November 7, 1997

The Honorable Mike Miller, President
Alaska State Senate
State Capitol, Room 107
Juneau, Alaska 99801

The Honorable Gail Phillips, Speaker
Alaska State House of Representatives
State Capitol, Room 208
Juneau, AK 99801

Re: Governor's Task Force on Subsistence
A.G. file no: 661-96-0796
1997 Op. Att'y Gen. No. 1

Dear President Miller and Speaker Phillips:

Several legislators have asked for opinions respecting various aspects of the final report issued by the Governor's Task Force on Subsistence on September 23, 1997. The purpose of this letter is to respond to these requests and to address each legal issue in turn. Because of the length of this opinion, I have indexed the individual topics for ease of reference.

I. Does the Task Force Proposal satisfy constitutional guarantees of equal protection?

A. Does the proposed constitutional amendment satisfy the constitutional problems cited in *McDowell I,* and therefore permit the Legislature to enact a rural preference?

Yes. In *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (*McDowell I*), the Alaska Supreme Court held that the state's rural priority for subsistence violated article VIII, sections 3, 15, and 17 of the Alaska Constitution, often referred to, respectively, as the "common use," "no exclusive fishery," and "uniform application" clauses dealing with natural resources. The court found it unnecessary to reach the article I, section 1, equal protection claims. The Task Force's proposed amendment specifically permits the legislature to provide a priority for subsistence uses in the taking of fish and wildlife based on place of residence. The "may provide" language of the proposed amendment empowers the legislature to enact a subsistence preference, but maintains flexibility. Similarly, the "place of residence" language which allows the legislature to grant the priority to rural residents (so long as similarly situated rural residents are treated similarly) does not violate the Alaska Constitution.

The proposed subsistence amendment is analogous to the 1972 amendment to article VIII, section 15 that allowed the state to limit entry into any fishery for certain purposes. The Alaska Supreme Court upheld the state's limited entry act in the face of challenges based on the same clauses of the constitution. The court reasoned that, "notwithstanding any state constitutional provisions otherwise prohibiting such a system," the purpose of the amendment was to grant the power to impose a limited entry system, and the authority to do so became a part of Alaska's constitution. It cannot "be challenged as unconstitutional under preexisting clauses in the same

document." *State v. Ostrosky*, 667 P.2d 1184, 1190 (Alaska 1983). Likewise, if the subsistence amendment is added to the Alaska Constitution, a rural subsistence priority should withstand a challenge brought under other provisions in the constitution.

B. Does the proposed constitutional amendment put forward a racial criterion that poses an Equal Protection problem, under either the Alaska or United States Constitution?

No. The proposed amendment does not establish a *racial* criterion; it is based on *place of residence*, regardless of race.[1] If the amendment is adopted as proposed, a rural/non-rural classification would be sustained in any equal protection challenge under either the state or federal constitutions.

The Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution guarantee equal protection under the law.[2] In general, under the federal constitution, a classification will be upheld if it is rationally related to a legitimate government interest. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Only if the statute uses a suspect classification or impinges upon constitutionally protected fundamental rights will the courts apply a strict scrutiny standard of review. Under federal

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[1] According to a 1994 subsistence report by the Alaska Department of Fish and Game, "[o]f the 116,653 rural residents, 55,888 were Alaska Natives and 60,765 were not."

[2] The Fourteenth Amendment reads in part:
[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment reads in part:
No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

constitutional analysis, a continuing residency requirement, like this rural residence requirement, is not a suspect classification. *See* discussion of right to travel cases, below. Hunting and fishing are not fundamental rights. *State v. Ostrosky, supra*; *O'Brien v. Wyoming,* 711 P.2d 1144 (Wy. 1986); *Sisk v. Texas Parks & Wildlife Dep't*, 644 F.2d 1056 (5th Cir. 1983). Because neither a suspect class nor a fundamental right is implicated here under the United States Constitution, the rural/non-rural classification would be tested under the extremely deferential "rational basis" standard. A rural preference for subsistence would pass that test.

