense of operating the person's business, including the costs of materials and supplies, if those expenses and costs are directly attributable to the work described in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

(B) does not include return on investment, insurance or bond premiums not covered under (A)(v) of this paragraph, or any other expense that the person has not incurred to complete work described in AS 27.30.010(a) [AS 27.30.010(a)(1) - (5)];

* Sec. 9. AS 27.30.099(3) is amended to read:

(3) "exploration activity data" includes, as applicable,

(A) a representative skeleton core for each hole cored or a representative set of cuttings for each hole rotary drilled;

(B) chemical analytical data, [AND] noninterpretive geophysical data, **and geological mapping**;

(C) aerial photographs or a topographic or geologic map showing the location of the drill holes, sample locations, or the other exploration activities undertaken;

* Sec. 10. This Act is retroactive to January 1, 1997, and applies to activities that qualify for the exploration incentive credit authorized by AS 27.30 that are undertaken after December 31, 1996.

* Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

Department of Natural Resources

Preliminary Analysis of HB 238

by
Division of Geological and Geophysical Surveys

This analysis addresses the financial implication of implementing the state's receipt and archiving of mineral-related geologic data from private companies seeking to earn a mineral exploration incentive tax credit.

The concept of acquiring mineral exploration data on Alaskan lands in exchange for a corporate tax credit is certainly worthy of serious consideration. It offers a means of building an in-state minerals-related database at a more rapid rate than can be achieved by the state alone. If done correctly, these data would provide a valuable and growing incentive to future exploration ventures in Alaska.

To be of any value to the state of Alaska or to future private sector mining ventures, the geologic data submitted for the tax credit would have to be timely, of suitable quality, and systematically organized and preserved. The archive system would have to allow for convenient public access at nominal cost to the public. If not maintained, the data submitted would soon be worthless. On the other hand, if adequately supported the database created would continually grow in value and could materially contribute to the creation of new employment opportunities throughout the state.

House Bill 238 will result in the annual submittal of a significant number of maps, cross-sections, drill logs, geochemical analyses, airphotos, and geological reports to DNR. At a minimum, these materials will have to be audited to determine whether they qualify for acceptance as a basis for establishing a mineral exploration tax credit. Such an audit is not a trivial exercise. It requires the attention of an experienced professional geologist.

In 1996 there were 52 major mineral exploration programs active in Alaska and scores of small scale prospecting efforts that could qualify for the HB238 incentive tax credit. Disregarding the prospector-scale efforts, the 52 major programs represent the generation of a multi-million dollar volume of data. In practice, a large portion of that data volume would have to be audited, organized, and entered into an active database each year. Thereafter, there would be a continually growing volume of data to be actively maintained so that it is readily accessible to the public throughout Alaska.

In 1947 the province of British Columbia started a similar but less ambitious mineral property database. Their system is still in use today and similar systems have been created in the other provinces of Canada. The British Columbia system requires companies or individuals to file an annual property report or pay $200 per claim for all mineral properties held in good standing. Actual data, maps, drill logs, etc. are optional. The annual reports usually are between 10 -15 type-written pages. Their data base consists of recording the availability of these documents in a PC database, extracting some specific information into the database, and microfilming the volunteered maps and drill logs. Newfoundland has a similar system but requires that the reports be filed in digital computer format.

British Columbia is maintaining a significantly simpler system of privately contributed data than what will result from HB238. Nevertheless, the annual maintenance of their system requires[1] :

---

[1] Dr. Ron Smyth, Director and Chief Geologist, Geological Survey Branch, British Columbia Division of Energy and Mines

1. One full time professional geologist auditor dedicated to examining the reports and data to determine whether they meet the minimum requirements for acceptance
2. Two full time professional geologists dedicated to organizing, and archiving the reports and geological data - including maintaining the PC-based database
3. A quarter to half-time system analyst dedicated to maintaining the PC-computer database system
4. A contractor who microfilms the maps and reports.

One can debate whether more or fewer resources would be needed to implement the review, acceptance and archiving of the data that will be submitted as a result of HB 238. As a first approximation, however, it is reasonable to expect that the fewer properties in Alaska versus British Columbia is offset by the more voluminous, non-standard, and therefore more costly, data that will have to be evaluated or processed by DNR as a result of HB 238. One can also debate whether the private sector can implement the system more cost effectively than can DNR. Somewhere, however, funding is going to have to be made available to sustain something like the above roster of resources. Some of those resources must be in DNR even if the majority of them are embodied in outside contractors. From a fiscal standpoint this is merely a shift from the 100-line to the 300-line.

A direct corporation-to-public at large transfer of data is probably an unworkable model. The mineral-related geological and geophysical data base implied in HB238 has value only if it is consistently updated and preserved in a way that the information is easily accessible to the public Corporations and small mining companies alike are ephemeral entities in this state: companies leave the state, companies cease to exist, many companies are single venture promotions, companies merge. When any of these things happen who does the public turn to? Who does the state hold accountable? It also is hard to believe that the public at large would be very satisfied with having to visit individual companies all over Alaska to acquire the released data. How would anyone know what was available and from whom? How would they deal with out of state companies? What would guarantee the long term preservation of the data the state had given a credit for?

These concerns raise the point that the entire concept of giving a tax credit for data submittals is only viable if the state, itself, makes a long term commitment to provide the resources necessary to preserve, maintain, and update the database.

ALASKA MINERS ASSOCIATION, INC.
501 W Northern Lights Blvd. Suite 203 Anchorage, Alaska 99503 FAX (907) 278-7997 Telephone (907) 278-0347

April 17, 1997

Honorable Al Vezey
Alaska State House
Capitol Building
Juneau, AK 99801

RE: House Bill 238, Amending Exploration Incentive Credits

Dear Representative Vezey,

We are writing in support of your recently introduced House Bill 238 that would amend the statute regarding exploration investment incentive credits. We feel that HB-238 would be complementary both to the existing incentive program and to the state's on-going investments in minerals data collection.

HB-238 addresses a perplexing question that has been discussed for many years within the mining industry. That is, many companies have made investments to collect data about the mineral resources of the state and then, for various reasons, have not continued with the projects. The data generated is proprietary and because it may be of value in the future, it is kept confidential within that company. This bill will provide an incentive for companies to release the information and would provide a mechanism so the data would become available to the public. The cost to the state in the form of a tax credit would be significantly less than the cost for the DNR Division of Geologic & Geophysical Surveys to obtain the same data using its personnel. Also, the release of the data would create new interest and encourage investment in Alaska by other companies.

We see several challenges that need to be addressed and thought through to make this type of a program work effectively. One item is to insure that data submitted for a credit is of value to the state. Data that the state already has should not qualify unless it brings something new to light. A second item concerns the quality, format, detail (spacing of data points), etc. of the data. Another issue is to insure that the final data package for use by the public will be of the same quality as existing DGGS materials.

We have read the bill but have not studied it in sufficient detail to know *if* these issues are addressed. We do not see these points as problems but rather as issues that need careful review and consideration. The current exploration investment credit program, which you sponsored with Representative Foster, has been a great success and at very little cost to the state. That success is due to the fact that industry, the sponsors, and DNR worked together on the bill for several months to insure that all the relevant questions were addressed.

We would propose that this same approach be taken with HB-238 Specifically, we suggest that over the up-coming summer and fall, we work together with DNR to evaluate the bill and the issues noted above in-depth and then be prepared to move forward with this bill in the Second Session of the 20th Legislature.

Thank you for introducing HB-238. We believe it has tremendous potential and look forward to seeing this bill become an added incentive for companies to invest and create additional new jobs in Alaska.

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc. Commissioner John Shively

ALASKA MINERS ASSOCIATION, INC.
501 W Northern Lights Blvd Suite 203 Anchorage, Alaska 99503 FAX (907) 276-7997 Telephone (907) 276-0347

April 30, 1997

Honorable Al Vezey
Alaska State House
Capitol Building
Juneau, AK 99801

RE: House Bill 238, Amending Exploration Incentive Credits

Dear Representative Vezey,

We are reviewing the Committee Substitute for your House Bill 238, CSHB-238( ) version "F", that would amend the statute regarding exploration incentive credits. We appreciate your efforts to incorporate comments from our letter of April 17, 1997.

We are still reviewing the CS in detail but have some initial comments that we felt should be raised. An over riding request by several persons I have talked to about this bill is that nothing be done that could complicate the existing statute for either the public or the State. During our review it became apparent that many of the questions we were seeing could be answered better if HB-238 was a stand-alone statute, with possibly some references to the existing statute, rather than an amendment of the existing statute.

It is also apparent that some of the underlying principles of the existing exploration incentive authorized by AS 27.30 are different than those contemplated in HB-238 and that the opportunity for misunderstanding by the industry and the state is significantly greater. The common principles for both bills include encouraging mineral investment that will create new jobs. Principles of the existing statute include: raw data only, not interpretation, tied to a specific mine, clearly defined cut-off point to insure that mine development or operating costs were not included, defined maximum credit per mine. When combined, these aspects result in a narrowly focused bill with clear side-boards.

