

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9398 HOUSE RESOURCES

34

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

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

4                (a) The legislature finds that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 (a) The legislature recognizes that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**TWENTIETH LEGISLATURE - SECOND SESSION**

**BY THE HOUSE RESOURCES COMMITTEE**

**Offered:  
Referred:**

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

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to fish and game; and providing for an effective date."**

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

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

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

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

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

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

15 (5) although customs, traditions, and beliefs vary, these Alaskans share ideals

1 of respect for nature, the importance of using resources wisely, and the value and dignity of  
2 a way of life in which they use Alaska's fish and game for a substantial portion of their  
3 sustenance;

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

9 (7) the fish and game resources of Alaska have adequate biological and  
10 reproductive capacity to provide an abundance of fish and game for all users;

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

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

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

20 (2) a significant role for local fish and game advisory committees and regional  
21 fish and game boards in the review of regulations governing the use of fish and game  
22 resources;

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

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

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

28 **Sec. 16.16.010. Preferred use of fish and game.** (a) The harvest of fish and  
29 game for personal and family use for sustenance by residents is the highest and best  
30 use of fish and game. The Board of Fisheries, the Board of Game, and the department  
31 shall adopt regulations, policies, and management plans to implement a preference for

1 consumptive use of fish and game for personal and family use for sustenance over  
2 other uses of fish and game.

3 (b) If the Board of Fisheries or the Board of Game determines that the  
4 projected level of harvest of a fish stock or game population in an area would exceed  
5 the sustainable level of harvest under the sustained yield principle, the appropriate  
6 board shall allocate, notwithstanding AS 16.05.251(e), the harvestable portion of the  
7 stock or population in that area among user groups in accordance with a ranking of  
8 beneficial uses of the stock or population that assigns the highest preference to  
9 consumptive use for personal and family use for sustenance.

10 **Sec. 16.16.020. Dependence on fish and game for sustenance.** (a) The  
11 Board of Fisheries and the Board of Game acting jointly shall identify and define fish  
12 and game dependent use areas. A fish and game dependent use area is an area where  
13 dependence on fish and game for personal and family use for sustenance is the  
14 principal characteristic of the economy and way of life of the area. In determining  
15 whether dependence on fish and game for personal and family use for sustenance is  
16 the principal characteristic of the economy and way of life of an area, the Board of  
17 Fisheries and the Board of Game shall jointly consider the relative importance of  
18 dependence on fish and game in the context of the totality of the following  
19 socioeconomic characteristics of the area:

- 20 (1) the social and economic structure;
- 21 (2) the stability of the economy;
- 22 (3) the extent and kinds of employment for wages, including full-time,  
23 part-time, temporary, and seasonal employment;
- 24 (4) the amount and distribution of cash income among those who live  
25 in the area;
- 26 (5) the cost and availability of goods and services to those who live in  
27 the area;
- 28 (6) the variety of fish and game species used by those who live in the  
29 area;
- 30 (7) the seasonal cycle of economic activity;
- 31 (8) the percentage of those who live in the area participating in hunting

1 and fishing activities or using wild fish and game;

2 (9) the harvest levels of fish and game by those who live in the area;

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

5 (11) the geographic locations where those who live in the area hunt and  
6 fish;

7 (12) the extent of sharing and exchange of fish and game by those who  
8 live in the area;

9 (13) the other sources of direct and indirect economic support available  
10 in the area;

11 (14) additional similar factors the boards establish by regulation to be  
12 relevant to a determination under this subsection.

13 (b) If the Board of Fisheries or the Board of Game, as appropriate, with the  
14 concurrence of the department, determines that a shortage of a fish stock or game  
15 population available for harvest in a fish and game dependent use area exists, the  
16 board may establish a preference for fish or game dependent uses of the stock or  
17 population and, consistent with sustained yield, reserve a sufficient portion of the stock  
18 or population to provide a reasonable opportunity to satisfy the need for fish and game  
19 dependent uses of the stock or population. A board shall make its determination of  
20 whether sufficient fish or game resources exist in an area to provide a reasonable  
21 opportunity to satisfy fish and game dependent uses of a stock or population based on  
22 the recommendations of the regional fish and game board for the area and the local  
23 fish and game advisory committees for the area. The preference established under this  
24 subsection shall be extended to a person who is determined to be dependent on fish  
25 and game for personal and family use for sustenance under (c) - (f) of this section.  
26 In a time of shortage of fish or game resources, the appropriate board may adopt a  
27 preference among beneficial uses of fish and game in a region or area by requiring that  
28 the flesh or meat of fish and game be used within the region or area where the fish or  
29 game was taken.

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

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

3 (2) submits to the regional fish and game board for the region in which  
4 the person lives a signed written statement that the person

5 (A) is dependent on fish and game for personal and family use  
6 for sustenance; or

7 (B) has no alternate means of sustenance as the result of

8 (i) the absence of a cash-based economy in the area  
9 where the person lives; or

10 (ii) the person's decision to adopt a fish and game  
11 dependent life style.

12 (d) Each regional fish and game board shall review the written statements  
13 submitted by persons asserting a dependence on fish and game for personal and family  
14 use for sustenance and make recommendations as to whether the person is entitled to  
15 a preference under (b) of this section. A regional board may hold a hearing to gather  
16 additional information regarding whether a person is dependent on fish and game for  
17 personal and family use for sustenance. Each regional board shall forward  
18 recommendations made by the regional board under this subsection and additional  
19 information collected by the regional board to the Board of Fisheries and the Board  
20 of Game.

21 (e) The Board of Fisheries and the Board of Game, acting jointly, shall make  
22 the final determination as to who is entitled to the preference authorized under (b) of  
23 this section. The statewide boards shall defer to the recommendations of the regional  
24 fish and game boards unless a person disputes the recommendation made by a regional  
25 board. The statewide boards shall hold a hearing subject to AS 44.62.330 - 44.62.630  
26 to make a final determination of whether the person is dependent on fish and game for  
27 personal and family use for sustenance.

28 (f) A person who is determined by the Board of Fisheries and the Board of  
29 Game to be dependent on fish and game for personal and family use for sustenance  
30 may take fish and game in any location in the state where a preference for the harvest  
31 of fish or game for personal and family use for sustenance has been established under

1 (b) of this section.

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

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

9 (1) "preference" means an advantage, but not necessarily an exclusive  
10 privilege, conferred on a use of fish and game over other uses through the adoption  
11 of seasons, areas, bag limits, methods and means, and other regulations that take into  
12 consideration the consumptive uses and harvest methods of the user groups;

13 (2) "principal" means more than 50 percent;

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

19 (4) "shortage" means the amount of a specific fish stock or game  
20 population available for harvest is not sufficient to provide a reasonable opportunity  
21 to take the stock or population for the sustenance needs of persons who are found to  
22 be dependent on the fish and game for personal and family use for sustenance;

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

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

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

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

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

1 dependent use [SUBSISTENCE HUNTING AND FISHING] shall

2 (1) compile existing data and conduct studies to gather information,  
3 including data from persons dependent on fish and game for personal and family  
4 use for sustenance [SUBSISTENCE USERS], on all aspects of the role of  
5 [SUBSISTENCE] hunting and fishing for fish and game dependent use in the lives  
6 of the residents of the state;

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

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

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

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

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

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

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

26 **Sec. 16.05.245. Review of regulatory proposals.** (a) Notwithstanding  
27 AS 44.62, each proposal for a regulation to be adopted by the Board of Fisheries or  
28 the Board of Game shall be submitted to local fish and game advisory committees and  
29 regional fish and game boards that may be affected by the proposal. Each advisory  
30 committee and regional board may review the proposed regulation and submit  
31 comments and recommendations regarding the proposal to the Board of Fisheries or

1 the Board of Game, as appropriate. This subsection does not apply to emergency  
2 regulations considered by either the Board of Fisheries or the Board of Game.

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

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

7 (2) the recommendation is not consistent with the conservation of the  
8 fish or game resource or with the sustained yield principle;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (B) will not unduly disrupt the fishery;

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

1 (D) can be coordinated with observer programs of other  
2 agencies, including the National Marine Fisheries Service, North Pacific  
3 Fishery Management Council, and the International Pacific Halibut  
4 Commission;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 (11) taking game to ensure public safety.

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

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

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

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

31 (1) determines that intensive management would be

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

- (A) ineffective, based on scientific information;
- (B) inappropriate due to land ownership patterns; or
- (C) against the best interest of persons who take game for

personal and family use for sustenance [SUBSISTENCE USES]; or

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

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

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

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

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

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

(c) A local fish and game advisory committee may

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

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

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

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

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

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

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

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

13 (h) Each regional fish and game board may

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

16 (2) hold public hearings on fish and game matters;

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

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

23 (i) The regional fish and game boards shall carefully review each  
24 recommendation made by a local fish and game advisory committee within its region  
25 regarding regulatory proposals and other fish and game matters. If the regional board  
26 does not adopt or concur in the proposal of the advisory committee, the board shall  
27 inform the advisory committee of its decision and state the reasons for its action.

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

29 Sec. 16.05.270. Delegation of authority to commissioner or to a regional  
30 fish and game board. (a) For the purpose of administering AS 16.05.251 and  
31 16.05.255, each board may delegate authority to the commissioner or to a regional

1 fish and game board to act in its behalf.

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

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

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

18 (b) A resident who is a person with physical disabilities may obtain from the  
19 department upon payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon  
20 submission of satisfactory proof of physical disabilities a resident hunting license, a  
21 resident sport fishing license, a resident [SUBSISTENCE] fishing permit for personal  
22 and family use for sustenance, or a resident personal use fishing permit indicating  
23 that the purchaser is a person with physical disabilities.

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

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

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

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

10 (2) the person's

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

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

15 (C) resident personal use fishing permit issued under  
16 AS 16.05.403; and

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

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

20 (e) This chapter does not prevent the limited noncommercial  
21 [TRADITIONAL] barter of fish and game taken for personal and family use for  
22 sustenance [BY SUBSISTENCE HUNTING OR FISHING], except that the  
23 commissioner may prohibit the barter of [SUBSISTENCE-TAKEN] fish and game by  
24 regulation, emergency or otherwise, if a determination on the record is made that the  
25 barter is resulting in a waste of the resource, damage to fish stocks or game  
26 populations, or circumvention of fish or game management programs.

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

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

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

31 (B) for other food or for nonedible items other than money if

1 the exchange is of a limited and noncommercial nature;

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

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

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

11 (37) "fish and game dependent uses" means the noncommercial,  
12 historical uses of fish and game by a resident for direct personal or family  
13 consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and  
14 selling of handicraft articles out of nonedible by-products of fish and game resources  
15 taken for personal or family consumption, and for the limited noncommercial barter  
16 or sharing for personal or family use for sustenance; in this paragraph, "family" means  
17 persons related by blood, marriage, or adoption, and a person living in the household  
18 on a permanent basis.

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

20 (b) In this section "user group" includes [, BUT IS NOT LIMITED TO,] sport  
21 fishermen, processors, commercial fishermen, persons who fish for personal and  
22 family use for sustenance [SUBSISTENCE FISHERMEN], and representatives of  
23 local communities.

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

25 (a) The legislature finds that

26 (1) the salmon fishing industry is among the state's largest industries  
27 and generate; hundreds of millions of dollars and thousands of jobs each year; the  
28 salmon fishery is vitally important to commercial, [SUBSISTENCE,] personal use, and  
29 sport fishing interests, to persons who fish for personal and family use for  
30 sustenance, and to the state's developing tourist industry;

31 (2) the state is committed to maintaining and enhancing its wild stocks

1 of salmon by careful management, by initiating a 20-year rebuilding program, and by  
2 investing in the fishing industry;

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

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

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

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

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

31 (1) "high seas interception," "interception," or a similar term means the

1 unauthorized catching, taking, or harvesting of salmon for other than sport, personal  
2 and family use for sustenance [SUBSISTENCE], or personal use purposes [.]

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

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

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

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

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

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

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

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

18 (f) The department shall allow commercial fishing, sport fishing, [AND  
19 SUBSISTENCE] fishing for personal and family use for sustenance, and hunting  
20 within the Yakataga State Game Refuge under regulations of the Board of Fisheries  
21 and the Board of Game. The department shall also permit associated support activities  
22 when necessary and consistent with AS 16.20.010 - 16.20.080 to support fishing and  
23 hunting permitted under this section, including fish buying operations, aircraft support  
24 including landing strips, and off-road vehicle use.