The state constitution generally provides greater protection for individual rights than the U.S. Constitution, especially in the area of natural resources. State equal protection analysis first looks to the importance of an individual's interest that is affected by the statute to determine the appropriate level of scrutiny. Next, the purposes served by the challenged statute are examined. "Depending on the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest." *State v. Enserch Alaska Const. Inc.*, 787 P.2d 624, 631 (Alaska 1989). Finally, the means employed to further the state's interest are examined, and again depending on the individual interest involved, the means/ends relationship must fall on a continuum from "substantial relationship" to "least restrictive means." *Id*. at 632.

In *McDowell I*, the Alaska Supreme Court indicated that residency classifications are subject to "scrutiny." 785 P.2d at 7. However, because the amendment would become a part of the Alaska Constitution, it could not be challenged under preexisting provisions of the same document. *State v. Ostrosky*, 667 P.2d at 1190. A statute drafted in conformity with the amendment would

survive challenge under the equal protection provisions of the Alaska Constitution because the amended constitution specifically would allow the legislature to grant a rural priority.

C. Does a rural preference violate fundamental principles of equality in the Alaska Constitution?

No. Different groups of people receive different treatment regularly in a variety of contexts, without offending concepts of equality.

The limited entry program is one example. Alaska Const. art. VIII, sec. 15. Under the Alaska Constitution only people who are qualified voters and residents of Alaska for at least three years can serve in the legislature. A senator must be 25 or older; a representative must be 21 or older. *Id.*, art. II, sec. 2. Only people who have lived in Alaska for 7 years and are at least 30 can be governor. *Id.*, art. III, sec. 2. Mining, utility, and oil companies, but not everyone, can exercise powers of eminent domain. *Id.*, art. VIII, sec. 18. Only qualified voters can sign an initiative or referendum application or petition. *Id.*, art. XI, sec. 2, 3. Many other privileges and rights are accorded different persons based on age, such as voting rights, drivers' licenses, curfews, and the right to obtain and consume alcohol and tobacco. Property taxes vary depending on location. The permanent fund dividend program is only open to certain individuals who have been Alaska residents for at least one year. AS 43.23.005. These are but a few examples of the many ways individuals receive differing treatment under the law. Amending the constitution to allow enactment of a rural preference for subsistence is not inconsistent with constitutional principles of equality.

D. Does the provision in proposed AS 16.05.261(b), requiring the Governor to appoint 4 of the 10 members of each regional subsistence council from nominees submitted by tribal councils in the region, violate the equal protection clauses in the state or federal constitutions?[3]

No. It is highly unlikely that a court would apply an equal protection analysis in this instance at all because the provision does not establish a classification that affects any individual right. It simply provides for certain entities, including local government and local advisory committees as well as tribal councils, to submit nominations to the governor for appointment to the councils. Both local governments and local advisory committees (*see* 5 AAC 96) are open to public participation, and there is no requirement that tribal councils nominate tribal members.

If equal protection analysis were appropriate, this provision would likely be upheld. If there is a classification, it is based on a political entity -- a tribe -- not race, and therefore not subject to the higher standards. *Morton v. Mancari*, 417 U.S. 535 (1974). The tribal councils themselves may have non-Native members, and they are not required to nominate tribal members. The only requirement is that the nominees reside in the region.

If a court applied a strict scrutiny analysis, this provision would likely pass the test. The individual interest affected, whether it were the ability to participate in the nominating process or to be nominated, would not be characterized as a fundamental right. But even assuming it were, the tribes could nominate any individual; moreover, a majority of the seats on the council will come

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[3] Concern has also been expressed that this provision might affect the state's position on sovereignty and Indian county. This provision has no effect on the state's position. The state has acknowledged that federally recognized Indian tribes exist in Alaska. The state continues to challenge the characterization of ANCSA land as Indian country. Having tribal councils submit the names of nominees to the governor for appointment to regional subsistence councils does not detract from that challenge.

from nominations made by local governments and local advisory committees. The provision is narrowly tailored to provide an opportunity for representation of broad viewpoints on the regional councils, which may well be considered a compelling state interest. Therefore, I believe proposed AS 16.05.261(b) would withstand an equal protection challenge.

