

The Regulation of Subsistence in Alaska: The State's Current Dilemma¹

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... the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption . . .

(ANILCA, Sec. 803)²

The Final Environmental Impact Statement (EIS) on the management of subsistence resources on federal lands within the State of Alaska was released by the Federal Subsistence Board on February 20, 1992. The EIS presents four subsistence management alternatives that would comply with Title VIII of the federal legislation entitled the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487. Title VIII of ANILCA provides that rural residents of Alaska have a priority for the harvest of fish and wildlife on federal lands.

One day prior to the release of the EIS, proposed legislation relating to the harvest of fish and game for subsistence on state lands in Alaska was introduced in the Alaska Legislature at the request of Governor Walter J. Hickel.³ The proposed legislation intended to comply with the "common-use" clause of the Alaska Constitution, which dictates that rural and urban residents of Alaska have the same rights to harvest the state's fish and game subsistence resources.⁴

In January 1992, the U.S. Ninth Circuit Court of Appeals ruled that the village of Tyonek, Alaska, does have certain legal jurisdiction over "Indian country" owned by the Native village corporation.⁵ Then in a rare reversal, on March 16, 1992, the federal appeals court withdrew its previous ruling and referred the case back to a lower court for additional research to support its findings.⁶ To the extent that the earlier ruling regarding the village of Tyonek is upheld, this may have further implica-

tions for the management of fish and game resources on land determined to be "Indian country."

This article describes the current dilemma confronting Alaskans in the regulation of Alaska's subsistence resources, at the core of which is a conflict between the Federal statute, ANILCA, which provides for a rural subsistence preference, and the Alaska Constitution, which mandates equal access to resources. The dilemma seems to be on the verge of having another dimension added, tribal management of fish and game on Alaska Native lands.

The Present, Dual Management of Subsistence Resources in Alaska

On July 1, 1990, the federal government reassumed regulatory authority over subsistence hunting and fishing on all federal public lands in Alaska. Federal agencies previously had regulated hunting and fishing throughout Alaska until 1960, the year following Alaska's admission to the Union, when that task was turned over to the State of Alaska. Currently, the State of Alaska manages subsistence and sport hunting activities on state owned lands, (29% of the lands in Alaska); on lands owned by Alaska Natives, primarily through ANCSA regional and village corporations (11%), and, on privately owned lands (1%). The state also manages subsistence, sport, and commercial fishing activities on most navigable waters in Alaska.⁷ The federal government manages subsistence hunting and fishing on the remaining 59% of lands in Alaska.⁸

The Alaska Boards of Fish and Game have regulatory authority over hunting and fishing on lands and waters managed by the state. The boards are composed of agency representatives and representatives of commercial, sport and subsistence user groups who are appointed by the Governor of Alaska. The regulatory authority over subsistence on federal public lands rests with the Federal Subsistence Board. The Federal Subsistence Board is comprised of the Alaska directors of four U.S. Department of Interior agencies — the Fish and Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, and National Park Service — and of the Alaska Regional Forester of the U.S. Department of Agriculture Forest Service.

This dual management system for Alaska's fish and game resources is a result of two related events. First, in 1989 the Alaska Supreme Court found in *McDowell v. Collinsworth* that the rural residency preference of the State of Alaska's subsistence law violated the Alaska Constitution. In 1978 the state had enacted legislation establishing a subsistence preference. After ANILCA became law in 1980, the State adopted regulations, and finally, a statute in 1986, establishing a "rural resident" subsistence preference as required under ANILCA. The *McDowell* Court ruled that the state's 1986 subsistence law was not consistent with the Alaska State Constitution because it granted a subsistence use priority based solely on place of residency, thus raising the issue of the state being in noncompliance with the federal subsistence requirements of ANILCA.⁹

Then, in July 1990, the Alaska Legislature rejected a proposal to place on the November 1990 state election ballot a proposition calling for a constitutional amendment to allow for a rural subsistence use preference. The federal government then initiated a process to assume regulatory authority over subsistence hunting and fishing on public lands in Alaska — an action that had been delayed while the state tried to find a means to comply with the federal subsistence law.