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

26 (a) The legislature recognizes that

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

31 (2) the Walrus Islands are uninhabited, and the walrus frequenting

1 them are not required by the state for personal and family use for sustenance  
2 [SUBSISTENCE UTILIZATION];

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

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

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

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

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

15 (e) The department shall permit uses of the Redoubt Bay Critical Habitat Area  
16 in a manner that is compatible with the purposes for which the critical habitat area is  
17 established. The department shall permit the following public uses to continue without  
18 further approval by the department unless the department determines that the use is not  
19 compatible with the purposes for which the Redoubt Bay Critical Habitat Area is  
20 established:

21 (1) hunting, including [SUBSISTENCE] hunting for personal and  
22 family use for sustenance, trapping, fishing for personal and family use for  
23 sustenance [AND SUBSISTENCE], commercial fishing, and sport fishing, including  
24 the continued use of cabins for the purpose of hunting, trapping, and fishing;

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

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

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

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

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

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

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

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

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

22 (1) wild stock is necessary to meet the initial needs of farm or hatchery  
23 stock;

24 (2) there are technological limitations on the propagation of culture  
25 stock for the species sought;

26 (3) wild stock sought is not fully utilized by commercial fisheries,  
27 sport fisheries, personal use [, OR SUBSISTENCE] fisheries, or by persons engaged  
28 in personal and family use for sustenance; or

29 (4) wild stock is needed to maintain the gene pool of a hatchery or  
30 aquatic farm.

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

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

3 (1) a resident of the Haines Borough representing a conservation  
4 organization;

5 (2) a representative of the United States Fish and Wildlife Service; and

6 (3) a member of the local [UPPER LYNN CANAL] fish and game  
7 advisory committee for the area.

8 \* Sec. 32. AS 16.05.258, 16.05.330(c), 16.05.940(7), 16.05.940(8), 16.05.940(27),  
9 16.05.940(30), 16.05.940(31), and 16.05.940(32) are repealed.

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

11 \* Sec. 34. TRANSITION. (a) Notwithstanding the repeal of AS 16.05.258, by sec. 32 of  
12 this Act, the areas outside of the nonsubsistence areas established by the Board of Fisheries  
13 and the Board of Game shall constitute fish and game dependent use areas under  
14 AS 16.16.020, added by sec. 2 of this Act, until the earlier of either the effective date of  
15 regulations adopted by the Board of Fisheries and the Board of Game acting jointly to identify  
16 fish and game dependent use areas under AS 16.16.020, added by sec. 2 of this Act, or two  
17 years from the effective date of this section.

18 (b) Notwithstanding the repeal and reenactment of AS 16.05.260 by sec. 12 of this  
19 Act, a local fish and game advisory committee established before the effective date of sec. 12  
20 of this Act that is active on the day before the effective date of sec. 12 of this Act shall  
21 continue to operate under the former provisions of AS 16.05.260 until the effective date of  
22 regulations adopted by the Board of Fisheries and the Board of Game, acting jointly, that  
23 establish the local fish and game advisory committees described in AS 16.05.260, as repealed  
24 and reenacted by sec. 12 of this Act. The Board of Fisheries and the Board of Game, acting  
25 jointly, shall appoint persons to serve on the local fish and game advisory committees  
26 established under AS 16.05.260, as repealed and reenacted by sec. 12 of this Act, immediately  
27 upon adoption of regulations establishing the local fish and game advisory committees  
28 described in AS 16.05.260, as repealed and reenacted by sec. 12 of this Act.

29 \* Sec. 35. INITIAL APPOINTMENT OF MEMBERS TO THE REGIONAL FISH AND  
30 GAME BOARDS. (a) Notwithstanding AS 16.05.260, as repealed and reenacted by sec. 12  
31 of this Act, immediately upon the adoption of regulations by the Board of Fisheries and the

1 Board of Game, acting jointly, to define the boundaries of fish and game management regions  
2 in the state, the governor shall solicit nominations from local fish and game advisory  
3 committees in existence at that time for persons to serve on each of the regional fish and game  
4 boards established under AS 16.05.260, as repealed and reenacted by sec. 12 of this Act.

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

8 \* Sec. 36. REVISOR'S BILL. The revisor of statutes shall prepare a bill for consideration  
9 of the resource committees of the House of Representatives and the Senate of the Alaska State  
10 Legislature that amends references to subsistence uses of fish and game outside of Title 16  
11 of the Alaska Statutes to conform to the provisions of this Act. The bill shall be presented  
12 to the resource committees by the 20th legislative day of the next regular session of the  
13 Alaska State Legislature following the effective date of this section.

14 \* Sec. 37. ADVISORY VOTE ON PREFERENCE FOR USE OF FISH AND GAME FOR  
15 PERSONAL AND FAMILY USE FOR SUSTENANCE. The lieutenant governor shall place  
16 before the qualified voters of the state at the next primary election a question advisory to the  
17 legislature as to whether the legislature should establish a preference for use of fish and game  
18 for personal and family use for sustenance. The question shall appear on the ballot in the  
19 following form:

20 Q U E S T I O N

21 Shall a law (HB 406) passed by the legislature  
22 which grants a preference in times of shortage  
23 for use of fish and game for personal and family  
24 use for sustenance take effect and shall the  
25 federal law (Alaska National Interest Lands  
26 Conservation Act) be amended to conform to  
27 state law regarding use of fish and game?

28 Yes [ ] No [ ]

29 \* Sec. 38. Sections 1 - 36 of this Act are repealed upon certification by the lieutenant  
30 governor that a majority of the voters voting on the proposition described in sec. 37 of this  
31 Act have voted "No" in response to the question presented.

1 \* Sec. 39. Sections 37 and 38 of this Act take effect immediately under AS 01.10.070(c).

2 \* Sec. 40. Except as provided by sec. 39 of this Act, this Act takes effect only if the events  
3 described in (1) and (2) of this section occur and if the Act takes effect, it takes effect upon  
4 the later of

5 (1) the day following the date on which the lieutenant governor certifies that  
6 a majority of the voters voting on the proposition described in sec. 37 of this Act have voted  
7 "Yes" in response to the question presented;

8 (2) the day following the date on which the Attorney General for the State of  
9 Alaska determines that Title VIII of the Alaska National Interest Lands Conservation Act (P.L.  
10 96-487) has been amended in such a manner that

11 (A) the provisions of this Act are consistent with the preference for  
12 subsistence uses of fish and wildlife under the Alaska National Interest Lands  
13 Conservation Act;

14 (B) the State of Alaska may resume management of fish and game on  
15 federal public land in the state under provisions of this Act;

16 (C) the definition of "public lands" in the Alaska National Interest  
17 Lands Conservation Act is amended to exclude state and private land and water,  
18 including navigable water;

19 (D) federal court oversight over state and private land and water,  
20 including navigable water, is eliminated; and

21 (E) the portion of sec. 316(b)(3)(B) of P.L. 105-83 relating to the  
22 management of fish and wildlife for subsistence uses on public lands in Alaska by the  
23 Secretary of the Interior is repealed.

RESOLUTION 91-01

Tim Sykes  
338-5551

**SUBSISTENCE**

**(The first resolution approved by the Green Party of Alaska)**

**WHEREAS**, Subsistence users with critical skills and knowledge have never become an important part of fish and game management, but need to become an effective part of fish and game management systems, and

**WHEREAS**, The federal government recognizes its obligation towards American indigenous peoples to provide health care, education and the right to continue indigenous cultures, and

**WHEREAS**, Subsistence is part of all Alaska Native cultures, involving special skills and knowledge, sharing and other cultural values not easily definable in numbers, and

**WHEREAS**, The valid existing rights of Alaska's Native peoples have not been recognized by the State of Alaska, and

**WHEREAS**, There are non-Native subsistence users who have established rural lifestyles and customary and traditional use of subsistence resources., and

**WHEREAS**, The Alaska National Interest Lands Conservation Act calls for a decentralized fish and game management system and a rural subsistence priority, and

**WHEREAS**, There are few conflicts regarding subsistence use outside of road connected regions, now

**THEREFORE BE IT RESOLVED**, That the Green Party of Alaska supports the guarantee for all traditional and customary subsistence users, Alaska Native or non-Native, to have continuous access to subsistence resources with top priority going to sustaining of the resources, and

**BE IT FURTHER RESOLVED**, That subsistence activities are viable economic pursuits in some of our rural communities. The Green Party of Alaska will work to ensure land use regulations, resource allocation and wildlife management regimes to reflect full local consultation, and

**BE IT STILL FURTHER RESOLVED**, That the Green Party of Alaska will listen carefully and develop policies and programs to strengthen and support the subsistence economy. The Green Party of Alaska will work with all concerned to resolve this problem that has been stretched way out of proportion.

APPROVED BY CONSENSUS THIS 17th DAY OF March, 1991

AT THE GREEN PARTY OF ALASKA CONVENTION IN ANCHORAGE, ALASKA.

*Joni Whitmore, Chair*

*Jean-Marie Crumb, Secretary*

Green Party of Alaska, P.O. Box 1, Anchorage, AK 99524-0001  
email: [greenak@alaska.net](mailto:greenak@alaska.net) Tim Feller, Chair 907-278-7637

0-LS1573P  
Utermohle  
3/5/98

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

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

**TWENTIETH LEGISLATURE - SECOND SESSION**

**BY THE HOUSE RESOURCES COMMITTEE**

**Offered:  
Referred:**

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

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to fish and game; and providing for an effective date."**

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

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

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

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

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

11 *[new]* (4) there are Alaskans, both Native and non-Native, who have a traditional,  
12 social, or cultural relationship to and dependence upon the wild renewable resources produced  
13 by Alaska's land and water; the harvest and use of fish and game for personal and family  
14 consumption is an integral part of those relationships;

15 (5) although customs, traditions, and beliefs vary, these Alaskans share ideals

1 of respect for nature, the importance of using resources wisely, and the value and dignity of  
2 a way of life in which they use Alaska's fish and game for a substantial portion of their  
3 sustenance;

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

9 (7) the fish and game resources of Alaska have adequate biological and  
10 reproductive capacity to provide an abundance of fish and game for all users;

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

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

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

20 (2) a significant role for local fish and game advisory committees and regional  
21 fish and game boards in the review of regulations governing the use of fish and game  
22 resources;

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

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

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

28 **Sec. 16.16.010. Preferred use of fish and game.** (a) The harvest of fish and  
29 game for personal and family use for sustenance by residents is the highest and best  
30 use of fish and game. The Board of Fisheries, the Board of Game, and the department  
31 shall adopt regulations, policies, and management plans to implement a preference for

1 consumptive use of fish and game for personal and family use for sustenance over  
2 other uses of fish and game.

3 (new) (b) If the Board of Fisheries or the Board of Game determines that the  
4 projected level of harvest of a fish stock or game population in an area would exceed  
5 the sustainable level of harvest under the sustained yield principle, the appropriate  
6 board shall allocate, notwithstanding AS 16.05.251(e), the harvestable portion of the  
7 stock or population in that area among user groups in accordance with a ranking of  
8 beneficial uses of the stock or population that assigns the highest preference to  
9 consumptive use for personal and family use for sustenance.

10 **Sec. 16.16.020. Dependence on fish and game for sustenance.** (a) The  
11 Board of Fisheries and the Board of Game acting jointly shall identify and define fish  
12 and game dependent use areas. A fish and game dependent use area is an area where  
13 dependence on fish and game for personal and family use for sustenance is the  
14 principal characteristic of the economy and way of life of the area. In determining  
15 whether dependence on fish and game for personal and family use for sustenance is  
16 the principal characteristic of the economy and way of life of an area, the Board of  
17 Fisheries and the Board of Game shall jointly consider the relative importance of  
18 dependence on fish and game in the context of the totality of the following  
19 socioeconomic characteristics of the area:

- 20 (1) the social and economic structure;
- 21 (2) the stability of the economy;
- 22 (3) the extent and kinds of employment for wages, including full-time,  
23 part-time, temporary, and seasonal employment;
- 24 (4) the amount and distribution of cash income among those who live  
25 in the area;
- 26 (5) the cost and availability of goods and services to those who live in  
27 the area;
- 28 (6) the variety of fish and game species used by those who live in the  
29 area;
- 30 (7) the seasonal cycle of economic activity;
- 31 (8) the percentage of those who live in the area participating in hunting

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those who live in the area;

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

(11) the geographic locations where those who live in the area hunt and fish;

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

(13) the other sources of direct and indirect economic support available in the area;

(14) additional similar factors the boards establish by regulation to be relevant to a determination under this subsection.

*(rewritten)* (b) If the Board of Fisheries or the Board of Game, as appropriate, with the concurrence of the department, determines that a shortage of a fish stock or game population available for harvest in a fish and game dependent use area exists, the board may establish a preference for fish or game dependent uses of the stock or population and, consistent with sustained yield, reserve a sufficient portion of the stock or population to provide a reasonable opportunity to satisfy the need for fish and game dependent uses of the stock or population. A board shall make its determination of whether sufficient fish or game resources exist in an area to provide a reasonable opportunity to satisfy fish and game dependent uses of a stock or population based on the recommendations of the regional fish and game board for the area and the local fish and game advisory committees for the area. The preference established under this subsection shall be extended to a person who is determined to be dependent on fish and game for personal and family use for sustenance under (c) - (f) of this section.

*Amendment*

In a time of shortage of fish or game resources, the appropriate board may adopt a preference among beneficial uses of fish and game in a region or area by requiring that the flesh or meat of fish and game be used within the region or area where the fish or game was taken.