E. Does this provision in proposed AS 16.05.261(b) affect funding from the federal government under the Pittman-Robertson Act or the Dingell-Johnson Act for fish and game programs?

No. The Pittman-Robertson Act, 16 U.S.C. §§ 669-669j, and the Dingell-Johnson Act, 16 U.S.C. §§ 777-777k, are federal statutory programs that provide funding to states for fish and wildlife restoration and management projects. Pittman-Robertson is directed at wildlife, and Dingell-Johnson deals with sport and recreational fishing. To participate in these dedicated fund programs, states must assent to the federal conditions. Alaska's assent is found in AS 16.05.140. AS 16.05.130 restricts the use of revenue, as required by the two federal acts. All projects funded under the acts must "conform to the standards fixed by the Secretary of the Interior." 16 U.S.C. § 777(a).

One of the standards fixed by the Secretary is found at 43 CFR § 17.1 *et seq.*, which prohibit discrimination in programs administered by the Secretary, expressly including Pittman-Robertson and Dingell-Johnson programs. *See* 43 CFR, Part 17, Subpart A, Appendix .

Nothing in the Governor's Task Force's subsistence plan limits participation in hunting or fishing on the basis of race, color, or national origin. Participation is limited by residence, not according to membership in a suspect class.

The provision of proposed AS 16.05.261(b), which would require four of ten members of regional subsistence councils to be nominees of tribal councils, does not implicate Pittman-Roberts or Dingell-Johnson, but 43 CFR § 17.3 would be applicable to ANILCA's funding for state advisory committees. However, I do not believe tribal council nominations to regional subsistence councils would constitute discrimination on the basis of race, color, or national origin because the U.S. Supreme Court has found tribes to be political organizations rather than racial ones. *Morton v. Mancari, supra.*

The Governor's Task Force amendments do not contain an explicit severability clause, but under AS 01.10.030 one is implied. Even if this provision allowing nomination of regional subsistence council members by tribal councils were struck down, the remainder of the act would stand.

II. Can the State of Alaska prevail in a challenge to ANILCA's rural preference for subsistence in the United States Supreme Court?

No. An original action in the United States Supreme Court challenging the constitutionality of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 *et seq.*, would be a waste of time and money for numerous reasons, the foremost being that the Court is unlikely to hear the case, and, even if it did, it would uphold the statute.

A. Supreme Court Original Jurisdiction

The original jurisdiction of the Supreme Court extends to suits brought by a state against the United States.[4] U.S. Const. art. III, sec. 2, cl. 2; 28 U.S.C. § 1251(b)(2). This jurisdiction is not exclusive and should be only "sparingly" invoked; the Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada & California*, 412 U.S. 534, 538 (1973).

In order to invoke the Supreme Court's original jurisdiction, a party must file a motion and accompanying brief asking to file a complaint with the Court. S. Ct. Rule 17.3. Since 1961, only about 105 such motions have been filed in actions by or against a state. Vincent L. McKusick, *Discretionary Gatekeeping; The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 188-89 (1993). The Court has granted about 50 percent of these motions, and most of them involved disputes concerning boundaries, water rights, the interpretation of interstate compacts, inter-state regulation or taxation, and state escheat of unclaimed property. *See* Stern, Gresssman, Shapiro and Geller, *Supreme Court Practice* §§ 10.2, 10.4 (7th ed. 1993). Many of these were disputes between two or more states where the Supreme Court has exclusive jurisdiction, *i.e.*, there is no other court in which to bring the claim. *See* 28 U.S.C. § 1251(a). The availability of the United States District Court to hear a challenge to ANILCA

[4] The United States "must give its consent to be sued even when one of the States invokes this Court's original jurisdiction." *California v. Arizona*, 59 U.S. 59, 61 (1979). This does not give the United States a "veto" power, however. Consent can be based on the statutory provisions by which the United States consents to suit for certain types of cases such as 28 U.S.C. §§ 1346 and 2201.