Conversely, HB-238 has a much broader application and its principles are: get what is otherwise proprietary raw data into public domain, get what is otherwise proprietary interpretation (geologic maps) into public domain, covers both new and previously collected data and interpretation. To make this work effectively and ensure needed side-boards the challenge will be to: insure quality of data and interpretation, get data and interpretation in common, usable, and reproducible form (i.e. the same form as DGGS now sells to the public), insure material is not a duplication, insure material is not data tied to a mine, include procedures to insure that the difficulty and cost to administer the incentive is minimized.

Another factor affecting HB-238 is that HB-46 needs to pass and become law so we know exactly how to reference the existing statute HB-46 contains changes to when the application must/can be filed, a fee requirement, etc The need for HB-46 to be in statute applies equally to amending the statute or to adding a new stand-alone portion

As noted in our previous letter, the success of the current exploration incentive credit program is due in part to the fact that the bill was thoroughly reviewed over a period of several months and this insured that all the relevant questions were addressed. We would like to suggest that once the current session of the Legislature is adjourned DNR, DOR, AMA (T Crafford, D.Manzer & myself), the Council of Alaska Producers, and you get on a teleconference and continue detailed review of the bill. This form of group review is the most effective way to work through the questions that are being raised.

Thank you for your consideration of these items

Sincerely,

Steven C Borell, P.E.
Executive Director

cc: Commissioner John Shively

DEPARTMENT OF NATURAL RESOURCES

Preliminary Analysis of HB 238

by

Division of Mining and Water Management
and
Division of Geological and Geophysical Surveys

April 17, 1997

- The overall concept of increasing the basic geological survey data in Alaska, regardless of land ownership, available to the public has merit.

- Several items of how HB 238 would work are not clear. Accordingly, the two Divisions of the Department of Natural Resources are not yet able to meaningfully recommend a position to the Department on the specifics of HB 238 in its present form or the potential costs to the Department of Natural Resources if implemented in its present form.

- Areas where there is a degree of uncertainty include the following:

a. When does the data for a mineral property or area that does not otherwise qualify for the exploration incentive credit become stale?

b. How are data that duplicates information already available to the public in part or in total to be credited?

c. How is this new credit to be considered when it involves a mineral property that subsequently qualifies for the existing exploration incentive credit program, and is part of the existing $20 million cap?

d. What is the standard of public availability--a professional publication, a draft report on file in a company office in Alaska or elsewhere, a report on file with the Division of Geological and Geophysical Surveys, and other related questions about availability?

e. How are the new credits that are totally or partially developed with federal, state, or other public funding to be treated?

f. What is the standard for determining whether the eligible costs in the new credit are reasonable?

g. Applications for the existing exploration incentive credit program over the past two years involve 139 individual mineral properties for a total expenditure of about $50 million. The supporting information with these applications suggest that up to $37 million might be an "eligible cost" under the HB 238 if none ever resulted in a producing mine. Is the intent of the Legislature?

- Close working relationships were developed between the Legislature, mining industry, Attorney General's Office, Department of Revenue and Department of Natural Resources during the consideration of the Exploration Incentives Credit Act (AS 27.30) in the last Legislature. Those working relationships have continued as a Department form for filing applications for exploration credits was prepared and then reviewed after the first year of use. These same relationships led to proposed amendments to the parent program in this Legislature with the introduction of HB 173 by Representative Foster and its subsequent incorporation into HB 46 (Representatives Kelly and Theriault) in the Senate Resources Committee with the full support and encouragement by the Administration.

Recommendation: Use the existing stakeholder relationships to (1) respond to the questions about how the intent of HB 238 can be effectively implemented and, as appropriate, (2) develop specific amendments to HB 238. This can take place over the summer with amendments developed with the sponsor prior to the next session. At that time the Administration, sponsor, and mining industry can be in a position to develop consensus to the maximum extent possible and for all to understand the rationale on any differences.

HB

243

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 243

Revision Date:
Title: Extend Current Subsistence Law
Dept. Affected: Fish and Game
BRU: Subsistence
Component: Subsistence
Sponsor: House Fisheries
Requester: House Resources
COMPONENT SERIAL NO. 483

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL		1.0				
CONTRACTUAL		6.8				
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	7.8	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		7.8				
1005 GF Program Receipts						
1037 GF Mental Health						
Other						
TOTAL		7.8				

Estimate of any current year (FY97) cost: $ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The preparation of this report would be performed by a contractor as was the 1996 report. The cost for this report is based on the cost of the 1996 report.

Prepared by: Mary Pete — Mary C. Pete
Division: Division of Subsistence
Phone: 465-4146
Date: 4/18/97

Approved by Commissioner: Frank Rue — Orson Bruce for
Agency: Fish and Game
Date: 4/18/97

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSSHB243(RES)

Dept. Affected Dept. of Fish & Game
BRU:

Title: An Act delaying the repeal of the current law regarding subsistence use of fish & Game...

Sponsor: House Special Committee on Fisheries
Requestor: House Resources Committee

Components:
Serial #

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants, Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	0.0	0.0	0.0	0.0	0.0	0.0
Federal Fund	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)
see attached analysis

Prepared by: House Resources Committee
Co-Chairman Scott Ogan

Scott Ogan

Date: May 2, 1997
Phone: (907)465-3715

Phone:

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SSHB 243

Revision Date: 4/30/97
Title: Extend Current Subsistence Law

Dept. Affected: Fish and Game
BRU: Subsistence
Component: Subsistence

Sponsor: House Fisheries
Requester: House Resources

COMPONENT SERIAL NO. 483

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL		0.0				
CONTRACTUAL		0.0				
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		7.8				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL		7.8				

Estimate of any current year (FY97) cost: $ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Mary Pete Mary C. Pete
Division: Division of Subsistence
Phone: 465-4146
Date: 4/30/97

Approved by Commissioner: Frank Rue Geron Bruce for
Agency: Fish and Game
Date: 4/30/97

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ALASKA STATE LEGISLATURE

House of Representatives
Special Committee on Fisheries

SPONSOR STATEMENT
HB 243

Under terms of the Act by which the state's 1992 subsistence law was enacted (Sec. 3, CH 1, SSSLA 1992), the 1992 law will be repealed on October 1, 1997. It will then be replaced by its predecessor, the 1986 subsistence law. This "sunset" provision was premised on the expectation that the legislature would consider reinstating the 1992 law following a review by the Governor.

Although there are many similarities between the 1986 and the 1992 versions of Alaska's subsistence law, there are some significant differences which favor the 1992 law.

First, the 1992 law incorporates the concept of "nonsubsistence areas" which was recently upheld by the Alaska Supreme Court. These are areas or communities where dependence on subsistence is not a principal characteristic of the economy, culture and way of life of the community or area, as determined by the Boards of Fisheries and Game based on several specific criteria. This allows the Boards the identify places such as the Anchorage bowl or parts of the Kenai Peninsula where the subsistence priority does not apply.

A second major advantage of the 1992 law is its definition of "customary and traditional", "customary trade" and "reasonable opportunity". These definitions are lacking in the 1986 law and hence are a continuous focus of controversy and litigation. the definitions in the 1992 law recognize prior interpretations of the Boards and give them latitude to further refine those definitions. The definition of "customary trade" and its legislative history clarify that trade is noncommercial and also requires the Boards to identify and provide for those trades.

Another advantage of maintaining the 1992 law is that all Board regulations will remain intact. If the law is allowed to sunset, the Boards will be required

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to review all regulations for consistency with the 1986 subsistence law. In 1989, the rural preference in the 1986 law was deemed unconstitutional by Alaska Supreme Court in McDowell v. Alaska. Reviewing and rewritting current subsistence regulations would be a time-consuming, expensive process that will disrupt the Boards' regulatory meetings and create public confusion. This disruption should not occur until the legislature decides that it prefers to return to the provisions of the 1986 law.

In sum, the clarifying definitions alone make the 1992 law an improvement over the 1986 law. Reverting to the 1986 law will be costly to the state and its citizens, both in terms of money and public confusion, and will serve no purpose. HB 243 should be passed to simply extend the state's 1992 subsistence law.

How Alaska's Subsistence Law is Working: Comparing Its Implementation Before and After 1992

Steven R. Behnke
Steven R. Behnke and Associates,
Juneau, Alaska

A Report to the
Alaska Department of Fish and Game
Division of Subsistence
March 1, 1996

How Alaska's Subsistence Law is Working: Comparing Its Implementation Before and After 1992

Steven R. Behnke
Steven R. Behnke and Associates,
Juneau, Alaska

A Report to the
Alaska Department of Fish and Game
Division of Subsistence
March 1, 1996

Introduction

This report examines the implementation of Alaska's 1992 subsistence law. It provides background for the Nineteenth Alaska State Legislature as it considers whether to reauthorize the 1992 law before key provisions sunset in October 1996, or to make other changes concerning the subsistence statute. This report updates and extends the analysis that ADF&G prepared for the legislature in January 1995 (Report on Implementation of the 1992 Subsistence Law, Alaska Department of Fish and Game, Division of Subsistence, January 1995).

The legislature amended the subsistence law in 1992 to address perceived problems with the 1986 law, including lawsuits that had arisen during its implementation. This report has two major objectives. The first objective is to describe the key differences between the 1992 law and the 1986 law. These involve four primary areas -- who qualifies for subsistence uses, where subsistence uses occur, providing for subsistence uses with regulations, and operation of the subsistence preference. The second objective is to examine how the 1992 law is being interpreted and implemented. This report does not address the problems created by dual state-federal management, and does not make recommendations for changes to the 1992 law.