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

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

3 (2) submits to the regional fish and game board for the region in which  
4 the person lives a signed written statement that the person

5 (A) is dependent on fish and game for personal and family use  
6 for sustenance; or

7 (B) has no alternate means of sustenance as the result of

8 (i) the absence of a cash-based economy in the area  
9 where the person lives; or

10 — (ii) the person's decision to adopt a fish and game  
11 dependent life style.

12 < new > (d) Each regional fish and game board shall review the written statements  
13 submitted by persons asserting a dependence on fish and game for personal and family  
14 use for sustenance and make recommendations as to whether the person is entitled to  
15 a preference under (b) of this section. A regional board may hold a hearing to gather  
16 additional information regarding whether a person is dependent on fish and game for  
17 personal and family use for sustenance. Each regional board shall forward  
18 recommendations made by the regional board under this subsection and additional  
19 information collected by the regional board to the Board of Fisheries and the Board  
20 of Game.

21 < new > (e) The Board of Fisheries and the Board of Game, acting jointly, shall make  
22 the final determination as to who is entitled to the preference authorized under (b) of  
23 this section. The statewide boards ~~shall~~ refer to the recommendations of the regional  
24 fish and game boards unless a person disputes the recommendation made by a regional  
25 board. The statewide boards shall hold a hearing subject to AS 44.62.330 - 44.62.630  
26 to make a final determination of whether the person is dependent on fish and game for  
27 personal and family use for sustenance.

28 < new > (f) A person who is determined by the Board of Fisheries and the Board of  
29 Game to be dependent on fish and game for personal and family use for sustenance  
30 may take fish and game in any location in the state where a preference for the harvest  
31 of fish or game for personal and family use for sustenance has been established under

1 (b) of this section.

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

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

9 (1) "preference" means an advantage, but not necessarily an exclusive  
10 privilege, conferred on a use of fish and game over other uses through the adoption  
11 of seasons, areas, bag limits, methods and means, and other regulations that take into  
12 consideration the consumptive uses and harvest methods of the user groups;

13 (2) "principal" means more than 50 percent;

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

19 (4) "shortage" means the amount of a specific fish stock or game  
20 population available for harvest is not sufficient to provide a reasonable opportunity  
21 to take the stock or population for the sustenance needs of persons who are found to  
22 be dependent on the fish and game for personal and family use for sustenance;

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

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

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

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

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

1 dependent use [SUBSISTENCE HUNTING AND FISHING] shall

2 (1) compile existing data and conduct studies to gather information,  
3 including data from persons dependent on fish and game for personal and family  
4 use for sustenance [SUBSISTENCE USERS], on all aspects of the role of  
5 [SUBSISTENCE] hunting and fishing for fish and game dependent use in the lives  
6 of the residents of the state;

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

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

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

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

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

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

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

26 **Sec. 16.05.245. Review of regulatory proposals.** (a) Notwithstanding  
27 AS 44.62, each proposal for a regulation to be adopted by the Board of Fisheries or  
28 the Board of Game shall be submitted to local fish and game advisory committees and  
29 regional fish and game boards that may be affected by the proposal. Each advisory  
30 committee and regional board may review the proposed regulation and submit  
31 comments and recommendations regarding the proposal to the Board of Fisheries or

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

the Board of Game, as appropriate. This subsection does not apply to emergency regulations considered by either the Board of Fisheries or the Board of Game.

(b) The Board of Fisheries and the Board of Game shall carefully review each recommendation made by a regional fish and game board and ~~shall~~ defer to the recommendation of the regional board ~~unless~~ <sup>OK</sup> ~~unless~~ <sup>unless</sup>

*amend.*

- ~~(1) there is a contrary recommendation from another regional board;~~
- ~~(2) the recommendation is ~~not~~ consistent with the conservation of the fish or game resource ~~with~~ <sup>and</sup> the sustained yield principle;~~
- ~~(3) the recommendation involves issues of statewide significance; or~~
- ~~(4) the recommendation involves conflicts between regional boards.~~

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

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

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

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

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

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

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

FISCAL NOTE

STATE OF ALASKA  
1998 LEGISLATIVE SESSION

BILL NO. CSHB406 (RES)

Revision Date: 3/5/98  
Title: An Act Relating To Subsistence  
Use of Fish & Game  
Sponsor: Representative Scott Ogan  
Requester: House Resources Committee

Dept. Affected Fish & Game  
BRU \_\_\_\_\_  
Component \_\_\_\_\_  
Component Serial No. \_\_\_\_\_

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES [ ]						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1091 Designated Program Receipts						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY97) cost: \_\_\_\_\_

POSITIONS

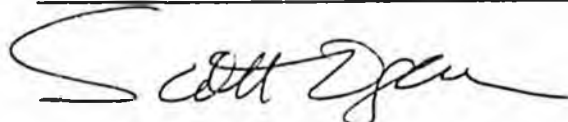
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Any cost associated with this legislation will be identified in the next committee of referral and has not been brought to my attention at this time.

Prepared by House Resources Committee  
Division \_\_\_\_\_  
Approved by Representative Scott Ogan  
Agency Co-Chair House Resources Committee

Phone 465-3715  
Date 3/5/98  
Date \_\_\_\_\_



FISCAL NOTE

STATE OF ALASKA  
1998 LEGISLATIVE SESSION

BILL NO. CSHB406 (RES)

Revision Date: 3/5/98  
 Title: An Act Relating To Subsistence  
Use of Fish & Game  
 Sponsor: Representative Scott Ogan  
 Requester: House Resource Committee

Dept. Affected Dept. of Law  
 BRU \_\_\_\_\_  
 Component \_\_\_\_\_  
 Component Serial No. \_\_\_\_\_

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1031 Designated Program Receipts						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY97) cost: \_\_\_\_\_

POSITIONS

POSITIONS	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Any cost associated with this legislation will be identified in the next committee of referral and has not been brought to my attention at this time.

Prepared by House Resources Committee  
 Division \_\_\_\_\_  
 Approved by Representative Scott Ogan  
 Agency Co-Chair House Resources Committee

Phone 465-3715  
 Date 3/5/98  
 Date \_\_\_\_\_

*Scott Ogan*

**HB**

**406**

**File 2**

*Law Office of*  
**GEOFFREY Y. PARKER**  
*Attorney at Law*

500 L Street, Suite 502  
Anchorage, Alaska 99502

Tel: (907) 272-9377  
Fax: (907) 272-9319

March 11, 1998

Members of House Judiciary Committee  
c/o Representative Joe Green, Chair  
Alaska State Legislature  
State Capitol (MS 3100)  
Juneau, Alaska 99801-1182

VIA FAX

RE: CSHB 406(RES) -- Subsistence Legislation

Dear Members of the House Judiciary Committee:

I have reviewed CSHB 406(RES). I served as a special counsel on subsistence to the Senate State Affairs Committee in 1985-86, when Alaska first went out of compliance with Title VIII ANILCA. For that committee I drafted most of what was eventually enacted by the Legislature in 1986. I also served on U.S. Fish and Wildlife Service staff on ANILCA in Washington, D.C. in the late 1970's when that legislation was being prepared. I am more than familiar with the intricacies of the subsistence dilemma as a set of legal, factual, and political issues.

These comments are in four parts. The first addresses CSHB 406(RES). The second lists principles which I think are useful in drafting any fish and game statute. The third states what might be a simple approach to the subsistence dilemma. The fourth comments on the importance of framing issues well and shows that CSHB 406(RES) demonstrates the danger of not framing issues well.

Under separate cover I have also sent through Chairman Green a draft paper I prepared, entitled "A Discussion of Nine Alternative Approaches To The Subsistence Dilemma and A Method Of Comparing Alternatives." It contains four sections: (A) a 70-page discussion of whether it is possible to comply with both the existing constitution and Title VIII of ANILCA, without amending the constitution or repealing "rural" from ANILCA, (B) a description of nine alternative approaches to the subsistence dilemma, (C) a 40-page critique of the Task Force proposals as they stood in the final Task Force Report of September 23, 1997, and (D) a method of comparing and ranking alternatives. There is a table of contents, and the document is in the format of legal memoranda - of a "question", a "short answer" and a "discussion".

**PART I -- OBSERVATIONS ABOUT CSHB 406(RES)**

1. Does CSHB 406(RES) Pass Constitutional Muster?
  - a. CSHB 406(RES) Creates An Unconstitutional Closed Class Every Bit As Much As Did The Rural Preference.

It is important to understand why the court in McDowell held the "rural-only" aspect of subsistence law violates the common use, equal access, and no exclusive right of fishery clauses of Article VIII of the Alaska Constitution. It did so, the court said at length because, "rural-only" establishes a "closed class".

In this respect, CSHB 406(RES) is no different. It establishes a "closed class" for "dependent use" of fish and game. This class is defined, by the proposed AS 16.16.020(c) in Section 2, as those who are eligible to receive a five-dollar resident hunting, trapping or sport fishing license under AS 16.05.340(a)(6). Under AS 16.05.340(a)(6), those who are eligible for such a license are those who receive welfare or who do not meet certain levels of income.

This is a closed class based on income and welfare, just as much as rural residency was a closed class. It would probably be unconstitutional for the same reasons that McDowell held the rural aspect of the current subsistence statutes unconstitutional.

- b. Can The Legislature Declare Constitutional Law?

Section 1 finds that the ability to take fish and game for "sustenance" is a "fundamental right" under the Alaska Constitution. This finding probably has no legal effect because under separation of powers the courts determine what the constitution means, not the Legislature or the Executive Branch.

You should ask the Department of Law or the Office of Legal Services of the Legislature about whether the Legislature can declare constitutional law.

- c. The Bill's Preference for "Dependent Use" Either Violates What the Bill Says Is A "Fundamental Right" To "Sustenance", Or The Preference For "Dependent Use" Is Meaningless.

Let's assume that Section 1, which finds that the ability to take fish and game for "sustenance" is a "fundamental right" under the Alaska Constitution, has some meaning and that a court would pay heed to this legislative finding. Apparently, all Alaskans will hold this fundamental right. Fundamental rights receive close scrutiny by the courts, so establishing a right to take fish and game as a "fundamental" right will make it tougher to uphold any alleged infringement on this right.

Careful reading of CSHB 406(RES) shows that it contains not one, but two, types of preferences in Section 2.

The first is in the proposed AS 16.05.010. AS 16.05.010(a) establishes "a preference for consumptive use of fish and game for personal or family consumption for sustenance over other uses of fish and game", and the proposed AS 16.05.010(b) assigns this the "highest preference". This "highest preference" seems to be a preference over "fish and game dependent uses".

The second is in the proposed AS 16.05.020. There, the proposed AS 16.05.020(b) allows the boards to establish "a preference for fish or game dependent uses".

If this preference for "dependent use" (by those who receive welfare or have a low income) is a preference over the fundamental right to "sustenance use" (held by all Alaska residents), then this preference for "dependent use" would violate unconstitutionally the new "fundamental" right. And if it does not -- and arguably it does not because sustenance is assigned the "highest priority" -- then this preference for "dependent use" is meaningless because it can never operate without violating the fundamental right.

So, the bill traps itself between unconstitutionality on the one hand and meaninglessness on the other. That is not good drafting, regardless of intent.

## 2. CSHB 406(RES) Invites A Host Of Constitutional Litigation Over Existing Regulations and Statutes.

By declaring the ability to harvest fish and game for sustenance a "fundamental right", CSHB 406(RES) invites constitutional litigation over existing regulations which allocate resources, regulate methods and means, regulate access, or establish size limits. For example, under the current Upper Cook Inlet Salmon Management Plan, 5 AAC 21.363, the priority use of salmon in Upper Cook Inlet after August 15 is recreational use. In order to implement that, the Board of Fisheries has closed personal use gill net coho fisheries in favor of rod and reel sport fisheries. That recreational priority will now be in jeopardy. Under the bill, a person who used coho for sustenance will have a claim that his or her "fundamental right" to harvest coho for sustenance has been infringed by elimination of the noncommercial gill net fisheries. The result will be a loss of the existing sport priority and opportunity.

Similarly, many commercial fishing regulations, catch-and-release sport regulations, trophy regulations, and potentially many other regulations governing methods and means (eg. bow hunting only, or fly fishing only), size limits (eg. antler size, or size limits on fish), no-bait, and even means of access (eg. bank only fisheries on the Kenai) could be challenged as violations of the

newly-declared fundamental right to sustenance.

This "fundamental right" also creates arguments that areas closed to fishing and hunting by the Legislature, such as the McNeil River and Walrus Island Sanctuaries, Chugach State Park, and the Alyeska Pipeline corridor, are unconstitutional.

3. **CSHB 406(RES) Reduces Opportunity To Use Fish and Game.**

a. **CSHB 406(RES) Will Result In Losses Of Opportunity For Those Who Do Not Hunt Or Fish For "Sustenance".**

Because McDowell severed the "rural" aspect of the subsistence law, the remaining statute requires that all Alaskans are eligible to participate in subsistence. This is referred to, for shorthand purposes, by the boards, by the Department of Law and by the Supreme Court in Morry v. State, as the "all-Alaskans policy."