and the fact that no other state is affected by ANILCA make it highly unlikely that the Supreme Court would hear the case.[5]

B. Substantive Challenges To ANILCA

1. ANILCA falls within Congress' broad powers to legislate.

Even if the Supreme Court took the case, it would likely uphold ANILCA as a permissible exercise of Congress' broad authority under the Property Clause to regulate federal public lands. In enacting ANILCA, Congress expressly invoked its constitutional authority to regulate commerce (art. I, § 8, cl. 3), Indian affairs (art. I, § 8, cl. 3), and federal public lands (art. IV, § 3, cl. 2). 16 U. S. C. § 3111(4). While the Act may be vulnerable under the first two powers,[6] the Property Clause provides the Court ample means to uphold Title VIII of ANILCA.

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[5] It is incorrect to assume that if the Court did exercise its original jurisdiction a speedy resolution would follow. *United States v. Alaska*, the "*Dinkum Sands*" case, was filed as an original action in the Supreme Court in 1979. The Court issued its opinion 18 years later, in 1997. 117 S. Ct. 1888 (1997).

[6] Generally, the Commerce Clause gives Congress broad authority to legislate with respect to both interstate and intrastate concerns. *See Wickard v. Filburn*, 317 U.S. 111,121 (1942); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 189-90 (1824). The power is not without limit, however, and in order to regulate activities of an intrastate nature, the activities must "'substantially affect[.]' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). ANILCA is vulnerable to challenge under *Lopez*. Most subsistence activities are not commercial in nature and, even when considered in the aggregate, arguably would not *substantially* affect interstate commerce. The dissent stated as much in *State of Alaska v. Babbitt*, 72 F.3d 698, 707 (9th Cir. 1995). A court would give serious consideration to the argument that Title VIII exceeds Congress' commerce power.

The Indian Commerce Clause gives Congress plenary authority over Indian affairs. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. at 551-52 (1974). However, it only authorizes regulation as it relates to Indians. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964), *modified on other grounds by Lopez, supra*. ANILCA's rural preference applies to *all* rural residents, Native and non-Native. To the extent that ANILCA regulates activities of non-Natives, it arguably exceeds Congress' authority under the Indian Commerce Clause.

The Property Clause gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, sec. 3, cl. 2. The Supreme Court has "repeatedly observed" that this provision gives Congress virtually unlimited power over "public land." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). In *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976), a unanimous Supreme Court held that the "'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."

Kleppe involved a challenge by New Mexico to the Secretary of the Interior's authority under the Wild Free-Roaming Horses and Burros Act to manage and protect wild horses and burros on federal public land. New Mexico argued that Congress could not regulate the animals unless they were "moving in interstate commerce or damaging the public lands." *Id*. at 533. The Court rejected that argument, finding the Property Clause sufficient authority for the act, and also rejecting the state's "claim that upholding the Act would sanction an impermissible intrusion on state sovereignty." *Id*. at 545. ANILCA by its terms is limited to federal public lands. 16 U.S.C. § 3102(3). While *Kleppe* is 20 years old, the Supreme Court continues to cite it with approval. *See, e.g., California Coastal Comm'n, supra,* 480 U.S. at 580. In all likelihood, ANILCA would be upheld as a permissible exercise of Congress' broad authority under the Property Clause.

2. ANILCA does not violate constitutional limitations on Congress' power to legislate.

Congress' powers, of course, "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Some urge that ANILCA be challenged on the grounds that it

violates equal protection, the equal footing doctrine, the right to travel, the Alaska Statehood Act, and the Tenth Amendment. These challenges also likely would fail. The U.S. District Court for Alaska in *McDowell v. United States*, A92-531-CV (HRH) (*McDowell II*), already has rejected these and other claims.[7]

As discussed above in section I. B., an equal protection challenge to the rural preference under the U.S. Constitution will not succeed. Because neither a suspect class nor a fundamental right is at stake here under the U.S. Constitution, the rural/non-rural classification would be tested under the extremely deferential "rational basis" standard. A rural preference for subsistence would pass that test.

