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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 27, 1992

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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The Honorable Lyman F. Hoffman
Senate Bush Caucus Chair
P.O. Box V
Juneau, Alaska 99811

The Honorable Georgianna Lincoln
House Bush Caucus Chair
P.O. Box V
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Re: Subsistence Legislation, Senate Bill 443, House
Bill 552

Dear Senator Hoffman and Representative Lincoln:

In your letter of March 16, 1992 to Attorney General Cole, you raised several concerns about the constitutionality of the provisions of the subsistence legislation drafted by the Governor's Subsistence Advisory Council and introduced by Governor Hickel as Senate Bill 443 and House Bill 552. Attorney General Cole asked me to respond to your letter.

Our department has reviewed the fish and game subsistence bill and it is our opinion that the bill is consistent with the constitutions of the United States and the State of Alaska. We do not believe that a constitutional amendment will be necessary to implement the provisions of this bill. The bill does raise several possible constitutional issues that have not been fully resolved by the courts, but we are prepared to fully defend the bill and expect favorable results. We have briefly analyzed below what are likely to be the most controversial issues, including those raised in your letter.

Community-Based Presumptions

One potential issue is whether the presumptions based on where a user lives, as outlined in the proposed AS 16.05.268(h), are consistent with the Alaska Constitution's provisions for equal access to fish and game. We believe that they are.

In subsections (f), (g), and (h), the new subsistence statute establishes presumptions based on community characteristics.

Under subsection (f), every area and community in the state will be classified into one of three categories.¹ Small communities that are subsistence dependent will be in category 1. Medium sized communities that are subsistence dependent will be in category 2. All other communities, large cities and suburbs or smaller and medium sized communities that are not subsistence dependent, will be in category 3. Subsection (g) lists factors the boards will use to determine subsistence dependence.²

¹ Subsection (f) states:

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

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

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

(3) category 3, an area that
(A) is an urban area or a single community where the human population is 7,000 or greater; or
(B) 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.

² Subsection (g) states:

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

- (1) the social and economic structure;
- (2) the stability of the economy;
- (3) the extent and 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;

Subsection (h) establishes administrative presumptions about the qualifications of individuals living in the communities in the categories.³ Only those who qualify under the individual

(3) the extent and 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;

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

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

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area 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;

(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 hunt and fish;

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

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

³ Subsection (h) states:

(h) Participation in a subsistence harvest in a subsistence use area is limited to persons whose taking and use of fish and game in that subsistence use area meets the requirements for qualification under (i) of this section, with the following presumptions and requirements:

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

(2) a person who is domiciled in the subsistence

requirements in (i) are authorized to subsistence hunt and fish, but (h) establishes presumptions about individual users based on where they live. Those who live in category 1 areas are presumed to individually qualify for subsistence hunting and fishing for the subsistence use area in which they live, but not for any other subsistence use area. They will not be required to submit any application or signed statement before hunting or fishing. The presumption is not conclusive and can be challenged by the state, but they will be allowed to subsistence hunt and fish in the subsistence area in which they live unless and until the state demonstrates, by clear and convincing evidence, that they are not qualified.

Those persons living in category 2 communities who choose to subsistence hunt and fish must first sign a statement in a form to be supplied by the department averring that they meet the individual qualifications standards of (i). Once they sign such a statement they are rebuttably presumed to qualify to subsistence hunt and fish in the subsistence use area in which they live, but not any other subsistence use area. Signing a false statement subjects the signer to prosecution for unsworn falsification. This presumption can be rebutted by the normal civil evidentiary standard: proof by a preponderance of the evidence.

Those persons living in category 3 communities, which will be larger cities or urban areas, smaller communities that do not have a demonstrated dependence on subsistence, or communities outside the subsistence use area, will qualify to subsistence hunt and fish under an individual application procedure outlined in subsection (i). They may not subsistence hunt or fish until their application is approved by the department.

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

(3) a person domiciled in an area identified under (f)(3) of this section or who is domiciled outside of the subsistence use area is qualified to participate in a subsistence fishery or hunt in that subsistence use area only upon certification by the commissioner that the person meets the requirements for qualification under (i) of this section.

This system of differing presumptions amounts to an administrative scheme to focus the state's efforts to weed out unqualified users onto those areas where most of the unqualified reside. Based on the information presented to the legislature, use of the three sets of standards will result in identifying, under (f)(1), communities or areas with a large majority of residents that would individually qualify as subsistence users in the subsistence use area in which they live; under (f)(2), communities with a majority of qualified subsistence users; and under (f)(3), communities with a very a small minority of qualifying individuals. Communities outside the subsistence use area are also expected to have very few people who would qualify. It is expected that the legislature will make statutory findings based upon this information.

The presumptions in this statute are reasonable and have a strong factual basis. The presumptions will not exclude any qualified subsistence user from access to fish and game. Residence in a particular community or state does not determine a person's qualification to subsistence hunt and fish; it does, however, determine the amount of administrative paperwork the person will be required to submit. It will impose a higher administrative burden on those users who are domiciled in areas that have been determined to have no significant dependence on subsistence; but the status of the community will not be determinative of whether an individual finally qualifies as a subsistence user.

While there is some difference in treatment of the individual based on community standards, the actual access to fish and game for subsistence is equal. No qualified user will be excluded. All those who actually and substantially rely on subsistence uses of fish and game in a particular area will receive the subsistence preference. All those who are similarly situated with respect to the fish and game resources in an area are given equal opportunity to take that fish and game.

The legislation generally requires that qualifying dependence be current. This will mean that some people that have had reliance in the past, but have not recently relied on fish and game in a subsistence use area, will not qualify for the preference. This does not present a constitutional problem. The situations of these people with respect to the fish and game are not similar to the situation of those who have a current reliance. See Article VIII, section 17 of the Alaska Constitution. Of course, once the past user demonstrates a current reliance, he qualifies for the preference.

We believe that this statutory scheme satisfies the concerns expressed in McDowell v. State, 785 P.2d 1 (Alaska 1989). In that case, the supreme court of Alaska held that qualification for a subsistence preference based conclusively and solely on an individual's residence in a rural area violated the provisions of the

Alaska Constitution requiring equal access to natural resources. In Part A of the decision, three justices of the Alaska Supreme Court ruled that sections 3, 15, and 17 of article VIII of the Alaska Constitution⁴ prohibited the grant of exclusive or special privileges based on the characteristics of the community in which a user resides. Id. at 9.

We think that the new subsistence legislation is consistent with the principles laid out in the McDowell decision. The critical right in McDowell was the "equal right to participate in [hunts and] fisheries, regardless of where one resides." Id. Under the new subsistence legislation, the right to participate in subsistence hunts and fisheries is the same for all people who actually and substantially rely on fish and game for subsistence purposes. The differentiation in treatment based on residence does not involve the right to hunt or fish; no qualified person will be excluded. The only difference in treatment comes in the extent of paperwork required of residents in different kinds of communities.

The McDowell decision also found fault in the old law because it limited admission to a user group based on residence. 785

⁴ Section 3 of article VIII of the Alaska Constitution provides:

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

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

P.2d at 8. With the new legislation, admission to the subsistence user group is not limited by residence.

Section 17 of article VIII of the Alaska constitution requires equal treatment of "all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Under the new legislation, all those who actually and substantially rely on the fish and game in an area will qualify for the subsistence preference. In McDowell, that was not the case. Urban users were excluded even though their reliance on fish and game may have been as substantial as that of rural users.

The difference in paperwork requirements for residents of different kinds of communities does not violate the equal access provisions. First of all, the paperwork requirements are not determinative of access to fish and game. Nor are any of the requirements so burdensome as to be an effective obstacle to access. The right affected by the discrimination under the new law is not the right of access to fish and game as was the case in McDowell and Owsichuk v. State, 763 P.2d 488 (Alaska 1988), but only the right to equal treatment under the law common to all equal protection issues. An individual's right to equal paperwork requirements is certainly not as important as the equal right to take fish and game, and is probably not an "important" interest in the context of equal protection analysis.

The Alaska courts use a "uniform-balancing" test for reviewing equal protection challenges under the state constitution. The "uniform balancing" test places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984). The minimum burden that the state must meet is the substantial relationship test: the state must show that the classification is reasonable and not arbitrary and is based on some ground of difference having a fair and substantial relation to the object of the legislation. State v. Ensearch Alaska Construction, Inc., 787 P.2d 624, 632 n.12 (Alaska 1990). In this case the right to equal paperwork, unlike the right to access to fish and game, is probably not an important individual right. The classification would, therefore, only have to meet the substantial relationship test.

The classification for purposes of paperwork requirements based on residence meets the substantial relationship test. The requirements are more burdensome for category 2 residents than category 1 residents and more burdensome for category 3 residents than the other two categories. But this graduated burden is fairly and substantially related to the purpose of the requirements: to direct the state's enforcement resources to those areas representing the biggest threat to the goal of preferring only actual and

substantial reliance. The lighter burden on category 1 residents is based on the fact that a large majority will qualify. The heavier burden on category 2 residents is based on the fact that a high percentage of category 2 residents are not qualified. The even heavier burden on category 3 residents and residents of communities outside the subsistence use area is directly related to the fact that an extremely high percentage of category 3 residents are certainly not qualified. A tougher standard for category 2 and 3 residents will result in preventing the highest number of unqualified persons from subsistence hunting and fishing. The discrimination in the paperwork requirements bears a fair and substantial relationship to the object of the requirements: preventing subsistence hunting and fishing by the most clearly unqualified users. We, therefore, believe that these provisions would pass constitutional muster should the bill become law.

Limitations to Subsistence Use Areas

Under the provisions of the bill, the entire state would be divided up into subsistence use areas. Every fish stock and game population would be within a subsistence use area. There is no danger that someone would be precluded from subsistence use of fish or game because it was not within a subsistence use area. It is true that fish and game within a category 3 community located in a particular subsistence use area would not be subject to the subsistence preference. Section 2, Line 11, SB 443. That was also the case with the 1986 subsistence law. AS 16.05.258(a) states:

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.

(Emphasis added). The McDowell court did not strike down this provision; it struck down the priority to rural users, not the limitation of the subsistence preference to rural animals.⁵ The

⁵ Upon remand of the McDowell case, superior court judge Beverly Cutler, in ruling on the question of severability, did state, in an unfortunate diversion from the issues:

The parties do not address whether the boards now should identify any such stocks or populations anywhere in the state, not merely in rural areas. That the boards should make these determinations anywhere in the state appears to be a logical result of the supreme court's holding in McDowell

Alaska Supreme Court has never required that regulation of seasons, bag limits, methods and means, etc., be uniform for every species throughout the state. There is no constitutional requirement that if a particular kind of use is allowed in one area of the state, the same kind of use must be allowed in all other areas. This point was later clarified by the court in Gilbert v. State, Dep't of Fish and Game, 803 P.2d 391, 398-99 (Alaska 1990).

What the constitution does require is that if a use is allowed, all persons that are similarly situated with respect to the resource and the purpose of the law be treated equally. Article VIII, section 17 of the Alaska Constitution. Gilbert, 803 P.2d at 399. There is no requirement of equal treatment of resources, rather than users of those resources.

There is also no constitutional requirement that once a person qualifies for a subsistence use in one area, she be entitled to a subsistence preference in another area. A person reliant on fish and game in Area A must be treated the same as all others similarly reliant on Area A fish and game; but that person need not be treated the same with respect to fish and game in Area B. Only those who have similar reliance on Area B fish and game must receive equal treatment. The new bill is not significantly different from the 1986 subsistence bill in this respect. Under that law, only residents of communities that had demonstrated customary and traditional uses of a particular fish stock or game population were granted a subsistence preference. See former 5 AAC 99.010 and 5 AAC 99.025. There was no statewide subsistence preference. Nor is there a statewide preference under the federal ANILCA regulations. Temporary Subsistence Management Regulations For Federal Public Lands In Alaska (1991-92). A statewide subsistence preference in state law would, itself, create a conflict between state law and ANILCA.

The Governor's Subsistence Advisory Council did not intend to prefer the reliance of a user who, for example, might take red salmon on the Copper River, king salmon on the Kenai River, chum salmon on the Tanana River, moose in the Innoko River area, deer on Kodiak Island, and caribou on the North Slope. In the advisory

McDowell v. State, Memorandum of Decision Severing Unconstitutional Portions of Statute from Remainder of Statute at 8 (Alaska Super. Ct. June 20, 1990). The obvious reason that the parties did not address the issue on remand is because it was not an issue on appeal. We do not believe that the Alaska Supreme Court would agree with Judge Cutler's ruling on this issue. See Gilbert v. State Dep't of Fish and Game, 803 P.2d 391, 398-99 (Alaska 1990).

council's eyes, that kind of reliance was not as deserving of a preference to fish and game in one of those areas as hunting and fishing that is concentrated in that area. It seems obvious that in deciding who should have a preference in a particular area, the user that gets all or most of his fish and game from the area should rank higher than one who gets only a smaller portion from that particular area. We believe the courts would decide that these two users are not similarly situated with respect to the resource and the purpose of the law. See article VIII, section 17 of the Alaska Constitution. We also believe that, as between a person who has demonstrated reliance on fish and game in Area A and one who has such reliance in another area that is suffering from shortages of fish and game, the person with demonstrated reliance in Area A may be properly preferred over the other user because they are not similarly situated with respect to the resource in Area A and the purpose of the bill.⁶

The Twelve Month Qualification Period

Under the proposed AS 16.05.268(i) and (o), qualifying activity must occur within the preceding twelve months. While it may be technically possible to qualify in as little as four months (taking fish or game in four different months is the longest determinative durational minimum requirement, proposed AS 16.04.268(i)(4)), it is generally anticipated that many users will require closer to the full twelve-month period to qualify. This provision does not create constitutional problems.

At first blush, the twelve-month provision might seem to create a durational residency problem. It does not. Several points must be kept very clear. Under this bill, residence in a particular area is never required for qualification. Residence in the subsistence use area is not required. To the extent that the user's presence, as opposed to residence, in the area is required, those requirements meet "durational residency" standards. Hicklin v. Orbeck, 565 P.2d 159, 162-65 (Alaska 1977) rev'd on other grounds, 437 U.S. 518 (1978).