An Overview of Subsistence in Alaska

While subsistence users currently take a very small proportion of the total harvest of fish and game resources in Alaska,¹⁰ subsistence has a vital role in the sustainability of rural Alaska's communities and villages. Baseline data from studies of 122 Alaska communities by the Alaska Division of Subsistence have revealed that in the 1980s:

. . . subsistence hunting and fishing were central activities in rural Alaska communities undertaken by family groups using small-scale, efficient technologies such as gill nets, fishwheels, small skiffs and motors, and snowmachines. Each family's subsistence production was supported and supplemented by cash employment. Earnings were invested in subsistence technologies. Employment tended to be seasonal and sporadic, and cash incomes were generally lower than those of urbanized areas.¹¹

Another point involves the regional nature of subsistence activities in rural Alaska. The types and quantities of subsistence foods rural Alaskans eat varies from region to region. For example, fish comprise a

smaller portion of the diet in extreme coastal arctic areas, where caribou, seal, whale, and walrus are major subsistence resources.¹²

The consumption of non-commercial fish and game resources ranges from 96 pounds per capita on the Kenai Peninsula (in southcentral Alaska) to 1,067 pounds per capita in the northwest Arctic region of Alaska.¹³

The Federal Program

On June 29, 1990, the federal government published temporary subsistence management regulations which created the Federal Subsistence Board and gave the board authority to oversee subsistence activities on federal public lands in Alaska. A process was established for the development of final programmatic subsistence management regulations. Because the development of the permanent regulations was considered "a major Federal action having a significant impact on the quality of the human environment" under the National Environmental Policy Act (NEPA), the board initiated the Environmental Impact Statement (EIS) process to analyze various alternatives for managing subsistence resources on federal lands in Alaska and to gather public comment on subsistence management issues and alternatives.¹⁴

Interagency teams from the U.S. Fish and Wildlife Service (FWS), the U.S. Forest Service (USFS), the National Park Service (NPS), and the Bureau of Land Management (BLM) held public scoping meetings in 56 Alaska communities and in Seattle and Washington, D.C., in the fall of 1990 to identify issues deserving analysis in the EIS. The FWS, designated as lead agency for the Federal subsistence management program, coordinated the preparation of the EIS by an interagency subsistence working group.

Following publication of the draft EIS and a period of public comment on the document, the Final EIS was published February 20, 1992. The Final EIS presents a draft of the final programmatic federal subsistence management regulations for public lands in Alaska which will go into effect on July 1, 1992. The major elements of the proposed federal management program are outlined below:¹⁵

- **Federal Subsistence Board** — Regulatory authority will come from the Federal Subsistence Board, which will be comprised of six members who are the Alaska

directors of the Fish and Wildlife Service, the Forest Service, the National Park Service, the Bureau of Land Management, the Bureau of Indian Affairs and a chair. In addition to the Board members, a state representative (nominated by the Governor) and the chairpersons of each of the eight regional advisory councils will serve as liaisons to the Board.

- **Regional and Local Advisory Councils** — There will be eight federal regional advisory councils, following, for the most part, the existing state regional advisory council boundaries; the existing state advisory committee and regional council will be allowed to submit proposals through the federal regional councils that will be established.
- **Rural Determination Process** — Communities that are socially and economically integrated will be aggregated. By looking at a community's use of fish and game resources, local economy, community infrastructure, and educational institutions, communities will be classified as being rural or non-rural. Using the federal process, with the exception of Anchorage, Fairbanks, Juneau, Ketchikan, parts of Kenai and the Wasilla area, Valdez and Adak, the rest of Alaska will be considered to be rural for the determination of subsistence priorities.
- **Customary and Traditional Uses** — Determinations of the customary and traditional use of subsistence resources will be made by the Board on recommendation of the regional councils.

The State's Plan

Faced with the fact of the federal management of subsistence resources on federal public lands, Alaska's political leaders are anxiously striving to fashion a law which satisfies the requirements of ANILCA and of various interest groups in Alaska. Governor Hickel has made restoration of state fish and game management throughout Alaska a principal goal of his administration. In 1990 he appointed a Subsistence Advisory Council composed of representatives of various interest groups and charged them with developing a plan that would satisfy

ANILCA's subsistence preference requirement without changing the Alaska Constitution.

If management of Alaska's subsistence resources is to be reunified, the challenge confronting this advisory council and the state is to provide for a preference for rural subsistence users as required by ANILCA, while at the same time making it possible for people to qualify as subsistence users regardless of where they live. A bill introduced in the 1992 Alaska Legislature at the request of Governor Hickel represents an attempt to address these issues.¹⁶

Key points that the bill attempted to address are as follows:

- The state's proposed plan attempts to provide a preference for rural subsistence users as required by ANILCA, while allowing for the *possibility* for non-rural residents to qualify as subsistence users.
- It establishes additional criteria besides place of residence for determining who qualifies as a subsistence user. These criteria can be grouped into three categories: customary dependence on subsistence; proximity of residence to subsistence resources; and, ability to obtain alternative foods. (Note: This is similar to ANILCA Title VIII Section 804.)
- It does not define a subsistence user simply on the basis of quantity of subsistence resources used or simply on the basis of economic need. Natives and others have argued vigorously that subsistence as a way of life must be valued and protected by the law.