Before proceeding, it is important to consider the purpose of the subsistence law. Alaskans from all walks of life make widely differing uses of fish and wildlife. For more than twenty years the state has wrestled with the question of how to protect the subsistence taking, uses, and practices of the people in the communities with the greatest dependence and historic reliance upon fish and wildlife for domestic consumption. Throughout this debate there has been widespread agreement that there is a need for some sort of protections for subsistence, but considerable disagreement about who should benefit and how to accomplish it.

One aspect of fish and wildlife management during this century has been the uneasy relationship between the fish and wildlife harvest patterns that people follow in small communities in Alaska and the laws and regulations created by government to regulate them.

- Subsistence patterns are developed by custom in small Alaska communities, and passed down through oral traditions and practice. They are "customary and traditional" uses that follow local rules within small communities.

- Subsistence uses of fish commonly include harvesting fish with efficient gear (such as nets, fishwheels, and hook-and-line); preserving fish for use (such as through freezing, drying, smoking, and salting); distributing fish through sharing and small-scale barter and trade; and consuming fish products.

- Subsistence uses of wildlife commonly include efficient hunting and trapping for big game (including moose, caribou, deer, sheep, goats, black bear, and brown bear), small game-fur bearers (including beaver, hare, fox, and wolf), and birds (including geese, ducks, and ptarmigan); preserving meat and furs; distributing meat and furs through sharing and small-scale barter and trade; and using meat and fur products as food and crafts.

- Subsistence patterns are common practices of families in small communities; they serve as a base for the economy, culture, and way of life in many Alaska communities.

By contrast, the written laws and regulations of the government pertaining to fishing and hunting have been developed primarily by legislatures, boards, and courts which to a great extent are distant from the small villages geographically, culturally, and politically. Families dependent upon subsistence in small communities have frequently found that their customary ways of taking and using wild foods are at odds with written laws and regulations regarding wild resource use.

This uneasy relationship of traditional practice and government regulation is at the heart of the subsistence issue, and is the main subsistence issue that must be addressed from the point of view of families dependent upon subsistence.

- Subsistence fishers and hunters don't want to be criminals in order to continue to feed their families;

- They wish that their customary and traditional patterns of resource use could be recognized and accommodated by the laws and regulations of government.

In situations where fish and wildlife use are such important parts of people's lives, there has to be mutual trust and cooperation between the people doing the regulating and those that are regulated if fish and wildlife populations and their uses are to be maintained.

The state subsistence law and federal subsistence laws were steps toward addressing these issues. The federal subsistence law and the pre- 1992 state subsistence law recognized the importance of the customary and traditional patterns of subsistence hunting and fishing that occurred in "rural" Alaska, and predominately in small villages. This is explicit in the legislative history of both the state and federal laws, as well as implicit in policy and legislation. As early as 1973 the Boards of Fisheries and Game had adopted a policy giving subsistence the "highest priority among beneficial uses." In 1975 the state legislature adopted legislation permitting the establishment of subsistence hunting zones to reduce competition between local residents and urban hunters, although none were ever established. The 1978, 1986, and 1992 subsistence legislation each acknowledged the importance of subsistence uses of fish and wildlife.

While the precise boundaries of the class of people intended to be protected by the state and federal laws are fuzzy, there is considerable agreement about the core of this class. Most commentators seem to agree that the subsistence law should protect uses of fish and wildlife by people living in small communities where a high proportion of residents have historically relied upon fish and wildlife for a large part of their livelihood, and with cultural and social ties based upon those uses. The Alaska Supreme Court concisely summarized these characteristics as including:

> ... economies which rely on hunting, fishing and gathering activities, strong kinship bonds, isolation from those parts of Alaska that approximate mainstream America, different seasonal activity patterns, concepts of time and scheduling, which in accordance with other cultural divergences, may be quite different from those of mainstream America, and finally, very limited participation in the cash economy. (Alvarado v. State, 486 P.2nd 891, 894 Alaska 1971).

The 1986 State Subsistence Law

In passing the first state subsistence law in 1978 the Alaska legislature found that "it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs, and traditions of Alaskan residents" (Sec. 1 ch. 151 SLA 1978). The 1978 law did four major things to accomplish this. (1) It defined subsistence uses. (2) It required the Alaska Boards of Fisheries and Game to adopt regulations permitting subsistence uses to occur when a harvestable surplus of a resource was available. (3) It established that in times of resource shortage, subsistence uses be given a preference over other uses, such as commercial, sport, or personal use. This meant that subsistence hunting and fishing were to be restricted last whenever it became necessary to restrict harvest opportunities for conservation purposes. (4) It created the Division of Subsistence within the Department of Fish and Game to provide information about subsistence and to assist the boards in carrying out the law.

In 1980 Congress passed Title VIII of ANILCA, which incorporated the basic ideas and language of the state law. The federal law, however, limits the subsistence preference to "rural Alaska residents" (P.L. 96-487, December 2, 1980 [94 Stat. 2371]). The federal law applies to federal public lands, but offers the state the option of continuing to manage subsistence on all lands in the state, if the Alaska legislature enacts "laws of general applicability which are consistent with and provide for the definition, preference, and participation specified [in the federal law]." The state initially attempted to comply with ANILCA by adopting a rural preference in regulation. After this was overturned by the Alaska Supreme Court in Madison, the legislature revised the subsistence statute in 1986, amending the definition of "subsistence uses" to read:

> the noncommercial, customary and traditional uses [IN ALASKA] of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption (AS 16.05.940(23)).

The legislature also defined "rural area" as:

> a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area (AS 16.05.940(32)).

The 1986 law also more explicitly defined steps to be taken by the boards in providing for subsistence. It required that the boards first identify the rural areas of the state, and then identify the fish stocks and game populations that are customarily and traditionally used for subsistence in those areas. For the stocks and populations identified as having customary and traditional uses, the board must then determine the harvestable surplus, and the portion of that surplus needed to provide a reasonable opportunity to satisfy subsistence uses. Finally, the board must adopt subsistence regulations necessary to provide for that opportunity.

The Department of the Interior quickly certified the 1986 law as consistent with ANILCA. Beginning that year the boards engaged in an ambitious effort to identify rural areas, customary and traditional uses, and fishing and hunting regulations that provided for subsistence uses. This process was nominally completed for most of the major subsistence hunts and fisheries in the state by 1990. Due to time constraints and conflicts, the Board of Game simply renamed existing general hunting regulations as subsistence regulations in many cases. Both boards noted that they would continue to accept specific proposals from the public for additional changes to subsistence regulations, and to apply the state law on a case by case basis.

The 1986 state subsistence law set up a procedure for state boards to identify subsistence uses by rural residents and provide for them in regulation.

- Areas and people participating in customary and traditional uses were supposed to be identified; and,

- Customary and traditional uses of fish and game were supposed to be identified and provided for in regulation, consistent with sustained yield management.

In addition, two protections for subsistence patterns were provided in the pre-1992 state subsistence law and the federal subsistence law:

- Subsistence practices in rural areas should not be unreasonably restricted by fishing and hunting regulations. That is, regulations must "provide" for established subsistence uses.

- When there are not enough wild fish or game to meet all consumptive uses, subsistence practices should be restricted only after sport fishing, general hunting, and commercial fishing. That is, subsistence has a "preference" over other types of fishing and hunting.

The state's pre-1992 subsistence law was still in the process of being implemented in regulation by the state Boards of Fisheries and Game when state law fell out of compliance with federal law in 1990. There were therefore still many unresolved inconsistencies between established subsistence practices in small villages and what was legal in regulation.

The 1992 State Subsistence Law

The legal foundation for state subsistence management changed abruptly in December of 1989 when the Alaska Supreme Court ruled that the rural provisions of the state's subsistence law violated the Alaska constitution (McDowell v. State 785 P. 2d 1 Alaska 1989). The court prohibited the state from using rural residency as the basis for subsistence eligibility. On remand to the superior court, the rural provisions were severed from the 1986 subsistence law, leaving the rest of the law intact.

This legal decision rendered the state law inconsistent with ANILCA Title VIII, the federal subsistence law, which defined subsistence as a use by rural people. Subsequently, in July of 1990, the federal government took over management of subsistence hunting on federal public lands in Alaska to provide for subsistence uses by rural Alaska residents on federal public lands. The state continued to manage for subsistence hunting and fishing in Alaska under the 1986 state law, but without the rural provisions. This resulted in state subsistence hunts and fisheries open to all Alaska residents (the so-called "all Alaskans" approach), and federal subsistence hunts on federal public lands open to qualified rural residents.

In the spring of 1990 the Alaska legislature considered placing a constitutional amendment before voters that would enable the state to meet ANILCA standards. That effort failed, as did a subsequent effort during a special legislative session in June of 1990.

Governor Hickel convened a Subsistence Advisory Council in 1991, shortly after taking office. He then brought its ideas concerning the subsistence issue to the 1992 legislative session. When the legislature adjourned in May of 1992 without taking any action on subsistence, the governor called a special legislative session in the summer of 1992. A range of subsistence management options were considered by the legislature. The subsistence law that eventually resulted from the 1992 special session made several changes in the state subsistence law. These did not bring the state's program into compliance with ANILCA.