The equal footing argument is that because other states have the right to manage fish and wildlife on federal lands, ANILCA violates the equal footing doctrine. The equal footing doctrine does not negate Congress' Property Clause power to regulate federal land. ANILCA only applies to federal public land. The Supreme Court has already held that Congress has authority to manage wildlife on federal land. *Kleppe, supra*. The Court has also held that Alaska received the same jurisdiction over fish and wildlife as other states. *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 57 (1962). No state has the authority to preempt federal regulation of federal land within its borders. The equal footing argument would fail.

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[7] Following appeal and remand, the district court dismissed the case, without prejudice to refile, for lack of subject matter jurisdiction because the suit was filed before the secretary published regulations for subsistence management on federal lands in Alaska. This order has been appealed to the Ninth Circuit. There is, however, no indication the district court would rule differently on the merits in a properly brought case. The district court also concluded that the Commerce, Indian Commerce, and Property Clauses of the U.S. Constitution give Congress power to enact ANILCA, although the decision pre-dates *Lopez*, which recognizes limits on Commerce Clause powers.

Nor is it likely that the urban/rural classification violates the right to travel. Whether there is a constitutionally protected right of intra-state travel is an open question but need not be resolved here. Even if there is, the cases striking down residency requirements distinguish between *continuing* and *durational* residency requirements, invalidating only the latter. *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Zobel v. Williams*, 457 U.S. 55 (1982). Durational residency requirements discriminate against those who have recently exercised the right to travel and are subject to strict scrutiny. *Id.*[8] A continuing residency requirement, like ANILCA's, is only subject to the rational basis test. *See, e.g., Fisher v. Reiser*, 610 F.2d 629 (9th Cir. 1979). Because there is a rational basis for ANILCA's rural classification, it would withstand a right-to-travel challenge.

A challenge based on the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, would have to rely on section 6(e), which grants the state the right to manage fish and wildlife in Alaska when certain conditions are met. The Statehood Act contains no guarantee that the state will manage all fish and wildlife on all lands in the state on whatever terms it decides, nor did the federal government waive its power to regulate federal land in Alaska. Numerous federal acts other than ANILCA affect fish and wildlife management, including the Marine Mammal Protection Act, 16

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[8] In *Zobel*, the Supreme Court noted:

> In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents. [Citations omitted.]

57 U.S. at 60, n.6.

U.S.C. §§ 1361 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712. ANILCA's requirement for a rural preference for subsistence on federal lands, falling as it does within Congress' authority to manage federal property, does not violate the Statehood Act.

The Tenth Amendment reserves to the states the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. Two arguments can be advanced under the Tenth Amendment. First, the authority to control fish and wildlife within the borders of a state is a power reserved entirely to the states. Second, ANILCA's penalty for failure to have a rural preference (a federal takeover) impermissibly attempts to compel the state to take action. Both arguments likely fail. *Kleppe v. New Mexico, supra,* almost certainly forecloses the first argument. As the Court said in *Missouri v. Holland*, 252 U.S. 416, 434 (1920), the state's authority over fish and wildlife is not necessarily exclusive in light of Congress' paramount powers under the Constitution.

As to the second argument, the Supreme Court has used the phrase "cooperative federalism" to describe, and uphold, "Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992). Congress cannot *require* the state to regulate, but it can offer strong incentives to induce the state to do so. *Id.* at 161. Significantly, the Court even cited ANILCA as an example of such "cooperative federalism." *Id.* at 168. Accordingly, it is unlikely that ANILCA would fall to any *New York* -type Tenth Amendment challenge.

III. Would enactment of the proposed statutory changes without a constitutional amendment survive a challenge under *McDowell I*, and allow the state to regain management of subsistence hunting and fishing on federal public lands?

No. The Alaska Supreme Court in *McDowell I* found the rural/urban classification scheme both over-inclusive and under-inclusive because it granted the preference to all rural residents regardless of individual needs and traditions, and denied it to all urban residents.