The Governor and his staff, in an attempt to devise a constitutionally safe compromise without altering the constitution, have put forth a complex of interweaving provisions. Whereas the Federal law only specifies "customary and traditional uses by rural Alaska residents," the Governor's bill specifies a weighted point system to compute eligibility as a subsistence user, measuring an individual's degree of conformation to seven particular criteria:

1. Amount of fish and game consumption (at least 125 pounds) in the past 12 months.

2. A use of a minimum number (to be set by the Boards of Fish and Game) of species and groups of species within the past twelve months.
3. Number of days (30 days minimum) during the year spent taking and processing fish or game.
4. Number of months during the year engaged in the taking of fish or game (4 months minimum).
5. Number of weeks during the year when subsistence was the principal work effort.
6. Number of households sharing in the use of taken fish and game.
7. Whether the taking occurred solely in the subsistence use area.

Having set out a basis for qualifying people individually, the Governor's plan nevertheless allows for whole groups of rural residents to legally exercise subsistence preference. To avoid case-by-case determination of individual subsistence eligibility, certain statutory presumptions would be made:

- **Communities with a population of less than 2,500:** All residents of communities located "where dependence upon subsistence is a principal characteristic of the economy, culture and way of life of the area . . ." and with less than 2,500 population are presumed to be subsistence users. This presumption "may be rebutted only by clear and convincing evidence."
- **Communities with a population of between 2,500 and 7,000:** Residents of communities located "where dependence upon subsistence. . . is a way of life of the area" and with populations between 2,500 and 7,000 would merely be required to sign a statement affirming compliance with subsistence qualification criteria. Rebuttal of this affirmation requires "a preponderance of the evidence."
- **Communities with a population of over 7,000:** Residents of communities with over 7,000 population are presumed to not qualify as subsistence users. Individuals may be "qualified only upon certification by

the (Fish and Game) commissioner that the person meets the qualification requirements . . .”

Because actually living in areas where “subsistence is a principal characteristic of the economy, culture and way of life” is a prerequisite to other important qualifications, the bill provides 13 criteria for determining which geographic areas are so characterized. These criteria include factors of the local economy, culture, social values, fish and game varieties, harvest levels and harvest patterns. Certain species would be designated as subsistence in various regions of the state according to traditional use patterns.

The proposed legislation also requires the Fish and Game Boards to determine what constitutes “a reasonable opportunity to participate in the subsistence uses . . .” and outlines six factors to be considered in the determination. The State plan requires the Boards of Fish and Game to establish regulations based on the criteria and guidance of the bill. Reaction to the bill by Native leaders suggests that it lacks support in the Native community. With so many facets of the law’s interpretation and application being subject to the Boards’ regulatory discretion, these Natives fear that subsistence priority will be compromised or weakly enforced. Without an amendment to the state constitution, it seems doubtful that the Native community will acquiesce to having the Federal authority replaced by State authority.¹⁷

The Governor’s design for regaining governance of all fish and game practices within Alaska faces a gamut of legislative debate, Federal determinations and probably some court tests. Because neither the Governor’s bill nor any other subsistence legislation was passed during the regular 1992 legislative session, the Governor did call the Legislature back into special session during the summer of 1992, however disagreements prevailed and the Governor’s package was still not adopted.

Native Jurisdiction Developments

Alaska Natives, who were disappointed that government had not adequately protected subsistence following passage of the 1971 Alaska Native Claims Settlement Act, successfully pressured Congress to include the rural preference clause in ANILCA. The consequence of the subsistence provisions of ANILCA

was generally welcomed by Alaska Native leaders. The Alaska Boards of Fisheries and Game are composed of sports, commercial, and subsistence representatives. In contrast, the federal government's mandate under Title VIII of ANILCA is to protect the priority of subsistence use of the resources. While Governor Hickel would like to resolve this conflict without amending the Alaska Constitution, the Alaska Federation of Natives wants a constitutional guarantee that the state will not renege on rural subsistence preference in the future.¹⁸