The twelve-month period is closely related to the patterns of use and fish and game in Alaska and is the only reasonable period for the demonstrations of actual and substantial reliance on fish and game. The goal of the legislation is to give a preference to those who currently, actually, and substantially rely on fish and game in particular areas of the state. It is not the goal to give

⁶ This is the situation posed by George Utermohle of the Legislative Legal Affairs Agency in his March 16, 1992 letter to Senator Lyman Hoffman at page 5, note 7.

There must necessarily be some kind of test to identify actual and substantial reliance on that fish and game. To avoid spurious claims of reliance based on very short-term or only sporadic use, some time requirements are necessarily included. In deciding what time period would make the most sense, the advisory council looked at the patterns of fish and game use in Alaska. Most uses are seasonal. For example, salmon are generally only available during a certain time-span during the year. With game, hunting is generally limited to one or two seasons to get the best quality of meat or to avoid interference with species reproduction. In any case, patterns of use are tied to yearly cycles. If the qualifying time was less than the preceding 12 months, persons in certain areas might be disadvantaged because of the seasonal availability of fish and game. If the time period was longer than twelve month you would expect to see duplication of activity which would be less probative of current reliance. The twelve-month period is obviously the most appropriate for this particular test. It is necessary to identify the kind of use of fish and game the bill is intended to prefer. It is the "least drastic means" to achieve the ends of the statute. Hicklin, 565 P.2d at 165. It is a necessary test of bona fide reliance.

Certainly, the twelve-month provisions, as explained above, meet substantive due process standards that legislative enactments be reasonable and not arbitrary. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

Tier II Criteria

In the proposed AS 16.05.268(b)(4)(B), subsistence use of game populations or fish stocks insufficient to provide for all subsistence uses would be authorized by ranking users by applying three criteria. One of the criteria would be "the proximity of the domicile of the subsistence user to the stock or population". Proposed AS 16.05.268(b)(4)(B)(ii); SB 443, Section 2 at page 4, lines 14-15. The question of the constitutionality of this provision was raised at one meeting of the Senate Resources Committee. We believe that the provision is probably constitutional.

First, it should be noted that the current subsistence law contains a very similar provision expressed simply as "local residency". AS 16.05.258(c)(2). This phrase has been interpreted by the Joint Boards of Fish and Game to mean that those who "live closest to the resource" would be given maximum protection. 5 AAC 99.010(f)(1). "Local residency" is also the language used in ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law or from ANILCA, but is intended to more clearly state how "local

The Honorable Lyman F. Hoffman
The Honorable Georgianna Lincoln

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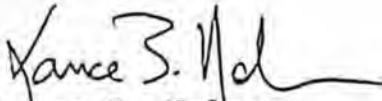
ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law, or from ANILCA, but is intended to more clearly state how "local residency" will be measured. If the Tier II provision of the subsistence legislation did not contain a "local residency/proximity to the resource" criterion it would be in conflict with Section 804 of ANILCA, 16 U.S.C. Sec. 3114(2).

While the Alaska Supreme Court ruled in McDowell that the subsistence preference could not be awarded on the basis of the characteristics of the community in which an individual user resided, there is nothing in that opinion to indicate that the location of an individual's residence in relation to the fish or game could not be a constitutional criterion, especially in the times of extreme shortages envisioned under the Tier II provisions. Upon remand of that case to the superior court, Judge Beverly Cutler ruled that the Tier II provisions did not violate the standards in McDowell.⁷ When there is not enough fish or game to satisfy all qualified subsistence users, further ranking of these users becomes mandatory. Assuming that two users are equal as to the two other criteria of dependence and the ability to obtain other food, it would seem that proximity to the resource would not be an unreasonable way to distinguish between the two otherwise similar users.

If you have further questions about issues raised by the subsistence legislation, we would be happy to discuss these matters with you at your convenience.

CHARLES E. COLE
ATTORNEY GENERAL

By:


Lance B. Nelson

Assistant Attorney General

⁷ Judge Cutler ruled that the Tier II "local residency" criterion did not violate the supreme court's holding in McDowell. McDowell v. State, Memorandum of Decision Severing Unconstitutional Portions of Statute from Remainder of Statute at 7 (Alaska Super. Ct. June 20, 1990).

was given to ANIC on July 29, rather than July 31 as determined by the Board.

This issue has been waived because it was raised first in the reply brief. Alaska R.App.P. 212(c)(3) (The reply brief "may raise no contentions not previously raised in either the appellant's or appellee's briefs."); *Conam Alaska v. Bell Lavalin, Inc.*, 842 P.2d 148, 158 (Alaska 1992). If Sumner intended to argue that the Board's finding was clearly erroneous, or not supported by substantial evidence, he should have done so in his points on appeal, or at least in his opening brief.

D. *There Is No Basis for Awarding a Penalty*

[9] Sumner observes that the Board did not determine whether the controversy was made in bad faith. He contends that this determination should have been made because he believes that bad faith warrants the imposition of a penalty regardless of the promptness of payment.

Sumner cites *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992), for support. *Harp* is inapposite. *Harp* dealt with an allegedly good faith controversy as a means of avoiding a penalty for a delayed payment. The instant case involves no delay; rather, Sumner alleges bad faith as a means of imposing a penalty. The controversy was timely. It was a simple letter to the examining doctor requesting clarification. It did not delay Sumner's receipt of PPI beyond the allotted time.

Sumner provides no other legal basis for imposition of a penalty. Thus, his claim fails.

III. CONCLUSION

The Board reasonably, and in our view correctly, interpreted and applied AS 23.30.155(b) and (e) to the timeliness of PPI payments under section 190. The issue regarding the Board's decision that notice was given to ANIC on July 31 has been waived. All other grounds for reversal argued by

Sumner are unpersuasive. Thus, the judgment of the superior court is AFFIRMED.



STATE of Alaska and Carl L. Roaler, in his official capacity as Commissioner of Fish and Game, Appellants,

v.

KENAITZE INDIAN TRIBE, Ninilchik Traditional Council, Knik Tribal Council, and the Native Village of Eklutna, Appellees.

No. S-6162.

Supreme Court of Alaska.

May 9, 1995.

Rehearing Denied June 2, 1995.

Indian tribe brought action challenging constitutionality of subsistence hunting and fishing statute. The Superior Court, Third Judicial District, Anchorage, Dana Fabe, J., ruled that portions of statute were unconstitutional, and appeal was taken. The Supreme Court, Matthews, J., held that: (1) provision of subsistence hunting and fishing statute using proximity of domicile of "Tier II" subsistence permit applicant to fish or game population which applicant wished to harvest as basis for applicant's eligibility violated equal access clauses of Alaska Constitution; (2) unconstitutional provision was separable from remainder of statute; and (3) provision of subsistence hunting and fishing statute requiring creation of areas in which permits for subsistence hunting and fishing could not be granted did not violate equal access clauses.

Reversed and remanded.

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Ch. 151, § 1
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AS 16.05.251

Thus, the judgment is AFFIRMED.

1. Constitutional Law ⇨328

Fish ⇨9

Game ⇨4

Provision of subsistence hunting and fishing statute using proximity of domicile of "Tier II" subsistence permit applicant to fish or game population which applicant wished to harvest as basis for applicant's eligibility violated equal access clauses of Alaska Constitution. Const. Art. 8, §§ 3, 15, 17; AS 16.05.258(b)(4)(B)(ii).

2. Statutes ⇨64(2)

Unconstitutional provision of subsistence hunting and fishing statute, using proximity of domicile of "Tier II" subsistence permit applicant to fish and game population which applicant wished to harvest as basis for applicant's eligibility, was severable from remainder of statute. Const. Art. 8, §§ 3, 15, 17; AS 01.10.030, 16.05.258(b)(4)(B)(ii).

1. Constitutional Law ⇨328

Fish ⇨9

Game ⇨4

Provision of subsistence hunting and fishing statute requiring creation of areas in which permits for subsistence hunting and fishing could not be granted did not violate equal access clauses of Alaska Constitution. Const. Art. 8, §§ 3, 15, 17; AS 16.05.258(c).

Stephen M. White, Asst. Atty. Gen., Juneau; T. Henry Wilson, Asst. Atty. Gen., Anchorage, Bruce M. Botelho, Atty. Gen., Juneau, for appellants.

Carol H. Daniel, Alaska Legal Services Corp., Eric Smith, Anchorage, William E. Caldwell, Alaska Legal Services Corp., Fairbanks, for appellees.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

1. Ch. 151, § 5, SLA 1978; *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168, 174 n. 12 (Alaska 1985).

2. AS 16.05.258(b)(4), set forth at note 18 *infra*.

OPINION

MATTHEWS, Justice.

The issues in this case are whether the Alaska Constitution is violated by a statute which (1) requires the creation of areas in which permits for subsistence hunting and fishing may not be granted, and (2) grants priority hunting and fishing rights to a preferred class of subsistence users based on where they reside.

I. BACKGROUND

Since 1978, subsistence hunting and fishing has had statutory priority over sport and commercial hunting and fishing.¹ In practice, when a fish or game population is insufficient to supply all consumptive uses consistent with the sustained yield principle, non-subsistence uses must be restricted; when a population is sufficient only to supply subsistence uses, nonsubsistence uses must be eliminated.²

From the outset, the statute establishing the subsistence priority created two tiers of subsistence users.³ The first tier includes all subsistence users.⁴ The second tier is more restricted. Tier II status becomes important when a fish or game population is inadequate to satisfy all subsistence needs. In such cases Tier I users' harvest opportunities must be curtailed or eliminated so that Tier II users can harvest the population.⁵

Under the current statutory formulation the Boards of Fisheries and Game define Tier II subsistence users 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

3. Ch. 151, § 4, SLA 1978.

4. AS 16.05.258(b)(3), set forth at note 18 *infra*.

5. AS 16.05.258(b)(4), set forth at note 18 *infra*.

of L. Rosier, in Commissioner Appellants,

IBE, Ninihchik Tribal Council of Eklutna,

Alaska.

June 2, 1995.

petition challenging the hunting and fishing statute. The Court, Third Circuit, Judge Dana Fabe, J., was divided. The Supreme Court held that: (1) the hunting and fishing statute using proximity of domicile of "Tier II" permit applicant to fish or game population which applicant wished to harvest as basis for applicant's eligibility violated Alaska Constitution; and (2) the hunting and fishing statute requiring creation of areas in which permits for subsistence hunting and fishing could not be granted violated equal access clauses of Alaska Constitution.

ALASKA COURT REPORTERS ASSOCIATION

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

AS 16.05.258(b)(4)(B).

In 1986 the subsistence statute was amended to define subsistence hunting and fishing as activities which can be undertaken "only by a resident domiciled in a rural area of the state."⁶ The term "subsistence uses" was also defined as requiring residency in a rural area.⁷ A rural area, in turn, was defined 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."⁸ Subsistence activities were limited to rural areas.⁹

In *McDowell v. State*, 785 P.2d 1 (Alaska 1989), we held that the 1986 statute was unconstitutional insofar as it disqualified as subsistence users residents of areas classified as nonrural. Following *McDowell*, all Alaskans became eligible to participate in subsistence hunting and fishing. *State v. Morry*, 836 P.2d 358, 368 (Alaska 1992).

In 1992 the legislature revised the subsistence statute.¹⁰ As revised, the statute continues to grant subsistence a priority over other consumptive uses and continues to provide for two tiers of subsistence users.¹¹ However, the new statute also requires the Boards to identify nonsubsistence areas—areas where no subsistence priority exists.¹² The definition of a nonsubsistence area under the 1992 revision, "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 communi-

ty," is essentially the negative of the definition of "rural area" which is still defined 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."¹³ The nonsubsistence provisions of the 1992 revisions to AS 16.05.258 expire on October 1, 1995, and the 1986 version again becomes law.¹⁴

Pursuant to the 1992 revisions, the Boards established the "Anchorage/MatSu/Kenai nonsubsistence area" encompassing most of the Kenai Peninsula, all of the Municipality of Anchorage, and much of the Matanuska Susitna Borough. In addition, the Boards established nonsubsistence areas in regions surrounding Fairbanks, Ketchikan, Juneau, and Valdez. 5 AAC 99.015.

11. PROCEEDINGS BELOW

The Kenaitze Indian Tribe filed suit in 1991, seeking a judicial declaration (1) that it was entitled to operate a communal set net in the Kenai River and (2) that the State was not managing the salmon stocks in Upper Cook Inlet in accordance with the subsistence priority as required by law. When the Boards established the Anchorage/MatSu/Kenai nonsubsistence area, Kenaitze amended its complaint to state claims that the nonsubsistence area violated its members' state constitutional rights under the equal access clauses of article VIII, sections 3, 15, and 17, and the equal rights and opportunities clause of article I, section 1 of the Alaska Constitution. Further, Kenaitze claimed that the Boards' creation of the An-

chorage/MatSu/Kenai nonsubsistence areas, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

6. Ch. 52, §§ 9, 11, SLA 1978; AS 16.05.940(28)-(29) (1986); *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

7. Ch. 52, § 10, SLA 1978; AS 16.05.940(30) (1986).

8. Ch. 52, § 11, SLA 1978; AS 16.05.940(25) (1986).

9. Ch. 52, § 6, SLA 1978; AS 16.05.258(a) (1986) provided:

The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and popula-

10. Ch. 1, SSSLA (Second Special Session Law Amended) 1992.

11. AS 16.05.258(b)(4)(B) set forth at note 11 *infra*.

12. AS 16.05.258(c) set forth at note 18 *infra*.

13. AS 16.05.940(27).

14. Ch. 1, §§ 3, 12, SSSLA 1992.

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orage/MatSu/Kensi nonsubsistence area
was not in compliance with the 1992 statute
because the Boards had exceeded their au-
thority and acted arbitrarily. The Ninilchik
Traditional Council, the Native Village of
Eklutna, and the Knik Tribal Council inter-
vened and filed similar claims.¹⁵

The State and Kenaitze filed cross-motions
for partial summary judgment on their con-
stitutional claims. The superior court grant-
ed the motion of Kenaitze and denied that of
the State. The court entered a final judg-
ment declaring the nonsubsistence area pro-
vision of the 1992 act unconstitutional in vio-
lation of article VIII, sections 3, 15, and 17 of
the Alaska Constitution and therefore void,
and severed AS 16.05.258(c) from the remain-
der of the 1992 act. The other claims of
Kenaitze were declared moot. The State
now appeals.