The "all-Alaskans policy" results in many hunts which were previously permit-draw general hunts being changed to Tier II subsistence hunts. In Tier II situations, the opportunity to participate is allocated to those who score the most points for being dependent on the resource and lacking in alternatives. Although all Alaskans qualify for Tier I subsistence, there is almost no Tier I subsistence because when there is not enough resource to satisfy all harvest demand, and the result is Tier II in which only those most dependent and lacking alternatives get to participate.

Under existing law, Tier II only occurs in subsistence areas; Tier II does not occur in nonsubsistence areas. However, under Section 2 of CSHB 406(RES), the preference for sustenance (as opposed to the preference for "dependant use") will be in all areas of the state under the proposed AS 16.16.010. The result will be Tier II type situations where we do not now have Tier II in addition to Tier II type situations where we now have Tier II.

That equates to a greater loss of opportunity. CSHB 406(RES) would create many more such situations than existing law. In that sense, the bill is worse than current state law.

b. **CSHB 406(RES) Lacks Criteria For Implementing The Preference For "Sustenance" And Therefore Results In Shorter Seasons And Other Losses of Opportunity.**

CSHB 406(RES) contains no criteria or guidance for implementing the preference for sustenance.

The result will be shorter seasons in many situations. Under current regulations, the length of season often depends on regulations which manage harvest or mortality, such as antler regulations, no-bait regulations, catch-and-release, trophy or size

limit regulations, and access regulations. These create longer seasons and greater opportunity to participate. However, these regulations arguably are contrary to the preference for sustenance and would have to be overturned. The result will be shorter seasons and less opportunity.

The same can be said for those who prefer quality sport fisheries, such as catch-and-release or trophy trout fisheries, or quality hunts such as trophy hunts. They too will lose opportunity. Most of Alaska's best trout fisheries are now managed for catch-and-release. In the Cook Inlet drainages they are so managed because of biological reasons rather than social allocation. CSHB 406(RES) will drive them to extremely short seasons for biological reasons.

**4. Ask The Department of Law Whether The Legislature Can Enact A Statute Which Allows An Agency to Re-Delegate Its Authority To Another Agency.**

Section 13 of CSHB 406(RES) amends AS 16.05.270 to permit the boards to delegate their authorities to ADF&G or to regional boards. You need legal advice on the law of delegation.

The legislature is the constitutional source of all original authority over the conservation and utilization of fish and game. It has delegated some of its authority over fish and game to the boards and some to ADF&G.

I have not researched constitutional law concerning what is called the "delegation doctrine", which as I recall is in decline, and once was used to hold some legislative delegations unconstitutional.

What bothers me is that the Legislature would be authorizing an agency (the boards) to delegate the Legislature's original authority to another agency (ADF&G or the regional boards). This strikes me as allowing the boards to do perform a legislative function. It is unusual. You should ask the Department of Law whether this is proper.

**5. Miscellaneous Problems**

**a. The Ballot Question Misdescribes HB 406 As Doing What It Does Not Do**

Section 37 of CSHB 406(RES) puts this advisory question on the ballot:

Shall a law (HB 406) passed by the legislature which grants a preference in times of shortage for personal and family use for sustenance take effect and shall the federal law (Alaska National Interest Lands Conservation

Act) be amended to conform to state law regarding use of fish and game?

However, CSHB 406(RES) refers to "shortage" only in terms of "dependent uses" under the proposed AS 16.16.020 in section 2, and the proposed AS 16.16.095 in Section 2 defines "shortage" in terms of persons who are "dependent". CSHB 406(RES) does not refer to "shortage" in terms of the preference for "sustenance", as the ballot question says. Thus, the ballot question at least seems inconsistent with CSHB 406(RES). Implicitly, however, any time a preference for sustenance is triggered, there will be a shortage. By avoiding this fact, CSHB 406(RES) avoids acknowledging that its preference for sustenance will create many new Tier-II-type situations all over the state, particularly in areas not available for dependent use -- i.e. in the areas currently nonsubsistence areas in Southcentral Alaska.

**b. The Ballot Question Contains Two Questions**

There are clearly two questions in the ballot question: (1) shall HB 406 take effect?, and (2) shall federal law be amended to conform to state law? A person could vote "yes" or "no" depending on which he or she views as the main question. That alone will render the result of the vote rather unclear. It would be wise to separate any multiple questions as occur in this ballot question.

**c. Sustained Yield Is Defined Narrowly and Inflexibly**

Section 2 of CSHB 406(RES), in the proposed AS 16.16.095, defines "sustained yield" as "a level of ... consumptive uses ... capable of being maintained in perpetuity." Currently, the boards define sustained yield differently depending on the situation of what sort of yield is necessary to meet social and biological demands. At one extreme, are antlerless moose and cow hunts for sustained yield of meat. Other moose hunts are managed more restrictively for sustained yield of larger bulls. Similarly, the Board of Fisheries manages wild trout fisheries in Cook Inlet and Southwest Alaska to maintain "historic size and age composition" under existing trout management plans. At the other extreme are catch-and-release trout fisheries. All of these are different ways of implementing sustained yield/

However, the definition of sustained yield in CSHB 406(RES) denies the boards this flexibility.

**d. Other Drafting Questions**

**1. What Is An "Affected" Local Fish and Game Advisory Committee or Regional Board?**

Section 5 amends AS 16.05.245 to require the boards to submit proposed regulations to local advisory committees and regional

boards "that may be affected by the proposal". What is an "affected" committee or regional board? The Anchorage Fish and Game Advisory Committee, upon which I have served for 13 years, is involved in regulatory proposals all over the state because Anchorage residents use resources all over the state. I favor the idea of local and regional review, but it is not good drafting to create legal obligations based on vague language.

**2. Why Does CSHB 406(RES) Require A Maximum of Five Regions When ANILCA Requires A Minimum of Six?**

Section 12 amends AS 16.05.260 to require a maximum of "five fish and game management regions". Section 805 of ANILCA requires a minimum of six, and section 805 is one of three sections of Title VIII with which the State must comply if it is to manage subsistence on federal lands and waters.

**3. Inconsistent Findings**

Section 1(a) of CSHB 406(RES) finds in part:

(6) while Alaska's fish and game are generally still plentiful, these resources are not limited 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, the Board of Fisheries, and the Board of Game to establish a preference for sustenance among the various beneficial uses of fish and game in Alaska;

(7) the fish and game resources of Alaska have adequate biological and reproductive capacity to provide an abundance of fish and game for all users[.]

These findings are inconsistent. Such generalities serve no purpose. It is more accurate to say that a few stocks of fish (such as second run Kenai sockeye or Bristol Bay sockeye) and some populations of game (such as the Mulchatna, Western Arctic, and Porcupine caribou herds) "have adequate biological and reproductive capacity to provide an abundance of fish and game for all users". However, this can never be said of many if not most stocks or populations of fish and game, such as Kenai kings (upon which we restrict commercial and sport harvest and do not allow subsistence or personal use gill net harvest), early run Kenai/Russian River sockeye (upon which we do not allow commercial and personal use gill net harvest), trout, steelhead or any resident (nonanadromous) fish population (many of which we manage for sport and not for sustenance), the Nelchina caribou herd (where we have Tier II restrictions), waterfowl, most small game adjacent to the road system, and innumerable other stocks and populations.

4. Is "Sustenance" The Same As "Personal Use" Or Different?

Currently, "personal use" appears only in the authorities of the Board of Fisheries, AS 16.05.251(a); it does not appear in the authorities of the Board of Game. "Personal use" arose as a regulatory creature in the early 1980's by which the Board of Fisheries created certain dip net or gill net fisheries in Cook Inlet and in the Copper River near Chitna to allow people who were urban and did not qualify for subsistence to continue their activity. Personal use fisheries are a form of "sport" fishery and require only a sport license. Fundamental to the creation of them was and remains a requirement that there be excess fish beyond reasonable commercial, subsistence and other sport needs. That is why personal use fisheries are on plentiful stocks of sockeye, such as the late Kenai sockeye, and why they are not on stocks such as king salmon, trout, or any game species.

CSHB 406(RES) appears to elevate "personal use" from situations involving excess fish to "sustenance" on all stocks of fish and game. This is a radical departure.

PART B -- THE IMPORTANCE OF FRAMING ISSUES

One problem in the subsistence dilemma is that people often do not frame issues well. Three examples demonstrate the importance of framing well the issues of law, policy and fact.

1. CSHB 406(RES) Misframes The Constitutional Issue In McDowell As A Policy Issue.

You can see that CSHB 406(RES) substitutes one closed class (based on income) for another (based on residency). You probably can see that the bill overlooks the legal issue of why the McDowell court held the "rural-only" classification scheme unconstitutional (because it created a closed class) and mistakes it as a policy issue of whether Alaska should adopt a preference for subsistence by rural residents or some other kind of preference for "dependent use" by those who receive welfare and have low income. By making this mistake, CSHB 406(RES) then proceeds to establish another closed class, which would probably be unconstitutional, too.

Misframing constitutional issues is fatal to statutes.

Here is a better statement of the policy issue: Does the Alaska Legislature want a "closed class"? If it does, then it is necessary to amend the constitution. If does not, then don't amend the constitution, and ask yourself if you still want to comply with federal law. You might be able to do so without amending the constitution, but that is a matter I address elsewhere in the materials sent under separate cover to Chairman Green.

## 2. Framing The Question Of Whether To Amend The Constitution

The issue of whether to amend the constitutional question is often framed as whether Alaskans should amend their constitution to allow a rural-only preference and comply with ANILCA. This assumes that ANILCA prohibits an urban resident from participating.

Although ANILCA defines "subsistence uses" in terms of "rural Alaska residents", it never refers to "urban" or "nonrural" residents and does not expressly bar an urban resident from participating in subsistence. Furthermore, § 815(3) saves to the State all authority over nonsubsistence uses. Arguably, the silence of ANILCA about urban residents and the savings clause at § 815(3) allow the State to view nonsubsistence for purposes of ANILCA as including participation by an urban resident in some form of "non-ANILCA subsistence". If so, then the issue becomes whether the State could permit some participation by some urban residents in "non-ANILCA subsistence" and still comply with ANILCA's preference for ANILCA-subsistence use by rural residents. If that can be done, then it may be unnecessary to amend the constitution.

No court has ruled on whether ANILCA bars an urban resident, although many people, including me, often assume that it does so.

So, the issue is better framed as whether it is legally necessary to amend the constitution in order to comply with ANILCA. You need to hear a variety of legal opinions on this question. Framing the question this way does not assume that ANILCA bars an urban resident. Framing it this way brings out the disagreements over whatever ANILCA means so that legislators can weight the risks of taking one view of ANILCA over another. That is why lawyers before courts struggle to frame issues well, so that the disagreement is sharpened and brought clearly before a court.

## 3. The Fact Issues of Fish and Game Management Differ From Situation to Situation

CSHB 406 (RES) treats all species as if they were uniform and could all sustain high levels of harvest by declaring that the highest is best use is sustenance. This will destroy many sport fisheries managed by limiting methods and means (e.g. no bait, catch-and-release, or size limits) to increase the season and recreational opportunity. In varying degrees, the current state subsistence statute, the Task Force Proposals, and ANILCA also treat fish and game as if they were a single entity, rather than innumerable diverse populations and stocks.

Any fish and game legislation needs to take into account that human use and values, as well as populations size, reproductive rates, etc., differ from situation to situation.

ANILCA's legislative history, which focused on what was

important for subsistence as part of determining what is customary and traditional was on the right course. Unfortunately, the recent federal amendment defining customary and traditional eroded the interpretative value of that legislative history by neglecting the matter of whether a resource is important to subsistence use.

#### PART C -- A POSSIBLE APPROACH TO THE SUBSISTENCE DILEMMA

I am rapidly coming to favor a simple, "stop-gap" statute and perhaps some version of a constitutional amendment which "buys time" between now and December 1.

Putting aside for a moment the question of amending the constitution, the Legislature could simply amend the authorities of the Board of Fisheries and the Board of Game, at AS 16.05.251(a) and .255(a), to say that the boards "may adopt regulations consistent or inconsistent with federal law concerning fish and game." The statutes need say no more as a legal matter.

That would shift debate to the boards and would buy time for the State, through the Joint Board of Fisheries and Game, to adopt in regulation a overall scheme which might comply with federal law. Nothing in ANILCA requires that state compliance be at the statutory level, as opposed to the regulatory level. Presently, regional councils exist only in state regulation, and prior to 1986 the rural preference existed only in state regulation. In other words, much of this debate does not have to occur before the Legislature. Except for the issue of amending the constitution, everyone could carry every other issue to the Joint Board between now and November or December, which is a lot more time than this legislature has. Then, if necessary, the Legislature could revisit the statutory issues.

The only question which has to occur before the Legislature is whether it is legally necessary to amend the constitution. If there is not now a necessary two-thirds majority in the Legislature to put a constitutional amendment on the ballot, then the Legislature needs to figure out if there is any other way to avoid a federal take-over.