The most substantive change, which was made to comply with the Supreme Court's ruling in McDowell, is that the 1992 law removes any reference to rural residents as the people whose uses of fish and wildlife are protected by the law. Another major difference is that the 1992 law explicitly prohibits the Boards of Fisheries and Game from permitting subsistence hunting or fishing in areas identified by the boards as "nonsubsistence areas". The 1992 law also defines some key terms that had been used in implementing the 1986 law but had not been defined in statute, and sets out specific procedures for the boards to follow in implementing the 1992 law. In summary the 1992 law:

- Allows any Alaskan to participate in subsistence hunts and fisheries if they use the fish or game harvested for subsistence purposes (such as personal or family consumption, sharing, and crafts).
- Directs the boards to identify "nonsubsistence areas" and to prohibit subsistence fishing and hunting in them.
- Establishes explicit procedures for implementing the subsistence preference.

- Defines "reasonable opportunity", "customary trade", and "customary and traditional".

- Includes a "sunset" provision calling for a review of the operation of the law by the governor and the legislature and a return to the 1986 law if no action is taken by the legislature.

Effects of Changes in the Subsistence Law

This section examines key differences between the 1986 and 1992 laws, and how they have been implemented. It is organized in terms of the four areas of major difference between the laws -- who qualifies for subsistence, where subsistence uses can occur, providing for subsistence uses in regulation, and the operation of the subsistence preference. Each section discusses the differences between the laws and their implementation.

Who Qualifies for Subsistence

"Rural Provisions" Severed from the 1986 Statute

Subsistence Users Can No Longer Be Clearly Identified by the Boards.

- **Pre-1990.** Rural residency was a tool used by the joint board to clearly identify the relatively small proportion of Alaska residents who rely on customary and traditional subsistence fisheries and hunts. The joint board identified about 20% of state residents as rural residents, who are potential subsistence users; the other 80% of state residents were identified as non-rural residents who could hunt under general hunting regulations or fish under sport or personal use regulations.

- **Post-1992.** Without rural residency as a board management tool, large numbers of urban-based sport hunters or personal use fishers now pass as subsistence users. Without the concept of subsistence as a rural use, it is unclear who a subsistence user is and what it is based on. The "new" urban subsistence users potentially overwhelm accessible customary and traditional subsistence fisheries and hunts, to the detriment of subsistence-dependent rural villages and other established uses (commercial fisheries, sport fisheries, non-resident sport hunts, guided hunts). The boards have dealt with this by restricting subsistence hunting regulations, creating Tier II hunts, and creating nonsubsistence areas (described below).

Where Subsistence Uses Occur

"Nonsubsistence Area" Provisions

Subsistence Use Areas Potentially Expand to Include All Urban Areas.

- **Pre-1990.** The rural provision of the pre-1990 law was a tool used by the boards to clearly identify areas where customary and traditional subsistence uses occurred -- subsistence occurred in areas "reasonably accessible" to rural communities, which in effect means subsistence use areas were rural areas.

- **Post-1992.** Without the rural provision as a management tool, the boards have been faced with the prospect of having to create subsistence hunts or subsistence fisheries wherever urban-based sport hunters or personal use fishers go, such as in urbanized areas like the Anchorage Bowl, Mat-Su Valley, Fairbanks North Star Borough, or the roaded Kenai Peninsula. The 1992 law attempted to address this effect with the "nonsubsistence area" concept, described below.

Nonsubsistence Area Provisions Were Used to Create Five Nonsubsistence Areas.

- **Pre-1990.** Because subsistence was a rural use near rural communities, the boards recognized only a few subsistence fisheries or hunts around urbanized areas (for instance, the Tyonek subsistence salmon fishery across Cook Inlet from Anchorage). In urbanized areas, most hunting was managed under general hunting regulations and most fishing was managed under sport, personal use, and/or commercial regulations.

- **Post-1992.** The joint board used the nonsubsistence area provisions in the 1992 law to create five nonsubsistence areas around urbanized population. At present, the nonsubsistence areas adopted by the joint board are similar to the nonrural areas identified before 1989 under the previous law. It is uncertain whether other areas might be identified as nonsubsistence areas by future joint board action. The statute provides no guidance on the number, relative size, or precise boundaries of nonsubsistence areas, leaving these matters up to the joint board. This lack of guidance raises several concerns. As evidenced by public proposals and board discussion, the nonsubsistence area provisions hold the potential for eliminating subsistence use patterns of rural villages, if they are applied in certain ways. Subsistence use areas of villages commonly overlap harvest areas used by urban-based residents. In the overlap area, subsistence uses can be eliminated if the urban-based users become a simple majority in the area. The nonsubsistence area provisions also allow for a "Swiss cheese" approach, where many small drainages or seemingly remote harvesting areas are designated nonsubsistence areas because the only written records of their use is by fly-in sport users. Implemented this way, village subsistence use areas can have small holes drilled in them, which are managed as exclusive use domains of sport users.

Providing for Subsistence Uses With Regulations

Effects on Hunting Regulations

Rural Subsistence Hunting Seasons and Bags Were Restricted.

- **Pre-1990.** Prior to 1990, the Board of Game was gradually implementing the subsistence statute, by identifying customary and traditional hunting practices of rural villages with the input from regional councils, and by gradually providing appropriate seasons, bags limits, and means-methods regulations. These local subsistence hunts were distinct from general hunting regulations of urban-based hunters. Residency was a tool used by the board to clearly identify local rural customary and traditional subsistence use patterns for rural residents (subsistence hunts) distinct from sport hunting patterns for urban-based residents (general hunts), and providing for them through appropriate seasons, bags, or means-methods. This was possible because rural hunts or fisheries were open to only a limited number of rural users.

- **Post-1992.** Without residency as a board management tool, the distinction between subsistence hunts and general sport hunts has been lost. The Board of Game has had to craft hunting regulations primarily with the urban-based majority hunters in mind. Most of the regulatory gains made by rural subsistence hunters were lost when subsistence hunts and general hunts were collapsed into a single category by the board in 1990. This resulted in more restrictive subsistence hunting seasons and bags which are open to all urban-based hunters (see Reductions in Subsistence Hunting Seasons and Bag Limits Following McDowell v Alaska, Division of Subsistence, Alaska Department of Fish and Game, October 1990). These restricted hunting regulations were readopted by the Board of Game in 1992 as providing "reasonable opportunity" to subsistence users (see next section). The hunt patterns which are appropriate for the majority urban-based hunters are typically inappropriate for the customary and traditional uses of rural families dependent on subsistence, which is one of the central problems the state subsistence statute was originally intended to solve.

Reasonable Opportunity

An Ambiguous Standard is Inserted in the Law.

- **Pre-1990.** The 1986 law required that the boards to adopt subsistence regulations that "provide a reasonable opportunity to satisfy the subsistence uses" (16.05.258(c)). There was a question about how to provide for customary and traditional uses with regulations. Did this include providing for a customary and traditional pattern of taking, such as customary and traditional seasons, means-methods, harvest levels, and reporting conventions? The boards were advised that regulations did not have to guarantee a take, but provide an "opportunity" for a subsistence use which was reasonable. The reasonableness of a regulation had to be demonstrated by some evidence concerning the customary and traditional pattern of use. The federal district court in Bobby supported this interpretation. In Morry the state court distinguished between "customary and traditional uses", which it held the state law required be provided for, and "methods of harvesting", which may be provided for in the discretion of the boards.

- **Post-1992.** The 1992 law requires that the boards "shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks and populations" (16.05.258(b)(1)(A)). The 1992 law provides a definition of reasonable opportunity: "for purposes of this section, 'reasonable opportunity' means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking fish or game" [emphasis added] (16.05.258(f)). This definition may narrow what regulations must provide for -- a reasonable expectation of a take -- and omits the other characteristics of a customary and traditional pattern of taking and use. The definition contains an ambiguous "normalcy standard" for determining reasonable opportunity for taking for subsistence uses. Normalcy implies a normal curve drawn from a set of observations. But which set of hunters are used as the basis for determining normalcy -- rural-resident hunters or urban-resident hunters? Without a clear normalcy standard, the Board of Game has picked among widely differing types of averages. For instance, in deciding season length, the board has reasoned that because the "average hunter" (including urban hunters) spends a certain number of days afield, a season length somewhat longer than the average provides a reasonable opportunity for moose hunters; or, that because the "average" success rates for hunters (including urban hunters) is a certain percent, a set of seasons and area restrictions that provide for that success rate is reasonable.

Customary and Traditional

"Customary and Traditional" is Given Some Additional Definition in Statute.

- **Pre-1990.** The pre-1990 law used the terms "customary and traditional" to define a subsistence use of fish and game. The terms were not defined in statute. The boards used eight criteria, which were adopted in regulation, to identify customary and traditional patterns of use (5AAC 99.010).

- **Post-1992.** The 1992 law provides a definition of "customary and traditional" -- "the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of fish or game" (AS 16.05.940(7)). The definition draws upon the first and fourth criteria in regulation (5AAC 99.010). It leaves the interpretation of terms like "long-term", "consistent", and "reliance" to the individual board, considering the facts pertaining to the specific stock, population, and area under consideration.

Customary Trade

"Customary Trade" is Distinguished from "Commercial Trade".