Briefly stated, the rationale of the superior
court was as follows. Residents of nonsub-
sistence areas and residents of subsistence
areas are similarly situated classes. The for-
mer are treated differently than the latter
because "only residents outside of nonsubsis-
tence areas . . . are afforded convenient local
subsistence access to fish and game re-
sources." Moreover, when fish and game
populations are insufficient to satisfy all sub-
sistence needs and the Tier II preference is
invoked, "residents of nonsubsistence areas
will inevitably suffer compared to other sub-
sistence users," because the section which
determines who may become a Tier II hunter
or fisherman "requires consideration of 'the
proximity of the domicile of the subsistence
user to the stock or population.' AS
16.05.258(b)(4)(B)(ii)." This differential
treatment may be justified by the need to
allocate fish and wildlife resources "given the
key social and economic roles that subsis-
tence, sport, and commercial fishing and
hunting play in the state, as well as the
mandate of article VIII, section 4 of the
Alaska Constitution that replenishable re-
source utilization be 'subject to preferences
among beneficial uses.'" However, based on

15. We will hereafter refer to all the appellees as
"Kenaitze."

16. Our order stated: "To the extent that 'tier
two' subsistence users are permitted to take fish

language in *Gilbert v. State*, 803 P.2d 391,
399 (Alaska 1990), an allocation must restrict
competing uses to the least possible extent
consistent with the purpose of the allocation.
Alaska Statute 16.05.258(c) fails to meet this
requirement as it bars subsistence in a par-
ticular area without requiring consideration
of resource availability: "To create areas
where subsistence activities are flatly prohib-
ited, without consideration of whether the
resources in the area could support some
kind of balance between subsistence, sport
and commercial hunting and fishing, does not
further the state's expressed purpose to 'allo-
cate' resources among user groups." The
superior court concluded as follows:

Stepping back to view the statute in
light of its history, it becomes apparent
that the criteria in AS 16.05.258(c) for de-
termining nonsubsistence areas effectively
re-establish the rural/urban residency re-
quirement struck down in *McDowell*. The
statutory language defining "rural areas"
in the 1986 statute is repeated in the defi-
nition of "nonsubsistence areas" under the
1992 statute. Compare AS 16.05.940(25)
(1986) with AS 16.05.258(c) (1992). The
only significant change has been to do
away with the requirement that only rural
residents may become members of the
subsistence user class, although subsis-
tence use is still allowed only in rural
areas. The statute, by selectively prohibi-
ting local subsistence activities and confer-
ring "tier two" advantages based on the
proximity of one's domicile to available
subsistence resources, is plainly discrimi-
natory against residents of nonsubsistence
areas. Such a substantially residency-
based classification scheme, under *McDo-
well*, violates the equal access clauses of
the Alaska Constitution.

Because of the importance of the role that
the Tier II domicile factor assumed in the
rationale of the superior court, we ordered
that the parties brief the constitutionality of
this factor along with the other issues in the
case.¹⁶

and game for subsistence use based on the 'prox-
imity of the domicile of the subsistence user to
the stock or population.' AS
16.05.258(b)(4)(B)(ii), is tier two unconstitutional

ALASKA SUPREME COURT

III. DISCUSSION

A. Relevant Constitutional and Statutory Provisions

The equal access clauses of the Alaska Constitution are article VIII, sections 3, 15,

under *McDowell v. State*, 785 P.2d 1 (Alaska 1989):"

17. Section 3 of article VIII provides:

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

Section 4 of article VIII provides:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

18. AS 16.05.258 provides:

(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

and 17; the sustained yield clause is contained in article VIII, section 4.¹⁷ Alaska Statute 16.05.258 is the current subsistence statute.^{18,19} Section 1 of chapter 1, SSSLA

(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:

19. See note on page 637.

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1992 contains the legislative findings, purpose and intent with respect to the 1992 subsistence revisions.²⁰

- (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.

19. AS 16.05.940, also relevant, provides in part:

(7) "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;

(24) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska resi-

dents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(27) "rural area" means 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;

(30) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(31) "subsistence hunting" means the taking of, hunting for, or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game;

(32) "subsistence uses" means the noncommercial, customary and traditional uses 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; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis[]

20. 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;

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B. *Is the "Proximity of the Domicile" Factor Unconstitutional?*

[1] We turn first to the question of whether linking eligibility for Tier II subsistence status to "proximity of the domicile of the subsistence user" to the target fish or game population violates article VIII, sections 3, 15, and 17 of the Alaska Constitution. This question is governed by our decision in *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

At issue in *McDowell* was whether provisions in the 1986 subsistence statute which barred all nonrural Alaska residents from eligibility as first or second tier subsistence users violated the article VIII equal access clauses. *Id.* at 1. We held that the rural preference was a special privilege explicitly barred by the first sentence of section 15 and implicitly barred by the common use and equal application clauses, sections 3 and 17. *Id.* at 6, 9. We concluded "that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution." *Id.* at 9.

Concerning sections 3, 15, and 17 of article VIII, we observed that while they have varied ramifications they share one meaning: "exclusive or special privileges to take fish and wildlife are prohibited." *Id.* at 6. We noted that these clauses afford protection against the creation of a "closed class" of fish and game users. *Id.* at 6-7. We observed that although the state was empowered to make decisions concerning which among such diverse groups as commercial, sport and subsistence users would have a preferred right

(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 manage-

to harvest a certain species, that authority "does not imply a power to limit admission to a user group." *Id.* at 8. We explained that the constitution does not bar "all methods of exclusion where exclusion is required for species protection reasons." *Id.* at 9. While we had no occasion to state what exclusionary criteria might be permissible in such circumstances, the opinion makes it clear that residence-based criteria are not permissible. We both quoted and stressed language holding that people who reside near a fish or game population do not have a higher claim to that population than state residents whose domiciles are more distant:

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

Id. at 12 (quoting *Lewis v. State*, 110 Ark. 204, 161 S.W. 154, 155-56 (1913)) (emphasis added by this court in *McDowell*).

Our holding in *McDowell* is controlling here. The requirements of the equal access clauses apply to both tiers of subsistence users. Just as eligibility to participate in all subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, eligibility to participate in Tier II subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population.²¹

ment 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.

21. Section 3 of article VIII is particularly strong in requiring that proximity to the resource be a neutral factor. It reserves "to the people for

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22. See note

We conclude that AS 16.05.258(b)(4)(B)(ii), which uses the proximity of the domicile of the Tier II subsistence permit applicant to the fish or game population which the applicant wishes to harvest as a basis for the applicant's eligibility, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

[2] The question which flows from this conclusion is whether the entire subsistence statute should be declared unconstitutional or whether AS 16.05.258(b)(4)(B)(ii) may be severed from the rest of the statute.

A general severability clause is contained in AS 01.10.030:

Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

In *Lynden Transport, Inc. v. State*, 532 P.2d 700, 712-13 (Alaska 1975), we indicated that this clause reverses the common law presumption against severability and creates a slight presumption in favor of severability:

A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

Id. at 713 (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 324, 68 L.Ed. 686 (1924)). "The key question is whether the portion remaining, once the offending portion of the statute is severed, is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part." *Sonnenman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992).

common use" wild fish and game "whenever occurring."

22. See note 20 *supra*.

Deleting subpart (ii) from AS 16.05.258(b)(4)(B) results in a subsection which requires the creation of a Tier II class of subsistence users based on dependence on the target fish or game population and the ability of the individual subsistence user to obtain food if subsistence use of the particular population were restricted or eliminated. The subsection as thus redacted is logically complete and capable of being given legal meaning.

Whether the legislature would have intended the subsection as redacted to stand had it known that the proximity of the domicile clause would be held unconstitutional is a question which cannot be answered with complete confidence. However, given the importance of subsistence as reflected in the legislative findings prefacing the 1992 act,²² periods in which individuals needfully dependent on subsistence are deprived of an opportunity to harvest fish or game are to be avoided. A holding that subsection (B)(ii) is not severable could result in such a period. Given this, and the statutory presumption in favor of severability, we conclude that (B)(ii) is severable.

C. Is AS 16.05.258(c) Unconstitutional?

[3] Alaska Statute 16.05.258(c) requires the Boards to "identify by regulation" non-subsistence areas.²³ In these areas, the subsistence priority over sport and commercial uses does not apply, and the statute states that "[t]he boards may not permit subsistence hunting or fishing." However, personal use fishing²⁴ and sport hunting are allowed. As the methods of conducting these pursuits are similar to their subsistence counterparts, the critical difference in non-subsistence areas is the absence of the subsistence priority. When this is appreciated, the superior court's conclusion that section 258(c) authorizes the creation of "areas where subsistence activities are flatly prohibited, without consideration of whether the resources in the area could support some kind of balance between subsistence, sport,

23. AS 16.05.258(c) set forth at note 18 *supra*.

24. See note 18 *supra* for a statutory definition.

cies, that authority to limit admission to

We explained that "all methods of harvest are required for special use lands." *Id.* at 9. While we do not think that what exclusionary language is permissible in such circumstances it is clear that residential use is not permissible. The language held in *Id.* near a fish or game area is a higher claim than the residents whose interests are

the preservation of which exists in certain territories may have the purpose of regulating game and fish harvesting and is intended to be applied to the people of the territory upon which it is intended to be applied to those who have been given the territory embraced in

State, 110 Ark. 1913)) (emphasis added).

It is controlling the equal access of subsistence participants in all hunting cannot be one lives in an area to participate in hunting and fishing and one lives to a certain area.²¹

A yield principle;

reference for subsistence uses of fish

legislature that Alaska's fish and game is highest preference and perpetuate

significant reallocation in Alaska.

particularly strong resource be a the people for

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

628 P.2d at 904.

The fact that residents of nonsubsistence areas must travel in order to utilize subsistence permits is not a limitation to their admission to a subsistence user group.³¹ Further, just as the fact that a certain species is made available for sport fishing in a given area does not mean that the same species must be made available for commercial fishing in the same area, the fact that a certain species is made available for sport or commercial use in a given area does not mean that the constitution commands that the same species be made available in the same area for priority subsistence use.

The legislature has mandated that the Boards, in determining which areas are to be nonsubsistence areas, make decisions allocating fish and game resources among competing users. Such decisions are constitutionally required under article VIII, section 4 of the Alaska Constitution.³² "The state may, indeed must, make allocation decisions between sport, commercial, and subsistence

users." *McDowell v. State*, 786 P.2d 1, 8 (Alaska 1989). Allocation decisions entail a complex mixture of biological, historical, and socio-economic factors.³³ These factors are "often competing." *Tongass Sport Fishing Ass'n*, 866 P.2d at 1319.

In reviewing allocation decisions made by the Board, a deferential standard of review is employed. Board decisions are upheld so long as they are not unreasonable or arbitrary and proper procedures have been followed. *Id.* (Board's decision favorable to commercial trollers concerning allocation of king salmon in Southeast Alaska not "unreasonable or arbitrary"); *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391, 399 (Alaska 1990) (Board's decision allocating sockeye salmon between commercial fishing interests in two areas on the Alaska Peninsula not arbitrary or unreasonable); *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174-175 (Alaska 1987) (Board's decision allocating sockeye salmon between commercial setnetters and driftnetters in Bristol Bay "reasonable and not arbitrary."). We have not subjected allocation decisions to the more rigorous least restrictive alternative test employed in cases where entry into a user class is restricted. Compare *McDowell*, 785 P.2d at 10; *Ovsi- chek*, 763 P.2d at 498 n. 17; and *Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1266 (Alaska 1988), with *Tongass*, 866 P.2d at 1319; *Gilbert*, 803 P.2d at 399; and *Meier*, 739 P.2d at 175.³⁴ Allocation

31. In *State v. Hebert*, 803 P.2d 863 (Alaska 1990), we upheld against a claim of article VIII violation a system which frankly was designed to favor local fishermen. *Id.* at 864. Under this system, "super-exclusive" districts were imposed in two Bering Sea sac roe herring fisheries. Fishermen who fished in one super-exclusive district could not fish for herring in any other district, super-exclusive or otherwise. *Id.* Fishermen who fished in any other district could not participate in either super-exclusive district. *Id.* While this system inconvenienced and limited the fishing options both of fishermen residing adjacent to each super-exclusive district and those in more distant locations, we held that the equal access clauses were not violated. *Id.* at 866. Both groups had an equal opportunity to fish in all districts except the super-exclusive districts, or in one of the super-exclusive districts but no other district. *Id.*

32. See note 17 *supra*.

33. See, e.g., AS 16.05 251(e); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314 (Alaska 1994); *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391 (Alaska 1990); *Meier v. State, Bd. of Fisheries*, 739 P.2d 172 (Alaska 1987).

34. While we stated in *Gilbert* that "to satisfy the uniform application clause of article VIII, state fish and game regulations creating nonuniform classifications must" have a legitimate and important purpose and "[t]he means used to further the important state purpose must be carefully drawn and designed for 'the least possible infringement on article VIII's open access values.'" *Gilbert* 803 P.2d at 399, we did not use this test in *Gilbert*. We went on to state that allocation "decisions are within the power of the Board, so long as they are not arbitrary and unreasonable and are consistent with and reasonably necessary to the conservation and development of Alaska fishery resources." *id.* (quot-

decisions are so complex and multi-faceted that they are not amenable to analysis under such a test.

In this case, the court did not reach the question of whether the joint Boards acted unreasonably or arbitrarily in creating the Anchorage/MatSu/Kenai nonsubsistence area. Instead, the court ruled that the statute was invalid on its face using a least restrictive alternative test. Given the proximity of the domicile Tier II requirement, use of this test was not error, for that requirement erected a bar to admission to a user class. However, with this requirement stricken from the statute, this test no longer applies.