The only method I can think of is to convert the urban-rural classification in state law from an impermeable barrier of law (which McDowell held unconstitutional because it created a "closed class" and therefore violated Art. VIII § 3, 15, and 17 of the Alaska Constitution) to a set of very high hurdles of fact. Use of "rebuttable presumptions" accompanied by the highest civil standards of proof (clear and convincing evidence) would accomplish this. If such an approach is pursued, then it would at least create a colorable argument that Alaska has complied with ANILCA. That would also buy time. The point is this that if the State cannot enact a barrier of law, the next closest thing is probably a set of rebuttable presumptions accompanied by the highest

standards of proof. In the discussion paper I have sent to Chairman Green, I outline what such a scheme might look like. It would also be useful to consider ways to minimize the administrative burden of individualized determinations, and I suggest several ways. That discussion paper devises six alternative approaches which do not depend on amending the constitution and which arguably could comply with federal law. I neither recommend or oppose any of these approaches, although I think some are better than others.

I would ask the Department of the Interior whether such approaches, if very carefully drafted, could comply with ANILCA.

Finally, if an amendment to the constitution is legally necessary, it likewise could simply be: "The legislature may enact statutes consistent with or inconsistent with federal law concerning fish and wildlife." That is preferable to what the Task Force submitted for reasons stated in the discussion paper.

Passing most of the buck to the boards has advantages, particularly at this point in time. First, it avoids making the legislation a lengthy "target" about which people holding different views will find many items about which to debate and object. Instead, it focuses the debate on: (1) whether the State will or will not regain management and avoid a takeover; and (2) the legal aspects of the constitutional issue. Second, it buys time at the statutory level and may even buy time on the constitutional issue. Third, it is consistent with general administrative law principles that legislatures delegate to agencies when issues are complex and vary from situation to situation.

#### **PART D — PRINCIPLES FOR DRAFTING FISH & GAME AND SUBSISTENCE STATUTES**

Fish and wildlife statutes are often difficult to draft. They often involve situations which are dynamic, biologically inconsistent and complex factually, and accompanied by often less than a desired level of accurate information and science. The situations are dynamic in terms of biology, changes in human use, and varying natural and human-caused conditions and events. The situations are inconsistent and often lacking desired information for the same reasons. In other words, the situations facing the drafter of a fish and game statute or regulation are more complicated than those which face the drafter of many other kinds of law -- for example the drafter of a statute making it illegal to fail to pay child support, or to stop at a stop sign.

From these observations, certain principles of drafting, which are basically cautionary, may be derived.

1. **First Principle -- Avoid Assuming Facts**

- a. **Avoid Simultaneously Assuming That Certain Biological Conditions Exist Or Are Stable, Or That Biological and Harvest Information Is Uniformly Available And Of High Quality, And Then Enacting Provisions Which Undermine Sustained Yield And Conservation In Situations That Are Dynamic or Inconsistent.**

Successful fish and game statutes abide by a principle that such statutes fail if they state litany that management is subject to sustained yield but include provisions which are inconsistent with and undermine sustained yield and conservation. Instead, the entire structure of the statute -- not just litany of sustained yield -- must produce the outcome sustained-yield conservation.

CSHB 406(RES) and the Task Force package transgress this principle. Both assume that ADF&G always has excellent, up-to-date, biological and harvest data on all species. ADF&G tends to have better data on the status of commercial fish harvest and run strength and on the status caribou and moose herds. However, beyond these limited situations the quality of data used to make management decisions is of a lesser level of certainty. The Task Force package would transgress by enacting a legal presumption in favor of recommendations of unanimous regional councils. That is dangerous if the data is not of high enough quality to know whether a recommendation would violate sustained yield. The preference in CSHB 406 for sustenance held by all Alaskans creates the same danger but to a greater degree because it would apply in areas not classified for dependent use.

- b. **Minimize Assumptions That People Share Identical Values About Use of Fish And Game.**

It may surprise many, but no study indicates that the recreational fisheries which focus on salmon are Alaska's most valuable sport fisheries. Instead, three studies indicate that sport fisheries which focus on catch-and-release trout fisheries in Southwest Alaska are more valuable economically. If that is true, then you should think carefully about this preference for sustenance applying to all species. Some, such as trout, are simply not numerous enough to sustain substantial harvest, as are many salmon and caribou stocks.

The Task Force Package, the current state subsistence law, and CSHB 406(RES) all assume that for purposes of resource management, all species are of equal value, numerosity, use, scientific complexity, etc. ANILCA, prior to the recent amendments, did not go as far in assuming that all species were of equal importance to customary and traditional use. In fact, the legislative history of that term says that it was to apply to species that were important to local use and that is why Congress expressly declined to define

"customary and traditional" and opted instead for a case-by-case approach. State statute currently ignores this case-by-case approach and contains a more general, useless definition (which I feel free to criticize because I was involved in drafting it). Unfortunately, the recent amendments to ANILCA are similar.

2. **Second Principle -- The Converse Of The First Principle Is That When Fish and Game Statutes Work Well, They Create Stability By Putting Resources First And Forcing Agencies To Act Conservatively In Everyone's Long-Term Interest, Even If Against Someone's Short Term Interest And Liberal Interpretation Of The Facts.**

Everyone likes to say "err on the side of the resource". This is a good principle for drafting successful fish and game statutes. Instead of stating, litany-like, that all management is subject to sustained yield, and then making assumptions that ADF&G will always know what sustained yield is, it is better to state the litany and then design the entire structure of the statute to support sustained-yield as an outcome.

3. **Third Principle -- Avoid Assuming Legal Knowledge Of Issues Not Yet Decided By Courts**

As I have pointed out above, framing issues well requires avoiding assumptions about law that may be unclear and not addressed yet by the courts.

4. **Fourth Principle -- Seek Simplicity, Because Over-drafting Creates Unnecessary, Huge, Political Targets.**

The Task Force bills and CSHB 406(RES) create large targets because they do a lot that is unnecessary to resolving the issue of whether or not the State will or will not comply with federal law. Large targets create too much to "shoot at".

5. **Fifth Principle -- Foster Flexibility Of Agencies To Respond To Different Situations Within Legislatively-set Guidelines**

This is basic administrative law, and subsistence statutes are administrative law. Generally, clear legislative direction to agencies is preferable to relying on the appointment power. However, when clear direction cannot be stated well, then legislative bodies delegate to agencies within more general guidelines or criteria. You need to think about the differences between clear directives, guidelines and criteria. They function differently. You should also think about the differences between such tools and relying on the appointment power. Some people try to solve statutory problems by use of directives, guidelines and criteria, and other seek to solve problems by determining who or what sort of person will occupy the chair of a decision-maker and then relying on the appointment power. I think legislators are

most responsible when they figure out what they want to do and write it, rather than when they rely on appointment-power approaches, because the former rests upon substance and the latter depends upon the vagaries of who is in power.

The Task Force Package, CSHB 406(RES), and ANILCA's amendments regarding the creation of regional councils all place greater emphasis on the appointment power than on clear direction, guidelines or criteria. In effect, they all reflect a distrust of agencies and a greater trust in the shifting tides of the appointment power and who is governor or in the Legislature. That is no way to draft law.

**6. A General Principle -- Avoid Vague Terms and Over-breadth**

This is a general principle of drafting all statutes and regulations.

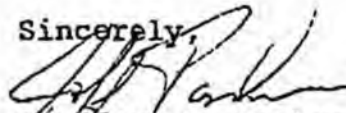
Subsistence legislation has problems with vague terms, less than meaningful definitions and over-breadth. "Customary and tradition" is was deliberately left undefined according to the legislative history of ANILCA so that it could be tailored case-by-case to what was important. That was the correct approach. Since then, the State and now Congress have reversed course to try to define the undefinable. That is a pointless approach and erodes the case-by-case design of ANILCA.

Nevertheless, the Task Force proposals, CSHB 406(RES), existing state statute and now ANILCA all try to define too much.

In practice, the regulatory criteria the boards have developed, for example as to what is "rural" have been more useful than either the Ninth Circuit's application of census data or attempts to define "rural" in statute.

CSHB 406(RES) goes further on this ill-conceived course. By trying to establish the right to sustenance as a fundamental constitutional right, it arguably creates grounds for challenging legislative and regulatory closures of hunting or fishing, whether full or partial, which occur in places such as McNeil River Sanctuary and Chugach State Park. If the Legislature wants to open those areas, it should do so directly rather than rely on someone asserting their "fundamental" constitutional right to hunt brown bears, for example, at McNeil River.

Sincerely,



Geoffrey Y. Parker



# UNITED FISHERMEN OF ALASKA

4:45 pm  
2/12/98

September 12, 1997

211 Fourth Street, Suite 112  
Juneau, Alaska 99801  
907/586-2820  
Fax: 907/463-2545

Governor Knowles Subsistence Task Force  
Office of the Governor  
P.O. Box 110001  
Juneau, Alaska 99811-0001

Dear Governor Knowles and members of the Subsistence Task Force,

United Fishermen of Alaska (UFA) commends the Subsistence Task Force for a job well done on a very complex and divisive issue. You have given all Alaskans a well reasoned proposal for the potential resolution of the long standing subsistence dilemma. UFA supports the basic construct of the proposal - technical amendments to ANILCA, constitutional amendment, and minor statutory changes - all linked together through 'effective date' provisions. Your "package" is similar to one advanced by UFA in 1992. However, we still believe there is room for improving the proposed "package", particularly in regard to the statutory provisions.

As you know, UFA has a long standing interest in the subsistence issue as it relates to the management of our fisheries. UFA has long recognized a natural linkage and compatibility between subsistence and commercial fishing. Commercial fishing is the main source of cash income in many subsistence "areas" and many fishermen are both commercial and subsistence "users". Accordingly, UFA has always supported a "rural" subsistence priority and recognized the importance of the subsistence way of life.

While supporting the concept of a rural priority, UFA also recognizes that this priority carries the "force of law" and the potential to eliminate all other uses of a given resource, including other uses by rural residents that could well be vital to their social and economic well being - e.g. commercial fishing, big game guiding, tourism related activities, etc. Noting that this potential outcome does and will exist, every word, phrase or definition needs to be carefully crafted to maintain the compatibility that we believe is possible.

UFA is also aware that since the Kenaitze decision there has been a string of federal court decisions interpreting the "meaning" of Title VIII of ANILCA. While we do not dispute the right of Congress to set "policy" for federal lands, we do feel it is perfectly reasonable to expect Congress - and not the federal courts - to tell us what this policy means.

-1-

#### MEMBER ORGANIZATIONS

Alaska Longline Fishermen's Association • Alaska Trollers Association • Bristol Bay Driftnetters Association • Concerned Area "M" Fishermen • Cook Inlet Aquaculture Association  
Cordova District Fishermen United • Kenai Peninsula Fisherman's Association • Kodiak Regional Aquaculture Association • Kodiak Seiners Association • North Pacific Fisheries Association  
Northern Southeast Regional Aquaculture Association • Northwest Selnnetters Association • Peninsula Marketing Association • Petersburg Vessel Owners Association  
Prince William Sound Aquaculture Corporation • Purse Seine Vessel Owners Association • Seafood Producers Cooperative • Southeast Alaska Seiners Association  
Southern Southeast Regional Aquaculture Association • United Cook Inlet Drift Association • United Southeast Alaska Gillnetters

Given the considerations noted above, UFA has long held that "technical" amendments to ANILCA, aimed at clarifying the meaning and extent of the priority and at defining key terms, are a vital link for any "package" concept seeking a comprehensive resolution of this long-standing "dilemma". It is in this spirit of desiring a comprehensive solution, compatible with other uses, that UFA has and will continue to comment on and support the "package" concept advanced by the Subsistence Task Force.

Prior to our comments on specific issues in the draft proposal, UFA notes that your efforts are but the first significant efforts in a process for public and legislative consideration. Our comments are, therefore, not all inclusive but address issues that we sincerely request you consider prior to forwarding any "final" package to the public and legislature.

### **UFA Comments on Specific Issues**

#### **Rural Definition**

There is a major flaw in this definition. It lacks any reference to subsistence being non-commercial and a principal characteristic of the economy. By tying subsistence to substantial dependence on fish and game for nutrition, the ability to evaluate the overall characteristics of a community or area is lost. Without the proven phrase "principal characteristic of the economy" areas like the road connected Kenai Peninsula could be right back in as a rural area. Clearly this is not the intent of the Subsistence Task Force - to go backwards from what exists now under state statutes. We request that you consider using the existing state definition of 'rural'. It's a proven and accepted definition.

#### **Rural Resident Definition**

This definition should be changed to reflect any changes you make in the definition of rural.

#### **Customary Trade Definition**

This definition is important to ensure that commercial fishing does not occur under the guise of subsistence fishing. We request that you substitute the existing state definition of "customary trade" as it 1) emphasizes "limited non-commercial" exchange, 2) has been accepted by the Legislature and 3) makes it clear that the appropriate state board - as opposed to federal regulators - may impose the restrictions.

#### **Stocks and Populations**

The proposed definitions are the existing state definitions and we support them as drafted and urge you not to amend them. These definitions add stability to the

regulatory process and in some measure eliminate extreme "ESA type" claims where any harvest of a stock or population of concern elicits calls for the elimination of all harvest.