In related developments, in January 1992, the U.S. Ninth Circuit Court of Appeals found that the Village of Tyonek in southcentral Alaska was correct in its claims to tribal legal jurisdiction, finding that in Alaska there is "Indian country" with attendant legal jurisdictional status similar to that held by tribes on reservations in the Lower 48 states.¹⁹ Then in a rare reversal, on March 16, 1992, the federal appeals court withdrew its previous ruling and referred the case back to a lower court for additional research to support its findings. To the extent that the earlier ruling regarding the Village of Tyonek is upheld and because there are a number of Lower 48 tribes who exercise fish and game management powers within "Indian country," this may have further implications for the management of fish and game resources on land determined to be "Indian country" in Alaska.²⁰

Co-management Alternative

Few people would argue that regulation of Alaska's fish and game by several distinct entities, each ignoring the other's information and actions, would be sensible. Alaska's wildlife pay no attention to "game management units," as defined on maps, or to boundaries between federal, state and Native lands. Sound management of wildlife resources requires that agencies look at herds, habitats, species, migrations, runs, and human interactions on a broad basis. Consequently, co-management is often talked about as a direction for the future, especially among Natives and other rural advocates. Past disputes about regulatory decisions that occurred between user groups and between users and regulators spawned several co-management schemes in Alaska.²¹

One group, the Alaska Eskimo Whaling Commission (AEWC), has assumed major de facto decision making power over the harvesting of bowhead whale by Inupiat. As David Case has pointed out, the AEWC has had the most success in asserting an "effective voice" in planning, implementing, and enforcing a workable subsistence policy controlled by the people most affected by it. The AEWC is made up of ten commissioners, one from each of the ten village whaling associations located in northern and northwestern Alaska. Working under an agreement with the National Oceanic and Atmospheric Administration for the cooperative management of the International Whaling Commission quotas, the AEWC allocates the annual whaling quota among its member villages, resolves disputes between whaling captains, and imposes sanctions on its members who violate the terms of the quota.²²

A more recent co-management effort is the Yukon River Drainage Fisheries Association (YRDFA) officially formed in early 1991. The YRDFA includes subsistence, commercial, and sports fishing interests from the entire 1200-mile length of the Yukon River in Alaska. The YRDFA is formulating plans to participate actively with state and federal officials in establishing seasons and catch quotas for salmon runs in the Yukon. Besides in-state coordination challenges, the Yukon fishery groups and officials are also addressing international coordination with Canadians who control and use the Canadian portion of the river.²³

Other co-management groups exercise varying degrees of influence on management decisions. In all cases, except for the AEWC, non-government participants have advisory capacity. In some situations, government agencies seek the consent of these advisory groups before finalizing regulations. The federal government's proposed alternatives for exercising its fish and game regulatory responsibilities, which were outlined earlier in this article, embrace the concept of advisory co-management.

Case concludes, in his comments on co-management, that

neither ANILCA nor the state subsistence regime offers Natives any certain role in either research or enforcement. At best, they afford local users of subsistence resources only an enhanced consultative role when it comes to rule making. That is the regime's biggest and, ultimately, debilitating flaw.²⁴

Conclusion

Among the fifty United States, Alaska is unique in terms of the biological, social, and legal circumstances surrounding the use of fish and game within its boundaries. Rural dwellers are often reliant on fish and game for basic sustenance, not merely for supplemental food or sports utilization as is common in other states. Subsistence hunting and fishing permeates many rural communities economically, socially, spiritually, and now, legally. Ancient practices, modern human migrations, and recent legal actions have combined to foment a dynamic dialogue among Alaska citizens. Alaskans opposing any differentiation among fish and game users or uses have repeatedly challenged subsistence priority in the laws. Alaskans supporting subsistence protection have been primarily reliant on federal legislation and courts. State government, which assumed early management over all fish and game matters, now struggles to regain that scope of control from the federal government while simultaneously trying to assuage all interest groups. Meanwhile, one of those interest groups, Alaska Natives, is asserting its own jurisdictional claims. While there are indications of regulatory authority patterns which might emerge, our political history cautions us to avoid firm predictions.