Alaska Statute 16.05.258(c), as it stands without the domicile proximity requirement, contains no characteristics implicating the equal access clauses of article VIII. It bars no Alaskan from participating in any fish or game user class. As these clauses formed the basis for the superior court's decision and no alternative grounds for upholding the court's decision have been argued, the decision must be reversed.

IV. CONCLUSION

The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live. The statutory section mandating the creation of nonsubsistence areas does not violate these sections. The judgment of the superior court is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this opinion.



ing *McDowell*, 785 P.2d at 10; *Kenai Peninsula*, 628 P.2d at 903), and reviewed the allocation

ESTATE OF Adam ARROWOOD, By and Through Joyce LOEB, personal representative, Terry Arrowwood and Alice Arrowwood, Appellants,

v.

STATE of Alaska, Appellee.

No. S-5667.

Supreme Court of Alaska.

May 12, 1996.

Negligence action was brought against state to recover for injuries sustained in accident occurring on icy highway. The Superior Court, Third Judicial District, Anchorage, Peter A. Michalski, J., entered judgment in favor of state, and appeal was taken. The Supreme Court, Rabinowitz, J., held that: (1) state's refusal to close highway due to icy conditions was planning-level decision that fell within ambit of discretionary function exception to Alaska Tort Claims Act; (2) evidence pertaining to road maintenance budget reductions was irrelevant; (3) plaintiffs' experts could not rely on transcript of recorded interview with alleged eyewitness to road conditions on date of accident; and (4) lay opinion testimony of operator of snowplow business regarding general reasonableness of state's maintenance efforts was irrelevant and inadmissible.

Affirmed.

1. Appeal and Error \S 863, 934(1)

When reviewing Superior Court's grant of summary judgment, state Supreme Court determines whether genuine issue of material fact exists and whether moving party is entitled to judgment as matter of law; in doing so, Court draws all reasonable factual inferences from proffered evidence in favor of nonmoving party. Rules Civ.Proc., Rule 56(c).

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MEMORANDUM

June 15, 1992

SUBJECT: Constitutionality of the Governor's proposed subsistence bill under the open access provisions of the Alaska Constitution

TO: Representative Ramona Barnes

FROM: George Utermohle *GU*
Legislative Counsel

You have asked whether the Governor's proposed subsistence bill is consistent with the open access provisions of the Alaska Constitution. At this time a copy of the Governor's proposed subsistence bill is not available. It is my understanding that the bill will be substantially the same as SB 443/HB 552 (17th Legislature), but with three or four minor technical changes that do not affect the substance of the bill.

For purposes of responding to your request, this memorandum answers your question in the context of SB 443/HB 552. If the legislation actually introduced by the Governor varies significantly from SB 443/HB 552, then I can reconsider your question in the context of the new legislation when it becomes available.

SHORT ANSWER

One, SB 443/HB 552 provides for the establishment of dozens of subsistence use areas. The mandatory minimum eligibility standards for subsistence hunting and fishing proposed by SB 443/HB 552 establish each subsistence use area as a separate use area and limit admission to the user group for that area to only those persons who have a history of recent and extensive use in the area. The mandatory minimum eligibility standards pose a significant infringement on the open access values of the Alaska Constitution. ~~There is a substantial risk that the mandatory minimum eligibility standards are unconstitutional.~~

Two, under SB 443/HB 552, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into fish and game user groups, they may inhibit equal and open access to

fish and game resources and, thus, are ~~at least constitutionally suspect~~ under the open access provisions of the Alaska Constitution.

DISCUSSION

This memorandum addresses the constitutional issues raised by SB 443/HB 552.^{1/} SB 443/HB 552 relates primarily to the subsistence use and allocation of fish and game resources. The bill establishes an intricate system for controlling entry into subsistence user groups and for limiting the activities of those user groups to certain areas of the state. The bill provides that persons with a recent history of dependence on and use of fish and game resources will be able to continue their subsistence activities while leaving an opportunity for new persons to qualify for subsistence activities. Minimizing the administrative burden on the individual subsistence user and the Department of Fish and Game is also an important element of the bill.

The bill provides for subsistence use of fish and game resources under the legislature's authority to provide for the utilization, development, and conservation of natural resources.^{2/} Subsistence is not a constitutionally mandated or protected use of fish and game resources. As a statutorily created use of fish and game resources, any system for management of subsistence use or for allocation of fish and game for subsistence use must be consistent with the Alaska Constitution. Of particular relevance to the subsistence use of fish and game are the "open access" provisions of the Alaska Constitution: common use section^{3/}, no exclusive right of fishery clause^{4/}, and uniform application section^{5/}. Although the ramifications of

^{1/} This memorandum does not address issues of statutory construction or legislative draftsmanship that do not implicate the Alaska Constitution. Those issues can be addressed later, if you wish.

^{2/} Article VIII, sec. 2:

GENERAL AUTHORITY. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

^{3/} Article VIII, sec. 3:

COMMON USE. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

^{4/} Article VIII, sec. 15, in relevant part:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. . . .

these provisions are varied, they share at least one meaning: exclusive or special privileges to take fish and game are prohibited. The no exclusive right of fishery clause states this explicitly with regard to fisheries. The proceedings of the Alaska Constitutional Convention show that this same meaning was intended with respect to fish and game under the common use section and the uniform application section. McDowell v. State, 785 P.2d 1, 6 (Alaska 1989).

The bill avoids creating an obviously closed class of subsistence users like the rural resident preference that the Alaska Supreme Court struck down in McDowell. Instead, the bill establishes a system in which any person may engage in subsistence use of fish and game provided that the person satisfies the prescribed eligibility criteria.

ELIGIBILITY CRITERIA FOR SUBSISTENCE

SB 443/HB 552 proposes seven fundamental considerations for determining who is eligible to engage in subsistence hunting and fishing. SB 443/HB 552, Sec. 2, Sec. 16.05.268(i); page 7, line 3 - page 8, line 1. The Board of Fisheries and the Board of Game are to jointly establish the actual criteria and a concomitant point system for determining eligibility based on the seven fundamental considerations. Though the boards jointly develop the actual eligibility criteria, four of the fundamental considerations in SB 443/HB 552 are in fact specific mandatory minimum standards that a person must satisfy in order to qualify for subsistence hunting and fishing:

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

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

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

S/(...continued)

S/ Article VIII, sec. 17:

UNIFORM APPLICATION. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

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

SB 443/HB 552, Sec. 2, Sec. 16.05.268(i)(1) - (4); page 7, lines 12 - 24.

Notably, three of the four mandatory standards (Sec. 16.05.268(i)(2) - (4)) set specific minimum requirements on the number of species of fish and game consumed and the number of days and months engaged in hunting and fishing activities (at least a total of 30 days during any four months) and requires that each of the three standards be satisfied in a single subsistence use area during the preceding 12 months.^{6/} Once an applicant for subsistence privileges satisfies these mandatory minimum standards in a subsistence use area and the other criteria adopted by the boards, the applicant is then eligible to participate in subsistence hunting and fishing in that subsistence use area. If an applicant wants to engage in subsistence hunting and fishing in an additional subsistence use area or to move subsistence activities to a new subsistence use area, the applicant must then satisfy the three mandatory standards in the new area as well as the other criteria established by the boards. The applicant can satisfy the three mandatory standards in the new subsistence use area by engaging in sport or personal use fishing or sport hunting in the area, taking the prescribed number of species in the area, and spending the required amount of time fishing and hunting in the area or processing fish and game taken in the area.

By combining standards for eligibility to engage in subsistence hunting and fishing with a requirement that the standards be satisfied in the subsistence use area in which the applicant wishes to use for subsistence hunting and fishing, the three mandatory standards establish each subsistence use area as a separate subsistence hunting and fishing area open only to certain persons and closed to all others. In fact the standards establish separate user groups for each subsistence use area and then limit admission to the user group to those persons who have a history of recent and extensive use in the area. An otherwise qualified subsistence user does not have the freedom to choose which subsistence use area the person will hunt or fish in. The person is confined to that subsistence use area in which he has established the requisite history of use.^{7/} All other persons are barred from using the area for

^{6/} A subsistence use area is the subunit of a game management unit together with the contiguous game management subunits, unless a board describes a different subsistence use area for a particular fish stock or game population. SB 443/HB 552, Sec. 2, Sec. 16.05.268(d) and (e). There are currently 69 game management subunits in the state and thus a possible 69 different subsistence use areas.

^{7/} For example, a subsistence user in Kotzebue who moves to Tok must continue to return to Kotzebue to engage in subsistence hunting and fishing, until the user establishes the prerequisite
(continued...)

subsistence hunting and fishing. Each subsistence use area becomes an exclusive use area open for subsistence use by only a few eligible persons and as such confers a "special privilege" to use the fish and game in the area on those persons.

A system for determining eligibility for engaging in subsistence hunting and fishing which opens participation for some and closes participation for others "will necessarily create tension with article VIII." McDowell, 785 P.2d at 9. Limits on admission to user groups are subject to scrutiny under the article VIII equal access provisions (State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v. State, 763 P.2d 488, 492 (Alaska 1988)), because the provisions of article VIII were intended to guarantee the broadest possible access to and use of fish and game (Owsichek, 763 P.2d at 492 - 93) and to prohibit exclusive or special privileges to take fish and game (McDowell, 785 P.2d at 6). "The history of the common use clauses, . . . , reveals anti-monopoly intent to prevent 'exclusive grants' and 'special privilege[s],' wholly apart from the limits imposed by other constitutional provisions." Owsichek, 763 P.2d at 496.

In Owsichek, the Alaska Supreme Court struck down exclusive guide areas and joint use areas, because these areas were grants of monopolies or special privileges based on a guide's previous use, occupancy, and investment in the area. "To grant such a special privilege based on seniority runs counter to the notion of 'common use'." Owsichek, 763 P.2d at 496. In McDowell, the Alaska Supreme Court struck down the rural residency requirement for subsistence because it amounted to an exclusive or special privilege prohibited by the open access provisions of the Alaska Constitution. McDowell, 785 P.2d at 9. In lieu of the rural residency requirement for determining eligibility for subsistence use of fish and game, SB 443/HB 552 uses the three mandatory minimum requirements to require recent and extensive use in the subsistence use area as a precondition for eligibility. Just as the rural residency requirement precluded nonrural residents from engaging in subsistence activities, the recent and substantial use requirement of SB 443/HB 552 precludes all other persons who are similarly situated but who do not have a recent and substantial history of use in the area from engaging in subsistence hunting and fishing in the subsistence use area. The fact that any nonrural resident could move to a rural area and thus qualify for subsistence was ineffective in saving the former rural residency requirement from

2/ (...continued)

history of use in the Tok area. (This assumes that the state does not deny the person's right to continue to engage in subsistence hunting and fishing in the Kotzebue area, because travelling from Tok to Kotzebue no longer satisfies the economical and efficient requirement for subsistence activities.)

For example, if a tier I subsistence user is closed out of his/her area because of a resource shortage that user may not move his/her subsistence activities to another subsistence use area, even though the person has a continuing need to engage in subsistence hunting and fishing.

invalidity. McDowell, 785 P.2d at 7. Likewise, the ability of an otherwise qualified person to establish a history of recent and extensive use of a new or an additional subsistence use area does not prevent the requirement for such a history of use as, a condition precedent to use of the new area, from being an excessive infringement on open access provisions of the Alaska Constitution.

Review of the three mandatory standards according to the equal protection analysis applied under the uniform application section requires the following procedure. First, the three mandatory standards must have a legitimate purpose. The purposes of SB 443/HB 552 that seem relevant to the mandatory standards are protection of healthy fish stocks and game populations and allowing participation in the subsistence taking of fish and game by those who actually and substantially depend on subsistence use of fish and game. SB 443/HB 552, Section 1(b). These purposes are legitimate purposes. Owsichek, 763 P.2d at 496 - 97; McDowell, 785 P.2d at 13 (concurring opinion). Second, the importance of the individual interest involved must be determined. The individual interest in equal access to fish and game is a highly important interest running to each person within the state. McDowell, 785 P.2d at 10; Owsichek, 763 P.2d at 492 n. 10. Third, the importance of the state's purpose must be balanced against the individual interest involved. McDowell, 785 P.2d at 10. The state's purpose must be at least important to overcome the highly important individual interest at stake. Fourth, the means to further the important state purpose must be carefully drawn and designed for the "least possible infringement on article VIII's open access values." McDowell, 785 P.2d at 10.

Assuming that the state's purpose underlying the three mandatory standards is sufficiently important to countervail the highly important individual interest at stake, it would appear that the means chosen to achieve the state's purpose is not the least possible infringement on open access to fish and game resources. The three mandatory standards allow otherwise qualified individuals to engage in subsistence hunting and fishing in only those subsistence use areas where the individual has a history of recent and extensive use. The remaining dozens of subsistence use areas are closed to this individual.^{8/}

In my opinion, there is a substantial and unnecessary risk that the three mandatory standards contained in SB 443/HB 552 are an impermissible infringement on open

^{8/} This result is intentional. The Section-By-Section Description of the Governor's Subsistence Bill, dated February 21, 1992, states at page 11:

The statute does not provide for qualification on a state-wide basis; hunting and fishing in one subsistence area will not qualify the user to subsistence hunt and fish in another area. While it may be technically possible for a person to qualify in more than one subsistence use area under this subsection [SB 443/HB 552, Sec. 2, Sec. 16.05.268(i)], it is generally contemplated that the vast majority of users will qualify for only one area.

access to fish and game resources and thus would violate the open access provisions of the Alaska Constitution.

It is the creation of dozens of separate, albeit overlapping, subsistence use areas that are each subject to distinct area specific criteria for access that infringes upon the open access provisions of article VIII. Those persons who ultimately qualify for subsistence hunting and fishing privileges in a subsistence use area receive a "special privilege" that is denied to all other persons. Those persons who are not qualified for subsistence hunting and fishing in the area are denied access to the user group for that subsistence use area because they have not established the requisite history of use.