#### Applicability to Private and State Lands

In the introduction to the draft proposal (page 3), it states that the definition of "federal public lands" will be clarified to ensure that it excludes all private and state lands. Yet, there is no such clarification in the proposed package. This is necessary in order for the State of Alaska to be able to move beyond the Katie John case. Please ensure that any state or private lands and waters, including navigable waters, are excluded from the definition of "public lands" in ANILCA.

#### Constitutional Amendment Linkage

In 1992, UFA proposed to link the effective date of a constitutional amendment to the passage of ANILCA amendments, state statutory changes and vice versa - tying them all through the effective date clause. While your proposal has the same intent, it doesn't quite close the loop on required ANILCA amendments. The linkage statements must be strengthened and clarified. The Constitutional Amendment should include a section (not just intent language) stating it will not become effective until ANILCA amendments are adopted. We support a Constitutional Amendment as one critical part of a comprehensive solution but would not be supportive unless this linkage occurs in both directions. Our interest is the same as yours - to achieve a comprehensive solution and not a partial fix.

#### Regional Subsistence Councils

We note that recommendations to the regional subsistence council from advisory committees are forwarded to the appropriate board even if the council does not adopt the recommendation of the advisory committee. This ensures the advisory committee's right of "due process" to the appropriate board is protected. But what happens if a citizen chooses not to go through an advisory committee and instead submits a subsistence proposal to the regional subsistence council and the council does not act or adopt the proposal? Is the citizen's access to the board then thwarted? We suggest that a similar requirement to forward on proposals to the appropriate board be included in section (g) on page 15. This will ensure that a citizen approaching the regional subsistence council will still have some recourse to the appropriate board.

We recognize that recommendations from regional subsistence councils should receive some deference in deliberations regarding specific subsistence proposals. However, the proposed language goes beyond this intent and far exceeds the 'shall consider' requirement in ANILCA. One can easily make the case that all proposals, policies, management plans etc. which address salmon also relate to subsistence. The Councils could then make recommendations on any and all commercial fisheries proposals and receive "substantial deference" and a "presumption in favor" when the

recommendation is unanimous. Unless the reach of the Councils is narrowed to specific subsistence proposals this section has the potential to create a duplicate process to the Board of Fisheries and Game and to disenfranchise users around the State. In this regard we strongly recommend that you:

- 1) amend line 11, page 15 so the authority of the Council applies to subsistence proposals only.
- 2) insert the word 'directly' in front of " relating to subsistence" - page 13, line 10
- 3) delete the reference to "existing" in line 9, page 13. This suggested change would prevent the Advisory Councils from automatically undoing the work of past and existing Boards. If the Advisory Council feels a change is necessary in an existing regulation, policy or management plan then all they need do is introduce a subsistence proposal.

The Councils are only going to work if they keep their focus on specific subsistence proposals and augment, not add to, the overload before the Boards of Fish and Game.

We also suggest that you delete the term substantial when referring to deference as this term has not been defined or tested in court, where as the term deference has been tested. Furthermore, the definition of deference is consistent with the requirements of ANILCA.

Anytime additional authority is given, there needs to be commensurate responsibility. If the Council's are to receive deference, then they should be required to support their recommendation with substantial evidence. This is the requirement in ANILCA and it should be the requirement here. We do not view the inclusion of the 'arbitrary and capricious' clause as a comparable, commensurate requirement of responsibility. Please insert the "substantial evidence" requirement into line 12, page 15 so that it reads "shall give [substantial] deference to [them] those recommendations supported by substantial evidence".

#### Advisory Committees

In section AS 16.05.260 (a), the Board of Fisheries and Game are required to set the number and terms of each of the members of the advisory committees. While we support this requirement, we suggest an additional requirement to address a problem that has occurred with some advisory committees. In the past, some committees have become "stacked" with controlling representation by one user group to the detriment of other user groups residing in the community. We suggest that the appropriate board should require that an advisory committee's composition reflect the mix of user groups residing in the respective area.

On page 11, section (d) allows the commissioner to delegate authority to advisory committees for emergency closures during established seasons. Then it goes on to empower the commissioners to make null and void *openings* set by the advisory committees. However, the advisory committees only has authority for emergency closures. This apparent oversight needs to be corrected, i.e. change 'openings' to 'closures' in line 13, page 11.

## Conclusion

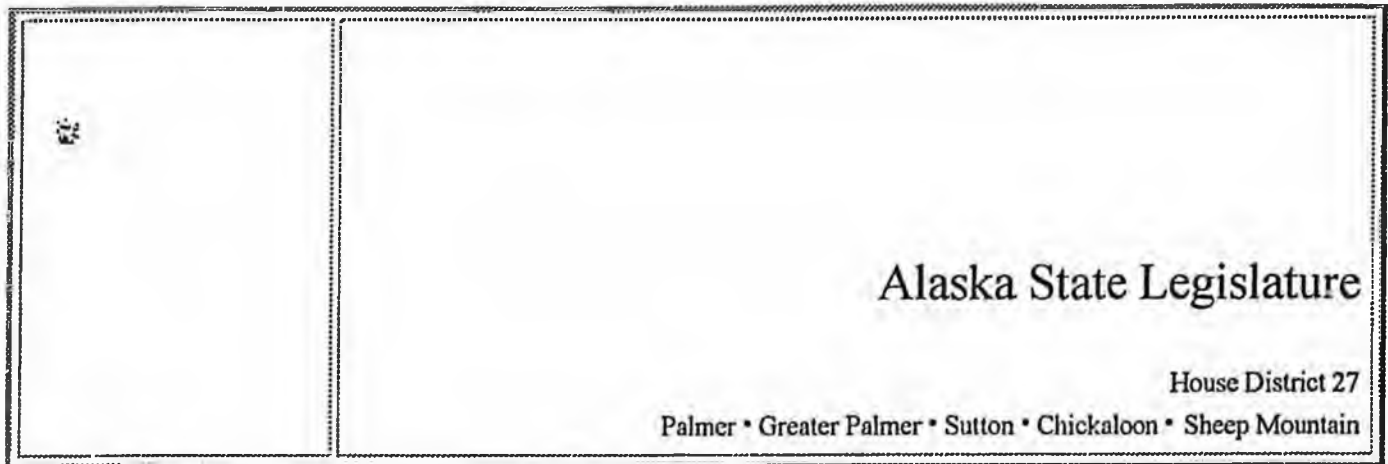
While the above comments on specific issues focused on areas where UFA sees a definite need for improvement and/or clarification, the positive contributions made by your proposed package can not be overlooked. For example, we are quite pleased to see 1) the technical amendments for ANILCA, 2) the incorporation of the concept of reasonable opportunity, 3) the reliance on past work of the Boards of Fisheries and Game, 4) the limitation of federal court oversight and 5) proposed wording for a Constitutional Amendment. But foremost, UFA acknowledges that only a "package" proposal such as this protects subsistence and returns full management of fish and game to the state and ends further encroachment by the federal government.

As requested, UFA has reviewed and comment on your draft proposal. It is our belief that it does constitute the beginning of a solution.

Sincerely,

Theo Matthews  
President

c.c.  
Senator Ted Stevens  
Senator Frank Murkowski  
Representative Don Young  
House Resources Committee  
Senate Resources Committee  
UFA Board of Directors



## Legal History of the Subsistence Issue: A Chronological Overview

To understand the subsistence preference issue, one must examine the legal history behind it. This outline will provide a concise road map to that history and will summarize the development of the legal issues.

I. **Alaska Constitution:** Adopted and ratified by the people of Alaska in 1956, the Alaska Constitution specifically addressed ownership and use of Alaska's fish, wildlife and other resources.

- A. Article VIII, § 3 states that fish and wildlife in their natural state are reserved for the *common use* of the people.
- B. Article VIII, § 4 requires that all the state's replenishable resources are to be managed on a sustained yield principle, subject to preferences among beneficial uses.
- C. Taken together, these provisions mean that the state cannot grant any group of *people* preferential use of fish and wildlife resources; the only legally acceptable preferences are among beneficial *uses*. *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

II. **Alaska Statehood Act:** The Alaska Statehood Act was a compact between the people of the state of Alaska and the United States of America providing for Alaska's admission to the Union as a state. It was passed by Congress and ratified by the people of Alaska in 1958, and Alaska was formally admitted as a state by a proclamation of President Eisenhower in 1959.

- A. The Statehood Act is not just a law; it is a *compact* between the people of the state and the United States, just as the U.S. Constitution is a compact between the people and the federal government. This is important because it means that Congress cannot unilaterally pass any law that contradicts or violates the terms of the compact. In other words, the Statehood Act takes precedence over other federal laws if there is a conflict.
- B. The Statehood Act specifically accepted and ratified the Alaska Constitution as the governing document for the new state, including those provisions reserving fish and wildlife for common use of all Alaskans. (Alaska Statehood Act, § 1)
- C. The Act also transferred management of Alaska's fish and wildlife resources to the state, except for special refuges or reservations set apart for wildlife protection.

III. **Alaska Native Claims Settlement Act (ANCSA):** The Native Claims Settlement Act of 1971 was

a full and final settlement of all claims to any rights, title, interest or privilege by people of Native origin in the state of Alaska, and extinguished any claims of Alaska Natives to special hunting or fishing rights. This Act is a legal settlement in the nature of a treaty; it therefore takes precedence over any previous or subsequent laws of Congress.

- A. Declaration of Congressional Policy in § 1 states that "the settlement should be accomplished . . . *without establishing any permanent racially defined institutions, rights, [or] privileges . . .*"
- B. The settlement provided for payment by the federal government to Alaska Natives of four-hundred sixty-two million, five-hundred thousand dollars (\$462,500,000) in cash payments, and another five-hundred million dollars (\$500,000,000) in assignments of mineral royalties and lease payments received by the State of Alaska. It also granted title to millions of acres of land to regional and village Native corporations established under the Act.
- C. In exchange, the Native peoples of the state specifically waived forever any and all aboriginal claims based on previous use or occupancy (in other words, traditional use), or based on any previous statute or treaty. These forfeited claims include claims to any right, title, use or occupancy in or to land and water areas of the State of Alaska:
  - b. All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and *including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.*

Alaska Native Claims Settlement Act, § 4 (b),(c) (emphasis added).

IV. **Implementation of Alaska Native Claims Settlement Act (ANCSA) and Alaska Statehood Act:** In 1980, Congress passed this Implementing Act which contains a number of clarifications and refinements of procedural and administrative issues relating to implementation of the Native Claims Settlement Act and the Statehood Act.

- A. Also establishes a new "Alaska Land Bank" program which authorizes holders of large tracks of land to place their land in a federal land bank for a ten year period, renewable in five year increments.
- B. A participating landowner agrees (among other things) to manage fish and wildlife on the land according to federal or state management plans, if any. In exchange, the federal government provides the owner with technical assistance in fish and wildlife management, as well as other benefits. The Act does not transfer management duties to the federal government, however.

V. **Alaska National Interest Lands Conservation Act (ANILCA):** This Act, passed by Congress in 1980, is often referred to as "ANILCA," and imposes a preference for uses of Alaskan fish and wildlife by "rural resident."

- A. Rural or bush residents are granted preference under ANILCA in the taking of fish and wildlife. (16 USC § 3114). While the Act tries to mask its racial preference agenda by granting the preference to rural subsistence users rather than to Natives, the true intent of congress is revealed in § 3111 where Congress invokes its constitutional authority over "Native affairs" to preserve the "economic, traditional and cultural existence" of "Native and non-Native" rural subsistence users and attempts to "fulfill the policies and

purposes of ANCSA."

- B. Defines the preferential "subsistence uses" as "customary and traditional uses" of fish and wildlife (16 USC § 3113). This is exactly the type of claims of aboriginal hunting or fishing rights based on previous use that were "extinguished" by the Native Claims Settlement Act.
- C. The Act does not authorize the federal government to manage fish and game according to this subsistence preference; it only authorizes federal judicial intervention if a subsistence user feels that he or she isn't receiving preferential treatment under the state's management plan.

## VI. Important Court Cases:

- A. In *McDowell v. State*, 785 P.2d (Alaska 1989), the Alaska Supreme Court ruled that the Alaska Constitution, which was ratified and approved by Congress in the Statehood Compact, prohibits granting a rural subsistence preference.
- B. In 1984, the 9th Circuit Court of Appeals issued an important ruling in two consolidated cases: *Inupiat Community v. U.S.*, 746 F.2d 570 (9th Cir. 1984) and *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984). The Court stated that Alaska Natives' claims of subsistence hunting and fishing rights had been forever extinguished with the Alaska Native Claims Settlement Act. The United States Supreme Court refused to hear the one of the two cases when the Native communities appealed, and in the other case bypassed the issue of extinguishment of Native rights by holding that neither the Alaska Native Claims Settlement Act (ANCSA) or Alaska National Interest Lands Conservation Act (ANILCA) applied to the outer continental shelf. *Gambell v. Clark*, 480 U.S. 531 (1991).
- C. These cases clearly hold that any and all claims by Alaska Natives to subsistence hunting and fishing preferences *cannot stand* under the Alaska Constitution, the Alaska Statehood Act, and the ANCSA. Yet the federal government has taken over the management of fish and wildlife on federal lands in Alaska to forcibly implement ANILCA'S unlawful subsistence preference scheme. It was this federal management of Alaska's fish and wildlife resources--which is not authorized in any statute, and which flagrantly violates Alaska statehood compact with the federal government--that was challenged in the *Babbitt* lawsuit.

and finally,

- D. *United States v. Alexander*, 938 F.2d 942 (CA9 1991). Persons convicted of selling subsistence taken roe-on-kelp challenged their conviction.