Because the proposed statutory amendments would authorize expanded proxy hunting and fishing, and authorize educational permits, in addition to providing a rural preference, the preference is no longer strictly applicable only to rural residents. However, under the reasoning of *McDowell I,* it is doubtful the Alaska Supreme Court would uphold such a statutory scheme in the absence of specific constitutional authority. The preference would still apply largely to rural residents; most urban residents would remain ineligible to participate in subsistence activities because they could not meet the requirements for either an educational permit or proxy hunting or fishing. The court has said that "[i]n reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values." *McDowell I*, 785 P.2d at 10. The court indicated that it views a rural/urban classification scheme as "extremely crude" and expressed the view that "a classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion." *Id*. at 11. Adoption of a statutory scheme that allows relatively few urban users to qualify while still allowing any and

all rural users to do so, in the absence of a constitutional amendment specifically authorizing it, is unlikely to survive challenge.

IV. Does article XII, section 12 of the Alaska Constitution bar state regulation of subsistence?

No. Article XII, section 12 of the Alaska Constitution provides in part:

> The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

Section 4 of the Alaska Statehood Act contains a similar disclaimer of:

> any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation;

These provisions have been read by some to direct the state to relinquish any right to regulate Native fishing. This argument is flawed. In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the U.S. Supreme Court held that by use of the phrase "absolute jurisdiction" in the Statehood Act, Congress did not mean exclusive jurisdiction. "The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest." *Id*. at 69. "Except where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation." *Id*. at 75.[9] The Alaska Court of Appeals agrees. *See Jones v. State*, 936 P.2d

[9] The Court refers only to the Statehood Act and does not discuss article XII, section 12 of the Alaska Constitution. This is probably due to the peculiar history of this case. In *Metlakatla Indian*

1236 (Alaska App. 1997). There are no treaties creating Native fishing rights in Alaska. The State of Alaska plainly has authority to regulate off-reservation Native fishing.[10]

V. What specific definition will be applied to the term "other renewable natural resources" as it is contained in the proposed constitutional amendment? Specifically, which resources are included and which are excluded?

This term is not defined in the recommendations of the Task Force, and should be given its ordinary meaning.[11] The proposed amendments to state and federal statutes do not expand the rural priority beyond the taking for subsistence uses of fish and wildlife. However, the proposed amendment does grant the legislature the authority to grant a rural priority for subsistence uses of whichever "other renewable natural resources" it deems in the state's interests to provide. Article VIII, section 4 of the Alaska Constitution gives some guidance on resources that could be included in the term, including "fish, forests, wildlife, grasslands and all other replenishable resources" in the list of resources subject to management under principles of sustained yield. The legislature could

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Comm. v. Egan, 362 P.2d 901 (Alaska 1962), the Alaska Supreme Court appears to hold that the disclaimer as to Native fishing rights is not part of the Statehood Compact. In both *Kake* and *Metlakatla Indian Comm. v. Egan*, 369 U.S. 45 (1962), the companion case to the *Kake* case in which the U.S. Supreme Court vacated and remanded the Alaska Supreme Court's decision as to Metlakatla, it is my understanding that the State of Alaska conceded that fishing rights were included in both parts of the disclaimer and dropped the argument that they are not part of the Compact.

[10] Also note that the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* Section 4(b) of ANCSA, 43 U.S.C. § 1603(b), explicitly extinguished "any aboriginal hunting or fishing rights that may exist."

[11] Section 803 of ANILCA, 16 U.S.C. 3113, defines the term "subsistence uses" as the "customary and traditional uses by rural Alaska residents of wild, renewable resources. . . ." Section 802(2), 16 U.S.C. 3112(2), provides that "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. . . ." Section 802(3), 16 U.S.C. 3112(3), speaks to the policy of "protecting the continued viability of all wild renewable resources in Alaska." However, those are the only sections to use the phrase, and the priority granted in ANILCA and the other provisions establishing the federal management system refer to "fish and wildlife" and do not use the term "wild, renewable resources."

grant a priority for some or all, or, as the current proposal is written, for none other than fish and wildlife.

Please contact me if I can be of further assistance.

Sincerely,

Bruce M. Botelho
Attorney General

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