The utilization of past use or activities in an area, as criteria for granting or denying access to fish and game resources has been rejected by the Alaska courts in Owsichek (guide exclusive use and joint use areas) and in Bozanich v. Noerenberg, (Alaska Superior Court, First Judicial District, Juneau, Case No. 70-389, March 15, 1971; state may not bar entry into a salmon net fishery by requiring prior experience in that fishery).

The primary shortcoming of the three mandatory standards is that they combine determinations on access to a user group with determinations on allocation of the fish and game resource. The Alaska Supreme Court is supportive of the state's power to allocate fish and game resources under the sustained yield section of the Alaska Constitution^{9/} (Gilbert v. State Department of Fish and Game, 803 P.2d 391 (Alaska 1990); Meier v. State, Board of Fisheries, 739 P.2d 172 (Alaska 1987)), provided that the allocations are not arbitrary and unreasonable and are consistent with and reasonably necessary to the conservation and development of fish and game resources (Gilbert, 803 P.2d at 399; Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 903 (Alaska 1981)). However, the authority to make allocation decisions does not imply a power to limit admission to a user group. State v. Hebert, 803 P.2d 863, 866; (Alaska 1990) McDowell, 785 P.2d at 7 - 8;^{10/}

^{9/} Article VIII, sec. 4:

SUSTAINED YIELD. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

^{10/} The requirement that a person must engage in subsistence activities in a specific subsistence use area is somewhat analogous to the superexclusive fishing districts established by the Board of Fisheries for the Bering Sea herring sac roe fisheries. The board established two superexclusive herring sac roe fishing districts. If a fisherman chose to fish in either of these fisheries, the fisherman could not fish in any other herring sac roe fishing districts. The Alaska Supreme Court upheld the use of the superexclusive use fisheries for the purpose of allocating the harvest of herring between
(continued...)

The access and allocation determinations could be separated by eliminating the requirement that the three mandatory standards be satisfied in a single subsistence use area. If the two determinations were separated, a fundamental weakness of SB 443/HB 552 would be avoided and SB 443/HB 552 would better withstand challenges under article VIII of the Alaska Constitution. SB 443/HB 552 can be amended to include criteria for determining where qualified subsistence users may engage in subsistence hunting and fishing or for establishing procedures for allocating fish and game resources among subsistence users. Prior use of a subsistence use area for the taking of fish and wildlife could be among the factors used to determine where a person may engage in subsistence fishing and hunting.

COMMUNITY BASED PRESUMPTIONS

Though the criteria for establishing eligibility to engage in subsistence activities are relatively uniform, SB 443/HB 552 provides that the proof necessary satisfy the criteria varies significantly depending on where a person lives.

A person who resides in a subsistence use area in a category 1 area^{11/} is presumed to satisfy all eligibility criteria to take fish and game for subsistence use in that subsistence use area without having to establish more than the person's place of residence. The person can engage in subsistence activities in the subsistence use area in which he/she resides until it is proven by clear and convincing evidence that the person is not qualified to engage in subsistence. SB 443/HB 552, Sec. 2, Sec. 16.05.268(h)(1); page 6, lines 17 - 22.

A person who resides in a subsistence use area in a category 2 area^{12/} is presumed to satisfy all eligibility criteria to take fish and game for subsistence use in that subsistence use area and need only sign a document asserting that the person does indeed qualify. SB 443/HB 552, Sec. 2, Sec. 16.05.268(h)(2); page 6, lines 23 - 29.

^{10/}(...continued)

competing groups of commercial fisherman. State v. Hebert, 803 P.2d 863 (Alaska 1990). The court found that superexclusive fishing districts were consistent with the Alaska Constitution because they did not limit admission to a user group; the fisherman was free to choose which fishing district to fish in. Hebert, 803 P.2d at 866.

^{11/} A category 1 area is an area where the human population of each community in the area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area. SB 443/HB 552, Sec. 2, Sec. 16.05.268(f)(1); page 5, lines 9 - 11.

^{12/} A category 2 area is an area that consists of a single community that has a human population of 2,500 to 6,999, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community. SB 443/HB 552, Sec. 2, Sec. 16.05.268(f)(2); page 5, lines 12 - 15.

Representative Ramona Barnes

June 15, 1992

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The person may engage in subsistence activities in that subsistence use area until it is proven by a preponderance of the evidence that the person is not qualified to engage in subsistence activities in that area.^{13/}

A person who resides in a category 3 area^{14/}, or who wants to engage in subsistence activities outside of the subsistence use area in which the person resides, must apply for certification for the desired subsistence use area from the commissioner of fish and game. The person may engage in subsistence activities in that subsistence use area only after the person has convinced the commissioner of fish and game that the person satisfies the eligibility criteria adopted by the joint boards for that area. SB 443/HB 552, Sec. 2, Sec. 16.05.268(h)(3), page 6, line 30 through page 7, line 2.

Under SB 443/HB 552, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into the class of subsistence users, they may inhibit equal and open access to subsistence resources and, thus, are at least constitutionally suspect under the open access provisions of the Alaska Constitution.

The rural preference of the former subsistence law was struck down in part because it was an "extremely crude" method to provide for the need to engage in subsistence activities. McDowell, 785 P.2d at 10. The classification scheme inherent in the category 1, 2, and 3 areas is subject to similar criticism. Residents in category 1 areas are presumed to qualify for subsistence activities regardless of their individual characteristics. Even those unqualified residents of a category 1 area who engage in subsistence are not penalized or sanctioned for their activities. An unqualified resident of a category 2 area is at least potentially subject to criminal prosecution for falsely alleging his/her qualifications. It is only the residents of a category 3 area that are evaluated on their individual qualifications. The category 1, 2, and 3 area concept is not the "classification scheme employing individual characteristics" which the McDowell court proposed as being "less invasive of Article VIII open access

^{13/} If it is proven that the resident of a category 2 area is not eligible to engage in subsistence activities in the area in which the person resides and that the person was aware of the lack of eligibility at the time the person signed the document, the person is potentially subject to criminal prosecution for unsworn falsification under AS 11.56.210.

^{14/} A category 3 area is an area that is
(A) an urban area or a single community where the human population is 7,000 or greater; or
(B) 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. SB 443/HB 552, Sec. 2, Sec. 16.05.268(f)(3); page 5, lines 16 - 21.

Representative Ramona Barnes
June 15, 1992
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values." McDowell, 785 P.2d at 11. The category 1, 2, and 3 area concept classifies persons as a group based on where they live in the state.

The purpose for this burden on equal access to fish and game resources under article VIII must be, at the minimum, an important purpose. McDowell, 785 P.2d at 10.

According to the Section-By-Section Description of the Governor's Subsistence Bill, dated February 21, 1992,^{15/} the primary purpose of the category 1, 2, and 3 areas is to simplify the task of determining who is eligible to engage in subsistence activities. This purpose amounts to promoting administrative convenience. Administrative convenience is generally accepted as legitimate purpose for legislation and regulations but is not necessarily an important purpose. See, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980); Deubelbeiss v. Commercial Fisheries Entry Commission, 689 P.2d 487, 489 (Alaska 1984). Administrative convenience may not be sufficient to justify the burdens imposed by the category 1, 2, and 3 area classification system.

Assuming that the court does find administrative convenience or some other purpose behind the category 1, 2, and 3 area classification system to be important, it is then necessary to establish that the classification system is "designed for the least possible infringement on article VIII's open access values." McDowell 785 P.2d at 10. Though the classification system may be better than the rural-urban distinction made by the former law, it is not the system based on individual characteristics that the Alaska Supreme Court was looking for. In light of the purpose of the uniform application clause "to exclude an especially privileged status for any person in the use of natural resources subject to disposition by the state"^{16/} it is possible that the courts will require less disparity among residents of the state based on their place of residence than provided in SB 443/HB 552.

A challenge to the category 1, 2, and 3 areas classification system under the uniform application section may result in an adverse decision from the courts because the system places different burdens on residents of the state based on where they live and not on their individual qualifications to engage in subsistence hunting and fishing. A system that required all residents to establish their eligibility to engage in subsistence in the same manner or that gave all residents the benefit of the same presumptions would provide fewer grounds for judicial challenge and be less susceptible to unanticipated judicial constructions.

If I may be of further assistance, please advise.

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^{15/} Page 10 - 11.

^{16/} Owsichek, 763 P.2d at 498 n. 17; quoting 6 Proceedings of the Alaska Constitutional Convention, app. V, at 99 (Commentary); emphasis added by court.

MEMORANDUM

TO: Territorial Sportsmen, Inc.
FROM: Gregory F. Cook
RE: DRAFT ANILCA & Alaska State law amendments
DATE: December 7, 1997

This memo responds to your request for counsel on the following three questions:

- 1) Does the proposed amendment to ANILCA § 807 insulate the State of Alaska from federal court oversight of State fish and wildlife management regulatory actions?

Answering this question involves a two-part legal analysis. First, we look at the meaning of the "arbitrary and capricious" standard of review specified in the amendment. This is a matter of federal common law. Federal law is quite distinct from State common law in Alaska that interprets the same words. Second, we look at the measure of deference accorded decisions of a federal agency to determine the effect of granting a state agency "the same deference" as a "comparable federal agency."

- 2) Can the chances of federal court intervention in State management within the framework of ANILCA and ongoing federal oversight be reduced?
- 3) What is the import of the "deference" standard contained in Governor Knowles' proposed AS 16.05.261(h), (i)?

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THE PROPOSED AMENDMENT TO ANILCA § 807 AND THE ISSUE OF
CONTINUING FEDERAL OVERSIGHT

QUESTION PRESENTED: Does the proposed amendment to ANILCA § 807 insulate the State of Alaska from federal court oversight of State fish and wildlife regulatory actions?

SHORT ANSWER: The proposed amendment to ANILCA § 807 provides no more than a thin sheet of protection from the cold reality of Federal Court oversight of State fish and wildlife management and penetrating Federal judicial scrutiny.

I. INTRODUCTION

The Governor's Task Force on Subsistence (1997) has recommended amending ANILCA § 807 to add two new sentences:

"Agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion.¹ When reviewing any action of a State agency, the District Court shall give the decision of the State agency the same deference it would give the same decisions of a comparable federal agency."²

These two sentences shall be analyzed separately. First, we focus on the standard for judicial review, i.e., the meaning of "arbitrary, capricious, or an abuse of discretion." Next, we examine the likely effect of the proposed amendment's second sentence according parity of deference to the decisions of State and federal agencies.

¹ The "arbitrary and capricious" standard of review is extremely common; it is prescribed by the federal APA, 5 U.S.C. § 706(2)(a).

² Implicit in this provision is the hypothesis that without this clause, a federal court would automatically grant greater deference to a federal agency than to a State agency.

1. The "arbitrary and capricious" standard of review

Analysis of the "arbitrary and capricious" standard of review in the context of ANILCA is a matter of federal common law. As with any matter of common law, the meaning of "arbitrary and capricious" is constantly evolving. There are few, if any, "bright line" distinctions or definitions. Interpretation of this standard is always subject to the discretion of an individual judge, albeit subject to appellate review.

The standards used to guide federal judicial review of agency decisions at the trial court level occupy a spectrum³. At one end of the spectrum is total unreviewability. At the other end of the spectrum is *de novo* review, where the court independently performs the fact-finding task, much like an agency's regulatory hearing⁴.

The most common type of judicial review, including "arbitrary and capricious" review, is in the middle of the spectrum.

The middle ground of judicial review of agency actions has been variously stated by legislative bodies. Examples include: "clearly erroneous," "clear error of judgment," "substantial evidence," "arbitrary and capricious," and "abuse of discretion." Each of these different statutory formulations of the standard for judicial review of agency action has been laboriously explicated by judges in many thousands of cases.

There is considerable cynicism among many legal commentators about judicial sophistry in interpreting and applying the different middle ground standards of judicial review. It is nonetheless useful to be familiar with some of the judicial definitions of the "arbitrary and capricious" standard of review.

The following statement by the U.S. Supreme Court is currently the preeminent explanation of "arbitrary and capricious" review.

...an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile

³ In the federal system, trial level is the District Court.

⁴ The Supreme Court first drew the distinction between reviewable and unreviewable agency actions in the famous case of Marbury v Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 2866-2867 (1983); see also Arkansas v Oklahoma, 503 U.S. 91, 113 (1992).

In seeking to understand the "arbitrary and capricious" standard of review, it would be a mistake to fail to consider the huge importance of how an agency formally justifies its regulatory decisions when the agency produces written findings. The statement below, is illustrative:

A federal agency's rule is arbitrary and capricious and may be set aside by a court if the agency relies on improper facts, ignores important arguments or evidence, fails to articulate a reasoned basis for the rule, or produces an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Natural Resources Defense Council, Inc., v E.P.A., 822 F.2d 104 (D.C. Cir. 1987).⁵

These judicial descriptions of the "arbitrary and capricious" standard should provide a good, general understanding of the term.

As a practical matter, under the "arbitrary and capricious" test, it is a relatively simple matter for a reviewing court, if it is so inclined, to overturn agency action.

Likewise, if a court wants to uphold an agency's action, it is just as simple for the court to review the agency's decision, summarize the administrative record, perhaps note that the court would not necessarily have reached the same conclusion as the agency, then pontifically opine that the court must nonetheless refrain from substituting its judgment for that of the agency.

Each of these two approaches is common in judicial review of agency actions under the "arbitrary and capricious" standard.

In a nutshell, Federal District Court judges have tremendous discretion when they review the decisions of administrative agencies under the "arbitrary and capricious" standard.

The foremost commentator in the field of federal administrative law (K.C. Davis) has written a summary of the law of this middle ground of judicial review that may be more reliable than the many complexities that are constantly repeated in federal judicial

⁵ In the 9th Circuit, it has been held that a Court of Appeals must uphold the findings of fact of an administrative agency if the agency's findings are supported by "substantial evidence" (a low threshold). As to questions of law, appellate review is plenary. SEE: Potato Sales Co., Inc., v Dept. of Agriculture, 92 F.3d 800 (9th Cir. 1996).

