

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9665 SENATE RESOURCES

| Issue | 1) Governor's Task Force Proposal | 2) Murkowski/Young ANILCA Amendments |
|--|--|--|
| <p>J Does it contain the principle of co-management?</p> <p>(Note: concept of "co-management" is defined differently by proposals listed to the right.)</p> | <p>Yes. New State law requires State Boards to establish at least six 10-member regional advisory councils, appointed by the Governor [4 members from local tribal councils' lists; 6 members (3 of whom must be subsistence users) from local governments' and local advisory committees' lists.] State Board must give deference to unanimous regulatory recommendations of regional councils. Regional councils must give deference to regulatory recommendations of tribes, municipalities, and local advisory committees.</p> | |
| <p>K Extent of federal jurisdiction when the State is out of compliance</p> | <p>Definition of "public lands" will be amended in an unknown way. Note: when State is in compliance, Secretarial regulatory authority and monitoring/reporting roles are eliminated.</p> | <p>Limits extent of federal jurisdiction to game on federal lands. No federal jurisdiction on State or private lands or waters or any federal claim to reserved water rights or navigational interests.</p> |
| <p>L Federal Court Oversight</p> | <p>ANILCA amendment adds judicial review standard: federal court can overturn State regulation only if "arbitrary, capricious or abuse of discretion." Federal court must give State Board same deference as federal agency.</p> | <p>Eliminates federal jurisdiction when the state has protected the subsistence priority through the State Constitution. Does not consider situation where there is a State Constitutional provision but no statutory provision providing for a meaningful subsistence priority.</p> |
| <p>M Nature of the State Constitutional Amendment</p> | <ul style="list-style-type: none"> • Permissive ("may"); • Consistent with sustained yield; • Rural priority. | |

| Issue | 1) Governor's Task Force Proposal | 2) Murkowski/Young ANILCA Amendments |
|--|--|--|
| N Amendments to Title VIII | 102: Definition of public lands "should" be modified in an unknown way. 803: Definitions of C&T, rural, and customary trade. 804: Changes standard to "reasonable opportunity" and defines it. 805: Changes in management system. 806: Repeal Secretarial monitoring/reporting during state compliance. 807: Review criteria for federal courts. 813: Conforming changes. 814: No Secretarial regulatory authority during state compliance. 816: Disclaimer clause: Nothing in these ANILCA amendments affects Indian Country, tribal jurisdictions, or Title VIII's status as Indian legislation. | |
| O Is there a subsistence defense against criminal prosecutions? | No. | |

| Issue | 1) Governor's Task Force Proposal | 2) Murkowski/Young ANILCA Amendments |
|---|--|--|
| A The Priority: Who is eligible? | Residents of Alaska communities that are <u>rural</u> , defined as "community or area substantially dependent on fish and game for nutritional and other subsistence uses." No population categories. No criteria for deciding which places meet above definition. (State Boards will set criteria, subject to ANILCA.) Applies to communities and areas: no individual qualification. | Rural-remote villages, communities and areas. No direction as to what remote means (e.g., from Bethel, Anchorage, jet service, road system, etc.). Individual eligibility, with presumption that all residents in the eligible areas qualify. Presumption can be rebutted with readily available evidence. Raises constitutional questions as no new entrants are permitted in the system. |
| B Definition: "Customary & Traditional" | "...Non-commercial, long-term and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time, taking into consideration the availability of the fish or game." (Same as in current State law.) | C&T would no longer be a part of the subsistence system. Subsistence uses are based upon <u>direct personal or family consumption...of wild renewable resources</u> . No direction as to how subsistence regulations are to relate to customary and traditional uses. |
| C Definition: "Customary Trade" | "Exchange for cash of fish or game in minimal, noncommercial quantities, as determined by regulation." (State Boards set regulations.) Does not restrict money sales of furs and furbearers. | Includes exchange of fish or game for other food or nonedible items if the exchange is of a very limited and noncommercial nature. Appears to eliminate trapping for money on federal lands and other exchanges for even limited amounts of money. |
| D When the priority is invoked | No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage). | At all times. |
| E Standard of protection for subsistence harvests | "Reasonable Opportunity." Allows subsistence user to participate in hunt or fishery with reasonable expectation of success (not a guarantee of success). State Boards must "consider" C&T seasons; however, it is unclear whether State Boards must mirror local C&T practices. | Subsistence uses are to have a reasonable opportunity. "Reasonable opportunity" is not defined. |

| Issue | 1) Governor's Task Force Proposal | 2) Murkowski/Young ANILCA Amendments |
|---|--|--|
| <p>F Subsistence opportunities for urban Natives:</p> <ul style="list-style-type: none"> historically rural Native communities/areas now defined as urban; individual Natives who moved to urban communities/areas | <ul style="list-style-type: none"> <u>Historically rural Native communities/areas now defined as urban:</u> Native (or non-Native) resident may get permit for taking fish or game to teach and preserve historic or traditional uses and harvest practices. <u>Individual Natives who moved to urban communities/areas:</u> Native (or non-Native) resident of any urban community/area may act as a proxy hunter or fisher in a rural area for a family member living there. | |
| <p>G What uses are protected (human consumption, nutrition, etc.)?</p> | <p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); handicraft production/sale; barter; customary trade for cash; sharing for personal or family consumption. <p>At Tier II, State Boards must adopt regulations that eliminate C&T uses other than food.</p> | |
| <p>H What is the geographical extent of the priority (on which lands and waters)?</p> | <p>All rural lands and waters. Note: definition of "rural" in Row A above. (Excluded: places currently within State's non-subsistence use areas.)</p> | |
| <p>I Are management reforms included?</p> | <p>Yes. See reforms listed below in row J.</p> | |

| Issue | 1) Governor's Task Force Proposal | 2) Murkowski/Young ANILCA Amendments |
|--|---|--|
| <p>J Does it contain the principle of co-management?</p> <p>(Note: concept of "co-management" is defined differently by proposals listed to the right.)</p> | <p>Yes. New State law requires State Boards to establish at least six 10-member regional advisory councils, appointed by the Governor [4 members from local tribal councils' lists; 6 members (3 of whom must be subsistence users) from local governments' and local advisory committees' lists.] State Boards must give deference to unanimous regulatory recommendations of regional councils. Regional councils must give deference to regulatory recommendations of tribes, municipalities, and local advisory committees.</p> | |
| <p>K Extent of federal jurisdiction when the State is out of compliance</p> | <p>Definition of "public lands" will be amended in an unknown way. Note: when State is <u>in</u> compliance, Secretarial regulatory authority and monitoring/reporting roles are eliminated.</p> | <p>Limits extent of federal jurisdiction to game on federal lands. No federal jurisdiction on State or private lands or waters or any federal claim to reserved water rights or navigational interests.</p> |
| <p>L Federal Court Oversight</p> | <p>ANILCA amendment adds judicial review standard: federal court can overturn State regulation only if "arbitrary, capricious or abuse of discretion." Federal court must give State Board same deference as federal agency.</p> | <p>Eliminates federal jurisdiction when the state has protected the subsistence priority through the State Constitution. Does not consider situation where there is a State Constitutional provision but no statutory provision providing for a meaningful subsistence priority.</p> |
| <p>M Nature of the State Constitutional Amendment</p> | <ul style="list-style-type: none"> • Permissive ("may"); • Consistent with sustained yield; • Rural priority. | |