- **Pre-1990.** The pre-1990 law's definition of "subsistence uses" included "sharing" "barter," and "customary trade". This provision recognizes the common customary practice of harvesters supplying relatives and friends with subsistence food products through non-commercial channels. Customary trade was not defined in statute. The individual boards had authority to regulate sharing, barter, and customary trade, but with a few exceptions, they had not addressed the customary trade issue. This left the issue open to court interpretation.

- **Post-1992.** The 1992 law provides a definition of "customary trade" -- "the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game resources; the terms of this paragraph do not restrict money sales of furs and furbearers" ((AS 16.05.940(8)). This definition better allows for distinguishing between customary trade and commercial trade of wild resources. The definition is worded so as to allow the sale of furs taken under subsistence regulations. The Board of Fisheries has used the definition to regulate the customary trade of limited amounts of herring roe on kelp in southeast Alaska, under the terms of a subsistence fishing permit.

Rural Public Involvement in Management

Participation by Rural Residents in the Regulatory Process Declines.

- **Pre-1990.** Before 1990, the state operated a system of regional advisory councils, made up of representatives of local fish and game advisory councils. The regional councils met requirements in ANILCA Section 805 for regional advisory councils in each subsistence region of Alaska. The councils provided a regional forum for discussing fish and game management issues, developing regional consensus on issues, and resolving disputes. Subsistence proposals from the regional councils were given special consideration in the regulatory system; the boards had to adopt proposals unless not supported by evidence or if contrary to conservation principles. There were substantial numbers of subsistence proposals each year from the rural public and the regional council and advisory committee system.

- **Post-1992.** The state's regional council system was disbanded in 1991. There has been declining participation in the state's regulatory process by rural residents dependent on subsistence, with very few subsistence proposals before the board each year. The decline results from a combination of factors -- no regional councils, the growing frustration by rural residents in the board's inability to craft area-specific subsistence hunting regulations, and the growing opportunity to participate in the federal subsistence system. The declining participation by rural subsistence users in the state's system reduces the state's ability to bring together different interests and to develop mutually acceptable solutions to fish and game issues.

Comanagement Initiatives

Development of Comanagement Arrangements Continues.

- **Pre-1990.** A number of comanagement arrangements were initiated between the state, federal, and subsistence groups to address subsistence issues related to specific stocks or populations. Examples include the Yukon-Kuskokwim Delta Goose Management Plan, the Kilbuck Caribou Cooperative Management Plan, the Kuskokwim River Salmon Management Group, and the Alaska and Inuvialuit Beluga Whale Committee. Solutions to fish and game management problems were developed through collaborative arrangements like these.

- **Post-1992.** Comanagement arrangements continue to be developed. Examples include the ones listed above and the Round Island subsistence walrus hunt co-management plan and the western arctic caribou initiative. Dual state and federal subsistence management, and declining participation by rural residents in the state's board process, complicate resource management, and may make these types of comanagement arrangements more necessary. Collaborative arrangements can provide effective additions to the existing fish and game advisory committee process.

Operation of the Subsistence Preference

Procedural Language

Explicit Steps for Implementing the Subsistence Preference are Put Into Statute.

- **Pre-1990.** The 1986 law contained general steps about how the subsistence preference was to be applied (AS 16.05.258(c): "If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria: (1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources."

- **Post-1992.** The 1992 law provides more specific procedures for applying the subsistence preference (AS 16.05.258(b). Four steps are identified, which make more explicit the process in the 1986 law. The 1992 statute also modifies the three Tier II criteria: "(1) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood; (2) the proximity of the domicile of the subsistence user to the stock or population; (3) the ability of the subsistence user to obtain food if the subsistence use is restricted or eliminated."

Tier II Provisions

A Clear and Verifiable Tier II Subsistence Eligibility Criterion is Lost.

- **Pre-1990.** Residency was a tool which could be used by the boards to help identify the most dependent subsistence users at the Tier II level (when there is not enough fish or game to provide for all subsistence users) – "local residency" was one of the three Tier II criteria, and served as the basis of verifiable Tier II questions.

- **Post-1992.** Residency was lost as a tool which could be used by the boards to help identify the most dependent subsistence users at the Tier II level. "Proximity of a subsistence user to the Tier II population" was one of the three Tier II criteria, but was ruled "unconstitutional" by the state supreme court in Kenaitze. The boards lost one of the few easily verifiable Tier II factors.

Popular General and Nonresident Hunts Were Eliminated, and Tier II Hunts Created.

- **Pre-1990.** Just prior to 1990, there were no Tier II subsistence hunts authorized by the board. Popular hunts like the Nelchina caribou hunt were managed with a subsistence hunt (open to certain rural residents) and a general (sport) hunt (open to residents and non-residents through a random draw), with an allocation of animals to each hunt.

- **Post-1992.** Because large numbers of urban-based hunters are now classified as subsistence users, certain subsistence hunts were oversubscribed. As stated above, this was dealt with in many hunts by reducing hunter efficiency through more restrictions on subsistence seasons and bags. But the Board of Game authorized 15 new Tier II hunts in 1990, including the Nelchina caribou hunt which previously was managed for multiple uses. The Tier II system, when applied to all Alaska residents, has created many special problems, including elimination of non-resident hunters, difficulties in verifying applicant responses, and declining public confidence in the Tier II process.

Conclusions

This report compares the implementation of the 1986 and 1992 subsistence laws in four major areas. It examines continuity and change in who qualifies for subsistence, where subsistence is allowed, what subsistence regulations are supposed to provide for, and how the subsistence preference operates.

- The greatest differences between implementation of the 1986 and 1992 laws result from the absence of the rural provisions in the 1992 law. Without the ability to narrow the pool of people who qualify for subsistence, the boards lack a major tool for managing and allocating fish and wildlife. The lack of the rural provision is at the root of several other problems with the law, which was originally designed around the rural provision.

- The boards have established "nonsubsistence" areas that are similar to the "nonrural" areas identified before 1990. However, public proposals and board discussions indicate that there is potential for the nonsubsistence provisions to be interpreted to allow for gerrymandering that could adversely impact small communities dependent on subsistence.

- The Board of Game substantially reduced subsistence hunting seasons and bag limits in many areas in 1990-91 in response to the McDowell decision. This addressed the over-harvest problems created by all urban hunters qualifying for subsistence hunts, but reduced rural residents' opportunities to take game legally for subsistence uses. After the 1992 law was passed, the board readopted most of these regulations with little substantive review. The boards have been reluctant to take up proposals that would require using the procedures set out in the 1992 law for identifying and providing for subsistence uses. Under the 1992 law, the distinction between subsistence hunts and general sport hunts has been lost.

- Reductions in subsistence hunting seasons and bag limits have been justified by the Board of Game under the ambiguous definition of "reasonable opportunity" in the 1992 law.

- After 1992 a number of popular general and nonresident hunts were replaced by highly unpopular Tier II subsistence hunts, because of the "all-Alaskan" policy. The Tier II system is widely viewed as unfair and unenforceable when applied to all Alaskans. The Tier II system is designed to provide hunting advantages for those most reliant upon subsistence when subsistence users exceed resource availability. But the effectiveness of the Tier II system to correctly identify those who are most reliant is being eroded by court decisions which prohibit the use of verifiable Tier II criteria linked to residency, proximity, or geography.

- Rural residents are participating less in the state's subsistence regulatory regime. This is due to the combined effects of cutbacks in state funding for the advisory committee system, the elimination of the state's regional council system, and the perception that the federal subsistence system is more responsive than the state system.

In conclusion, there appear to be two major types of problems with the 1992 subsistence law -- those created primarily by the absence of the rural provisions, and those due to the lack of a clear standard for what the law is supposed to protect.

Because of these problems with the law, the Board of Game is not able to craft rules that allow rural people, who are most dependent upon subsistence, to legally pursue customary harvest methods and practices. While the 1992 law poses similar problems for the Board of Fisheries, it is not to the same extent because the Board of Fisheries are still able to distinguish subsistence uses and users based on gear types in most cases.

Current implementation of the law emphasizes providing some level of opportunity for successful taking. It downplays the need to provide regulations that are appropriate to the context within which harvest occurs, such as the seasonal pattern of game availability, seasonal needs for particular types of food, and community patterns of harvest and sharing. This leads to problems for both users and managers. Villagers do not want to be treated as criminals for feeding their families and following customary ways of life. And fish and wildlife management can only be successful in rural Alaska if people respect it and play a significant role in the system.

On balance, implementation of the 1992 law has had the effect of limiting subsistence hunting for rural residents compared with the way the 1986 law was being implemented prior to McDowell. The law in its present form does not allow the Board of Game to create regulations that protect the subsistence patterns which are such a valued part of the state's diverse cultures, economies, and ways of life.

Appendix A. Subsistence Management Chronology

1925: Alaska Game Law. Believed to provide for most subsistence hunting during territorial days, the law stated that "...any Indian or Eskimo, prospector, or traveler [can] take animals, birds, or game fishes during the closed season when he is in the need of food."

1960: Statehood. The federal government transferred authority for management of fish and game in Alaska to the new state government. Both the federal and the state government recognized subsistence fisheries.

1971: ANCSA. The Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal hunting and fishing rights. No law was enacted that protected subsistence, but the conference report stated Native subsistence and subsistence lands would be protected by the State of Alaska and the Department of Interior.