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

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

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

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

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

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

Professor Davis adds that:

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

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

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

What is "substantial evidence?"

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

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

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

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

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

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

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

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

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

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

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

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

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:7 p. 356.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

never come as a surprise.

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

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

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

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

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

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

c. Senator Stevens' version of amended § 807

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

Translated into plainer English, this method of judicial review of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Kenaitze

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

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

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

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

The 9th Circuit roundly rejected this argument and wrote:

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

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

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

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

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

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

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

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

b. U.S. v Alexander

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

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

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

c. Conclusion

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

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

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

i. State Interpretation of Federal Law

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

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

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

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

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

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

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

ii. State Application of Federal Law to Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE POSSIBILITY OF REDUCING FEDERAL INTERVENTION

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

SHORT ANSWER: Yes, within limits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁴(...continued) .

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

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

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

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

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

THE CONFUSING REQUIREMENT OF "DEFERENCE"

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

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

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

A. Summary Description of the Proposed Statutory Framework

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

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

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

B. Proposed AS 16.05.261(h)

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

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

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

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

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

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

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

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

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

The Alaska Constitution, Article VIII, § 3, "is particularly strong in requiring that proximity to the resource be a neutral factor. It reserves 'to the people for common use' wild fish and game '[w]herever occurring.'" (Emphasis in original. State v Kenaitze, 894 P.2d 632, 642 n. 21 (Alaska 1995).

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

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

(continued...)

(AS 16.05.261(d)(5).)

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

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

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

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

5) inter-regional proposals and issues.

(AS 16.05.261(g).)

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

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

²⁵(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁹ c.f. AS 38.04.910(11).

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

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

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

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

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

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

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

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

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

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

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

This short provision provides:

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

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

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

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

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

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

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

PLAIN ENGLISH SUMMARY

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

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

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

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

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

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



P.O. Box 20761, Juneau, Alaska 99802

Phone/FAX (907) 789-2399

July 18, 1997

Governor Knowles' Subsistence Task Force
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Knowles and the Subsistence Task Force:

These are the official comments of the Territorial Sportsmen Board of Directors concerning the proposed draft Subsistence Proposal.

Territorial Sportsmen, Incorporated is a Juneau based sportsmen/conservation organization dedicated to the principles of good conservation, wise use and equal treatment under our Constitution. We have always defended our Constitutional rights and strongly support state management of our fish and game resources. Our organization has existed for over 50 years and has a total membership of about 2,000.

First, we want to express our support for the development of a comprehensive solution to the existing subsistence crisis. We agree with the basic goal of the task force to return effective fish and wildlife management to the state. We also recognize the importance of subsistence in the lifestyles of many Alaskans and support providing a carefully crafted preference for true subsistence uses when taken for personal or family consumption..

The Territorial Sportsmen have always opposed amending the equal protection and common use provisions of our Constitution for any purpose. We have always opposed Constitutional amendments and laws which divide Alaskans along ethnic or other grounds which tend to pit Alaskans against each other. From our perspective, any modifications of our Constitution must be balanced with major concessions from Congress to remove federal oversight and preemption authorities and return effective management to the state.

This proposed package is patterned after Lt. Governor Ulmer's proposal with some major improvements. There are, however, some issues which must be addressed before the Territorial Sportsmen could actively support a Constitutional amendment coupled with statutory changes in both ANILCA and state statutes.

We have reviewed the Subsistence Proposal crafted by the Subsistence Task Force and have the following comments:

FEDERAL COURT OVERSIGHT

As we stated in our comments to Lt. Governor Ulmer; we cannot endorse any proposal which provides federal court oversight over all lands in Alaska. We reluctantly agree that federal court oversight of federal lands in Alaska is inevitable and that the basic subsistence priority thrust in ANILCA may not be radically changed for federal lands. In view of this, we recommend that all subsistence suits emanating from Alaska federal lands be required to be filed in the federal court system within Alaska.

It is our belief that Congress did not intend to preempt state management on state and private lands and waters and that is, from our standpoint, a bottom line position. We are adamant that the balance struck in ANILCA be maintained at all cost. Any compromise package must remove any federal court oversight over any private and state lands and waters.

STATE JURISDICTION

It is imperative from the standpoint of our organization that it be made abundantly clear that ANILCA did not intend to provide authority for federal preemption of state management on state and private lands and waters. As we mentioned to Lt. Governor Ulme the definition of "public lands" in ANILCA must be clarified to exclude any state or private lands and waters, including navigable waters.

In addition, we support the language in Senator Murkwoski's and Congressman Young's proposal which said:

"Federal authority to enforce this priority shall not extend to and shall not affect the regulation of taking fish and wildlife or other wild, renewable resources on State or private lands, waters, including but not limited to any reserved waters, or interests therein. Federal jurisdictional interests and authorities, including but not limited to navigational servitudes, do not constitute public lands for the purposes of this Title."

CONSTITUTIONAL AMENDMENT LINKAGE

If a Constitutional amendment must be considered then this proposal does not have adequate linkage language tied to the amendment. It is our opinion that any Constitutional amendment must be tied specifically to amendments to ANILCA. If the ANILCA amendments are not adopted or if adopted and later amended by Congress then the Constitutional amendment must be declared null and void.

RURAL QUALIFICATIONS

If it is the collective decision of our elected officials to craft a subsistence use solution using "rural" community qualifications rather than individual qualifications, then we recommend several modifications. It is not acceptable to assume that all communities residing outside existing non-subsistence areas be initially classified as "rural." We recognize that this is the direction taken by the federal subsistence regulators and some of the past Boards of Fisheries and Game but it is the source of much contention and social unrest in Alaska. If we are going to fix the subsistence conflicts then it is critical that we all bite the bullet and narrow the subsistence qualifications to the "true" subsistence users. Communities like Kodiak, Cordova, Sitka, Petersburg, Nome and Bethel should not qualify as rural subsistence communities. It is imperative that the final package clearly identify which communities are classed as "rural."

We recommend that the legislature either list each community that initially qualifies and eliminate those that the preponderance of the economy is other than subsistence related, or establish a reasonable base from which to start, such as communities with a population under 1,000. It is recognized that the Boards of Fisheries and Game will be empowered to review these rural designations and restrict or add to the list under criteria established by the legislature. The political realities are that the proposal as drafted will limit the Boards to only deleting communities from subsistence use under the definition of rural. Clear legislative standards must be provided.

From the standpoint of our membership, this proposal can only lead to further restrictions for the residents of Juneau. As we mentioned to Lt. Governor Ulmer, everyone in southeast Alaska has a priority over residents of Juneau and Ketchikan. If king salmon, cohos, chum salmon, pink salmon, steelhead, halibut, ling cod and other species are declared as Customary and Traditional subsistence resources, then the priority use in this region will be extended to everyone except those living in Juneau and Ketchikan. We truly question whether our neighbors in Petersburg or Sitka have a greater need or dependency on the resources of our region than those living in Juneau. It also doesn't take much imagination to see the potential for increasing social strife-- unfortunately spearheaded by a proposed Constitutional amendment to sections designed to guarantee equality.

DEFINITION OF "RURAL"

The criteria utilized to-date for determining "rural" eligibility are too vague. The proposed package improves on the definition of "rural" but we also propose that it be amended to say:

"rural community or area" is a community or area substantially dependent on fish and game for direct personal or family nutritional and other subsistence needs.

We also recommend that "substantial" be defined as follows:

"substantially dependent" means a community which at least 50% of the economy is dependent on subsistence resources.

In our opinion, this truly reflects where "true" subsistence needs exist and should be given a preference.

REGIONAL SUBSISTENCE COUNCILS

The proposed regulatory structure including the re-establishment of Regional Subsistence Councils appears to be a duplication or overlap of responsibilities with the existing advisory committees. The already overloaded Boards of Fisheries and Game are going to have their calendars extended even further than they are today. The regulatory process will, in our opinion, be almost unworkable due to the complexity of the system and inherent problems with bureaucratic processes.

We do recognize the improvements made in this proposal from what exists with the current federal regional council and regulatory board processes. Some of the changes will certainly assist the state Boards in their deliberations. We are concerned, however, that the changes are not substantial enough to make the resulting structure workable.

This can be addressed in any legislative session, but possible changes to the existing advisory committee system should be considered to help streamline the regulatory process and simplify the public input process.

With this type of concession to the federal law we strongly recommend language which says that regional councils will only exist if the federal government pays for them.

SUBSISTENCE PRIORITY

This proposal changes the existing state law providing a "preference" for subsistence to mirror the federal law which provides a "priority." We support the existing state law which recognizes a "preference" for subsistence uses. From the standpoint of our Board of Directors, a preference means additional benefits or special opportunities whereas a "priority" implies a higher degree of protection and an absolute guarantee.

CONCLUSION

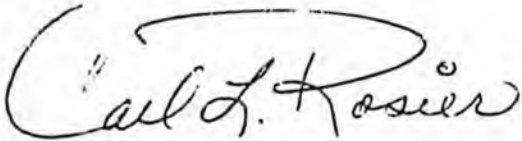
In conclusion, the Territorial Sportsmen Board of Directors have and will continue to participate in the negotiations regarding state management of our fish and wildlife resources. There are some major areas of the proposed subsistence solution which must be addressed before we recommend to our members that it be supported. We do support the efforts of our political leaders to bring about a permanent solution to this growing crisis. We are not, however, willing to accept a package, including a

Constitutional Amendment unless certain amendments and legal guarantees are included in the package.

The Territorial Sportsmen also recommend that any solution which is presented in final form to the public clearly spell out whether an individual or community is "in or out" as far as qualifying for the subsistence priority. To pass a vague package of amendments to the Constitution, state statutes and ANILCA without clearly identify qualifications for the public would be irresponsible. It is not satisfactory for us to leave it up to future politically appointed Boards or the federal court system to decide eligibility. History has shown the unpredictability of this issue and the public deserves a clear picture so that they can cast an enlightened vote.

Thank you for the opportunity to comment on this proposed subsistence package. We certainly applaud you and the working group for taking on the task of attempting to craft a long term solution to the subsistence issue.

Sincerely,

A handwritten signature in cursive script that reads "Carl L. Rosier". The signature is written in dark ink and is positioned above the typed name.

Board of Directors, Territorial Sportsmen
Carl L. Rosier, Vice President

**Alaska Communities
and 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unem- ployment*	% Adults Not Working**
Akhiok	101	\$42,500	93.5%	2.4%	18.8%	50.9%
Akiachak	560	\$23,750	95.0%	13.0%	12.7%	54.5%
Akiak	327	\$13,571	97.2%	33.9%	16.0%	60.2%
Akutan	420	\$27,813	13.6%	16.6%	0.4%	7.4%
Alakanuk	651	\$17,708	95.8%	29.4%	26.8%	61.5%
Alatna	32	\$6,030	93.5%	83.0%	100.0%	100.0%
Alcan	16	\$53,338	0.0%	0.0%	0.0%	33.3%
Aleknagik	226	\$21,875	83.2%	28.8%	14.3%	62.2%
Alexander Creek	38	\$8,166	25.0%	38.0%	0.0%	100.0%
Allakaket	182	\$11,477	94.1%	46.9%	69.4%	78.4%
Ambler	333	\$22,500	89.7%	31.1%	39.3%	66.3%
Anaktuvuk Pass	301	\$37,292	84.9%	16.1%	23.6%	45.5%
Anchor Point	1,157	\$42,847	3.7%	0.7%	17.5%	53.0%
Anchorage	254,849	\$43,946	6.4%	7.0%	7.0%	26.7%
Anderson	565	\$53,413	3.7%	3.7%	11.5%	22.2%
Andreafsky	469	\$28,958	84.4%	26.0%	18.6%	43.8%
Angoon	616	\$32,083	82.3%	21.9%	35.1%	54.1%
Aniak	578	\$32,841	70.7%	16.4%	9.7%	32.2%
Anvik	83	\$10,694	91.5%	45.0%	13.6%	60.4%
Arctic Village	121	\$9,661	93.8%	31.5%	12.5%	52.5%
Atka	111	\$40,625	91.8%	16.2%	25.7%	44.7%
Atmautluak	292	\$15,833	96.9%	47.6%	25.3%	55.3%
Atkasuk	235	\$56,352	93.1%	15.2%	29.7%	45.1%
Barrow	4,380	\$56,688	63.9%	7.5%	11.5%	30.4%
Beaver	118	\$20,313	95.1%	32.2%	22.6%	63.6%
Bethel	5,277	\$42,232	63.9%	12.2%	9.0%	36.6%
Bettles	32	\$38,333	22.2%	7.1%	0.0%	0.0%
Big Delta	508	\$32,813	4.0%	23.2%	1.6%	54.0%
Big Lake	2,243	\$36,583	3.7%	11.3%	12.9%	43.8%
Birch Creek	37	\$5,032	90.5%	92.6%	0.0%	48.0%
Brevig Mission	265	\$15,000	92.4%	24.7%	35.3%	54.6%
Buckland	412	\$18,906	95.0%	32.8%	12.2%	59.4%
Butte	2,538	\$41,471	3.6%	7.7%	10.4%	35.5%
Cantwell	144	\$44,000	22.4%	10.3%	34.6%	57.6%
Central	57	\$28,036	1.9%	13.7%	19.0%	64.6%
Chalkyitsik	87	\$12,750	92.2%	67.3%	31.3%	81.0%
Chase	53	\$61,359	0.0%	0.0%	0.0%	0.0%
Chefornak	405	\$20,278	97.5%	35.4%	6.2%	66.8%
Chenega Bay	91	\$22,083	69.1%	26.6%	14.3%	41.9%
Chevak	721	\$17,222	93.0%	27.0%	17.8%	53.5%
Chickaloon	205	\$32,083	6.2%	31.2%	26.7%	38.2%
Chignik	125	\$36,875	45.2%	0.0%	4.2%	38.2%
Chignik Lagoon	74	\$56,250	56.6%	6.4%	20.0%	84.0%
Chignik Lake	127	\$19,167	91.7%	42.0%	15.2%	68.2%
Chiniak	74	\$44,375	5.8%	20.2%	5.1%	28.8%
Chistochina	55	\$24,167	61.7%	17.7%	52.0%	72.1%
Chitina	84	\$13,125	46.9%	40.9%	33.3%	64.7%