| Issue | 1) Governor's Task Force Proposal | 2) Murkowski/Young ANILCA Amendments |
|--|--|--|
| N Amendments to Title VIII | 102: Definition of public lands "should" be modified in an unknown way. 803: Definitions of C&T, rural, and customary trade. 804: Changes standard to "reasonable opportunity" and defines it. 805: Changes in management system. 806: Repeal Secretarial monitoring/reporting during state compliance. 807: Review criteria for federal courts. 813: Conforming changes. 814: No Secretarial regulatory authority during state compliance. 816: Disclaimer clause: Nothing in these ANILCA amendments affects Indian Country, tribal jurisdictions, or Title VIII's status as Indian legislation. | |
| O Is there a subsistence defense against criminal prosecutions? | No. | |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/RurAL CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|---|--|---|-----------------------------------|--|---|---|---|---|--|
| A The Priority: Who is eligible? | <p><u>Federal Lands:</u> Rural residents with C&T uses. "Rural defined by Federal Subsistence Board, based on population and rural characteristics of community/area.</p> <p><u>State, Private Lands:</u> All Alaska residents. Only priority is for subsistence use over other uses, not for any Alaska residents over other Alaskan residents.</p> | Residents of Alaska communities that are rural (as defined in <i>Kenaitze</i> case); priority applies only to specific fish stocks and game populations customarily and traditionally used by community. Applies to communities and areas: no individual qualification. | Alaska Natives only. | AVCP will provide information before the presentation. | Members of federally recognized tribes within their customary and traditional hunting and fishing grounds. The priority would apply to all tribes, including those currently located within "non-subsistence" areas. No individual qualification. | Rural, plus urban Natives; repeal Sec 4(b) of ANCSA. | <p><u>SUPPORT GOVERNOR'S TASK FORCE PROPOSAL FOR STATE MANAGEMENT IF IT IS MODIFIED AND AMENDED AS SET FORTH BELOW</u>, and in August 19, 1997 North Slope Subsistence Workshop and Summit Resolution. Governor's proposal must make it clear that larger communities like Barrow and Bethel qualify as "rural," and that residents receive a Rural subsistence priority.</p> | Native preference is the best option, but a rural preference is acceptable. | Alaska Natives and their descendants, and those Alaska residents having a customary and traditional use. |
| B Definition: "Customary & Traditional" | <p><u>Federal Lands:</u> No definition in ANILCA. Regulations' definition: "A long-standing, consistent pattern of use, incorporating beliefs and customs, transmitted from generation to generation...use plays important role in economy of community."</p> <p><u>State, Private Lands:</u> "...Non-commercial, long term taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time, taking into consideration the availability of the fish or game."</p> | No statutory definition. Hunting and fishing regulations must mirror customary and traditional methods, means and uses (including locations, seasons, bag limits, and proxy hunting and fishing). | No statutory definition proposed. | | No statutory definition. Hunting and fishing regulations must mirror customary and traditional methods, means and uses (including locations, seasons, bag limits, and proxy hunting and fishing). | No statutory definition. Hunting and fishing regulations must mirror customary and traditional methods, means and uses (including locations, seasons, bag limits, and proxy hunting and fishing). | Add "trapping" to hunting and fishing. See Section 2 of Resolution. | Maintain current federal regulatory definitions. Hunting and fishing regulations would have to conform to local customary and traditional uses, as was the original intent of Title VIII of ANILCA. | Hunting and fishing regulations would have to conform to local customary and traditional uses, as was the original intent of Title VIII of ANILCA. Local input would be necessary. |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/RurAL CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|---|--|--|--|--------------------------------|--|--|-------------------------------------|--|--|
| <p>C Definition: "Customary Trade"</p> | <p><u>Federal Lands:</u> No definition in ANILCA. Regulations' definition: "Cash sale of fish and wildlife resources regulated herein, not otherwise prohibited by State or Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise." <u>State, Private Lands:</u> "Exchange for cash of fish or game in minimal, noncommercial quantities, as determined by regulation." (State Boards set regulations.) Does not restrict money sales of furs and furbearers.</p> | <p>Allows sales for cash. Does not require that such fish or game be harvested primarily for personal or family consumption; does not draw line where amount sold or dollar value violates subsistence. Courts must decide (as in <i>Alexander</i> case) any claim that subsistence crossed into commercial.</p> | <p><u>Federal Lands:</u> No definition in ANILCA. Regulations' definition: "Cash sale of fish and wildlife resources regulated herein, not otherwise prohibited by State or Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise." <u>State, Private Lands:</u> "Exchange for cash of fish or game in minimal, noncommercial quantities, as determined by regulation." (State Boards set regulations.) Does not restrict money sales of furs and furbearers.</p> | | <p>Allows sales for cash. Does not require that such fish or game be harvested primarily for personal or family consumption; does not draw line where amount sold or dollar value violates subsistence. Courts must decide (as in <i>Alexander</i> case) any claim that subsistence crossed into commercial.</p> | <p>Exchanges for cash within family and community networks.</p> | <p>See Section 3 of Resolution.</p> | <p>Current federal regulatory definitions <u>but</u> excluding references to state regulations <u>and</u> allowing for court interpretation.</p> | <p>Allows sales for cash. Does not require that such fish or game be harvested primarily for personal or family consumption; does not draw line where amount sold or dollar value violates subsistence. Courts must decide (as in <i>Alexander</i> case) any claim that subsistence crossed into commercial.</p> |
| <p>D When the priority is invoked</p> | <p><u>Federal Lands:</u> As in ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage). <u>State, Private Lands:</u> Priority for subsistence over other uses is in force at all times. However, Tier II priority may not be based on local residency.</p> | <p>No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).</p> | <p>In times of harvests below community requirements.</p> | | <p>No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).</p> | <p>No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).</p> | | <p>At all times.</p> | <p>No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).</p> |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/Rural CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|---|---|---|--|--------------------------------|--|---|--|--|---|
| <p>E Standard of protection for subsistence harvests</p> | <p><u>Federal Lands:</u> Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p> <p><u>State, Private Lands:</u> Reasonable opportunity for subsistence taking and use; requires regulations providing normally diligent person reasonable expectation of success. Not a guaranteed harvest.</p> | <p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p> | <p>Below the level required by a Native community to meet its demonstrated subsistence requirements.</p> | | <p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p> | <p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p> | <p>See Section 3(c) of Resolution.</p> | <p>Least adverse impact.</p> | <p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p> |
| <p>F Subsistence opportunities for urban Natives:</p> <ul style="list-style-type: none"> • historically rural Native communities/areas now defined as urban; • individual Natives who moved to urban communities/areas | <p><u>Federal Lands:</u> No ANILCA provisions for urban Natives, either: 1) Historically rural Native communities/areas now defined as urban, or 2) Individual Natives who moved to urban communities/areas.</p> <p><u>State, Private Lands:</u> State has issued some Subsistence educational permits to historically rural Native communities/areas now defined as urban (e.g., Kenaitze).</p> | <p>Federal priority should be strengthened (e.g., by Native or Native-plus priority, or better definition of "rural") to guarantee adequate subsistence protections for Native residents of historically rural Native communities/areas now defined as urban. (Note: Native or Native-plus priority would protect <u>both</u> categories of urban Natives.)</p> | <p>Alaska Natives, including urban Natives, protected for hunting or fishing in their customary and traditional locations.</p> | | <p>Individual Natives, as members of federally recognized tribes, would be eligible for priority within their customary and traditional use areas, regardless of where they now reside. Tribal priority would protect <u>both</u> categories of urban Natives.</p> | <p>Urban Natives would be able to participate in subsistence uses in their customary and traditional use areas.</p> | <p>Need to strengthen the "reasonable opportunity" standard. Need to provide a maximum opportunity, although not a guaranteed harvest. See Section 3(c) of Resolution.</p> | <p>Urban Natives who are members of federally recognized tribes would be eligible for priority within their customary and traditional use areas, regardless of where they now reside. Tribal priority would protect <u>both</u> categories of urban Natives.</p> | <p>Alaska Natives, and descendants of, including urban residents for hunting or fishing in their customary and traditional locations.</p> |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/Rural CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|--|--|--|--|--------------------------------|--|--|--|--|--|
| <p>G What uses are protected (human consumption, nutrition, etc.)?</p> | <p><u>Federal Lands:</u> All C&T takings and uses for:</p> <ul style="list-style-type: none"> • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. <p><u>State, Private Lands:</u> All C&T uses, as listed above, plus potlatches.</p> | <p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. | <p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. <p><u>Plus:</u> Clarification to include religious and ceremonial uses.</p> | | <p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. <p><u>Plus:</u> Clarification to include religious and ceremonial uses.</p> | <p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. | <p>See Section 3 (d) of Resolution.</p> | <p>All C&T uses currently provided for in ANILCA as defined and practiced by the tribal community. Including the taking of, use of, and customary trade, barter and sharing.</p> | <p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. <p><u>Plus:</u> Clarification to include religious and ceremonial uses.</p> |
| <p>H What is the geographical extent of the priority (on which lands and waters)?</p> | <p><u>Federal Lands:</u> All rural federal public lands (including reserved waters).</p> <p><u>State, Private Lands:</u> All State lands outside non-subsistence use areas, all private lands outside non-subsistence use areas (including ANCSA), and State or ANCSA selected/unconveyed lands + unreserved navigable waters.</p> | <p>All rural lands and waters. Note: definition of "rural" in Row A above.</p> | <p>Federal public lands (including reserved waters); Native lands (ANCSA and allotments); and possibly State lands in vicinity of any Native community seeking a permit.</p> | | <p>All lands and waters in Alaska.</p> | <p>All rural lands and waters. Note: definition of "rural" in Row A above.</p> | <p>Statewide. See Section 3 (e) and Section 6 of Resolution.</p> | <p>Statewide: All lands (including all waters).</p> | <p>Statewide: All lands (including all waters).</p> |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/Rural CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|--|--|---|---|--------------------------------|--|--|---|--|--|
| <p>I Are management reforms included?</p> | <p><u>Federal Lands:</u> Fed agencies have ability to enter into cooperative management agreements. 10 fed regional advisory councils operate.</p> <p><u>State, Private Lands:</u> State agencies have ability to enter into cooperative management agreements. No State regional advisory council system.</p> | <p>Yes. Mandatory and basic reforms of state systems:</p> <ul style="list-style-type: none"> • board structure and processes; • regional advisory councils to generate subsistence regulations; • co-management contracting and delegation of management powers and functions to Native communities and organizations. | <p>Federal board and federal regional councils to monitor Native subsistence harvests and to provide opportunities by permit for Native communities when insufficient harvests occur. Actions are initiated by regional councils, which are entitled to deference from Federal Subsistence Board.</p> | | <p>Yes. Mandatory and basic reforms of State systems. Local subsistence needs and uses would be identified and provided for through a Regional Council System that ensures a co-management role for tribal governments on all issues affecting subsistence management; the State Board system would also be reformed so that subsistence decisions are made by a board composed of subsistence users nominated by Regional Subsistence Councils.</p> | <p>Yes. Mandatory and basic reforms of state systems:</p> <ul style="list-style-type: none"> • board structure and processes; • regional advisory councils to generate subsistence regulations; • co-management contracting and delegation of management powers and functions to Native communities and organizations. | <p>See Section 4 of Resolution.</p> | <p>Yes, we support a federal takeover. The Federal government should exercise its existing authority to regulate and protect subsistence on state and private lands to protect subsistence on federally reserved lands & waters.</p> | <p>Yes. Local subsistence needs and uses would be identified and provided for through a Regional Council System that ensures a co-management role for tribal governments on all issues affecting subsistence management; the State Board system would also be reformed so that subsistence decisions are made by a board composed of subsistence users nominated by Regional Subsistence Councils.</p> |
| <p>J Does it contain the principle of co-management? (Note: concept of "co-management" is defined differently by proposals listed to the right.)</p> | <p><u>Federal Lands:</u> Section 809 authorizes, but does not mandate, cooperative agreements.</p> <p><u>State, Private Lands:</u> No specific requirement in State law or regulations.</p> | <p>Yes, as stated above: contracting and delegation of management functions and powers to Native communities and organizations.</p> | <p>Requires co-management between Secretary and Native groups. "Co-management" is not defined.</p> | | <p>Yes. Maximum possible involvement of tribes in co-management. "Co-management" is not defined. If state opts not to participate, there would still be co-management between tribes and the federal government.</p> | <p>Any proposals by Alaska Native Community for changes in subsistence management shall include a provision for co-management by Tribes as equal partners with other governmental entities; convening a SE Technical Conference on co-management led by SE Tribes and organizations to explore and define co-management; and each Native community define co-management parameters itself within its traditional usage area and that each community activate Tribal members, especially elders and youth, to the opportunities of co-management.</p> | <p>See Sections 4 and 7 of Resolution. Co-management through contacts and cooperative agreements needs to be authorized. The Alaska Eskimo Whaling Commission provides a successful model. Local subsistence users role in Regional Councils and Advisory Boards needs to be strengthened..</p> | <p>Yes, maximum involvement of tribes and landowners in co-management at the federal and state levels.</p> | <p>Yes, as stated above: contracting and delegation of management functions and powers to Native communities and organizations.</p> |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/RurAL CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|---|---|---|---|--------------------------|--|---|--|---|--|
| K Extent of federal jurisdiction when the State is out of compliance | <p><u>Federal Lands:</u> All federal public lands (including adjacent reserved waters).</p> <p><u>State, Private Lands:</u> All State lands, private lands (including ANCSA), and State or ANCSA selected/unconveyed lands + unreserved navigable waters.</p> | <ul style="list-style-type: none"> All public lands (including broadest possible definition of "reserved waters"); all State and ANCSA selected / unconveyed lands (including over-selections); maximum extraterritorial reach off public lands. | State would always be in compliance. State would have authority on all state, federal, and private lands. | | Expands federal jurisdiction to all public lands and the broadest definition of reserved waters (including navigable waters outside federal parks and reserves); all selected and unconveyed lands; and provides for maximum extra-territorial reach of tribes in co-management. | <ul style="list-style-type: none"> All public lands (including broadest possible definition of "reserved waters"); all State and ANCSA selected / unconveyed lands (including over-selections); maximum extraterritorial reach off public lands. | See Resolution. | Expands federal jurisdiction to all public lands, including the broadest definition of reserved waters; all selected and unconveyed lands; and provides for maximum reach off public lands. | <ul style="list-style-type: none"> All public lands (including broadest possible definition of "reserved waters"); all State and ANCSA selected / unconveyed lands (including over-selections); maximum extraterritorial reach off public lands. |
| L Federal Court Oversight | <p><u>Federal Lands:</u> Private right of action in federal court against State or federal regulations that are inconsistent with federal law.</p> <p><u>State, Private Lands:</u> None.</p> | No change from ANILCA: private right of action in federal court against State or federal regulations that are inconsistent with federal law. | Federal court oversight of Federal Subsistence Board decisions only. | | No change from ANILCA: federal court oversight would continue and there would continue to be a private right of action in federal court against State or federal regulations that are inconsistent with federal law. | No change from ANILCA: private right of action in federal court against State or federal regulations that are inconsistent with federal law. | See Section 8 (b) of Resolution. Limiting Federal Court review should be reconsidered. Also an administrative appeal process to provide a fair hearing to reconsider allocation decisions which adversely impact individuals, communities, or Tribal groups should be considered for the State Boards and regional Councils. | No change from ANILCA: private rights of action on federal court against state regulations that are inconsistent with federal law. | No change from ANILCA: private right of action in federal court against State or federal regulations that are inconsistent with federal law. |
| M Nature of the State Constitutional Amendment | Not applicable. | No official AFN position taken since 1990 – because no constitutional amendment seriously considered by the Legislature in seven years. | None required. | | Recognition in the Alaska Constitution of the "political" status of Alaska Natives. | No official position. | The language to "permit" rather than to require a subsistence priority merits review. | We do not support a State Constitutional amendment. Such actions give too much power to a hostile legislature to enact hunting and fishing laws adverse to the subsistence way of life. | None required. |
| N Amendments to Title VIII | Not applicable on either federal or State/private lands. (No ANILCA amendments have been enacted by Congress.) | No Title VIII amendments, unless they <u>strengthen</u> federal protections. Solution should include Native or Native-plus priority, or better definition of "rural" – for Native communities that could drop out of current "rural" definition. | All amendments would be made through ANILCA. | | Yes, but only to provide for a Native or "tribal" subsistence priority and a tribal role in the management of subsistence resources. | No Title VIII amendments, unless they <u>strengthen</u> federal protections. Solution should include Native or Native-plus priority, or better definition of "rural" – for Native communities that could drop out of current "rural" definition. | | No Title VIII amendments including appropriation riders. | Keep Title VIII closed. |

Subsistence Proposal Comparisons

| Issue: | Present Situation Dual Management | AFN No Net Loss | 3) TCC Proposal | 4) AVCP/Calista Proposal | 5) AITC/Rural CAP Proposal | 6) Southeast Proposal | 7) North Slope Proposal | 8) Northwest Proposal | 9) Kodiak Proposal |
|--|--|-----------------|-----------------------|--------------------------------|----------------------------------|-----------------------------|-------------------------------|-----------------------------|-----------------------|
| O Is there a subsistence defense against criminal prosecutions? | <u>Federal Lands:</u> Yes. <u>State, Private Lands:</u> No. | Yes. | | | Yes. | | | | |



COOK INLET SPORTFISHING CAUCUS
3620 PENLAND PARKWAY
ANCHORAGE, ALASKA 99508
(907) 276-2222 FAX (907) 278-0896

September 26, 1997

Senate Resources Committee

The impact of the federal management on subsistence fisheries will be traumatic to sport and commercial fishing. It will create a two tier management system. We asked Dan Coffey, Vice Chair of Board of Fisheries for his comments and this was his response:

Q. What would be the effect if the feds take over management of subsistence?

A. "It is impossible for any fishery to be managed by two different agencies. It would certainly be a nightmare, with a potential for disaster."

Q. What would be the effect if legislation and regulations were adopted as proposed by the Task Force?

A. "There would be no significant changes in the way our fisheries are managed for any user group nor in the way that people fish today."