1978: State's First Subsistence Law. The state passes its first subsistence law which, once sustained yield has been ensured, requires that subsistence uses be allowed, with a priority if necessary (Ch. 151 SLA 1978). The law defines subsistence as "customary and traditional uses" of fish and game for specific purposes such as food.

1980: ANILCA Passed. Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves, and wildlife refuges (P.L. 96-487, December 2, 1980 [94 Stat. 2371]). Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982: State Law's Consistency With ANILCA is Established. The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses (5 AAC 99.010), and the Department of Interior certifies the state's consistency with ANILCA.

1982: Repeal Initiative. A statewide effort to repeal the subsistence initiative fails by a large margin at the polls (58.4% of Alaskan voters in favor).

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

1985: Madison Decision. The Alaska Supreme Court, in the Madison decision, rules that state regulations limiting subsistence to rural residents (enacted by the Joint Boards in 1982) are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions of ANILCA and threatens takeover of fish and wildlife on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986: New Subsistence Law. The Alaska legislature enacts a new law limiting subsistence to rural residents (Ch. 52 SLA 1986; AS 16.05.90). Rural is defined as an area where the "...noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy..." In state superior court, the McDowell suit is amended to challenge the new subsistence law. The Kenaitze Indian tribe also files a suit in federal court under ANILCA to protest the classification by the Boards of the Kenai Peninsula as an urban area (Kenaitze Indian Tribe vs. State of Alaska, No. A86-367).

1987: Kenaitzes Initially Denied. A federal court judge rules against the Kenaitze Tribe, saying the state's subsistence law's definition of rural agrees with use of the word "rural" in federal subsistence law.

1987: McDowell Initially Denied. The state superior court holds that the 1986 subsistence law is constitutional.

1988: Kenaitze Decision Reversed. The ninth U.S. circuit court of appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA (Kenaitze Indian Tribe vs. State of Alaska, 860 F. 2nd 312, [9th Cir. 1988]). The court suggests that a definition of rural hinges on demographic characteristics. The U.S. Supreme court ultimately denies review.

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

1989: McDowell Decision. On December 22, 1989, ruling in McDowell v. State, the Alaska Supreme Court found that the 1986 state subsistence law was unconstitutional because it excluded urban residents from subsistence activities. On January 5, 1990, the Alaska Supreme Court granted the state a stay in the McDowell decision until July 1, 1990.

April, 1990: Federal Government Moves to Assume Subsistence Management. On April 13, 1990, a Notice of Intent to propose regulations was published in the federal register. Temporary regulations establish a federal program that minimizes change to the state program, consistent with the federal government's ANILCA responsibilities. Temporary regulation were published on June 8, 1990.

May 1990: Legislature Debates Subsistence Options. Among options discussed by the legislature was a draft constitutional amendment submitted by Governor Cowper. After lengthy hearings in the final days of the session, the House amended the Governor's proposed amendment, then rejected it by a vote of 20-20 (27 votes needed). The amendment was never voted on by the Senate.

June 8, 1990: Governor Calls Special Session. Negotiations with several interest groups prior to the opening of the session failed to reach an agreement on a solution. On the opening day of the session, the Governor introduced a constitutional amendment that would have required, if approved by the voters at the next general election, a vote on the issue four years later. The amendment would have prevented federal management from occurring on July 1, and would have given groups time to either sue on the constitutionality of ANILCA Title VIII, or amend ANILCA. The governor's proposal was further amended by the Senate to require a vote in two years, and together with legislation creating a Subsistence Review Commission, passed the Senate in early July. However, on July 8, the House failed by one vote (26 in favor, 14 opposed) to obtain a 2/3 majority for a constitutional amendment.

June 1990: Cutler Decision on Severability. The Supreme Court remanded McDowell to the lower court for implementation of their order, and in an opinion dated June 20, with two subsequent clarifications, Judge Cutler found the unconstitutional portion of the state subsistence law to be severable from the rest of the law. This left the state with a subsistence priority law on the books, with its application to rural residents severed.

July 1, 1990: Federal Management Begins. The federal land management agencies initiated a program that assumed management of subsistence uses on federal public lands. This included creation of a five-member federal subsistence board, representing the BLM, NPS, BIA, USFS, and USFWS.

July 1990: New Subsistence Hunts. The Board of Game held an emergency meeting to promulgate hunting regulations for the 1990 fall hunts. Nonresidents were excluded from many hunts, and others were put n a Tier II, individual subsistence application basis.

October 1990: All Alaskans Eligible. At a joint Boards of Fisheries and Game, on October 26, 1990, the Department of Law reported to the Boards that, after the McDowell decision, all Alaskans must be considered potential subsistence users of the fish and game under state jurisdiction. The boards subsequently issued a policy statement that it was impossible, under the legal decisions, to identify subsistence users.

November 1990: New Subsistence Fisheries. The Board of Fisheries met and established new subsistence fisheries in both upper and lower Cook Inlet. A subsequent policy stated that subsistence fishing proposals, throughout the state, would be addressed only if subsistence needs were not being met, or if there was a conservation concern that was addressed by the proposal.

February 1991: Governor's Subsistence Advisory Council is Formed. Governor Hickel appointed an initial subsistence advisory group early in 1991 and reorganized it in November to add public members and remove the state commissioners; in all, the groups met for over a year. The ten-member group was charged with drafting a new subsistence statute that would comply with the state constitution.

Federal Subsistence Program Develops: 1991-92. Publication in the Spring of 1992 of an EIS on the Federal Subsistence Program in Alaska clarified the federal government's intent with regard to managing subsistence on federal lands (mandated by ANILCA). The federal subsistence board established a staff and regular meeting schedule and began accepting public proposals. Other elements of the program included federal regional subsistence advisory councils, and a process for identifying rural areas and customary and traditional uses. The program applied to wildlife and to fishing in non-navigable federal waters.

February 1992: Governor Introduces New Subsistence Legislation. Governor Hickel introduced a bill to the legislature that would establish a new subsistence statute. A key feature of the bill, which was based on the work of the subsistence advisory council, was a presumption that residents of small communities would automatically meet specified subsistence criteria, in mid-sized communities that presumption was "rebuttable", and urban residents must apply for subsistence qualification on an individual basis. Also, nonsubsistence areas were authorized, and implementation would require amending ANILCA. The legislature failed to take action on the bill. Other bills also were considered during the session, but not passed, including an AFN- sponsored bill that provided a rural preference and also a second-level preference for urban residents who could demonstrate community or individual dependence.

June 15-22 1992: Governor Convenes Special Session on Subsistence: 1992 Subsistence Law is Enacted. Governor Hickel presented the legislature with a version of the bill that had been introduced in the previous session. Other bills also are introduced, as are motions to place a constitutional amendment on the ballot. The legislature ultimately passed a subsistence bill that provided eligibility for all Alaskans, included a definition of "customary trade" and allowed the Boards to establish "nonsubsistence areas" in places where subsistence "is not part of the economy, culture, or way of life" of an area.

November 1992: Joint Boards of Fisheries and Game Establish Four Nonsubsistence Areas. Meeting jointly, the boards established nonsubsistence areas around Fairbanks, Anchorage-Matsu-Kenai, Juneau, and Ketchikan. These were areas where subsistence regulations would not be established. Subsistence regulations within these areas were repealed. They issued a call for proposals for other areas also. At a subsequent meeting the following March (1993), an area around Valdez also was designated as a nonsubsistence area. Eventual public proposals for additional areas included GMU 13, all roaded areas, and an area on the Upper Holitna Drainage.

Fall 1993: State Superior Court Finds Nonsubsistence Areas to be Unconstitutional. Judge Fabe, in State Superior Court, found in Kenaitze v. State that the nonsubsistence areas authorized by the 1992 state law were unconstitutional because they "effectively re-establish the rural/urban residency requirement struck down in McDowell" (Kenaitze Indian Tribe v. State of Alaska, 3AN-91-4560 Civil, Order, October 26, 1993). After the Alaska Supreme Court's subsequent denial of the state's motion for a stay, the Boards met in Spring 1994 and authorized the department to enact emergency regulations that would re-establish the previous subsistence regulations for the former nonsubsistence areas. The state also appealed the ruling to the State Supreme Court.

March 1994: U.S. District Court Validates Federal Subsistence Board Authority, Extends Federal Subsistence Management to Include Navigable Waters. Following preliminary rulings in Katy John, in late 1993, Judge Holland issued a final ruling that interpreted ANILCA as giving the federal government broad authority to manage subsistence on federal public lands, and extended jurisdiction to include navigable waters on federal lands. A parallel ruling in the case of State v. Babbitt found that creation of the federal subsistence regulatory board did not exceed the authority granted by ANILCA. These rulings were immediately appealed to the Ninth Circuit Court of Appeals by both the state and federal governments.

May 1994: Secretary of Interior Declares Intent to Manage Subsistence Fisheries Throughout the State. In a letter to the Governor that urged the state to act to come into compliance with ANILCA, Secretary Babbitt stated his intention to begin management of subsistence fisheries, "pursuant to the direction of the federal courts," if the state doesn't pass a constitutional amendment. The federal subsistence board was told to prepare a subsistence fisheries management plan.

January 1995: State Drops Babbitt Lawsuit. Governor Knowles directed the Attorney General to drop the state's appeal of the Babbitt case.