**Alaska Communities
and 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unem- ployment*	% Adults Not Working**
Chuathbaluk	115	\$13,750	89.7%	47.4%	8.6%	47.5%
Circle	83	\$17,083	86.3%	10.9%	36.7%	62.7%
Circle Hot Springs	32	\$6,250	0.0%	74.1%	33.3%	54.5%
Clam Gulch	100	\$60,233	12.7%	0.0%	0.0%	61.3%
Clark's Point	66	\$17,083	88.3%	16.1%	18.5%	42.1%
Coffman Cove	246	\$44,063	7.0%	4.7%	14.7%	29.8%
Cohoe	598	\$33,550	1.8%	15.9%	14.0%	49.5%
Cold Bay	120	\$45,625	5.4%	0.0%	0.0%	15.9%
College	11,663	\$43,329	8.4%	9.6%	7.8%	32.3%
Cooper Landing	271	\$42,250	1.2%	3.6%	0.0%	53.8%
Copper Center	536	\$34,643	34.5%	12.9%	0.0%	53.8%
Copperville	196	\$47,188	26.4%	9.8%	26.6%	51.8%
Cordova	2,467	\$46,304	11.2%	4.7%	3.1%	23.8%
Covenant Life	54	\$23,571	0.0%	20.0%	100.0%	100.0%
Craig	2,043	\$47,250	22.9%	3.9%	8.4%	25.9%
Crooked Creek	138	\$16,250	90.6%	28.7%	27.3%	64.7%
Crown Point	88	\$43,864	4.8%	0.0%	0.0%	38.0%
Cube Cove	137	\$51,280	5.8%	5.7%	0.0%	21.4%
Deadhorse	24	\$102,264	11.5%	0.0%	0.0%	0.0%
Deering	158	\$15,208	94.3%	21.6%	6.7%	41.7%
Delta Junction	855	\$31,250	4.4%	8.4%	8.6%	35.4%
Dillingham	2,252	\$44,083	55.8%	9.5%	6.7%	37.7%
Diomede	174	\$14,375	93.8%	63.0%	0.0%	60.4%
Dot Lake	80	\$38,333	54.3%	3.2%	13.6%	47.2%
Dry Creek	110	\$40,625	0.0%	12.8%	0.0%	13.7%
Eagle	165	\$12,500	3.0%	43.4%	32.5%	52.5%
Eagle Village	34	\$11,875	80.0%	17.1%	93.1%	93.8%
Edna Bay	70	\$12,250	0.0%	63.7%	25.0%	67.2%
Eek	277	\$21,000	95.7%	28.6%	23.9%	63.4%
Egegik	127	\$20,625	70.5%	34.1%	24.3%	69.6%
Eielson AFB	4,203	\$25,924	0.9%	2.8%	13.0%	18.2%
Eklutna	425	\$66,946	12.6%	8.0%	3.5%	29.1%
Ekwok	124	\$10,833	87.0%	52.0%	23.5%	73.1%
Elfin Cove	54	\$43,125	1.8%	7.1%	0.0%	28.2%
Elim	301	\$16,250	91.7%	25.1%	36.1%	66.2%
Emmonak	820	\$25,625	92.1%	20.9%	34.6%	62.0%
Ester	236	\$44,688	4.8%	12.8%	11.5%	33.0%
Evansville	20	\$29,167	57.6%	36.1%	16.0%	16.0%
Eyak	166	\$150,001	7.6%	0.0%	4.3%	22.1%
Fairbanks	31,850	\$32,033	9.2%	10.3%	11.6%	29.6%
False Pass	64	\$21,667	76.5%	17.9%	0.0%	53.1%
Ferry	69	\$25,625	12.5%	15.5%	39.1%	65.0%
Fort Greely	740	\$25,801	1.0%	6.3%	14.4%	21.7%
Fort Yukon	575	\$17,969	85.0%	32.1%	27.4%	55.4%
Fox	321	\$28,250	7.3%	9.2%	18.0%	47.8%
Fox River	435	\$93,848	0.0%	9.1%	0.0%	45.7%
Fritz Creek	1,972	\$45,143	3.4%	3.4%	6.1%	38.5%

**Alaska Communities
and 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unem- ployment*	% Adults Not Working**
Gakona	23	\$32,500	0.0%	60.0%	0.0%	25.0%
Galena	543	\$28,611	45.3%	18.2%	9.2%	24.7%
Gambell	653	\$15,938	96.2%	46.4%	16.8%	71.1%
Game Creek	67	\$12,500	0.0%	59.6%	0.0%	13.8%
Glennallen	513	\$30,833	6.7%	8.0%	4.4%	30.7%
Golovin	152	\$16,146	92.9%	8.3%	15.3%	44.4%
Goodnews Bay	263	\$13,523	95.9%	41.8%	3.1%	56.6%
Grayling	186	\$21,641	93.3%	12.6%	29.6%	57.5%
Gulkana	95	\$38,750	59.2%	20.3%	27.3%	59.5%
Gustavus	346	\$41,538	3.9%	3.6%	4.6%	26.2%
Haines	1,429	\$38,542	18.1%	4.9%	5.4%	30.9%
Halibut Cove	78	\$68,760	3.8%	0.0%	0.0%	0.0%
Happy Valley	391	\$16,250	6.1%	32.8%	25.6%	68.6%
Harding Lake	29	\$52,126	0.0%	0.0%	0.0%	76.0%
Healy	603	\$56,313	1.4%	3.8%	3.9%	39.4%
Healy Lake	60	\$5,841	85.1%	70.8%	33.3%	85.7%
Hobart Bay	107	\$52,377	6.4%	1.0%	0.0%	10.9%
Hollis	175	\$31,250	2.7%	15.2%	8.3%	44.3%
Holy Cross	260	\$13,750	93.5%	48.8%	38.6%	72.3%
Homer	4,126	\$36,652	3.6%	5.0%	7.9%	35.6%
Hoonah	906	\$36,442	67.2%	3.8%	14.9%	35.4%
Hooper Bay	1,012	\$18,125	96.0%	43.5%	41.7%	66.3%
Hope	152	\$17,250	3.1%	33.5%	38.4%	50.8%
Houston	994	\$32,344	3.6%	9.7%	15.4%	52.0%
Hughes	69	\$15,833	92.6%	16.6%	15.4%	53.2%
Huslia	245	\$13,333	90.8%	43.7%	38.5%	67.5%
Hydaburg	425	\$20,139	89.1%	26.3%	21.8%	60.5%
Hyder	151	\$23,750	1.0%	14.4%	22.7%	47.4%
Igiugig	46	\$41,250	78.8%	0.0%	0.0%	38.5%
Iliamna	103	\$41,250	66.0%	12.1%	0.0%	42.1%
Ivanof Bay	27	\$21,500	94.3%	18.4%	0.0%	45.8%
Jakolof Bay	35	\$21,875	0.0%	0.0%	0.0%	32.0%
Juneau	30,396	\$47,924	12.9%	5.5%	4.8%	25.0%
Kachemak	398	\$55,000	3.0%	7.3%	4.0%	32.0%
Kake	767	\$35,875	73.4%	7.0%	10.9%	46.8%
Kaktovik	222	\$46,250	84.4%	20.6%	30.7%	50.0%
Kalifornsky	335	\$52,354	4.2%	12.2%	25.6%	47.8%
Kaltag	245	\$15,500	92.5%	41.4%	24.1%	52.9%
Karluk	48	\$31,250	91.5%	3.6%	9.1%	40.0%
Kasaan	42	\$46,667	53.7%	0.0%	64.5%	73.8%
Kasigluk	514	\$26,563	95.3%	20.4%	34.8%	66.3%
Kasilof	539	\$51,439	2.9%	2.5%	18.4%	40.8%
Kenai	6,971	\$42,889	8.5%	7.3%	12.1%	38.2%
Kenny Lake	500	\$21,786	9.7%	24.8%	22.9%	50.7%
Ketchikan	8,552	\$41,931	15.7%	5.5%	8.6%	31.2%
Kiana	415	\$28,125	93.5%	24.5%	27.4%	62.1%
King Cove	773	\$53,631	39.2%	10.0%	1.8%	24.0%

Alaska Communities
and 1990 U.S. Census Data

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unem- ployment*	% Adults Not Working**
King Salmon	478	\$54,072	15.5%	3.0%	5.8%	16.2%
Kipnuk	567	\$4,999	97.4%	76.6%	12.9%	78.7%
Kivalina	357	\$28,036	97.5%	32.2%	55.6%	71.4%
Klawock	704	\$39,583	54.3%	8.4%	17.3%	48.4%
Klukwan	160	\$36,042	86.8%	3.5%	60.4%	76.1%
Knik	443	\$26,250	11.4%	6.5%	24.8%	54.2%
Kobuk	89	\$20,625	89.9%	34.7%	35.0%	66.7%
Kodiak	6,749	\$46,050	12.7%	6.2%	4.4%	23.0%
Kodiak Station	1,638	\$34,196	1.7%	7.0%	6.3%	12.1%
Kokhanok	168	\$14,286	90.1%	53.4%	7.7%	65.4%
Koliganek	194	\$18,125	96.1%	35.6%	11.1%	72.4%
Kongiganak	349	\$33,250	97.3%	30.3%	16.3%	60.0%
Kotlik	543	\$20,417	97.0%	17.7%	36.6%	65.2%
Kotzebue	3,232	\$42,367	75.1%	12.7%	13.1%	41.2%
Koyuk	272	\$18,750	94.8%	30.0%	37.3%	64.6%
Koyukuk	126	\$13,929	97.6%	39.2%	27.0%	62.0%
Kupreanof	24	\$55,447	0.0%	0.0%	0.0%	0.0%
Kwethluk	672	\$16,000	96.4%	38.7%	11.8%	72.0%
Kwigillingok	333	\$14,500	95.0%	43.1%	9.2%	58.6%
Lake Minchumina	45	\$75,222	18.8%	0.0%	0.0%	48.3%
Larsen Bay	120	\$39,750	84.4%	3.1%	40.0%	67.6%
Lazy Mountain	1,043	\$36,250	4.3%	11.7%	21.3%	53.9%
Levelock	115	\$12,159	82.9%	25.8%	20.9%	57.5%
Lignite	122	\$38,125	0.0%	1.9%	15.2%	43.5%
Lime Village	47	\$9,257	95.2%	63.8%	13.6%	36.7%
Lower Kalskag	278	\$10,357	98.3%	61.2%	37.9%	77.5%
Lutak	52	\$70,485	17.8%	0.0%	0.0%	48.4%
Manley Hot Springs	90	\$31,250	14.6%	30.0%	12.5%	32.3%
Manokotak	387	\$20,500	95.6%	28.6%	16.1%	58.1%
Marshall	318	\$28,750	92.7%	16.9%	19.0%	55.5%
McCarthy	28	\$23,750	4.0%	0.0%	100.0%	100.0%
McGrath	456	\$36,250	47.0%	10.5%	9.9%	36.3%
McKinley Park	196	\$40,313	2.9%	4.0%	13.4%	40.8%
Meadow Lakes	4,693	\$33,106	2.9%	12.5%	13.3%	44.1%
Mekoryuk	192	\$14,792	99.4%	31.5%	16.7%	59.1%
Mendeltna	72	\$18,750	5.4%	5.7%	0.0%	60.0%
Mentasta Lake	122	\$11,250	72.9%	44.1%	18.8%	81.9%
Mellakatia	1,595	\$38,370	82.4%	9.8%	12.8%	49.2%
Meyers Chuck	28	\$16,250	10.8%	33.3%	0.0%	54.2%
Minto	244	\$17,656	97.2%	35.0%	60.3%	81.6%
Moose Creek	683	\$25,326	2.5%	9.4%	10.5%	32.7%
Moose Pass	116	\$22,083	11.1%	0.0%	25.8%	25.8%
Mosquito Lake	92	\$28,750	1.3%	38.8%	7.3%	32.1%
Mountain Village	738	\$26,750	91.1%	25.3%	36.7%	68.0%
Naknek	640	\$50,907	41.0%	1.7%	3.9%	36.0%
Nanwalek	177	\$46,563	91.1%	11.0%	46.4%	66.7%
Napakiaik	354	\$18,125	94.3%	36.2%	33.3%	61.3%