We have reviewed the revised Task Force proposal as to how it would effect sportfishing in Alaska. Our analysis is as follows:

"If we replaced todays laws relating to sport fishing with the revised Task Force proposal, the result would be neutral to neutral-positive for sport fishing statewide; it would be equal to or better than todays laws for the 200,000 Alaskans who hold sport fishing licenses."

We urge the Legislature to proceed with a Constitutional Amendment as quickly as possible before the Feds get their program in place.

Don't let the Feds in.

Robert Penney

Alaska State Legislature

Mailing Address:
P.O. Box 55094
North Pole, Alaska 99705
Ph: (907) 488-0862
Fax: (907) 488-4271



MIKE MILLER
President of the Senate

Whitcomb Terrace
State Capitol
Juneau, Alaska
99801-1182
Ph: (907) 465-4978
Fax: (907) 465-3883

Senate District 0

September 15, 1997

Mr. Steve Ginnis
Chairman of the Board
Alaska Inter-Tribal Council
4201 Tudor Centre Drive, Suite 220
Anchorage, Alaska 99508

VIA FAX: (907) 563-9337

Dear Mr. Ginnis;

In preparation for upcoming Senate Resources Committee hearings on the Governor's proposal to reconcile differences between federal law (ANILCA) and Alaska's Constitution, I would like to request that the Alaska Inter-Tribal Council submit their proposal, so that it may be considered at the same time.

I have followed closely the actions taken at the three-day Native subsistence summit in Anchorage and am aware of the "guiding principals" approved by the delegates at the summit. In addition, I would like the Senate Resources Committee to consider the Alaska Inter-Tribal Council's official proposal to reconcile the differences between federal law (ANILCA) and Alaska's Constitution.

Please submit the Council's proposal to Senator Rick Halford, Chairman, Senate Resources Committee, PO Box 670190, Chugiak, Alaska 99567, as soon as possible, so that committee members will have time to review the proposal prior to the September 24, 1997 committee hearing in Fairbanks.
Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Mike Miller".
Senator Mike Miller
SENATE PRESIDENT

Alaska State Legislature

Mailing Address:
P.O. Box 55094
North Pole, Alaska 99705
Ph: (907) 488-0862
Fax: (907) 488-4271



MIKE MILLER
President of the Senate

While in Juneau
State Capitol
Juneau, Alaska
09801-1182
Ph: (907) 465-4976
Fax: (907) 465-3883
Senate District Q

September 15, 1997

Mr. Dewey Skan, President
Rural Alaska Community Action Program, Inc.
731 East 8th Avenue
Anchorage, Alaska 99501

VIA FAX: (907)278-2309

Dear Mr. Skan;

In preparation for upcoming Senate Resources Committee hearings on the Governor's proposal to reconcile differences between federal law (ANILCA) and Alaska's Constitution, I would like to request that the Rural Alaska Community Action Program, Inc. submit their proposal, so that it may be considered at the same time.

I have followed closely the actions taken at the three-day Native subsistence summit in Anchorage and am aware of the "guiding principals" approved by the delegates at the summit. In addition, I would like the Senate Resources Committee to consider RuralCAP's official proposal to reconcile the differences between federal law (ANILCA) and Alaska's Constitution.

Please submit RuralCAP's proposal to Senator Rick Halford, Chairman, Senate Resources Committee, PO Box 670190, Chugiak, Alaska 99567, as soon as possible, so that committee members will have time to review the proposal prior to the September 24, 1997 committee hearing in Fairbanks.
Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Mike Miller". The signature is written in black ink and is positioned above the printed name and title.

Senator Mike Miller

SENATE PRESIDENT

Alaska State Legislature

Mailing Address:
P.O. Box 55094
North Pole, Alaska 99705
Ph: (907) 488-0862
Fax: (907) 488-4271



MIKE MILLER
President of the Senate

While in Juneau
State Capitol
Juneau, Alaska
99801-1182
Ph: (907) 465-4976
Fax: (907) 465-3883
Senate District Q

September 15, 1997

Ms. Julie Kitka, President
Alaska Federation of Natives, Inc.
1577 C Street, Suite 201
Anchorage, Alaska 99501

VIA FAX: (907)276-7989

Dear Ms. Kitka;

In preparation for upcoming Senate Resources Committee hearings on the Governor's proposal to reconcile differences between federal law (ANILCA) and Alaska's Constitution, I would like to request that the Alaska Federation of Natives, Inc. submit their proposal, so that it may be considered at the same time.

I have followed closely the actions taken at the three-day Native subsistence summit in Anchorage and am aware of the "guiding principals" approved by the delegates at the summit. In addition, I would like the Senate Resources Committee to consider AFN's official proposal to reconcile the differences between federal law (ANILCA) and Alaska's Constitution.

Please submit AFN's proposal to Senator Rick Halford, Chairman, Senate Resources Committee, PO Box 670190, Chugiak, Alaska 99567, as soon as possible, so that committee members will have time to review the proposal prior to the September 24, 1997 committee hearing in Fairbanks.
Thank you.

Sincerely,

Handwritten signature of Mike Miller in cursive script.
Senator Mike Miller
SENATE PRESIDENT



An Analysis of the Governor's Proposal for Subsistence

Analysis by - Carol Daniel for RurAL CAP
Comments and Suggestions Incorporated
From - Lare A. Aschenbrenner (NARF),
Sky Starkey and Bill Caldwell



Contents

- 1. A Summary of the Major
Defects of the Governor's
Subsistence Proposal**
- 2. Analysis by Topic**
- 3. Full Analysis of the Governor's
Subsistence Task Force Proposal**

Written by Carol Daniel, Comments and Suggestions from attorneys Lare Ashenbrenner (NARF), Sky Starkey, and Bill Caldwell (Ak Legal Services).
Distributed by the Rural Alaska Community Action Program, Inc., (RurAL CAP) Anchorage, Alaska August 27, 1997. Jeanine Kennedy, Executive Director.

SUMMARY OF MAJOR DEFECTS IN GOVERNOR'S SUBSISTENCE PROPOSAL

By Lare Aschebrenner, Carol Daniel, Sky Starkey and Bill Caldwell

The Governor's Subsistence Proposal Violates Both AFN's No-Net-Loss Policy and RuralCap/AITC's Subsistence Proclamation

- A. **The Subsistence Proposal of the Governor's Task Force Violates the No-Net Loss Policy in the Following Respects:**
1. The Governor's proposal would increase the number of "non-rural" areas, thereby removing them from the protection of the federal subsistence priority. Most of the Kenai Peninsula and Saxman, for example, which are "rural" under federal law would become "non-rural" under the Governor's plan. Although the proposal provides for educational permits, those permits are given no priority, and no protection in federal law.
 2. The Governor's proposal would eliminate the federal law requirement that subsistence regulations conform to traditional and customary subsistence practices both in terms of the geographic areas where subsistence activities take place, and in terms of the means and methods employed. For example, under federal law, location, seasons, bag limits, gear restrictions and proxy hunts must conform to local tribal practices. Under the Governor's proposal, the State Boards are only required to "consider" customary seasons, but are under *no obligation* to accommodate either customary seasons or other traditional practices. Federal law also recognizes that subsistence uses are "local" uses. The Governor's proposal, however, incorporates the State's current definition of "customary and traditional" ("C & T"), which does not recognize that subsistence uses are "local."
 3. Under the Governor's proposal, the Boards could deny rural residents the right to satisfy their subsistence needs as required under federal law. The Governor's proposal would incorporate into federal law the State's "reasonable opportunity" standard for determining whether subsistence needs have been satisfied. Contrary to current federal law, the State restrictively interprets "reasonable opportunity" to mean nothing more than a "sporting chance" to take fish and game.
 4. The Governor's proposal also substitutes a "reasonable opportunity" standard for one of the most important ANILCA protections—that any regulation of subsistence must be designed to have the least adverse impact possible on actual subsistence practices.
 5. The Governor's proposal restricts federal court oversight of the State's implementation of the federal subsistence priority. His proposal would raise the

standard for federal court intervention, *severely limit the remedies that might be imposed for State violations*, and eliminate the Secretary's duty to monitor State implementation of the subsistence priority.

6. The Governor's proposal calls into question ANILCA's status as federal Indian legislation, and by giving the State the principal role in interpreting ANILCA, effectively eliminates the Canon of Construction requiring that where Title VIII of ANILCA is ambiguous or silent it must be construed to protect the subsistence lifestyle of Alaska Natives.
7. The Governor's proposal would eliminate a rural resident's right, under existing federal law, to raise a subsistence defense to an alleged hunting or fishing violation.
8. The Governor's proposal makes it easier for the State Boards to reject recommendations of regional councils by expanding the grounds upon which such recommendations may be rejected.
9. The Governor's proposal would allow catch and release fishing for steelhead or non-anadromous resident fish, *even* if the harvestable surplus is not sufficient to satisfy subsistence needs.
10. The Governor's proposal could substantially delay future "C&T" subsistence species determinations because it lifts the Commissioner's present obligation to make "C&T" recommendations and makes such recommendations discretionary.
11. Under the Governor's proposal, the definition of customary trade is much more limited than what is allowed under current federal law.

B. The Governor's Task Force Proposal Conflicts With the RuralCap/AITC Subsistence Proclamation in the Following Respects:

The RuralCap/AITC subsistence proclamation provides:

"We the Alaska Native People assembled at the Subsistence Roundtable conference on the 17th of February, 1997, find and declare that the right to forever live the Native way of life; to govern ourselves; to determine our own destiny; and to maintain our cultural existence, are basic human rights.... In order to secure these basic human rights and transmit the blessings of our way of life to future generations, we declare and demand full recognition of our inherent hunting and fishing rights."

1. Under the proclamation, there are two fundamental pre-conditions for the state to recover management of subsistence resources: an express recognition of a "Native Tribal" subsistence priority under both State and Federal law; and an express

recognition that Native Tribes have a co-equal right to manage fish, wildlife and other renewable resources under both State and Federal law. The Governor's proposal violates both pre-conditions in that it fails to recognize either a "Native" subsistence priority or a Tribal right to co-management.

2. The proclamation also implicitly includes AFN's no-net-loss policy. Therefore, the Governor's proposal violates the proclamation for all of the same reasons listed in Part A above.
3. Under the proclamation, the subsistence priority includes all navigable waters in Alaska. However, the Governor's proposal contemplates an amendment to ANILCA's definition of Federal public lands that could restrict the fishing priority to navigable waters within federal parks, reserves, or other enclaves, thereby leaving thousands of river miles (and perhaps a majority of Native subsistence fishing grounds) totally unprotected. The Governor's proposal may also eliminate the extraterritorial reach of the Federal Subsistence Board's jurisdiction.
4. Under the proclamation, both urban and rural Natives would be covered by the federal subsistence priority and both the State and Federal Government would be barred from designating any area customarily used for Native subsistence as a "non-subsistence" area. Under the Governor's proposal, only "rural residents" are protected by the priority, and new "non-rural" areas could be added under broadened guidelines, largely at the discretion of the State Boards.
5. Under the proclamation, the State Boards must be reformed so that subsistence decisions are made by Boards comprised of subsistence users nominated by Regional Subsistence Councils. Although the Governor's proposal includes some involvement by tribes at the regional council level, it includes no reformation of the current Board system. While the Regional Subsistence Councils might limit, to some extent, what the Boards could do, Native subsistence uses would remain largely in the Board's control, subject to severely limited judicial review.

Analysis of the Governor's Subsistence Task Force Proposal

by Carol H. Daniel (August 16, 1997)

- A. The Priority, who is eligible? Those who live in areas and communities classified as rural. Rural is defined as "a community or area substantially dependent on fish and game for nutritional and other subsistence uses." (Every community or area outside of the State's nonsubsistence areas will be considered "rural," so, for example, all of the communities on the road system on the Kenai Peninsula, including those places now considered "rural" under the federal regulations and places like Saxman in S.E. Alaska, will not be eligible for the priority.) The Boards, acting jointly, will determine by regulation whether additional communities should be added or deleted from the rural classification. The Joint Boards will set the criteria. Arguably, the new definition of rural will make it more difficult for communities to be classified as rural and could result in some Regional Centers falling out of that category. Under the Governor's Task Force proposal, a community or area must show that it is "substantially dependent" on fish and game for nutritional and other subsistence uses," whereas under the previous definition they only had to demonstrate that subsistence was a principle characteristic of the economy of the area. In any event, there would be no individual qualifications.
- B. Definition of "Customary and Traditional". ANILCA has no definition of customary and traditional. The Governor's proposal defines it as the "noncommercial, long-term, and consistent taking of, use of, and reliance upon fish and game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game." This definition is identical to the 1992 State Subsistence Law. The 1986 State law did not have a definition of "customary and traditional," but the Joint Boards had adopted eight criteria to identify customary and traditional uses.
- C. Customary Trade. Defined as the "exchange for cash of fish or game in minimal, noncommercial quantities as determined by the appropriate board." Does not restrict money sales of furs and furbearers. The Boards will set by regulation what is considered "minimal, noncommercial quantities." This is essentially the same definition contained in the 1992 State Subsistence law. ANILCA does not contain a definition. Neither did the 1986 State Subsistence law. Current federal regulations allow some degree of commercial enterprise as "customary trade" if it is not "significant."
- D. When the priority is invoked? There would be no change from ANILCA in this respect. Subsistence regulations would be required at any time there is an identified subsistence use. Tier I and Tier II priority would be invoked at any time takings must be restricted, i.e., in times of shortage. However, at tier II, all customary and traditional subsistence uses would be eliminated except for human consumption.