April 1995: U.S. Ninth Circuit Court of Appeals Decides Katy John Case. The court of appeals held that ANILCA's subsistence priority applies to waters in which the United States has reserved water rights. The court further held that the federal agencies that administer the subsistence priority are responsible for identifying those waters. Federal agencies continued development of a fisheries plan and began a process for identifying waters where the plan would apply.

May 1995: Alaska Supreme Court Decides Nonsubsistence Areas Are Constitutional and the Tier II Proximity Criteria is Not. The Alaska Supreme Court, in the case of Kenaitze v. State, determined that "...the Tier II proximity of the domicile factor violates the Alaska Constitution because it bars Alaska residents from participating in certain subsistence activities based on where they live." Also, the court decided that the nonsubsistence area provision in the 1992 state subsistence law is constitutional because "...it bars no Alaskan from participating in any fish or game user class." With this ruling, the previously designated nonsubsistence areas were automatically reinstated. The Kenaitze's challenge to the findings of the Joint Boards that resulted in the establishment of the Anchorage-MatSu-Kenai Peninsula nonsubsistence area was remanded back to the Superior Court. Briefing on remaining issues should be completed by late April, 1996.

August 1995: Alaska Supreme Court Disagrees with Federal Court on the Scope of the Federal Subsistence Law.
In the case of Totemoff v. State the Alaska Supreme Court made three significant findings: the federal subsistence law does not preempt nonconflicting state law; interpreted ANILCA as not protecting customary and traditional means and methods; and directly disagreed with the Ninth Circuit Court of Appeal's finding in State v. Babbitt (the Katie John case) that public lands include certain navigable waters. Because of the direct conflict with the federal court interpretation, the state filed a petition for review by the U.S. Supreme Court on December 5, 1995.

Appendix B. Text of the 1992 Subsistence Law

AN ACT

Relating to the taking of fish and game; and providing for an effective date.

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

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

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

(3) customary and traditional uses of Alaska's fish and game originated with Alaska Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses, among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of identity for many subsistence users;

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

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

(b) It is the purpose of this Act

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

(2) to provide for a preference for subsistence uses over other consumptive uses of fish and game resources.

(c) It is the intent of the legislature that

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

(2) this Act not result in significant reallocations of fish and game in Alaska.

* **Sec. 2.** AS 16.05.258 is repealed and reenacted to read:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.

(b) The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a stock or population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

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

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

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

(C) may adopt regulations to differentiate among uses;

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

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

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

(C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

(A) determine the portion of the stocks or populations that can be harvested consistent with sustained yield; and

(B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and

(4) if the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses, other than subsistence uses;

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

(i) the customary and direct dependence on the fish stock or game population by the subsistence user for human

consumption as a mainstay of livelihood;

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

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

(c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

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

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

(5) the cost and availability of goods and services to those domiciled in the area or community;

(6) the variety of fish and game species used by those domiciled in the area or community;

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those domiciled in the area or community;

(10) the cultural, social, and economic values associated with the taking and use of fish and game;

(11) the geographic locations where those domiciled in the area or community hunt and fish;

(12) the extent of sharing and exchange of fish and game by those domiciled in the area or community;

(13) additional similar factors the boards establish by regulation to be relevant to their determinations under this subsection.

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

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

(f) For purposes of this section, "reasonable opportunity" means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.

* Sec. 3. AS 16.05.258 is repealed and reenacted to read:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

(b) The boards shall determine

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

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

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is

determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria:

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

(2) local residency; and

(3) availability of alternative resources.

(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.

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

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

* **Sec. 4.** AS 16.05.940 is amended by adding new paragraphs to read:

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

(37) "customary trade" means the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game

resources; the terms of this paragraph do not restrict money sales of furs and furbearers.

* **Sec. 5.** AS 16.05.940(36) and 16.05.940(37) are repealed.

* **Sec. 6.** REGULATIONS. Notwithstanding the provisions of AS 16.05.258, as in effect on the day before the effective date of sec. 2 of this Act, the Board of Fisheries, Board of Game, and Department of Fish and Game shall adopt regulations necessary to implement the provisions of secs. 1, 2, and 4 of this Act.

* **Sec. 7.** TRANSITION. (a) It is the intent of the legislature that the Board of Fisheries and the Board of Game expeditiously adopt regulations necessary to implement secs. 1, 2, and 4 of this Act.

(b) Regulations adopted by the Board of Fisheries, Board of Game, or Department of Fish and Game after July 1, 1992, may not be inconsistent with the provisions of secs. 1, 2, and 4 of this Act.

(c) Regardless of whether regulations in effect on July 1, 1992, and adopted under the authority of AS 16.05.251, 16.05.255, or 16.05.258, as that statute read on the day before the effective date of sec. 2 of this Act, are inconsistent with the provisions of secs. 1, 2, or 4 of this Act, they may continue to be implemented and enforced until the effective date of sec. 2 of this Act.

* **Sec. 8.** TRANSITION. After January 1, 1995, the Board of Fisheries, Board of Game, and Department of Fish and Game may adopt regulations to implement AS 16.05.258, as amended by sec. 3 of this Act. Regulations adopted under this section may not take effect before the effective date of sec. 3 of this Act.

* **Sec. 9.** REVIEW. (a) The legislature acknowledges and recognizes that this Act deals with a subject of vital concern and that the subject merits review. Therefore, it is the intent of the legislature that the operation of this Act and the regulations adopted under this Act be fully reviewed by the governor no later than June 1, 1994.

(b) This review period is intended to allow for further research and to gain experience in implementing this Act and regulations adopted under secs. 6 and 7 of this Act. It is the intent of the legislature that the governor convene a representative group to provide recommendations to the governor before the end of the review period. It is the intent of the legislature that representatives of the legislature and persons with a history in the formulation

of subsistence legislation in this state participate in the group.

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

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

*** Sec. 10.** Sections 6 - 8 of this Act take effect immediately under AS 01.10.070(c).

*** Sec. 11.** Sections 1, 2, 4, and 9 of this Act take effect on the effective date of regulations first adopted under sec. 6 of this Act by the Board of Fisheries and the Board of Game.

*** Sec. 12.** Sections 3 and 5 of this Act take effect October 1, 1995.

AUTHENTICATION

The following officers of the Legislature certify that the attached enrolled bill, CCS HB 601, consisting of 8 pages, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

Passed by the House June 22, 1992

Ben Grussendorf, Speaker of the House

ATTEST:

Kristin Gray, Chief Clerk of the House

Passed by the Senate June 22, 1992

R. I. Eliason, President of the Senate

ATTEST:

Nancy Quinto, Secretary of the Senate

ACTION BY GOVERNOR

Approved by the Governor___ _____ 19_____

Walter J. Hickel, Governor of Alaska

HB

255

Official Business

MEMBER
Natural Resources
Committee

Alaska State Legislature

Chair, Legislative Council
Chair, World Trade
And
State/Federal Relations

REPRESENTATIVE
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SPONSOR STATEMENT

House Bill 255

House Bill 255 was crafted using Alaska's Constitution as it's basis.

The Legislature is mandated by the constitution to provide for the utilization, development and conservation of all natural resources belonging to the State, including the land and waters...for the maximum benefit of its people.

Further, wherever occurring in their natural state, the fish, wildlife and waters of the state are reserved to the people for common use.

Under the Alaska Constitution no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

The laws and regulations which govern the use or disposal of natural resources under the state constitution, shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Replenishable resources belonging to the state shall be utilized, developed and maintained on a sustained yield principle subject to preferences among beneficial users.

HB 255 would establish an allocation mechanism and ensure the allocation for the various uses of the fish and game resources including subsistence use, to be consistent with the principles of sustained yield and will be the result of decisions by the respective Boards of Fish and Game.

The Boards are empowered to adopt criteria upon which to base allocation decisions, including the allocation for subsistence. The Boards will provide regulations to determine who may participate in subsistence hunting and fishing during times of abundance and shortage.

The subsistence allocation will be determined as a percentage of the stock or population that is available, based upon sustained yield. The percentage must provide a preference to satisfy subsistence use.

The Boards of Fish and Game shall distinguish among those provided a subsistence use on the basis of need, customary use and one's ability to obtain food by other means, should restrictions become necessary.

Under the provisions of HB 255, commercial sale of subsistence-taken fish or game is prohibited, however customary trade, barter or sharing for personal or family use is authorized.

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

DIVISION OF SUBSISTENCE

TONY KNOWLES, GOVERNOR

P.O. BOX 25526
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April 30, 1997

Mr. Pete Ecklund
Representative Bill Williams office
State Capitol Building, Room 424

Dear Mr. Ecklund:

As you had requested on the phone earlier this week, I am providing a review of the impacts of HB 255. If enacted, HB 255 would substantially revise the state's subsistence statute, as well as change the way that the Board of Fisheries and Board of Game allocate between commercial, sport, personal, and subsistence uses. Significant aspects of the bill include the following:

Individual Eligibility Criteria

The bill requires the Board of Fisheries and Board of Game to establish in regulation individual eligibility criteria for determining who may participate in subsistence fisheries or subsistence hunts (Sec. 2, Sec. 3). There are two sets of criteria -- one set for identifying who is a subsistence user in general, and one set for distinguishing between subsistence users when all subsistence users cannot harvest. Individual eligibility criteria likely would be based on some individual needs-based dependency test, because the act changes the definition of "subsistence uses" to be "by an individual who significantly depends on the resource" (Sec. 10). A person's eligibility might change from year to year. Under this system, there would be tens of thousands of applicants yearly, creating a significant new task to the Alaska Department of Fish and Game (ADF&G). A major change is that non-residents could qualify for subsistence eligibility because of changes in key definitions (see below).