**Alaska Communities
and 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unem- ployment*	% Adults Not Working**
Napaskiak	399	\$18,750	94.8%	34.3%	22.7%	63.4%
Naukati Bay	136	\$43,333	1.1%	4.8%	9.1%	26.8%
Nelson Lagoon	90	\$44,583	80.7%	26.0%	0.0%	80.8%
Nenana	440	\$27,292	47.8%	10.4%	17.5%	52.8%
New Stuyahok	452	\$12,083	95.9%	51.0%	17.7%	74.9%
Newhalen	177	\$26,250	94.4%	22.4%	5.5%	46.9%
Newtok	269	\$14,844	93.2%	50.2%	25.9%	68.2%
Nightmute	217	\$17,813	95.4%	62.0%	26.9%	68.6%
Nikiski	3,023	\$44,242	6.1%	7.0%	14.5%	42.2%
Nikolaevsk	474	\$19,688	1.3%	46.1%	0.0%	52.5%
Nikolai	108	\$11,250	89.0%	44.5%	35.5%	73.0%
Nikolski	43	\$13,750	82.9%	0.0%	0.0%	53.3%
Ninilchik	655	\$31,518	19.5%	9.6%	24.4%	59.7%
Noatak	401	\$36,458	96.7%	17.1%	45.1%	75.1%
Nome	3,656	\$45,812	52.1%	9.9%	11.0%	36.0%
Nondalton	221	\$21,750	89.3%	20.3%	42.6%	70.0%
Noorvik	631	\$32,969	93.8%	16.6%	17.5%	60.7%
North Pole	1,631	\$32,937	5.4%	5.0%	10.2%	26.9%
Northway	119	\$39,375	64.2%	11.9%	26.0%	54.9%
Northway Junction	114	\$41,875	70.5%	10.0%	35.8%	73.9%
Northway Village	110	\$13,333	94.7%	47.0%	51.3%	72.1%
Nuiqsut	435	\$32,188	92.7%	13.3%	33.1%	48.2%
Nulato	365	\$17,143	96.9%	35.9%	25.7%	66.7%
Nunapitchuk	489	\$17,083	97.1%	40.0%	12.3%	60.8%
Old Harbor	301	\$16,875	88.7%	31.5%	39.1%	75.9%
Oscarville	59	\$26,250	91.2%	27.2%	0.0%	56.0%
Ouzinkie	245	\$48,393	85.2%	10.2%	18.9%	51.9%
Palmer	4,167	\$34,940	7.7%	6.2%	16.7%	53.9%
Paxson	34	\$31,250	0.0%	3.4%	0.0%	30.0%
Pedro Bay	37	\$38,125	90.5%	2.9%	0.0%	34.8%
Pelican	187	\$27,083	29.3%	13.6%	3.4%	17.2%
Perryville	107	\$25,000	94.4%	25.4%	13.6%	72.9%
Petersburg	3,432	\$49,318	10.4%	4.1%	4.2%	28.8%
Pilot Point	115	\$38,750	84.9%	12.9%	0.0%	55.3%
Pilot Station	547	\$16,000	95.0%	51.3%	35.1%	62.9%
Pitka's Point	154	\$17,813	95.6%	28.2%	5.1%	57.0%
Platinum	41	\$23,056	92.2%	35.8%	8.0%	54.0%
Pleasant Valley	552	\$49,464	4.7%	0.0%	4.5%	24.2%
Point Baker	57	\$12,083	0.0%	0.0%	0.0%	73.0%
Point Hope	749	\$47,788	91.9%	9.2%	23.4%	52.0%
Point Lay	207	\$49,583	81.3%	3.3%	11.5%	22.7%
Polk Inlet	36	\$50,446	13.3%	4.4%	24.4%	36.3%
Port Alexander	94	\$20,625	2.5%	18.2%	11.5%	31.3%
Port Alice	19	\$28,750	6.7%	8.3%	0.0%	42.9%
Port Alsworth	67	\$36,250	1.8%	0.0%	10.5%	54.1%
Port Clarence	24	\$12,264	0.0%	0.0%	0.0%	0.0%
Port Graham	186	\$33,750	90.4%	2.1%	38.8%	62.4%

**Alaska Communities
and 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unemployment*	% Adults Not Working**
Port Heiden	116	\$35,000	72.3%	24.3%	22.0%	45.8%
Port Lions	239	\$40,938	67.6%	5.3%	14.1%	41.8%
Port Protection	58	\$10,000	1.6%	45.6%	75.0%	95.3%
Portage Creek	14	\$5,360	60.0%	100.0%	0.0%	100.0%
Primrose	62	\$46,563	0.0%	0.0%	0.0%	35.2%
Prudhoe Bay	47	\$39,673	8.5%	0.0%	0.0%	0.0%
Quinhagak	567	\$17,500	93.8%	37.2%	5.9%	60.6%
Rampart	54	\$15,000	94.1%	36.2%	78.8%	87.5%
Red Devil	49	\$25,000	50.9%	30.7%	14.3%	63.6%
Ridgeway	2,364	\$48,967	4.6%	6.1%	6.3%	30.6%
Rowan Bay	9	\$58,295	6.8%	0.0%	9.8%	22.4%
Ruby	217	\$15,000	74.1%	24.4%	12.8%	52.9%
Russian Mission	295	\$21,667	94.7%	45.0%	21.0%	61.1%
Saint George	184	\$25,250	94.9%	41.9%	14.9%	52.9%
Saint Mary's	504	\$28,542	83.0%	17.3%	19.2%	44.3%
Saint Michael	341	\$23,194	91.2%	20.9%	22.9%	60.6%
Saint Paul	764	\$39,922	66.1%	7.1%	10.8%	32.6%
Salamatof	1,134	\$38,203	10.4%	9.8%	14.6%	64.9%
Salcha	373	\$35,909	4.2%	8.0%	14.5%	36.9%
Sand Point	870	\$42,083	49.3%	12.5%	2.9%	32.1%
Savoonga	622	\$11,339	95.2%	50.9%	14.7%	72.2%
Saxman	381	\$30,481	77.0%	5.7%	25.5%	51.6%
Scammon Bay	459	\$15,179	96.5%	40.7%	18.4%	60.1%
Selawik	696	\$21,833	95.5%	23.1%	31.3%	67.2%
Seldovia	285	\$27,500	15.2%	16.2%	11.8%	50.3%
Seward	2,999	\$37,049	15.2%	10.7%	9.2%	44.9%
Shageluk	145	\$16,250	95.0%	34.8%	22.9%	67.5%
Shaktolik	226	\$18,438	94.4%	22.8%	31.9%	54.4%
Sheldon Point	177	\$16,250	92.7%	56.2%	13.0%	41.2%
Shishmaref	542	\$15,625	94.5%	27.3%	18.0%	65.1%
Shungnak	252	\$29,583	94.6%	5.7%	14.0%	64.9%
Sitka	8,733	\$43,337	20.9%	4.8%	6.7%	26.7%
Skagway	816	\$37,500	5.5%	4.2%	10.6%	27.5%
Skwentna	77	\$17,692	1.2%	24.2%	0.0%	66.7%
Slana	58	\$25,417	6.3%	19.0%	44.4%	62.5%
Sleetmute	102	\$10,000	86.8%	62.6%	12.9%	67.5%
Soldotna	4,092	\$38,004	4.5%	5.7%	8.7%	33.0%
South Naknek	149	\$23,750	79.4%	26.3%	27.5%	58.0%
Stebbins	513	\$23,333	94.8%	32.3%	39.2%	64.0%
Sterling	5,705	\$51,145	2.1%	7.6%	7.4%	38.9%
Stevens Village	99	\$10,000	91.2%	73.9%	43.3%	72.6%
Stony River	42	\$5,156	88.2%	100.0%	26.7%	64.5%
Sutton	431	\$23,393	5.8%	38.1%	17.2%	47.6%
Takotna	63	\$18,750	44.7%	14.2%	0.0%	36.0%
Talkeetna	347	\$11,991	1.6%	34.3%	10.1%	26.1%
Tanacross	85	\$14,750	94.3%	23.8%	35.4%	59.7%
Tanana	299	\$17,000	78.3%	24.1%	21.8%	53.9%

**Alaska Communities
and 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unem- ployment*	% Adults Not Working**
Tatitlek	99	\$27,188	86.6%	19.8%	0.0%	75.8%
Tazlina	297	\$45,625	23.1%	22.0%	13.2%	36.4%
Telida	5	\$43,750	90.9%	0.0%	0.0%	0.0%
Teller	265	\$20,000	86.8%	32.1%	3.3%	38.9%
Tenakee Springs	116	\$18,125	9.6%	10.8%	20.0%	74.0%
Tetlin	68	\$15,750	95.4%	29.6%	25.0%	58.5%
Thorne Bay	625	\$39,688	1.2%	5.2%	18.6%	38.4%
Togiak	762	\$15,000	87.3%	46.3%	23.1%	72.9%
Tok	1,216	\$30,341	12.5%	8.7%	20.3%	44.4%
Toksook Bay	496	\$21,875	95.5%	39.2%	25.5%	59.1%
Tonsina	46	\$16,250	18.4%	0.0%	0.0%	66.7%
Trapper Creek	306	\$31,071	6.1%	16.2%	30.3%	60.2%
Tuluksak	385	\$20,446	95.5%	51.2%	2.5%	56.9%
Tuntutuliak	351	\$14,444	96.7%	46.0%	6.4%	59.5%
Tununak	330	\$18,750	96.2%	26.3%	14.0%	50.0%
Twin Hills	59	\$11,667	92.4%	50.0%	25.0%	72.7%
Two Rivers	623	\$53,518	7.3%	4.0%	10.5%	32.2%
Tyonek	151	\$11,591	92.2%	37.1%	37.7%	64.5%
Ugashik	5	\$37,500	85.7%	0.0%	80.0%	83.3%
Unalakleet	803	\$34,531	81.8%	11.6%	19.2%	46.0%
Unalaska	4,251	\$56,215	8.4%	15.3%	1.0%	7.8%
Upper Kalskag	198	\$16,250	84.9%	39.6%	25.5%	68.5%
Valdez	4,486	\$68,570	5.9%	5.1%	8.8%	26.0%
Venetie	241	\$14,688	94.0%	47.2%	37.5%	69.8%
Wainwright	550	\$33,333	94.3%	4.1%	10.2%	40.4%
Wales	162	\$15,000	88.8%	35.2%	19.3%	53.5%
Wasilla	4,917	\$37,619	5.3%	10.8%	11.1%	36.6%
Whale Pass	79	\$49,583	2.7%	14.0%	35.7%	59.1%
White Mountain	193	\$15,893	87.8%	38.3%	36.4%	67.3%
Whitestone Logging Camp	189	\$45,625	3.7%	7.6%	9.7%	23.8%
Whittier	289	\$33,636	12.3%	13.0%	8.0%	37.0%
Willow	408	\$34,773	1.1%	14.7%	0.0%	48.3%
Wiseman	24	\$4,999	15.2%	100.0%	0.0%	50.0%
Womens Bay	662	\$44,861	10.5%	3.2%	6.5%	26.2%
Wrangell	2,543	\$37,538	20.0%	6.0%	9.0%	34.1%
Yakutat	833	\$36,875	55.1%	10.5%	11.8%	33.7%

* % Unemployment =

Percent of persons age 16+ actively seeking employment, calculated from unemployment compensation claims

** % Adults Not Working =

Percent of persons age 16+ actively seeking employment and those not actively seeking employment ("discouraged workers", in school, retired, disabled, or at home raising children, for example)

**Alaska Communities, by Percent of Population Below Poverty Level in Ascending Order
From 1990 U.S. Census Data**

Community	1997 Pop.	1990 U.S. Census				
		Median HH Income	% Native Pop	% Below Poverty	% Unemployment*	% Adults Not Working**
Eyak	166	\$150,001	7.6%	0.0%	4.3%	22.1%
Deadhorse	24	\$102,264	11.5%	0.0%	0.0%	0.0%
Lake Minchumina	45	\$75,222	18.8%	0.0%	0.0%	48.3%
Lutak	52	\$70,485	17.8%	0.0%	0.0%	48.4%
Halibut Cove	78	\$68,760	3.8%	0.0%	0.0%	0.0%
Chase	53	\$61,359	0.0%	0.0%	0.0%	0.0%
Clam Gulch	100	\$60,233	12.7%	0.0%	0.0%	61.3%
Rowan Bay	9	\$58,295	6.8%	0.0%	9.8%	22.4%
Kupreanof	24	\$55,447	0.0%	0.0%	0.0%	0.0%
Alcan	16	\$53,338	0.0%	0.0%	0.0%	33.3%
Harding Lake	29	\$52,126	0.0%	0.0%	0.0%	76.0%
Pleasant Valley	552	\$49,464	4.7%	0.0%	4.5%	24.2%
Kasaan	42	\$46,667	53.7%	0.0%	64.5%	73.8%
Primrose	62	\$46,563	0.0%	0.0%	0.0%	35.2%
Cold Bay	120	\$45,625	5.4%	0.0%	0.0%	15.9%
Crown Point	88	\$43,864	4.8%	0.0%	0.0%	38.0%
Telida	5	\$43,750	90.9%	0.0%	0.0%	0.0%
Igiugig	46	\$41,250	78.8%	0.0%	0.0%	38.5%
Prudhoe Bay	47	\$39,673	8.5%	0.0%	0.0%	0.0%
Ugashik	5	\$37,500	85.7%	0.0%	80.0%	83.3%
Chignik	125	\$36,875	45.2%	0.0%	4.2%	38.2%
Port Alsworth	67	\$36,250	1.8%	0.0%	10.5%	54.1%
McCarthy	28	\$23,750	4.0%	0.0%	100.0%	100.0%
Moose Pass	116	\$22,083	11.1%	0.0%	25.8%	25.8%
Jakolof Bay	35	\$21,875	0.0%	0.0%	0.0%	32.0%
Tonsina	46	\$16,250	18.4%	0.0%	0.0%	66.7%
Nikolski	43	\$13,750	82.9%	0.0%	0.0%	53.3%
Port Clarence	24	\$12,264	0.0%	0.0%	0.0%	0.0%
Point Baker	57	\$12,083	0.0%	0.0%	0.0%	73.0%
Anchor Point	1,157	\$42,847	3.7%	0.7%	17.5%	53.0%
Hobart Bay	107	\$52,377	6.4%	1.0%	0.0%	10.9%
Naknek	640	\$50,907	41.0%	1.7%	3.9%	36.0%
Lignite	122	\$38,125	0.0%	1.9%	15.2%	43.5%
Port Graham	186	\$33,750	90.4%	2.1%	38.8%	62.4%
Akhiok	101	\$42,500	93.5%	2.4%	18.8%	50.9%
Kasilof	539	\$51,439	2.9%	2.5%	18.4%	40.8%
Eielson AFB	4,203	\$25,924	0.9%	2.8%	13.0%	18.2%
King Salmon	478	\$54,072	15.5%	3.0%	5.8%	16.2%
Larsen Bay	120	\$39,750	84.4%	3.1%	40.0%	67.6%
Womens Bay	662	\$44,861	10.5%	3.2%	6.5%	26.2%
Dot Lake	80	\$38,333	54.3%	3.2%	13.6%	47.2%
Point Lay	207	\$49,583	81.3%	3.3%	11.5%	22.7%
Fritz Creek	1,972	\$45,143	3.4%	3.4%	6.1%	38.5%
Paxson	34	\$31,250	0.0%	3.4%	0.0%	30.0%
Klukwan	160	\$36,042	86.8%	3.5%	60.4%	76.1%
Cooper Landing	271	\$42,250	1.2%	3.6%	0.0%	53.8%
Gustavus	346	\$41,538	3.9%	3.6%	4.6%	26.2%