- E. Standard for Protection of Subsistence Harvest. The Governor's Task Force proposal adopts the "reasonable opportunity" standard, defined as "an opportunity that allows a subsistence user to participate in a subsistence hunt or fishery with a reasonable expectation of success." In providing a reasonable opportunity, the board is required only to "consider" customary seasons, but not necessarily customary and traditional patterns of taking and use, i.e., means and methods, locations, bag limits, and proxy hunting and fishing. The statutory definition further provides that "reasonable opportunity shall not guarantee that any subsistence user will take fish or game."

Under ANILCA, as interpreted by the federal court in *Bobby*, subsistence regulations must closely mirror local customary and traditional harvest and use patterns. In fact, regulations that restrict subsistence uses must have the "least adverse impact" possible on customary and traditional taking and use patterns. The Alaska Supreme Court in *Morry* rejected the *Bobby* standard, and held that while the Boards could consider customary and traditional patterns of use, they were not required to do so, i.e., only "uses" had to be accommodated, not methods, means, seasons, and other local harvest practices.

- F. Subsistence Opportunities for urban Natives. For historically rural Native communities that would be defined as non-rural: The State statute would allow, but not require, the Commissioner to issue permits for the taking of fish or game "in order to teach and preserve historic or traditional uses and harvest practices." These permits would not be entitled to priority. The Regional Subsistence Councils would be authorized to recommend to the appropriate board the amount of fish or game to be made available under the permit, but there would be no guaranteed allocation. There would also be no protection in the federal law (or under the State constitution) for these permits.

For Individual Natives who move to Urban areas: The law would add a new provision to its proxy hunting and fishing regulations that would allow a family member of a rural resident (or another rural resident) to take fish and game as a proxy. There would be various limitations and reporting requirements applicable to these hunts, including limiting the proxy to hunting or fishing for one person at a time and the person who gives the proxy would be unable to participate in the hunt or fishery for which the proxy was given. No cash payment could be made in connection with such a proxy harvest.

- G. What Uses are protected (human consumption, nutrition, etc.). All customary and traditional uses for
- direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools
 - handicrafts production /sale
 - barter

- customary trade (see paragraph C above)
- sharing, for personal or family consumption.

At Tier II, State Boards must adopt regulations that would eliminate customary and traditional uses other than food.

H. What is the geographic extent of the priority (on which lands and waters?): The Governor's Task Force proposal would apply to all lands and waters in Alaska within those areas designated as "rural."

I. Are Management Reforms Included? Yes, but there would be no reform in the Joint Board system and no co-management role for tribes. See specific management reforms listed below.

J. Does the proposal contain the principle of co-management? Yes (recognizing that there are many levels of co-management and the concept is defined differently by the various proposals). The Governor's proposal would include in State law the following reforms:

- The Boards would be required to establish at least 6, 10-member regional subsistence councils.
- Members would be appointed by the Governor (4 from local tribal councils' list; 6 members (3 of whom must be subsistence users and 3 sport or commercial users) from local governments and local advisory committees lists. The three sport and/or commercial users would not have to be residents of the region.
- State Boards are required to give deference to unanimous regulatory recommendations of the regional councils and the regional councils are to strive for consensus, but will decide by majority vote.
- Regional Councils must give deference to regulatory recommendations of tribes, municipalities, and local advisory committees which identify local subsistence uses and needs, including methods, means, seasons and other issues related to local subsistence management. The same requirement, however, is not placed on the Boards.
- Boards may reject Regional Council's recommendation if proposal violates sustained yield, is arbitrary and capricious, is detrimental to subsistence uses, involves unresolved statewide or inter-regional subsistence management uses, or is contrary to an overriding statewide fish and game management interest.

- The Boards are directed to “seek data from, consult with, and make use of the special knowledge of subsistence users” in implementing the Regional Council System. The Department is authorized to contract for services with subsistence users and local groups for this purpose.

Certain portions of this structure are inconsistent with ANILCA. For example, section 805 requires members of the Regional Council to be residents of the region. This proposal would allow sport and commercial users to be from anywhere in the State. Also, ANILCA imposes a more stringent standard for rejection of a regional council recommendation, i.e., the Board must follow the recommendation of the Regional Council unless it is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or is detrimental to the satisfaction of rural subsistence needs. The Governor’s proposal imposes a weaker standard (“arbitrary and capricious” and “detrimental to subsistence “uses”). It also adds two additional reasons to reject proposals from the Regional Councils.

- K. Extent of Federal Jurisdiction when the State is out of Compliance. It is unclear what the federal jurisdiction would be when the State is out of compliance under this proposal because the Governor’s proposal suggests that “the definition of “federal public lands” in section 102 of ANILCA will be clarified to ensure that it excludes all private and state lands.” The proposal at page 35 also states that it has not been determined exactly how these definitions (referring to “lands”, “federal lands,” and “public lands”) should be modified.” The proposal does not specify the nature of the amendments it has in mind. It is likely that the “clarification” would be directed at ensuring that the Federal Board does not have jurisdiction over selected but not conveyed lands or the authority to restrict hunting and fishing activities on state and private lands if necessary to provide for and protect subsistence uses on the public lands. The proposed federal regulations would give the federal board such jurisdiction. Also, it should be noted that when the State is in compliance, Secretarial regulatory authority and monitoring/reporting roles would be eliminated.
- L. Federal Court Oversight. Section 807 of ANILCA would be amended to change the judicial review standard available in federal court. It would allow the federal court to overturn State Boards actions only if they are “arbitrary, capricious, or an abuse of discretion.” That standard of review is arguably weaker than what ANILCA currently requires, although the matter is currently the subject of on-going litigation in federal court in *Ninilchik Traditional Council v. U.S.*, A96-31 Civ. (D. Alaska) (appeal pending). Section 807 provides an unqualified right to bring a ‘civil action’ which is usually read as intending such cases to receive plenary review, i.e., a trial *de novo*.

The second amendment to 807 would require the federal court to give the State Board decisions the same deference as it would give to a federal agency. This amendment is intended to give the State Boards the primary responsibility for interpreting ANILCA

and would overturn that part of the *Kenaitze* decision that held that the State's interpretation of ANILCA is due no deference by the federal courts. Generally speaking, federal courts may not substitute their own interpretation of a federal statute that is ambiguous or silent on a specific issue for a reasonable interpretation of a federal agency charged with enforcing the statute. The *Kenaitze* court held that the State is delegated no authority under ANILCA. In fact, ANILCA was passed as "remedial" legislation designed to reform the regulatory failures of the State. It would make no sense to have the courts defer to the interpretations of ANILCA by the very regulators whose wrongdoing made ANILCA necessary in the first place. Basically, under ANILCA the State is allowed to manage subsistence uses on federal lands only if it complies with the provisions of 805(d) of ANILCA and the Secretaries remain in charge of interpreting the federal law.

There is another reason the State regulators should not be given the same deference in their interpretation as the federal agencies. They do not have the necessary "national perspective" needed to enforce a federal statute. For example, the State regulators take the position that ANILCA is not "Indian" legislation. The federal courts (and the Secretary of the Interior) recognize that ANILCA is "Indian" legislation. If the statute is ambiguous or silent, the federal agencies and the federal courts are required to interpret the statute in favor of Alaska Natives' subsistence lifestyle. Since the State Boards and the State courts are unlikely to apply this Indian canon of construction to their interpretations of Title VIII of ANILCA, this particular amendment is especially dangerous and undesirable.

- M. Nature of the State Constitutional Amendment. It would authorize, but not compel, the State legislature to provide a priority for subsistence uses for "rural residents" (consistent with the sustained yield principle). Once ANILCA has been amended, and the State has regained management authority, there would be nothing to prevent a future State legislature from repealing the State Statute granting the priority. While this would likely entitle the federal government to step in and reassume management authority on federal lands in Alaska, it would be under a significantly different ANILCA – one that would contain many aspects of the current state subsistence law. The geographic scope of the Federal Subsistence Board's management authority could be more limited depending on how the Task Force "clarifies" the definition of "federal public lands." Also, the priority is limited to "rural" residents. While educational or cultural permits are included in the state statute, there is no guarantee that they would withstand a constitutional challenge. It would be preferable if the constitutional amendment included "culture" as a basis for differentiating among subsistence users in terms of allocating fish and game in order to provide a clear constitutional basis for such permits.

There may also be a problem in implementing the "proximity of the subsistence user to the stock or population" tier II provision of the proposed statute since the Alaska Supreme Court declared a similar "local residency" (tier II) provision of the 1992 State law unconstitutional in *State v. Kenaitze Indian Tribe*. While the proposed

Constitutional Amendment allows the legislature to provide a priority for subsistence uses to and among rural residents, that does not necessarily mean the priority could be restricted on the basis of the user's proximity to the stock or population. One way to avoid these problems (and leave the door open to a Native or Native plus priority), would be to require that subsistence uses be given a priority and authorize the legislature to differentiate among users on the basis of any one of a number of factors, including customary and traditional use, cultural tradition, direct dependence, local residency, or the availability of alternative resources.

N. Is a subsistence defense available in a criminal prosecution for a fish and game violation? Under the governor's proposal (and current state law), a person being prosecuted for a fish or game violation cannot defend by showing that the taking was done for subsistence uses. Under federal law, the person would be allowed to raise such a defense.

O. Amendments to Title VIII of ANILCA. The Governor's Proposal includes an extensive package of amendments to ANILCA. They include the following:

1. 102. Definition of "Federal Public Lands." The definition of "federal public" lands will be amended in unknown ways to "clarify" that it excludes all private and state lands.
2. 803. Subsistence Uses. Definitions of "customary and traditional", "customary trade" and "rural Alaska resident" will be added. The proposed definition of "customary and traditional" is the definition contained in current State law. It is possible that incorporation of this definition will carry with it the Alaska Supreme Court's interpretation of customary and traditional uses in the *Morry* case. There the court held that only customary and traditional "uses" had to be provided for, but not local methods of harvesting subsistence resources. Under current federal law (*Bobby* case), "customary and traditional subsistence uses" has been interpreted to mean "local" uses and to include harvest practices, i.e., seasons, locations, means, methods, bag limits and proxy hunting and fishing practices.

The definition of "rural" would tie and limit future determinations of "rural" to "substantial dependency on fish and game."

The definition of "customary trade" would place in federal law a clear prohibition against "commercial" enterprises of any size as with the exception of cash sales for furs and furbearers.

3. 804. Priority. This section would be amended to incorporate the State's "reasonable opportunity" standard for determining whether subsistence needs have been satisfied. The federal priority would become one for "a

reasonable opportunity to take fish and wildlife." The state definition of "reasonable opportunity" would also be added. As noted earlier, this standard has been used by the State Boards to limit subsistence uses. Under federal law, any regulation of subsistence uses must be designed to have the "least adverse impact" possible on actual local subsistence uses. The "reasonable opportunity" standard is a weaker standard.

4. 805. Management System; Requirements for State Compliance. This section sets up the Regional Councils, provides authority for annual reports to the Secretary, provides for the implementation of this system conditioned upon the State's compliance with sections 803, 804, and 805 (a)-(c) within one year, and reimbursement to the State for setting up and running the Regional Council System. The Governor's Task Force proposal offers no specific language, but notes that it may require amendments to accommodate the State management system.
5. 806. Federal Monitoring. This section would be repealed and replaced with a section that would automatically restore the State regulation of subsistence management on federal lands. It would have the effect of "deeming" the State in compliance with Section 805(d) of ANILCA. It would prohibit the federal agencies from implementing the federal scheme unless and until the State statute and the Constitutional Amendment are repealed or "a court of competent jurisdiction determines that the State has "substantially" failed to implement their provisions and that the State has failed or refused to cure the failure in a reasonable period of time following the court's determination." This change would make it more difficult for the federal government to reassume jurisdiction in the event the State fails to comply with ANILCA. It could also result in a considerable delay in terms of implementing a federal program in the event of state non-compliance. Finally, it would mean that the State statute could be amended in ways that do not rise to the level of "substantial" without serious risk of a federal takeover. For example, the State could probably repeal the educational and proxy hunting provisions of State law without risking a federal takeover since those permits are given no protection under federal law.
6. 807. Federal Court Enforcement. The Governor's proposal imposes restrictions on federal court oversight of the State's implementation of the federal subsistence priority. It raises the standard for federal court intervention, severely limits the remedies that might be imposed for State violations by requiring the federal courts to give deference to the Boards decisions, and gives the State the principal role in interpreting ANILCA.
7. 813. Periodic Reports. This section requires the Secretary to prepare periodic reports for Congress and the public on the State's Compliance

with Sections 803, 804 and 805 of ANILCA. The Governor's Task Force proposal states that this section will need conforming changes, but they are not outlined.