The 9th Circuit Court of Appeals found that ANILCA does not limit customary trade to transactions involving personal or family consumption. The sale of herring roe is customary trade [up to fifteen thousand dollars (\$15,000) per person]. ANILCA allows rural Alaskans to engage in limited sales of herring roe so long as the sales are part of customary trade. State regulations cannot prohibit the sale of herring roe taken in subsistence fisheries because customary trade in fish and game is a subsistence use of fish.

The court remanded the case for a new trial. If the defendants were found, at the new trial, to have engaged in a sale of herring roe that was more than a limited cash sale then they could be convicted of unlawful selling of subsistence caught herring roe.

## Appendix . Subsistence Management Chronology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**March 1994: U.S. District Court Validates Federal Subsistence Board Authority, Extends Federal Subsistence Management to Include Navigable Waters.** Following preliminary rulings in Katy John, in late 1993, Judge Holland issued a final ruling that interpreted ANILCA as giving the federal government broad authority to manage subsistence on federal public lands, and extended jurisdiction to include navigable waters on

federal lands. A parallel ruling in the case of State v Babbitt found that creation of the federal subsistence regulatory board did not exceed the authority granted by ANILCA. These rulings were immediately appealed to the Ninth Circuit Court of Appeals by both the state and federal governments.

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

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

**May, 1995: State Supreme Court Upholds State Subsistence law.** The Alaska State Supreme Court overturns the State Superior Court decision in State v. Kenaitze Indian Tribe. This validates use of nonsubsistence areas.

**1995: Appropriation Language Prohibits Preemption Actions for FY 96.** Alaska's congressional delegation inserts language in appropriations bill prohibiting expenditure of funds to preempt state management on some navigable waters. R

**October, 1995: Totemoff Case.** The Alaska Supreme Court ruled that the state had jurisdiction to prosecute Mr. Totemoff for spotlighting deer in state navigable waters. The court also ruled that the federal government has no jurisdiction in state navigable waters.

**December, 1995: Ninth Circuit Court of Appeals in Katie John Case.** The Ninth Circuit Court ruled that the Reserved Water Rights Doctrine provided authority for the federal agencies to extend their jurisdiction into some navigable waters.

**April, 1996: Advance Notice of Proposed Rulemaking.** The Departments of Interior and Agriculture published their advance notice of proposed rulemaking describing preemptive regulations to be adopted for state and private lands and waters.

**May, 1996: Appeal of Katie John Case to Supreme Court.** The U.S. Supreme Court denied the Petition for Writ of Certiorari in the Katie John case.

**1996: Appropriations Language Prohibits Preemption Action for FY 97.** Alaska's congressional delegation inserts language in appropriations bill for 1997 with expanded language prohibiting implementation of federal preemption regulations and state lands and waters.

**1996: Line Item Veto Bill Passes.** Congress passes line item veto bill which may provide mechanism for President to eliminate appropriations language protecting Alaska from preemption regulations.



# CHOGGIUNG LIMITED

VILLAGE CORPORATION

P.O. Box 330 104 MAIN STREET DILLINGHAM, ALASKA 99576  
PHONE (907) 842-5218 FAX (907) 842-5462 E-MAIL chognt@nushtel.com


January 13, 1998

The Honorable Ivan M. Ivan, Representative  
ALASKA STATE LEGISLATURE  
State Capitol (MS 3100).  
Juneau, AK 99801-1182

Dear Representative Ivan:

I am enclosing a copy of Resolution 97-15 of the Choggiung Limited Board of Directors requesting that during this session the Legislature make subsistence the number 1 priority. All other issues and capital project needs for rural Alaska pale in comparison to the importance of preserving subsistence for rural Alaskans.

Wishing you the best for the session.

Regards,  
CHOGGIUNG LIMITED  
  
Tim Troll, CEO

DISTRIBUTED AT  
REQUEST OF  
REP. IVAN

RESOLUTION 97-15  
OF THE BOARD OF DIRECTORS OF CHOGGIUNG LIMITED  
REQUESTING THE ALASKA LEGISLATURE  
TO MAKE SUBSISTENCE A PRIORITY

WHEREAS: Subsistence is of paramount importance to the Native people of Dillingham, most of whom are shareholders of Choggiung Limited Village Corporation;

WHEREAS: Choggiung encourages the adoption of a subsistence priority in the Alaska State Constitution;

WHEREAS: In the absence of a constitutional amendment the Legislature should establish a subsistence priority;

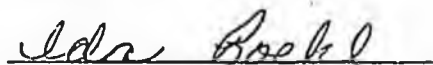
THEREFORE, BE IT RESOLVED: The Alaska Legislature shall adopt the following:

The legislature shall, consistent with the principle of sustained yield and in recognition of Alaska Native historical, traditional and customary use, provide for a priority for subsistence uses to and among rural residents in the taking of fish and wildlife and other renewable natural resources. Further, the ANILCA remain intact.

Passed and Approved by a duly constituted quorum of the Board of Directors of Choggiung Limited this 5<sup>th</sup> day of November 1997.

  
Victor Sifsof, President

ATTEST:

  
Secretary

# SOUP

"The blackfish (*Dallia pectoralis*) is common wherever sluggish streams and lakelets occur from Kotzebue Sound to the Kuskokwim River. Throughout this region, they are taken by means of small wicker traps, about 18 inches wide and 5 feet long, which are set in small streams, with a wicker fence leading from the mouths of the traps to the shore. By means of traps of this character, vast quantities of blackfish are taken in the waters of the low country between the Yukon and Kuskokwim rivers, where they are abundant and form one of the principal sources of supply for the people during several months of the year.

— Edward W. Nelson, "The Eskimo About the Bering Strait" (1899)

**N**ot long ago I was having a pleasant lunch in Anchorage with a friend who was fairly new to Alaska. We met at one of those new brewpub places. I ordered a smoked-turkey sandwich with sprouts, soup and a robust beer. I believe he had something with shrimp, a salad and a crisp, light ale. I was in Anchorage for the Alaska Federation of Natives convention to accompany the board of directors of the Native village corporation that employs me. Eventually our conversation came around to rural Alaska and he asked me to explain the subsistence issue.

I launched into a dissertation on the equal-protection provision of the Alaska Constitution: the special relationship of the federal government to Alaska Natives; the reasons why Alaska Natives might prefer federal control of fish and game; the reasons why federal control could be disastrous for rational management of the resources and blah, blah, blah, blah and blah.

After a while I could hear myself talking. I was just repeating all the arguments I've heard time and again. As in all those forums I've attended with panels of subsistence experts, I have allowed the issue to become a lunch topic. After we departed, I felt uneasy. Now I realize I missed the point: Subsistence isn't a lunch topic; it's a topic about lunch.

So, my friend, let me try again.

Subsistence is about soup with eyes.

My first encounter with subsistence was as a young VISTA volunteer traveling around southwestern Alaska. Invited for lunch one day by an old couple in a village on the Lower Yukon, I was treated to the soup with eyes. Blackfish soup. A thick mash of drab, green prehistoric-looking little fish all boiled together with eyes floating around like large kernels of pepper. The old couple smiled and waited with anticipation. Would I eat the soup? I looked down at the soup. Could I eat the soup? The soup looked up at me. I smiled and asked for some pilot bread. I took a deep breath, swallowed a mouthful and quickly followed that with a bite of pilot bread. The old man laughed and asked, "Do you like?" I said it was "interesting." Thankfully, he thought I was making a compliment. Then he told me that they had some "kass'aq" (white man's) food if I would prefer. "Dinty Moore?" he asked. I politely declined and finished the blackfish soup.

A few months later I visited again. While I was enjoying a lunch of Dinty Moore and pilot bread, the old man told me how he grew up on blackfish. It was a staple food of his childhood. His father made a special effort to show him how to make blackfish traps and where to set them. There would be times when the salmon were not plentiful or hunting would be hard. Blackfish could keep starvation away. He talked about the struggle his parents endured simply to avert hunger. He repeated stories they told him about the "starvation times" — years when whole villages went hungry because food was scarce — or



W  
I  
T  
H

E  
Y  
E  
S

worse, because sickness had so decimated the population there were no men left who could hunt.

The old couple and I formed a bond the day I ate that blackfish soup. They dared me to try their "Native" food and were delighted when I did. They genuinely loved to share — and tease. I have since had similar experiences with foods like walrus intestine, lampreys fried in their own fat, dried dog salmon dipped in seal oil (a favorite) and frozen whitefish — not dishes I would normally prefer to a smoked-turkey sandwich with sprouts, or even a bowl of Dinty Moore stew. And that is the point: Subsistence is about what we eat for lunch. It's about food — food that in many instances you and I would be quite happy to let others eat. When it does involve food we might all enjoy, like salmon or moose, Natives and rural Alaskans ask only that their needs be met

first from the food roaming in their own back yard, and then only when that food is likely to be in short supply. Not an unreasonable request.

It is easy to muddle an issue like subsistence, and I think we have muddled it. We need to put the legalities aside and approach subsistence with a little human compassion. It really shouldn't be an issue. Let's do the right thing. Let's do what it takes to make subsistence a priority. If we could view rural subsistence resources not as everyone's to take, but theirs as rural Alaskans to share, I don't think anyone would go hungry. There are still plenty of old Native couples out there ready to share little of their soup with eyes. A

■ Tim Troll writes and paints in Dillingham where he works for Chogglung Ltd., Native village corporation.

STORY AND ART  
BY TIM TROLL

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 465-2075

February 28, 1998

The Honorable Irene Nicholia  
Alaska House of Representatives  
State Capitol, Room 409  
Juneau, AK 99801-1182

Re: CS HB 406 (Resources)

Dear Representative Nicholia:

You have asked several questions about CS HB 406 (Resources), a bill dealing with subsistence. Your questions, and our responses, are set out below.

1. Does this legislation comply with Title VIII of ANILCA and if not, why?

In Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), nonwasteful subsistence uses of fish wildlife are the priority, consumptive uses of those resources on the federal public lands of Alaska. 16 U.S.C. § 3112. When it is necessary to restrict harvest of those resources, subsistence uses have a preference over other uses, like sport hunting and commercial fishing. 16 U.S.C. § 3114.

ANILCA defines "subsistence uses" as uses by rural Alaska residents. 16 U.S.C. § 3113. In its present form, ANILCA defines "rural Alaska resident" as "a resident of a rural community or rural area." A "rural community or area" is defined as "a community or area substantially dependent on fish and wildlife for nutritional and other subsistence uses. Pub.L. No. 105-83 (1997).<sup>1</sup>

---

<sup>1</sup> The ANILCA definitions will be repealed on December 1, 1998, if by that date the state has not adopted laws that provide for the subsistence definition, preference, and participation specified in that law. Pub.L. No. 105-83 (1997). In that event, ANILCA will not have a statutory definition of "rural."

In contrast to ANILCA, CS HB 406 does not define eligibility for the "sustenance" priority in terms of the characteristics of communities or areas. Instead, the bill sets out individual criteria for that eligibility. Under those criteria, a person must: (1) possess a hunting, fishing, or trapping license which is only available to persons who have received public assistance or who have lower income; (2) depend on fish and game for sustenance or lack an alternative means of sustenance; (3) have consumed within the past 12 months a certain number of species of fish and game; and (4) have shared or received fish and game from other households. All of the individual criteria must be met before a resident will be entitled to enjoy the "sustenance" priority. Proposed AS 16.16.020(c), section 2 of CS HB 406.

Under ANILCA, the state is entitled to manage subsistence hunting and fishing on federal public lands if it adopts laws "which are consistent with, and which provide for the definition, preference, and participation specified in . . ." that federal law. 16 U.S.C. § 3115(d), emphasis added. The question, then, is whether the two sets of criteria for participating in subsistence/sustenance -- the rural residency criteria of ANILCA and the individual criteria of CS HB 406 -- are "consistent."

The question can best be answered by examining the judicial treatment of an earlier "consistency" dispute. In 1988, the Ninth Circuit Court of Appeals compared the state's definition of "rural," which looked at whether traditional uses were a principal characteristic of an area, with a definition of rural that the court could derive from ANILCA.<sup>2</sup> The court concluded that the state's definition was not consistent with the common understanding of "rural," i.e., areas of sparse population. Its conclusion was based on a comparison of the geographic areas that would qualify under each. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 316-318 (9th Cir. 1988) The court noted that the Kenai Peninsula would qualify under its interpretation of "rural," but that it did not qualify under the state's definition. Because the state's definition would exclude practically all areas that would be commonly thought of as rural, the court concluded that the definition was not consistent with ANILCA. *Id.*

We believe that a court would follow a similar approach to determine if the individual criteria of CS HB 406 are consistent with ANILCA's definition. A court could not compare geographic areas because CS HB 406 does not use a person's place of residence as a qualifier. Instead, a court would likely compare the two groups who would qualify. If the membership of the group

---

<sup>2</sup> At that time, ANILCA had no statutory definition of "rural."

qualifying under the rural residency criteria differed significantly from the membership of the group qualifying under the individual characteristics criteria, it is likely that a court would find them inconsistent.