The Board of Fisheries and Board of Game act separately, so potentially there could be separate eligibility standards for subsistence fishing and subsistence hunting – persons eligible to fish may not be the same as persons eligible to hunt and vice versa. ADF&G likely would administer the individual subsistence permit system, determining which applicants score high enough to be eligible for participating in subsistence fishing and subsistence hunting. Each individual would have to apply for a permit to participate in a subsistence fishery or hunt – in a family, husband, wife, and older children would all have to apply (presumably, children below a certain age might not need a permit).

Allocation Quotas ("Percentage for Subsistence, Personal, Sport, and Commercial Uses").
The bill requires the Board of Fisheries and Board of Game to establish regulatory quotas (called a "percentage of the stock or population") allocated for subsistence uses, personal uses, sport uses, and commercial uses (Sec. 6). Allocations between these uses would be done on every stock or game population in the state with a harvestable surplus. In making allocations, the percentage allocated for subsistence uses must give a preference to satisfy subsistence uses. Allocations between personal, sport, and commercial uses of fish presumably would be based on criteria listed in AS 16.05.251(e) (Sec. 1).

The Procedural Steps for Applying the Subsistence Preference are Removed, and Replaced by an Uncertain Quota Allocation System
The bill removes the 1992 procedural steps for applying the subsistence preference (Sec. 5) – that is, under the 1992 law, as the harvestable surplus declines, restrictions are placed on commercial, sport, or personal uses before subsistence uses are significantly restricted. Existing procedural steps are replaced by an uncertain quota allocation system (Sec. 6) – under one interpretation, once the "percentage for subsistence" and for other uses are established they are fixed, and as the harvestable surplus declines, restrictions are placed on all uses concurrently. Under a fixed quota system, the pool of subsistence users compete among themselves for their percentage of the harvestable surplus. When the fixed subsistence percentage of the harvestable surplus is not sufficient "to continue subsistence uses", then two criteria are used by the Board of Fisheries or Board of Game to distinguish among subsistence users (Tier II), reducing the number of subsistence fishers or hunters.

However, the act is unclear if subsistence uses and other user groups are locked into their percentage of the allocation, or if the boards can readjust the percentages to provide for one user group over another when the harvestable surplus declines. Under another interpretation of the act, it may be that as the harvestable surplus declines, the Board of Fisheries and Board of Game must readjust the percentages allocated among all competing uses, so that subsistence uses are always satisfied; how this occurs is unclear.

Nonsubsistence Areas Are Eliminated
The act removes language allowing the Boards of Fisheries and Game to establish "non-subsistence areas" – areas where subsistence is not a principal characteristic of the economy, culture, and way of life (Sec. 5). The act would eliminate the five nonsubsistence areas which have been established by the Board of Fisheries and Game – the Anchorage-Matsu-Kenai Nonsubsistence Area, the Fairbanks Nonsubsistence Area, the Juneau Nonsubsistence Area, the Ketchikan Nonsubsistence Area, and the Valdez Nonsubsistence Area. The act would require the Board of Fisheries and Board of Game to create subsistence fisheries and hunts on stocks and populations in the five current nonsubsistence areas. General hunts in the Anchorage-Matsu-Kenai and Fairbanks areas likely would be converted into subsistence hunts under a Tier II system, unless the eligibility criteria for subsistence hunting were very restrictive. Subsistence fisheries likely would be established in the nonsubsistence areas.

Definitions of Key Terms Are Changed

Non-residents become eligible to participate in subsistence fishing and hunting, because the act modifies the definitions of "subsistence hunting" (sec. 8), "subsistence fishing" (sec. 9), and "subsistence uses" (sec. 10) to eliminate the requirement that the user be a rural resident of the state, or even a resident of the state. The definition of "subsistence uses" is changed to include an individual, needs-based eligibility standard, with the phrase, "by an individual who significantly depends on the resource".

One of the three Tier II criteria are eliminated – "the proximity of the domicile of the subsistence user to the stock or population" (sec. 6); this criterion was found to be unconstitutional by the Alaska Supreme Court. The act eliminates the definition of "rural area" in AS 16.05.940(27) – "a community or area of the state in which the noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area".

Sunset Provisions Are Eliminated

The act removes the sunset provisions in the current law (sec. 12). The 1986 subsistence law language retained in the sunset provisions would disappear, making it more difficult for the state's law to return to the pre-1992 language (under which the state retained management of fish and game on all Alaska lands).

These are the major changes pending with HB 255 that the Division of Subsistence has identified. Because it removes rural residency preference for the subsistence priority, enactment of this bill would not comply with ANILCA, so it would not allow state resumption of subsistence management on federal lands.

Please feel free to call if you have further questions about this analysis. Thank you.

Sincerely,

Mary C. Pete

Mary C. Pete
Director

LEGAL SERVICES

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MEMORANDUM April 18, 1997

SUBJECT: Sectional Summary: Draft bill relating to subsistence hunting and fishing (Work Order No. 20-LS0922\A)

TO: Representative Ramona Barnes

FROM: George Utermohle
Legislative Counsel

This memorandum is a sectional summary of the draft bill regarding subsistence hunting and fishing.

A sectional summary of a bill is not an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Section 1 of the bill amends AS 16.05.251(e), which relates to the criteria that the Board of Fisheries must use for allocating fishery resources. This section requires the board to adopt criteria for allocating fishery resources to and among subsistence users that are consistent with AS 16.05.258. The remainder of subsection (e) sets out criteria for allocation of fishery resources among personal use, sport, guided sport, and commercial fisheries.

Section 2 of the bill adds a new subsection (i) to AS 16.05.251, relating to the powers of the Board of Fisheries. This subsection requires the board to establish criteria for determining who may engage in subsistence fishing in times of resource abundance and in times of resource shortage.

Section 3 of the bill amends AS 16.05.255(a), relating to the powers of the Board of Game. The board shall regulate subsistence hunting in a manner consistent with AS 16.05.258. The board shall also adopt criteria for determining who may engage in subsistence hunting in times of resource abundance and in times of resource shortage.

Section 4 of the bill repeals and reenacts AS 16.05.258(a), relating to the identification of fish stocks and game populations used for subsistence uses. The Board of Fisheries and the Board of Game are to identify stocks and populations that are customarily and traditionally used for subsistence uses in areas identified by the boards. The former reference to "rural areas" has been dropped from this subsection.

Section 5 of the bill repeals and reenacts AS 16.05.258(b), relating to the assessment of harvestable portions of stocks and populations. The boards shall determine what portion of stocks and populations identified as used for subsistence uses under AS 16.05.258(a) can be harvested consistent with sustained yield and what portion of the harvestable portion of the stock or population is necessary to provide a reasonable opportunity to satisfy subsistence uses.

Section 6 of the bill repeals and reenacts AS 16.05.258(c), relating to allocation of fish and game resources among the various user groups. The boards shall by regulation determine the percentages of a stock or population that may be taken for subsistence, personal use, sport, and commercial uses. The boards shall also allocate the available resources among subsistence users if there is not sufficient resources. The boards shall distinguish among subsistence users based on their customary and direct dependence on the stock or population for human consumption and their ability to obtain other food if subsistence uses are restricted or eliminated.

This bill does not use local residency or proximity of domicile to the resource to determine eligibility for Tier II subsistence. This provision was found to be unconstitutional. The McDowell court hinted that criteria based on local residency may not be a legitimate factor to be considered but the Kenaitze court addressed this issue directly and determined that a person's place of residency in the state cannot be used to distinguish among subsistence users.

Section 7 of the bill adds a new subsection to AS 16.05.258, authorizing the boards to allow nonsubsistence hunting and fishing on stocks and populations identified as being used for subsistence under AS 16.05.258(a).

Sections 8 and 9 of the bill amend the definitions of "subsistence fishing" and "subsistence hunting" to eliminate the requirement that a person be domiciled in a rural area of the state to engage in subsistence fishing and hunting. Also eliminated is the requirement that subsistence is restricted to residents.

Section 10 of the bill amends the definition of "subsistence uses" by eliminating the requirement that a person be domiciled in a rural area of the state and that the person be a resident of the state. The definition is further amended to provide that subsistence uses are certain uses of wild renewable resources by an individual who significantly depends on the resource for direct personal or family consumption, etc.

Section 11 of the bill provides that the definition of "rural area" is repealed.

Section 12 of the bill repeals provisions of the 1992 subsistence law that would sunset the current subsistence law as well as provisions of this bill. If not repealed, these provisions

of ch. 1, SSSLA 1992 would have the effect of reenacting the provisions of the 1986 subsistence law.

Section 13 of the bill contains transitional provisions relating to the transition from the current subsistence regulations to the new regulations that will be required to implement this bill. The boards and the department are to start adopting conforming regulations once the bill takes effect but the current regulations stay on the books until superseded by new regulations or until October 1, 1997, whichever comes first. This provision eases the burden on the boards to make the transition to the new subsistence law.

Section 14 of the bill provides an immediate effective date.

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