8. 814. Authority to Prescribe Regulations. The proposal would add a sentence prohibiting the Secretaries from making or enforcing regulations "concerning subsistence" during any time that the State is in compliance. This is so broadly worded that it could well encompass the Secretaries ability to enact or enforce regulations under other provisions of Title VIII, for example, Section 810 (effects of federal agency land use decisions on subsistence uses; Section 816 (closures of federal lands and waters); Section 808 (implementation of the subsistence priority within national parks and monuments); Section 811 (ensuring access to subsistence resources); or Section 812 (undertaking research on subsistence uses).
9. 816. Closures/Disclaimers. This section addresses closures of federal lands and waters to subsistence uses. Except for the potential effect of the Section 814 prohibition on making or enforcing regulations, the Secretaries' closure authority would not appear to be modified by the draft package.

The draft package, however, adds a new and unrelated paragraph which states that the draft package of ANILCA amendments and implementation of them shall not be construed to "validate or invalidate or in any way affect" an assertion that a Native organization has or does not have governmental authority or that Indian Country in Alaska exists or does not exist, or any assertion that ANILCA is Indian law.

As noted earlier, Title VIII of ANILCA has been construed by the federal courts to be "Indian legislation." The Department of Interior, in an opinion dated April 11, 1995, specifically rejected a narrow interpretation of Section 805(c) as contrary to the Indian canon of construction that legislation passed for the benefit of Native Americans be construed in their favor. Moreover, the legislative history of Title VIII of ANILCA confirms that Title VIII is Indian legislation. Placing language – even if neutral – in a disclaimer that implies that the issue is still one open to debate is dangerous. While the Indian country and jurisdictional issues may still be subject to debate, this issue is not and should not be called into question by implying that it is still an open question. For purposes of future 638 contracting and compacting, it is important that Title VIII's status as "Indian legislation" not be called into question.

LAW OFFICES OF
CAROL H. DANIEL
731 e. 8th Ave.
Anchorage, Alaska 99501
(907) 279-4442
(907) 278-2309 (fax)

**Review and Analysis
of
Governor's Task Force on Subsistence Proposal
for a Subsistence Priority and
Return of Fish and Game Management to the State of Alaska**

The Governor's Task Force package consists of an amendment to the Alaska Constitution, linked to a number of amendments to ANILCA and changes to the State fish and game laws. Under this package, the amendments to ANILCA and the State's Subsistence law would become effective only upon passage of the constitutional amendment.¹ The package includes a "rural" priority and a "congressional" determination that the State, upon passage of the constitutional amendment and implementation of the revised statutes, is in compliance with ANILCA and may resume fish and game management on all lands and waters in Alaska.

I. Constitutional Amendment

Article VIII of the Constitution would be amended to add a new section that reads as follows:

Notwithstanding any other provision of this article, the legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses to and among rural residents in the taking of fish and wildlife and other renewable natural resources.

The use of the term "may" instead of "shall" means that the legislature would be authorized, but not required, to provide a priority for subsistence uses. Once ANILCA has been amended, and the State has regained management authority on all lands in Alaska, a future State legislature could repeal the subsistence law. While this would likely entitle the federal government to step in and reassume management authority on federal lands in Alaska, the geographic scope of its management authority is likely to be more limited than it is today under *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1996), *cert. denied*, 116 S.Ct. 1672 (1996) (the *Katie John* decision). Also, the proposed amendment

¹ A 2/3 vote of both houses of the State legislature (at least 14 Senators and 27 Representatives) will be required to place a constitutional amendment on the ballot for the November, 1998, general election.

to Section 806 of ANILCA would preclude federal takeover unless and until the constitutional amendment and the State statute implementing the subsistence priority are both repealed or a court has determined that the State has "substantially failed" to implement their provisions and has failed or refused to cure the failure within a "reasonable" time. This could result in a significant delay between State non-compliance and a federal takeover. See discussion of ANILCA amendments below.

The proposed Constitutional Amendment also limits the subsistence priority to "subsistence uses to and among rural residents." It does not contain language that would authorize the legislature to differentiate among users based on customary and traditional use, cultural tradition, direct dependence, proximity of the user to the stock or population, or the availability of alternative resources.

With the exception of the special rule it made for funeral potlatches,² the Alaska Supreme Court has been hostile to using "cultural tradition" as a basis for fish and game allocations. Therefore, there is no guarantee that a provision in State law requiring the Boards of Fish and Game to adopt regulations allowing the commissioner to issue permits for the taking of fish and game in order to "teach and preserve historic or traditional uses and harvest practices" would withstand a constitutional challenge. It would be preferable if the constitutional amendment included "culture" as a basis for differentiating among subsistence users in order to provide a clear constitutional basis for such permits.

There may also be a problem in implementing the tier II provisions of the proposed State statute. The Alaska Supreme Court declared the "local residency" (tier II) provision of the 1992 State law unconstitutional in *State v. Kenaitze Indian Tribe*. The proposed State statute authorizes the appropriate board to distinguish among subsistence users when the harvestable portion of a stock or population is not sufficient to provide a reasonable opportunity for all subsistence uses, based on (1) "customary and direct dependence," (2) proximity of the subsistence user to the stock or population, i.e., "local residency"; and (3) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. While the proposed Constitutional Amendment allows the legislature to provide a priority for subsistence uses to and among rural residents, that does not necessarily mean the priority could be restricted on the basis of the user's proximity to the stock or population.

One way to avoid these problems (and leave the door open for a Native or "Native plus" priority), would be to require that subsistence uses be given a priority and authorize the legislature to differentiate among users on the basis of any one of a number of factors, including customary and traditional use, cultural tradition, direct dependence, local residency, or the availability of alternative resources.

² *Frank v. State*, 604 P.2d 1068 (Alaska 1979) ("utilization of moose meat at a funeral potlatch . . . is the equivalent of sacred symbols in other religions").

II. Section-by Section Comparison and Analysis of Proposed Amendments to State Fish and Game Statutes and to Title VIII of ANILCA

The 1992 State subsistence law is used as the framework for the State statute included in the Governor's Task Force package. Under the proposed state statutory amendments, the current law would be amended to grant a subsistence priority to rural residents. All areas not included in the current "nonsubsistence" areas would be classified as "rural." Communities or areas can be added or deleted under regulations to be developed by the State Boards. "Rural" would be re-defined as those areas or communities that are "substantially dependent on fish and game for nutritional and other subsistence uses."

The State statutes would also be amended to provide for educational hunting and fishing permits; to change the definition of "customary trade" and "reasonable opportunity," and to create Regional Subsistence Councils. The Boards of Fisheries and Game would continue to have the final authority for determining which species are customarily and traditionally used for subsistence, what the harvestable surplus is; how much of that surplus is reasonably necessary for subsistence; providing for a "reasonable opportunity" for subsistence hunting and fishing; and deciding whether Tier II restrictions must be imposed.

State Statutes 16.05.258 (a)

Current Law compared to proposed amendments

The current law requires the Boards to identify fish stocks and game populations customarily and traditionally taken for subsistence uses except in nonsubsistence areas and requires the commissioner to provide recommendations to the boards concerning the stock and population identifications; the Boards cannot make these determinations prior to the receipt of the Commissioner's recommendations.

The Governor's Task Force proposal makes the Commissioner's recommendations discretionary.

.258 (b)(1)-(3)

Under current state law, the Boards must determine whether a portion of a fish stock or game population can be harvested consistent with sustained yield and if so the amount of the harvestable surplus that is reasonably necessary for subsistence uses. If it is sufficient to provide for all uses, the Boards must adopt regulations that provide a reasonable opportunity for subsistence uses, subject to preferences among beneficial uses. If the harvestable surplus is not sufficient to provide for

subsistence and all other consumptive uses, the Boards are required to eliminate all other consumptive uses in order to "provide a reasonable opportunity" for subsistence uses.

The Governor's Task Force proposal makes no changes to these provisions of State law.

.258 (b)(4)

Under current state law, if the harvestable portion of a stock or game population is not sufficient to provide a reasonable opportunity for all subsistence uses, the appropriate board is required to adopt regulations eliminating all consumptive uses other than subsistence uses and to distinguish among subsistence users, through limitations based on customary and direct dependence, local residency, and the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

Under the Governor's Task Force proposal, tier II restrictions would come into play only after all subsistence uses other than "human consumptive subsistence uses" have been eliminated.

.258 (c)

This section currently authorizes the Boards to determine nonsubsistence areas. It would be replaced with a new section that declares all communities and areas outside the nonsubsistence areas (as of May 15, 1993) to be "rural" under the State law. The Joint Boards would then be authorized to determine by regulation whether additional communities or areas should be classified as rural or whether those currently classified as rural should no longer be classified as rural. The state statute would no longer contain the detailed list of socioeconomic factors for determining rural areas. Future determinations would be made on the basis of whether the area or community is "substantially dependent on fish and game for nutritional and other subsistence uses."

The proposed change would automatically make all of the Kenai Peninsula, including Ninilchik and places like Saxman non-rural, despite the fact that under federal law (*Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 315-16 (9th Cir. 1989), *cert. denied*, 491 U.S. 905 (1989)) at least part of the Kenai Peninsula is considered "rural", as is Saxman in S.E. Alaska.

.258(d) The Governor's Task Force proposal would simply add a sentence that states that the Boards may permit subsistence hunting and fishing only in rural areas or communities.

.258(e) This section would not be changed. It provides that takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods & means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations.

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

The Governor's Task Force proposal deletes the underlined language. In providing a reasonable opportunity, the Board is required only to "consider those times that fish and game have customarily and traditionally been harvested in the region for subsistence uses," i.e., customary seasons. There is no requirement that the Boards even "consider" customary and traditional patterns of taking and use (methods and means, locations, quotas, bag limits or harvest levels). The section further provides that "reasonable opportunity shall not guarantee that any subsistence user will take fish or game."

Under ANILCA, as interpreted by the federal court in *Bobby v. State of Alaska*, 718 F. Supp. 764 (D. Alaska 1989) subsistence regulations must closely follow customary and traditional harvest and use patterns, which would include more than just customary seasons. In fact, regulations that restrict subsistence uses must have the least adverse impact possible on customary and traditional taking and use patterns. The Alaska Supreme Court in *State v. Morry* (1992) rejected the *Bobby* standard, and held that the Boards were not compelled to consider customary and traditional patterns of use.

The "reasonable opportunity" standard has been used by

the Boards to severely restrict subsistence uses in order to continue other uses. For example, after the 1992 State law was enacted, the Board of Game refused to grant a tier II hunt in GMU 13. Instead, it imposed a spike/fork 50 inch antler restriction, a 7-day season (previously, there had been a 26 day fall hunt and a 24 day winter hunt) and a 1 moose per household bag limit.

16.05.258(g)

This is a new provision that would allow catch and release fishing for steelhead or non-andromous resident fish to continue as long as the Board of Fishery has made a finding that the mortality caused by such fishing does not jeopardize subsistence uses or the conservation of healthy stocks.

Rainbow trout and steelhead are important subsistence resources in some areas. Under § 804 of ANILCA, if the harvestable surplus is not sufficient to provide for subsistence uses, the Board is required to close the catch and release fishery since at that point any mortality caused by such fishing impacts subsistence uses.

16.05.259

This section currently provides that 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 subsistence uses. This provision is retained in the Governor's proposal and is inconsistent with ANILCA, as interpreted by the federal court in *Bobby*.

16.05.260

This section currently provides for the establishment of advisory committees. The advisory committees will be retained under the Governor's Task Force Proposal, but their recommendations on subsistence uses will be sent to Regional Subsistence Councils for review and adoption before being forwarded to the Boards. If a Regional Subsistence Council does not adopt an Advisory Committee recommendation, it shall state its reasons. Subsection (d) would make the delegation of authority to advisory committees for emergency closures during established seasons discretionary.

16.05.261

This is a new section. Subsection (a) would require the Boards to adopt regulations establishing at least six (6) Regional Subsistence Councils.

Subsection (b) provides that each regional council will be composed of 10 members appointed by the Governor: 4 of the 10 would be selected from a list submitted by tribal councils in the region and 6 would be selected from names submitted by local governments and local advisory committees (3 local subsistence users and 3 sport or commercial users from anywhere in the State). The regional subsistence councils would have specifically enumerated authorities, including the authority to review, evaluate and make recommendations to the Boards on any matter relating to subsistence uses; to comment on sport, personal use and commercial proposals; and to make recommendations concerning the educational and proxy hunting and fishing permits.