It is probable that the makeup of the two groups would be different. Under ANILCA, residents of all rural communities and areas qualify. Under the individual criteria of CS HB 406 some urban residents would qualify, and some rural residents would not qualify. Although not certain, it is likely that the number of sustenance users qualified by CS HB 406 would be fewer than the number qualified by ANILCA. Because of this probable difference in group makeup and size, we believe that a court would conclude that the bill does not "provide for the . . . participation specified in . . ." ANILCA (16 U.S.C. § 3115(d)). Thus, the two would be found inconsistent, and the state would not be entitled to manage subsistence on federal public lands in Alaska.

2. Does this legislation raise constitutional issues and if so, what are they?

CS HB 406 has a "regional area preference." Under section 2, "In a time of shortage of fish or game resources, the appropriate board may adopt a regional preference among beneficial uses of fish and game by requiring that the flesh or meat of fish and game be consumed within the region where the fish or game was taken."

Representative Ogan said that this is a key element of the bill. He believes that it is constitutional because it is a "preference among beneficial uses."<sup>3</sup>

Presumably, the "beneficial use" contemplated by the bill is the consumption of subsistence fish and game. To date, the Alaska Supreme Court has not recognized consumption as a "use" under the Alaska Constitution. The only recognized uses are commercial, sport (recreational), subsistence, and personal use. That is not to say, however, that the Court would not accept consumption as a beneficial use.

A constitutional problem arises because "consumption" must be in a particular geographic place, specifically the region

---

<sup>3</sup> Article VIII, section 4, of the Alaska Constitution allows "preferences among beneficial uses." the Alaska Supreme Court has held that because those preferences do not restrict admission to a resource user group, they are permissible under that clause and the other "equal access" clauses. *Gilbert v. Department of Fish & Game*, 803 P.2d 391 (Alaska 1990).

where the fish and game are harvested. If the Boards adopted such a regional preference, it would significantly restrict the opportunity of residents living outside of a region to harvest subsistence resources in the region. For example, a person living outside a region who shot a subsistence moose would have to either: (1) remain in the region until the person or the person's family consumed the moose; or (2) give the moose away to non-family persons who do live in the region. The first option is impractical. Few persons would find it reasonable to set up a temporary household for weeks or months in a different region just to consume fish and game harvested there. The second option is contrary to the purpose of HB 406. If the harvester had to give the fish and game away to non-family members, the activity would no longer be "the harvest of fish and game for personal and family use for sustenance." CS HB 406, § 1.

Essentially, the "regional area preference" provision establishes a preference for subsistence harvest based on one's place of residence. Although it does not, on its face, exclude harvest by persons outside of a region, in its practical application, the only persons who could consume the fish and game in the region are those who live there. They would have a significant advantage, if not a monopoly, to those resources because of their closer proximity. Indeed, Representative Ogan said the purpose for the amendment is to make sure that, in times of shortage, persons are given a preference for harvesting fish and game in their own regions.

Since *McDowell*, the Alaska Supreme Court has said that, under the present Article VIII "equal access" clauses of the Alaska Constitution -- the clauses guaranteeing common use, prohibiting exclusive rights of fisheries, and requiring uniform application of natural resource laws -- the right to harvest subsistence resources cannot be based upon the location of a person's residence. Most recently, the Court, when discussing *McDowell*, said, "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. . . . 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." *State v. Kenaitze*, 894 P.2d 632, 638 (Alaska 1995). Under that principle, the Court struck down the Tier II proximity criterion. *Id.*

The intended purpose and the practical effect of the "regional area preference" is to give certain residents a "higher claim" to subsistence resources because they live closer to them. For that reason, it is unlikely that the preference would survive

The Honorable Irene Nicholia  
Alaska House of Representatives  
Re: CS HB 406 (Resources)

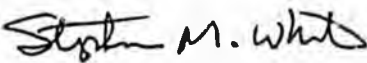
February 28, 1998  
Page 5

a legal challenge under the present "equal access clauses." For the preference to be constitutional, Article VIII would have to be amended to allow a priority for subsistence hunting and fishing that is based upon a person's place of residence.

Please contact me if I can assist you further.

Sincerely yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:   
Stephen M. White  
Assistant Attorney General

SMW: lmt:pch  
J:\WHITE\NICHOLIA.WPD

Comments on HR 406 - 5 pages

To: House Submitted by  
Resources Barbara Bronwater  
Committee - Box 875082  
Scott Olson wasilla 99687

See 2. Dec 13-20 pg 2 is in  
conflict with current policies of  
ADF&G as stated in hunting regs.  
Because they are not adhering to  
AS 16.05 255 d in particular Unit  
14A. Our resources in 14A are  
declining due to heavy hunting pressure  
from easy access and Anchorage unable  
to hunt in their "Bowl". Cow permits  
and any Bull permits are issued to  
non-residents. Enforcement of AS 16.05.255-d  
needs to be enforced in 14A as well as  
other areas where Cow permits are issued  
Non-residents should only be issued  
harvest tickets since they are not  
meat hunters. Many Alaska  
residents cannot fill their freezers  
due to non-residents receiving  
this priority.

pg 4 lines 9-13 add to (c).

possesses a permanent disabled  
veteran's sports license issued  
under AS 16.05.940 & AS 16.05.34

pg 5 line 2 add that a

person is entitled to  
preference under (b) and (c) of  
this section (person who  
possesses either a disabled  
sports license or  $\$5^{00}$  license.)

Those aforementioned due to their  
disabilities, fiscal or low income  
necessities, their dependence on  
food & game for personal &  
family use for sustenance.

pg 5 lines 27-30 It seems as

though there is alot of  
bureaucracy when a final  
hearing still needs to be held,  
unless anyone disputes what the  
local advisory board determines.

pg 2 of 5

are qualified. A lot of extra funds will be required unnecessarily at a time when the State needs to reduce its spending and budget. How will this tier of boards be financed?

Sec 4 lines 5-9 pg 7 it is not logical or feasible to give added responsibility to ADF&G to determine the nutritional value or the extent of dependence on food acquired thru sustenance.

Reporting this information to other agencies or organized bodies is irrelevant. Just more inflated and increased of government!

ADF&G is not qualified to determine nutritional value - they are not nutritionalist, doctors or health care advisors. Their responsibility only is game management.

Sec 6 pg 8 lines 25-27. add  
disabled veterans under  
AS 16.05.940, AS 16.05.341

Sec 6 pg 10 lines 7-10 How will  
this be enforced?

Sec 12 pg 13 lines 8 & 9 delete  
The governor... asks for  
additional names. Can  
lead to favoritism. The  
last submitted submitted  
by committee should stand  
as is. Line 14-15 is  
essential... subject to  
confirmation ~~by~~ by legislature.

Sec 14 pg 16 line 2. add. This  
subsection does not limit  
the right of an Alaskan  
resident who is a Disabled  
Veteran to claim an exception  
from hunting or sports fishing

license under AS 16.05.940 and  
AS 16.05.341

Sec. 14 pg 16 lines 3, 8, 9, 14  
change to age 60 as  
stated, on current hunting  
and fishing regs and also  
as stated, on pg 8 Sec 6  
lines 25 + 26

I support the basis of HB  
406

Alaska residents receive  
priority for fish and game  
for personal and family use  
for maintenance.

pg 5 of 5

# PREPARE



## Special Subsistence Edition

March, 1990

### My Story

If a rite of puberty for boys growing up in South Texas existed 50 years ago, it most certainly included some form of hunting and/or fishing.

By the time I reached 12, my great ambition was to have my very own .22 rifle.

There was nothing wrong with my father's old bolt action rifle, which he freely loaned me for rabbit and squirrel hunts with my buddies – after repetitious training in the safe handling of firearms, of course. But just as most boys now yearn for "wheels" of their own, I wanted my very own semi-automatic that I could clean and oil and keep in my own closet!

I still have that first rimfire .22 which my Dad allowed me to choose from the vast stock at Corpus Christi Hardware. It was a reward for practicing hard and winning first in a State music contest when I was 14. Since that time I have enjoyed the thrills of hunting the brown bear of Chichagof Island (not with that little .22, of course), and hooking the king salmon of Favorite Channel as well as the halibut of Homer.

I share this bit of personal history because you have a right to

know where I am coming from as I make this effort to shed light on what at first may appear to be simply hunting, fishing and gathering by Native Alaskans – Aleuts, Eskimos and Indians.

My education into the life and cultures of of Alaska's indigenous



peoples began in Juneau in 1956. For 10 years I was pastor of the Juneau Methodist Church there. During that time I was fortunate to have a close working relationship with our Choir Director, Richard Newton. Richard is a wise and wonderful Tlingit leader then employed by the U. S. Forest Service; and a fine musician who shaped our chancel choir into one of the best in Alaska.

From Richard I learned much about the culture of the rain forest people – including the sacred ritual of returning salmon bones to the river from which they had come. All of life for his people had been tuned to the cycles and recycling processes of nature. The

awareness of the sacred was woven into the whole fabric of their lifestyle and culture.

### Culture & Tradition

I have come to understand now that what we call "subsistence" is not the same as sport hunting and fishing. It is not simply "living off the land", either. In the words of Jonathan Solomon of Fort Yukon,

*When we talk about subsistence in the areas, we should be talking about Native culture and their land. I never heard the word subsistence until 1971*

*under the Native land claims act. Before that time, when I was brought up in the culture of my people, it's always been 'our culture' and 'our land'. You cannot break out subsistence or the meaning of subsistence or try to identify it, and you can't break it out of the culture. The culture and the life of my Native people are the subsistence way of life. It goes hand in hand with our own culture, our own language, and all our activities.*<sup>1</sup>

Culture includes that which matters most to any people – values, religion, all that is sacred. And this may explain why Native Americans (including Alaskans) have never been



able to reach a common understanding about the land with white Europeans and others who immigrated to this continent.

### The Land

Land is traditionally not simply "real estate" for Native peoples. It is the essence of existence, identity and belonging.

For European immigrants, on the other hand,

*...land was merchantable. Law and usage had developed a complicated system of privileges and obligations, all deriving from the notion of a transferable fee title in land. Land that was not encompassed within some form of recorded title was outside of law itself . . . When these Europeans found that Indians had no proceedings for recording title, indeed had no titles, they readily assumed that there was no ownership. <sup>2</sup>*

This is not to suggest that the Europeans simply occupied and appropriated the land of Native Americans. The Puritans, for example, believed that the confiscation of property was wrong whether boundary markers existed or not. Roger Williams, among others, proposed that the land be purchased from the Native Americans for a reasonable price. This approach, as much as his theological ideas, perhaps, contributed to his banishment from Plymouth! <sup>3</sup>

Political reality – perhaps more than morality – induced European immigrants to secure land and resources by negotiation rather than by conquest. Hostile environment, Quaker and Puritan ethics, combined with principles of British and International Law (as well as military necessity) reinforced this pattern. During the American Revolution the colonists who cultivated alliances with East Coast tribes became obligated to them for support or – at least – neutrality. <sup>4</sup>

Such is the historical background for the more than 200 years of treaties between colonial, state and federal governments and Native Americans. As has been well documented, this history has been marred by broken treaties and legislated plunder.

### ANCSA

The relationship of the federal government to Alaska Natives both before and after the Alaska Native Claims Settlement Act of 1971 has been essentially the same as that of other Native Americans under American law. <sup>5</sup>

The highest hopes of Alaska Natives have included the preservation of their land claims, subsistence and self-government. ANCSA addressed only the land claims. However, the Conference Committee report made it clear that the subsistence needs of Alaska Natives were to be protected.

### Subsistence

*The Conference Committee after careful consideration believes that all Native interests in subsistence resource land can and will be protected by the Secretary (of the Interior) through the exercise of his existing withdrawal authority. The Secretary could, for example, withdraw appropriate lands and classify them in a manner which would protect Native subsistence needs and requirements by closing appropriate lands to entry by nonresidents when subsistence resources for these lands are in short supply or otherwise threatened. The Conference Committee expects both the Secretary and the State (of Alaska) to take any action necessary to protect the subsistence needs of the Native. (Emphasis added.) <sup>6</sup>*

### ANILCA

Since neither the Secretary of the Interior nor the State of Alaska fulfilled these expectations, Congress added Title VIII to the Alaska National Interest Lands Conservation Act of 1980 (ANILCA).

*ANILCA requires the state to manage fish and game resources according to federal subsistence requirements as the price to be paid for the right of managing fish and game on federal (public) lands. <sup>7</sup>*