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NOTES

- 1 The authors would like to gratefully acknowledge the assistance of Robert Anderson, Willie Kasayulie, John Tetpon, Rod Kuhn and Mary Ann Katt. All errors remain the responsibility of the authors.
- 2 Alaska National Interest Lands Conservation Act, P.L. 96-487, Title VIII, 94 Stat. 2371, 2422 (codified as amended at 16 U.S.C. §§ 3111-3126 (1988)).
- 3 Alaska State Legislature, House Bill 552/Senate Bill 443 "An Act relating to the taking of fish and game for subsistence, and providing for an effective date," February 21, 1992.
- 4 In 1980 the U.S. Congress passed the Alaska National Interest Conservation Lands Act (ANILCA), in which the federal government is

required by Title VIII of ANILCA to provide a subsistence priority for hunting and fishing by rural residents on federal public lands in Alaska. In both the federal and previous state laws dealing with a rural preference for subsistence, the meaning of preference is that in times of shortages, subsistence uses would exercise a preference over sport and commercial taking of subsistence resources.

- ⁵ *Native Village of Tyonek v. Puckett*, Nos. 87-3569, 87-3587, 87-3588, Slip op. (9th Cir. January 13, 1992).
- ⁶ *Anchorage Daily News*, March 18, 1992. "Tyonek sovereignty ruling withdrawn."
- ⁷ Alaska encompasses approximately 365 million acres. Source: *Alaska Blue Book*, 1985.
- ⁸ Federal management does not extend to navigable waterways because the Federal government does not usually hold title to them and they are not included within the definition of public lands for purposes of this discussion of ANILCA.
- ⁹ See David Case, "Subsistence and Self-Determination: Can Alaska Natives Have a More 'Effective Voice?'," *Arctic Issues Digest*, October 1991, pp 28-29. This is actually the second time the state has been faced with the prospect of federal takeover of the management of fish and game. In 1985 in the Madison case, the Alaska Supreme Court held that the state subsistence statute on which the Alaska Department of Fish and Game had based its "rural resident" subsistence preference regulations did not limit subsistence fishing and hunting to rural residents. Alaska then in 1986 passed the current law (Alaska Statute 16.05.258) which did limit the subsistence preference to rural residents.
- ¹⁰ See Fall, James A., p. 81. "The Division of Subsistence and the Alaska Department of Fish and Game: An Overview of Its Research Program and Findings, 1980 to 1990." *Arctic Anthropology*, 27(2)(1990): 68-91. Research by the Alaska Department of Fish and Game's Division of Subsistence has revealed that in 1985, commercial users took 95 percent of the total harvest; subsistence users, 4 percent; and sport hunters and fishermen, 1 percent.
- ¹¹ *Ibid.* (See Fall, p. 80.)
- ¹² See Wolfe, Robert J., p. 17. "Myths: What Have You Heard?" *Alaska Fish and Game*, 21(6): 16-19, 1989.
- ¹³ See Wolfe, Robert J. and Robert J. Walker, p.61. "Subsistence Economies in Alaska; Productivity, Geography, and Development Impacts." *Arctic Anthropology*, 24(2):56-81, 1987.
- ¹⁴ *Environmental Impact Statement for Subsistence Management on Federal Public Lands in Alaska*, Federal Subsistence Board, February 1992.
- ¹⁵ The Final EIS, along with its summary document, has been distributed and a record of decision will be published in 30 days following the publication of the Environmental Protection Agency notice in the *Federal Register* of the filing of the final EIS.
- ¹⁶ See House Bill 552/Senate Bill 443 "An Act relating to the taking of fish and game for subsistence, and providing for an effective date."

- ¹⁷ *AFN Newsletter*, "Statewide Native Community Sends Clear Message at Subsistence Summit," Vol. X, No. 3, Alaska Federation of Natives, April/May 1992, p.1.
- ¹⁸ *Ibid.*
- ¹⁹ *Native Village of Tyonek v. Puckett*, Nos. 87-3569, 87-3587, 87-3588, Slip op. (9th Cir. January 13, 1992).
- ²⁰ *Anchorage Daily News*, March 18, 1992. "Tyonek sovereignty ruling withdrawn" and see also *New Mexico v. Mescalero Apache Tribe*, 76 L Ed 2d 611.
- ²¹ These include: The Alaska Eskimo Whaling Commission; Alaska Eskimo Walrus Commission; Kuskokwim Cooperative Management Group (Kuskokwim River fisheries); Alaska Sea Otter Commission; Yukon-Kuskokwim Delta Goose Management Project; and, Yukon River Drainage Fisheries Association.
- ²² See Case, 1991, pp 33-34. Note also that if criminal prosecution is necessary, then NOAA is responsible for it. The AEWWC doesn't have true enforcement powers.
- ²³ Personal attendance and observation at YR DFA meetings by Francis Mitchell, December, 1990, and February, 1991.
- ²⁴ See Case, 1991, p. 34.