The Boards are required to consider the reports and recommendations of subsistence councils and to give substantial deference to them if the council recommendation is unanimous. While the presumption is in favor of adoption by the Board, the Board may reject a proposal if it violates sustained yield, is arbitrary and capricious, is detrimental to subsistence uses, involves unresolved statewide or inter-regional subsistence management uses, or is contrary to an overriding statewide fish and game management interest. If not adopted, the Board must provide a written statement of the reasons and remand the proposal to the Regional Council for further consideration. The Regional Councils will strive for consensus, but can decide by majority vote. They are also authorized, but not required to adopt a mediation process.

Subsection (h) requires the Regional Subsistence Council to give deference to proposals from local governments, tribal councils and local advisory committees, which identify local subsistence uses and needs and methods, means, seasons and other issues related to local subsistence management.

Subsections (j) and (k) direct the Boards and the ADF&G to "seek data from, consult with, and make use of the special knowledge of subsistence users" in implementing the Regional Council System and authorizes the department to contract for services with subsistence users

and local groups for this purpose.

Certain portions of this structure of local and Regional advisory councils would be inconsistent with the current provisions of Section 805 of ANILCA. For example, section 805(a) requires each Regional Council to be composed of residents of the region, but this proposal would allow sport and commercial users to be residents from any part of the state. Section 805(d) requires that Regional Council recommendations be followed unless "not supported by substantial evidence," violates recognized principles of fish and wildlife conservation, or is detrimental to the satisfaction of rural subsistence "needs". The Governor's proposal imposes a weaker standard ("arbitrary and capricious" and detrimental to subsistence "uses"). It also adds two additional reasons for rejecting a Regional Council recommendation: (1) where "unresolved statewide or inter-regional subsistence management issues" are involved, or (2) when the proposal is contrary to an "overriding statewide fish or game management interest." The draft package notes that section 805 "may require amendments to accommodate the State management system," but the amendments are not specified.

16.05.330 (c)

This section permits the Boards to adopt regulations providing for the issuance of subsistence permits. It would be amended to impose the requirement that a person be a rural resident to receive a subsistence permit, or when no permit is required, in order to be eligible to take fish or game for subsistence uses.

16.05.330 (d)

Adds a new provision that would allow, but not require, the Commissioner to issue permits for the taking of fish and game "in order to teach and preserve historic or traditional uses and harvest practices." These permits would not entitle their holders to any priority. The Regional Councils would be authorized to recommend to the appropriate board the amount of fish or game to be made available under the permits.

Current ANILCA regulations allow the Federal Subsistence Board to issue similar permits to hunt or fish on federal lands and waters for educational and other

special purposes. See § 242.6(f)(3), (4); 50 CFR § 100(f)(3), (4).

16.05.405(g)

Adds a new provision to the State's proxy hunting and fishing regulations that would allow a family member of a rural resident (or another rural resident) to take fish and game as a proxy, regardless of the eligible resident's age or physical abilities. There would be various limitations and reporting requirements applicable to these hunts, including limiting the proxy to hunting or fishing for one person at a time and the person who gives the proxy can not participate in the hunt or fishery for which the proxy was given. No cash payment can be made in connection with such a proxy harvest.

Current federal regulations allow the Federal Subsistence Board to authorize similar proxy harvests on federal lands and waters. 36 C.F.R. § 242.6(f)(2); 50 C.F.R. § 100.6(f)(2).

Both the proxy hunting provision and the cultural (or educational) permit provision could be repealed by the State legislature without the State losing management authority under ANILCA. The federal regulations would be of no avail since the Federal Subsistence Board would no longer exist.

16.05.940

Subsection (8) amends the current state definition of "customary trade" to mean the "exchange for cash, for fish or game in minimal, noncommercial quantities as determined by the appropriate board," with the proviso that it does not restrict money sales of furs and furbearers. This definition is arguably more limited than what is currently allowed under federal law, although the limits of customary trade under ANILCA's "subsistence uses" definition is currently the subject of pending litigation in *Peratovich v. United States*, No. A92-0734-CV (D. Alaska).

Subsection (27) currently defines "rural community or area" as one in which the noncommercial customary and traditional use of fish or game for personal or family consumption is "a principle characteristic of the economy of the community or area." The Governor's Task Force

would amend the definition of "rural community or area" to mean a "community or area substantially dependent on fish and game for nutritional and other subsistence uses."

Requiring a community or area to show that it is "substantially dependent" on subsistence uses as opposed to demonstrating that subsistence is "a principle characteristic" of the economy of the community may be a more difficult standard, making it more difficult for some of the rural regional centers, like Bethel, to remain rural. The more stringent statutory standard, combined with the lack of specific criteria for making the determinations in the future give the State Boards greater power and discretion in determining which communities or areas should be added to or deleted from the "rural" classification.

Subsection (32) defines "subsistence uses." The current definition is basically identical to the definition of subsistence uses in 803 of ANILCA, except that the State statute adds the word "noncommercial" prior to the phrase "customary and traditional" in describing what kinds of uses qualify. State law also defines "customary and traditional uses" as "noncommercial uses." AS 16.05.940(8).

Finally, the draft package would delete the rural resident limitation from the definition of subsistence uses and in subsections (30) "subsistence fishing" and (31) "subsistence hunting"; however, since AS 16.05.330(c) would be changed to require a person to be a rural resident to be eligible to take fish and game for subsistence uses, these changes are not particularly significant.

ANILCA AMENDMENTS

Section 102 - "Public lands"

The priority under Title VIII (section 804) applies to the taking of fish and wildlife for subsistence uses on "public lands." Public lands are defined to include "federal lands, waters and interests therein." Under the *Katie John* decision, the priority extends to waters in Alaska in which the U.S. holds reserved water rights. The extent to which the federal priority will be applied to regulate fish and game harvests on various inland waters, state and

private lands and selected, but not conveyed lands remains the subject of federal agency proposed rulemaking and pending federal litigation. However, the advanced Notice of Proposed Rulemaking (61 Fed. Reg. 15014 (April 4, 1996)) proposes that the federal subsistence board maintain jurisdiction over selected but not conveyed lands and delegates to the Board the authority to exercise its jurisdiction to restrict hunting and fishing activities on state and private lands if necessary to provide for the priority on public lands.

The draft Task Force proposal will amend the definition of "federal public lands" in order to "clarify" that "it excludes all private and state lands." The proposal notes however, at p. 35 that "[i]t has not been determined exactly how these definitions (referring to the "land", "federal land" and "public lands" definitions in § 102 of ANILCA) should be modified." The draft package seems to envision a change in the definition of public lands that would eliminate any argument that the Federal Board can exercise its jurisdiction to restrict fish and wildlife harvests on State or privately owned lands. The changes contemplated might also include all navigable waters within the meaning of "state or privately owned lands."

Section 803 - "Subsistence Uses"

This section defines "subsistence uses", "family" and "barter". The Governor's Task Force proposal adds definitions of "customary and traditional", "customary trade", and "rural Alaska resident." These definitions would conform to those same terms in the State statute portion of the Task Force package. The proposed definition of "customary and traditional" is the definition contained in current state law. It is possible that incorporation of the State's definition of customary and traditional uses would limit the federal protections for subsistence uses since the Alaska Supreme Court has interpreted customary and traditional subsistence "uses" (which must be provided for) to exclude local methods of harvesting subsistence resources (which do not have to be provided for). Prior to 1992, there was no state statutory definition of customary and traditional. Instead, the Joint Boards adopted 8 criteria for identifying customary and traditional uses.

The addition of the above definitions would place in federal law a clear prohibition against "commercial" enterprises of any size as "customary trade" with the exception of cash sales of furs and furbearers. Current federal regulations allow some degree of commercial enterprise as "customary trade" if it is not "significant."

The definition of "rural" would tie and limit future determinations of "rural" to substantial dependency on fish and game for subsistence uses; current federal regulations do not.

Section 804: Priority

This section states the priority granted rural Alaska residents, and the criteria for the "tier II" priority among rural residents. The draft package adds a new paragraph to expressly state that the priority granted is for a "reasonable opportunity to take fish and wildlife." It then defines "reasonable opportunity" as it is defined under the State statute. *See* discussion of "reasonable opportunity" under the discussion of the State statute.

Section 805 - Management System; Requirements for State Compliance

This section of ANILCA sets up the Regional Councils, provides authority for annual reports to the Secretary, provides for the implementation of this system, conditioned upon the State's compliance with sections 803, 804, and 805 (a)-(c) within one year, and reimbursement to the State for setting up and running the Regional Council System. Again, the Governor's Task Force proposal offers no specific language changes to Section 805, but notes that the section may require amendments to accommodate the State management system. *See* discussion of State Management System under the analysis of the State statute.

Section 806 - Federal Monitoring

Section 806 requires the Secretary of Interior to monitor State implementation of the priority and report annually to Congress. The Draft package would repeal this monitoring section and replace it with a provision that would restore State regulation of subsistence management on federal, as well as state and private lands and waters throughout Alaska upon adoption of the draft package.

The replacement language would have the effect of automatically "deeming" the State in compliance with

Section 805(d) of ANILCA. It would prohibit the federal agencies from implementing the federal scheme in sections 805 (a) - (c) unless and until the State statute and the constitutional amendment are repealed or "a court of competent jurisdiction determines that the State has *substantially* failed to implement their provisions and that the State has failed or refused to cure that failure within a reasonable period following the court's determination."

This change would immediately bless the State program and allow the State to takeover management on all lands and waters in Alaska. It would also make it more difficult for the federal government to takeover management in the event of future non-compliance on the part of the State. In fact, under this provision, the State could amend or repeal the State statute or suspend implementation of it without invoking a federal takeover as long as the constitutional amendment remained in effect. Since the constitutional amendment only permits, but does not mandate implementation of a rural subsistence priority, this presents the potential for the State to forego implementation of the rural priority without the federal government being able to cure the deficiency until a court has decided that the State has "substantially" failed to implement the state statute within a "reasonable period." This could result in a considerable delay in terms of implementing the federal program in the event of state non-compliance.

Also, it appears that the State could modify its statute in ways that might be characterized as "refinements" or "clarifications" without serious threat of a federal takeover, as long as the State avoided changes that would rise to the level of a "substantial" failure to implement the original provisions of the State statute that relate to Sections 803, 804 and 805 of ANILCA. For example, the State could probably repeal the proxy and educational permit provisions of the State statute without regard to the requirements of this section. Section 805(d) only requires the State to enact laws of general applicability "which are consistent with, and which provide for the definition, preference, and participation specified in sections 803, 804 and 805." The educational and proxy permit permits have no protection under ANILCA.

Section 807: Federal Court Enforcement

The Governor's draft proposal would amend section 807 of ANILCA to state that agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion." The proposed change appears to eliminate the "not otherwise in accordance with law" language of the APA review standard that would otherwise apply to agency action implementing a federal law. Although this was the standard the federal district court applied in the *Bobby* case, there is an argument that Section 807 authorizes an unqualified right to bring a "civil action" which is usually read as intending such cases to receive plenary review, i.e., a trial *de novo*.

The Governor's draft proposal would also amend section 807 to require the court in its review of the Boards' actions, to give the decisions of the State Boards the same deference the court would give to "the same decision of a comparable federal agency." This change is intended to overturn that part of the *Kenaitze* decision that says that the State's interpretation of ANILCA is due no deference. Generally speaking, federal courts may not substitute their own interpretation of a federal statute that is ambiguous or silent on a specific issue for a reasonable interpretation of a *federal* agency charged with enforcing the statute. The *Kenaitze* court held that the state is delegated no authority under ANILCA, and therefore due no deference. This interpretation is consistent with the remedial nature of Title VIII of ANILCA – it was passed to reform the regulatory failures of the State. It would make no sense to have the courts defer to the interpretation of ANILCA by the very regulators whose wrongdoing make ANILCA necessary in the first place.

Moreover, the State regulators take the position that ANILCA is not "Indian" legislation. The federal courts (and the Secretary of the Interior) recognize that ANILCA is "Indian" legislation. In cases where Title VIII is ambiguous or silent, the federal agencies and the federal courts must interpret the statute in favor of Alaska Natives' subsistence lifestyle. The State regulators will not be applying this standard to its interpretation of Title VIII of ANILCA.

Section 813: Periodic Reports

This section requires the Secretary to prepare periodic reports for Congress and the public (every 3 years) on the

State's compliance with Sections 803, 804 and 805 of ANILCA. The Task Force proposal states that Section 813 will require conforming changes, but those changes are not specified other than to say that subparagraph (1), which refers to Section 806, should be deleted.

Section 814: Authority to Prescribe Regulations

Section 814 requires the Secretaries of Interior and Agriculture to prescribe such regulations as are necessary to carry out their responsibilities under Title VIII. The Draft Package would add a sentence prohibiting the Secretaries from making or enforcing regulations "concerning subsistence" during any time "that the State has complied with Section 805(d)." The proposal suggests that this change is necessary to clarify the statement in Section 805(d) that the Secretary shall not implement the federal management schedule in sections 805 (a)-(c) if the State enacts and implements an adequate state law rural resident subsistence priority scheme.

This change may relate more closely to the section 806 amendments, which would bless the State program upon adoption of the state constitutional amendment and statutory changes. In any event, the language of this provision is so broad it could well encompass any regulations pertaining to the effects of federal agency land use decisions on subsistence uses (§810) or closures of federal lands and waters to subsistence harvest (§ 816), or the implementation of the subsistence priority within the national parks and monuments (§ 808), ensuring access to subsistence resources (§ 811) or undertaking research on subsistence uses (§ 812). One would assume that the Task Force intended only to preclude the Secretaries from promulgating regulations implementing § § 803, 804 and 805 (a) - (c); however, that is not clear.

**Section 816:
Closures/Disclaimers**

This section addresses closures of federal lands and waters to subsistence uses. Except for the potential effect of the § 814 prohibition on making or enforcing regulations described above, the Secretaries' closure authority would not appear to be modified by the draft package.

The draft package, however, does add a new and

unrelated paragraph which states that the draft package of ANILCA amendments and implementation of them shall not be construed to "validate or invalidate or in any way — affect" an assertion that a Native organization has or does not have governmental authority or that Indian Country in Alaska exists or does not exist, or any assertion that ANILCA is Indian law.

As noted earlier, Title VIII of ANILCA has been construed by the federal courts to be "Indian legislation." The Department of the Interior, in an opinion dated April 11, 1995, specifically rejected a narrow interpretation of Section 805(c) as contrary to the Indian canon of construction that legislation passed for the benefit of Native Americans be construed in their favor. Moreover, the legislative history of Title VIII of ANILCA confirms that Title VIII of ANILCA is Indian legislation. Placing language, even if neutral, in a disclaimer that implies that the issue is still open to debate is dangerous. While the Indian country and jurisdictional issues may be subject to debate, this issue is not and should not be called into question by implying that it is still an open question.



Final Task Force Plan for a Subsistence Priority and Returning Fish and Game Management to the State

Updated: 9/23/97

THE BASIC PACKAGE AND LINKAGE

There are two primary goals:

- To ensure effective state authority over fish and game management on all lands and waters of Alaska;
- To recognize the paramount importance of the subsistence way of life to Alaskans.

Alaskans may be reluctant to amend the Alaska Constitution without knowing what changes will be made in the Alaska National Interest Lands Conservation Act (ANILCA) and the state fish and game statutes. The solution is a linked package of amendments to ANILCA, the Alaska Constitution, and the Alaska statutes.

The effective date of the ANILCA amendments and the state statutory amendments will be the passage of the constitutional amendment. Voters will know exactly what is in the ANILCA amendments and the state statutory amendments when they vote on the constitutional amendment. The package will include a congressional determination that the state, upon passage of the constitutional amendment and implementation of the revised statutes, is in compliance with ANILCA and may resume fish and game management statewide.

The constitutional amendment cannot be voted on until the November 1998 general election.

THE STATE CONSTITUTIONAL AMENDMENT

The Alaska Constitution will be amended to permit, but not to require, the Alaska Legislature to grant a subsistence priority based on place of residence. Simultaneously, state statutes will be amended to create a rural subsistence priority and those statutes, and the ANILCA amendments, will become effective only if the constitutional amendment is passed.

THE STATE STATUTORY AMENDMENTS

The Alaska fish and game statutes will be amended to grant a subsistence priority to rural residents. Communities outside the current non-subsistence areas will be classified as rural on the day the state regains management. The Boards of Fisheries and Game acting jointly through regulation will have the power to change community classifications (add or delete) in the future as communities change.

The state statutes will also be amended to:

- a. improve the proxy hunting and fishing provisions;
- b. provide for educational hunting and fishing permits;
- c. clarify the definitions of "rural," "customary trade," and "customary and traditional;"
- d. make clear that the subsistence priority is a reasonable opportunity to take, not a guarantee of taking; and
- e. refine the subsistence management system, including adding a state Regional Subsistence Council system.

ANILCA AMENDMENTS

The amendments fall roughly into four categories.

- a. **Definitions** - The priority created by ANILCA is keyed to rural residency, but "rural" is not defined. ANILCA leaves the determination of what is rural to the administrative process subject to court review. In this subsistence package, a rural community or area has been carefully defined as "a community or area substantially dependent on fish and game for nutritional and other subsistence uses." In addition, "customary trade" will be defined so that subsistence taking of fish and game cannot become a commercial enterprise. "Customary and traditional," an operative but undefined term in ANILCA, will also be defined. Finally, the concept of "reasonable opportunity" will be defined to make clear that the priority is a reasonable opportunity to take, not a guarantee of taking, and that the boards must consider customary and traditional uses.
- b. **Court Oversight** - Section 807 will be amended to state the standard of review for actions of the fish and game boards ("arbitrary, capricious, or abuse of discretion") and to require the federal courts to give board decisions the same deference that would be given a federal agency decision. Adding these standards is not believed to be a change in current federal law, but the standards are not explicit in Title VIII.
- c. **State Management** - Title VIII will be amended to make it clear that the state manages subsistence on all lands and waters, whether federal, state, or private.
 - i. Section 814 will be amended so that the Secretary of the Interior cannot interfere with state regulations.
 - ii. The definition of "federal public lands" will be clarified to ensure that it excludes all private and state lands.

The collective purpose of these amendments is to make clear the state has full management authority while the state is in compliance with ANILCA.

- d. **Congressional Seal of Approval, Noncompliance, and Neutrality on Indian Country** - Section 805 will be amended (1) to declare the state in compliance with Section 805(d) when it passes the constitutional amendment and statutory amendments (see above) and (2) to make future noncompliance a court determination.

A new section will be added to declare that these ANILCA changes do not affect and cannot be used to argue Indian country and sovereignty issues.

This proposal was written by the Governor's Task Force on Subsistence. The members of the Task Force were: Governor Tony Knowles, Lieutenant Governor Fran Ulmer, Governor Jay Hammond, Senate President Mike Miller, House Speaker Gail Phillips, Alaska Permanent Fund Corporation Executive Director Byron Mallott, and Former Attorney General Charlie Cole.

The complete proposal from the Governor's Task Force on Subsistence is available on the Internet at www.gov.state.ak.us/Algov/subsist/subprop.htm or by calling your local Legislative Information Office or the Governor's Office at (907) 269-7450.

**PLAN FOR A SUBSISTENCE PRIORITY
AND RETURNING FISH AND WILDLIFE
MANAGEMENT TO THE STATE**

Report of the

Governor's Task Force on Subsistence

Governor Tony Knowles
Lt. Governor Fran Ulmer
Senate President Mike Miller
House Speaker Gail Phillips
Governor Jay Hammond
Charlie Cole
Byron Mallott

September 1997



Final Task Force Plan for a Subsistence Priority and Returning Fish and Game Management to the State

Updated: 9/23/97

THE BASIC PACKAGE AND LINKAGE

There are two primary goals:

- To ensure effective state authority over fish and game management on all lands and waters of Alaska;
- To recognize the paramount importance of the subsistence way of life to Alaskans.

Alaskans may be reluctant to amend the Alaska Constitution without knowing what changes will be made in the Alaska National Interest Lands Conservation Act (ANILCA) and the state fish and game statutes. The solution is a linked package of amendments to ANILCA, the Alaska Constitution, and the Alaska statutes.

The effective date of the ANILCA amendments and the state statutory amendments will be the passage of the constitutional amendment. Voters will know exactly what is in the ANILCA amendments and the state statutory amendments when they vote on the constitutional amendment. The package will include a congressional determination that the state, upon passage of the constitutional amendment and implementation of the revised statutes, is in compliance with ANILCA and may resume fish and game management statewide.

The constitutional amendment cannot be voted on until the November 1998 general election.

THE STATE CONSTITUTIONAL AMENDMENT

The Alaska Constitution will be amended to permit, but not to require, the Alaska Legislature to grant a subsistence priority based on place of residence. Simultaneously, state statutes will be amended to create a rural subsistence priority and those statutes, and the ANILCA amendments, will become effective only if the constitutional amendment is passed.

THE STATE STATUTORY AMENDMENTS

The Alaska fish and game statutes will be amended to grant a subsistence priority to rural residents. Communities outside the current non-subsistence areas will be classified as rural on the day the state regains management. The Boards of Fisheries and Game acting jointly through regulation will have the power to change community classifications (add or delete) in the future as communities change.

The state statutes will also be amended to:

- a. improve the proxy hunting and fishing provisions;
- b. provide for educational hunting and fishing permits;
- c. clarify the definitions of "rural," "customary trade," and "customary and traditional;"
- d. make clear that the subsistence priority is a reasonable opportunity to take, not a guarantee of taking; and
- e. refine the subsistence management system, including adding a state Regional Subsistence Council system.

ANILCA AMENDMENTS

The amendments fall roughly into four categories.

- a. **Definitions** - The priority created by ANILCA is keyed to rural residency, but "rural" is not defined. ANILCA leaves the determination of what is rural to the administrative process subject to court review. In this subsistence package, a rural community or area has been carefully defined as "a community or area substantially dependent on fish and game for nutritional and other subsistence uses." In addition, "customary trade" will be defined so that subsistence taking of fish and game cannot become a commercial enterprise. "Customary and traditional," an operative but undefined term in ANILCA, will also be defined. Finally, the concept of "reasonable opportunity" will be defined to make clear that the priority is a reasonable opportunity to take, not a guarantee of taking, and that the boards must consider customary and traditional uses.
- b. **Court Oversight** - Section 807 will be amended to state the standard of review for actions of the fish and game boards ("arbitrary, capricious, or abuse of discretion") and to require the federal courts to give board decisions the same deference that would be given a federal agency decision. Adding these standards is not believed to be a change in current federal law, but the standards are not explicit in Title VIII.
- c. **State Management** - Title VIII will be amended to make it clear that the state manages subsistence on all lands and waters, whether federal, state, or private.
 - i. Section 814 will be amended so that the Secretary of the Interior cannot interfere with state regulations.
 - ii. The definition of "federal public lands" will be clarified to ensure that it excludes all private and state lands.

The collective purpose of these amendments is to make clear the state has full management authority while the state is in compliance with ANILCA.

- d. **Congressional Seal of Approval, Noncompliance, and Neutrality on Indian Country** - Section 805 will be amended (1) to declare the state in compliance with Section 805(d) when it passes the constitutional amendment and statutory amendments (see above) and (2) to make future noncompliance a court determination.

A new section will be added to declare that these ANILCA changes do not affect and cannot be used to argue Indian country and sovereignty issues.

This proposal was written by the Governor's Task Force on Subsistence. The members of the Task Force were: Governor Tony Knowles, Lieutenant Governor Fran Ulmer, Governor Jay Hammond, Senate President Mike Miller, House Speaker Gail Phillips, Alaska Permanent Fund Corporation Executive Director Byron Mallott, and Former Attorney General Charlie Cole.

The complete proposal from the Governor's Task Force on Subsistence is available on the Internet at www.gov.state.ak.us/1gov/subsist/subprop.htm or by calling your local Legislative Information Office or the Governor's Office at (907) 269-7450.

Table of Contents

| | |
|--------------------------|----|
| Constitutional Amendment | 1 |
| ANILCA Amendments | 2 |
| Statutory Amendments | 28 |

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
32
33
34
35
36

CONSTITUTIONAL AMENDMENT

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SPECIAL SESSION

BY

Introduced:
Referred:

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of renewable natural resources by rural residents.

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

*Section 1. Article VIII, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 19. Subsistence. The legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses in the taking of fish and wildlife and other renewable natural resources based on place of residence.

*Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

NOTE: There is a linkage between this constitutional amendment and changes to ANILCA and state statutes. Amendments to ANILCA and amendments to Alaska's fish and game statutes will be passed prior to voting on this constitutional amendment, but will not become effective unless the constitutional amendment passes.

*Sec. 3. The amendment proposed by this resolution shall be effective immediately upon certification that it has passed.

NO ANILCA
LINKAGE

ANILCA (TITLE VIII) AMENDMENTS

PUBLIC LAW 96-487—DEC. 2, 1980

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

43 USC 1601
note.

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

POLICY

16 USC 3112

Sec. 302. It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

ANILCA p. 2377

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

DEFINITIONS

Sec. 803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term—

16 USC 3113.

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses—

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

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

"AND" IN STATUTE
BROADENS DEFINITION

This section shall be amended by adding the following definitions:

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

(4) "customary trade" means the limited noncommercial exchange for cash of fish or wildlife or their parts in minimal quantities. The terms of this paragraph do not restrict money sales of furs and furbearers.

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

PREFERENCE FOR SUBSISTENCE USES

Sec. 804. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

16 USC 3114

Priority criteria.

- (1) customary and direct dependence upon the populations as the mainstay of livelihood;
- (2) local residency; and
- (3) the availability of alternative resources.

A new paragraph shall be added:

The priority granted by this section is for a reasonable opportunity to take fish and wildlife. "Reasonable opportunity" means an opportunity, consistent with customary and traditional use, to participate in a subsistence hunt or fishery with a reasonable expectation of success. Reasonable opportunity shall not guarantee the taking of fish or wildlife.

NOTE: These definitions apply to Title VIII but are in Title I (16 U.S.C. § 3102). They are reprinted here for convenience.

ANILCA LAND DEFINITIONS

§ 3102. Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], and the Alaska Statehood Act)—

- (1) The term "land" means lands, waters, and interests therein.
- (2) ~~The term "Federal land" means lands the title to which is in the United States after December 2, 1980.~~

Proposed amendment to 16 USC 3102(2),

The term "federal land" means lands the title to which is in the United States after December 2, 1980. "Federal land" does not include lands the title to which is in the State after December 2, 1980, Native lands, other private lands, or Native Corporation and State land selections defined in subsection (3)(A) and (B) below.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

(5) The term "Alaska Native Claims Settlement Act" means "An Act to provide for the settlement of certain land claims of Alaska Natives, and for other purposes", approved December 13, 1971 (85 Stat. 683), as amended [43 U.S.C.A. § 1601 et seq.].

(6) The term "Native Corporation" means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Native Group.

(7) The term "Regional Corporation" has the same meaning as such term has under section 3(g) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1602(g)].

(8) The term "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1602(j)].

(9) The term "Urban Corporation" means those Native entities which have incorporated pursuant to section 14(h) (3) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1613(h) (3)].

(10) The term "Native Group" has the same meaning as such term has under sections 3(d) and 14(h) (2) of the Alaska Native Claims Settlement Act [43 U.S.C.A. §§ 1602(d) and 1613(h) (2)].

(11) The term "Native land" means land owned by a Native Corporation or any Native Group and includes land which, as of December 2, 1980, had been selected under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] by a Native Corporation or Native Group and had not been conveyed by the Secretary (except to the extent such selection is determined to be invalid or has been relinquished) and land referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1618(b)].

(12) The term "Secretary" means the Secretary of the Interior, except that when such term is used with respect to any unit of the National Forest System, such term means the Secretary of Agriculture.

(13) The terms "wilderness" and "National Wilderness Preservation System" have the same meaning as when used in the Wilderness Act (78 Stat. 890) [16 U.S.C.A. § 1131 et seq.].

(14) The term "Alaska Statehood Act" means the Act entitled "An Act to provide for the admission of the State of Alaska into the Union", approved July 7, 1958 (72 Stat. 339), as amended.

(15) The term "State" means the State of Alaska.

Ch. 51 ALASKA NATIONAL INTEREST LANDS

16 § 3102

(16) The term "Alaska Native" or "Native" has the same meaning as the term "Native" has in section 3(b) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1602(b)].

(17) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(18) The term "take" or "taking" as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

(Pub.L. 96-487, Title I, § 102, Dec. 2, 1980, 94 Stat. 2375.)

NOTE: The state management system is discussed at pages 35-40.

SECTION 805 OF TITLE VII WITH AMENDMENT
TO MAKE THE SECTION CONSISTENT WITH
THE STATE STATUTORY AMENDMENTS

1 LOCAL AND REGIONAL PARTICIPATION

2 SEC. 805. (a)(1) Except as otherwise provided in subsection (d) of this section, ~~one-year~~
3 ~~after the date of enactment of this Act,~~ the Secretary in consultation with the State shall
4 establish --

5 ~~(1)(A)~~ at least six Alaska subsistence resource regions which, taken together,
6 include all public lands. The number and boundaries of the regions shall be sufficient
7 to assure that regional differences in subsistence uses are adequately accommodated;

8 ~~(2)(B)~~ such local advisory committees within each region as he finds necessary
9 at such time as he may determine, after notice and hearing, that the existing State
10 fish and game advisory committees do not adequately perform the functions of the
11 local committee system set forth in a paragraph (3)(D)(iv) of this subsection; and

12 ~~(3)(C)~~ a regional advisory council in each subsistence resource region.

13 (2) The members of each regional advisory council shall be appointed by the
14 Governor of Alaska. Each council shall have ten members, four of whom shall be selected
15 from nominees who reside in the region submitted by tribal councils in the region, and six
16 of whom shall be selected from nominees submitted by local governments and local advisory
17 committees. Three of these six shall be subsistence users who reside in the region and three
18 shall be sport or commercial users. Sport and commercial representatives may be residents
19 of any subsistence resource region. The regulations shall provide for staggered terms of

1 council members. The maximum term shall be three years, with no limit on the number of
 2 terms served. A quorum shall be a majority of the members of a council. Each regional
 3 advisory council shall be composed of residents of the region and shall have the following
 4 authority:

5 (A) the review and evaluation of proposals for regulations, policies,
 6 management plans, and other matters relating to subsistence uses of fish and wildlife
 7 within the region;

8 (B) the provision of a forum for the expression of opinions and
 9 recommendations by persons interested in any matter related to the subsistence uses
 10 of fish and wildlife within the region;

11 (C) the encouragement of local and regional participation pursuant to the
 12 provisions of this title in the decision making process affecting the taking of fish and
 13 wildlife on the public lands within the region for subsistence uses;

14 (D) the preparation of an annual report to the Secretary which shall contain —
 15 (i) an identification of current and anticipated subsistence uses of fish
 16 and wildlife populations within the region;
 17 (ii) an evaluation of current and anticipated subsistence needs for fish
 18 and wildlife populations within the region;
 19 (iii) a recommended strategy for the management of fish and wildlife
 20 populations within the region to accommodate such subsistence uses and
 21 needs; and

1 (iv) recommendations concerning policies, standards, guidelines, and
 2 regulations to implement the strategy. The State fish and game advisory
 3 committees or such local advisory committees as the Secretary may establish
 4 pursuant to paragraph (2) of this subsection may provide advice to, and assist,
 5 the regional advisory councils in carrying out the functions set forth in this
 6 paragraph.

7 (b) The Secretary shall assign adequate qualified staff to the regional advisory
 8 councils and make timely distribution of all available relevant technical and scientific support
 9 data to the regional advisory councils and the State fish and game advisory committees or
 10 such local advisory committees as the Secretary may establish pursuant to paragraph (2) of
 11 subsection (a).

12 (c) The Secretary, in performing his monitoring responsibility pursuant to section 806
 13 and in the exercise of his closure and other administrative authority over the public lands,
 14 shall consider the report and recommendations of the regional advisory councils concerning
 15 the taking of fish and wildlife on the public lands within their respective regions for
 16 subsistence uses. The Secretary may choose not to follow any recommendation which he
 17 determines is not supported by substantial evidence, violates recognized principles of fish
 18 and wildlife conservation, or would be detrimental to the satisfaction of, subsistence needs.
 19 If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and
 20 the reasons for his decision.

21 (d) The Secretary shall not implement subsections (a), (b), and (c) of this section if
 22 ~~within one year from the date of enactment of this Act.~~ an amendment to Alaska's

1 Constitution has been adopted which allows for the preference specified in section 804, and
2 the State enacts and implements laws of general applicability which are consistent with, and
3 which provide for the definition, preference, and participation specified in section 803, 804,
4 and 805, ~~such~~, Such laws, unless and until repealed, shall supersede such sections insofar
5 as such sections govern State responsibility pursuant to this title for the taking of fish and
6 wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory
7 committees and regional advisory councils consistent with section 805 shall provide that the
8 State rulemaking authority shall consider the advice and recommendations of the regional
9 councils concerning the taking of fish and wildlife populations on public lands within their
10 respective regions for subsistence uses. The regional councils may present
11 recommendations, and the evidence upon which such recommendations are based, to the
12 State rulemaking authority during the course of the administrative proceedings of such
13 authority. The State rulemaking authority may choose not to follow any recommendation
14 which it determines is not supported by substantial evidence presented during the course of
15 its administrative proceedings, violates recognized principles of fish and wildlife conservation
16 or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation
17 is not adopted by the State rulemaking authority, such authority shall set forth the factual
18 basis and the reasons for its decision.

19 (e)(1) The Secretary shall reimburse the State, from funds appropriated to the
20 Department of the Interior for such purposes, for reasonable costs relating to the
21 establishment and operation of the regional advisory councils established by the State in
22 accordance with subsection (d) and the operation of the State fish and game advisory

1 committees so long as such committees are not superseded by the Secretary pursuant to
2 paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such
3 costs in any fiscal year. Such costs shall be verified in a statement which the Secretary
4 determines to be adequate and accurate. Sums paid under this subsection shall be in
5 addition to any grants, payments, or other sums to which the State is entitled from
6 appropriations to the Department of the Interior.

7 (2) Total payments to the State under this subsection shall not exceed the sum of
8 \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in
9 every five years as to whether or not the maximum payments specified in this subsection are
10 adequate to ensure the effectiveness of the program established by the State to provide the
11 preference for subsistence uses of fish and wildlife set forth in section 804.

For reference, unamended section 805 is reproduced in its entirety.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115

Sec. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

- (1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;
- (2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and
- (3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

- (A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;
- (B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;
- (C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;
- (D) the preparation of an annual report to the Secretary which shall contain—

Annual report to Secretary.

- (i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;
- (ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;
- (iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and
- (iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported

by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 802, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

Implementation.

(e)(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

Reimbursement to States.

(2) Total payments to the State under this subsection shall not exceed the sum of \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

Report to Congress.

(a)

FEDERAL MONITORING

Sec. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

Report to congressional committees.
16 USC 3116

Existing Section 806 shall become Section 806 (a) and a new subsection shall be added:

(b) At such time as the State of Alaska enacts into law and implements the [Subsistence Act of 1997 is the working title] and the people of Alaska approve the amendment to the Alaska Constitution which is incorporated into that Act by reference and which empowers the Alaska legislature to enact the Act, the State shall be deemed to have complied with section 805(d) and the State may immediately assume fish and game management as provided in section 805(d). Sections (a), (b), and (c) of section 805 shall not be implemented by the Secretary unless and until the Act or the constitutional amendment is repealed or a court of competent jurisdiction determines that the State has substantially failed to implement their provisions and that the State has failed or refused to cure that failure within a reasonable period following the court's determination.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

Sec. 807. (a) Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Hearing.

(b) A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

(c) This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.

Two new sentences shall be inserted in Section 807:

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

Subsistence
hunting pro-
gram.

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

Program and
recommendation
implementation.

COOPERATIVE AGREEMENTS

Sec. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title. 16 USC 3119

SUBSISTENCE AND LAND USE DECISIONS

Sec. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Notice and hearings.
42 USC 4332

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

48 USC note prec. 21
43 USC 1601 note.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

16 USC 3121.

Sec. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

16 USC 3122

Sec. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

Submittal to
Speaker of
House and Presi-
dent of Senate
16 USC 3123

Sec. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

- (1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;
- (2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;
- (3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;
- (4) the role of subsistence uses in the economy and culture of rural Alaska;
- (5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;
- (6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and
- (7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

Publication in
Federal Regis-
ter.

or the State at any time the State has complied with section 805(d)

REGULATIONS

Sec. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title. 16 USC 3121

A new sentence shall be added:

During any time that the State has complied with Section 805(d), the Secretary shall not make or enforce regulations implementing sections 805(a), (b), or (c).

NOTE: This change is necessary to clarify the "Secretary shall not implement" language in Section 805(d).

LIMITATIONS, SAVINGS CLAUSES

Sec. 815. Nothing in this title shall be construed as—

16 USC 1125

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535; 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

16 USC 1131
note

16 USC
665-665d

Publ. p 3300

16 USC 3126

SEC. 316. (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

Publication in
Federal Register.

A new paragraph shall be added:

(c) No provision of this Act (the Alaska National Interest Lands Conservation Act Amendments of 1997), exercise of authority pursuant to this Act, or change made by, or pursuant to, this Act shall be construed to validate or invalidate or in any way affect —

(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 1987), as amended) [section 461 et seq. of Title 25, Indians] has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the boundaries of the State of Alaska, or

(2) any assertion that Indian country (as defined by 18 U.S.C. § 1151 [section 1151 of Title 18, Crimes and Criminal Procedure] or any other authority) exists or does not exist within the boundaries of the State of Alaska, or

(3) any assertion that the Alaska National Interest Lands Conservation Act is or is not Indian Law.