Special Publication No. SP1995-001

Report on Implementation of the 1992 Subsistence Law

by

Alaska Department of Fish and Game

1995

Alaska Department of Fish and Game Division of Subsistence

Symbols and Abbreviations

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Weights and measures (metric)

centimeter	cm
deciliter	dL
gram	g
hectare	ha
kilogram	kg
kilometer	km
liter	L
meter	m
milliliter	mL
millimeter	mm

Weights and measures (English)

cubic feet per second	ft^3/s
foot	ft
gallon	gal
inch	in
mile	mi
nautical mile	nmi
ounce	oz
pound	lb
quart	qt
yard	yd

Time and temperature

day	d
degrees Celsius	°C
degrees Fahrenheit	°F
degrees kelvin	K
hour	h
minute	min
second	s

Physics and chemistry

all atomic symbols

alternating current	AC
ampere	A
calorie	cal
direct current	DC
hertz	Hz
horsepower	hp
hydrogen ion activity (negative log of)	pH
parts per million	ppm
parts per thousand	ppt, ‰
volts	V
watts	W

General

Alaska Administrative Code	AAC
all commonly-accepted abbreviations	e.g., Mr., Mrs., AM, PM, etc.
all commonly-accepted professional titles	e.g., Dr., Ph.D., R.N., etc.
at	@
compass directions:	
east	E
north	N
south	S
west	W
copyright	©
corporate suffixes:	
Company	Co.
Corporation	Corp.
Incorporated	Inc.
Limited	Ltd.
District of Columbia	D.C.
et alii (and others)	et al.
et cetera (and so forth)	etc.
exempli gratia (for example)	e.g.
Federal Information Code	FIC
id est (that is)	i.e.
latitude or longitude	lat. or long.
monetary symbols (U.S.)	$, ¢
months (tables and figures)	first three letters (Jan,...,Dec)
registered trademark	®
trademark	™
United States (adjective)	U.S.
United States of America (noun)	USA
U.S.C.	United States Code
U.S. state	two-letter abbreviations (e.g., AK, WA)

Measures (fisheries)

fork length	FL
mideye-to-fork	MEF
mideye-to-tail-fork	METF
standard length	SL
total length	TL

Mathematics, statistics

all standard mathematical signs, symbols and abbreviations

alternate hypothesis	H_A
base of natural logarithm	e
catch per unit effort	CPUE
coefficient of variation	CV
common test statistics	(F, t, χ^2, etc.)
confidence interval	CI
correlation coefficient (multiple)	R
correlation coefficient (simple)	r
covariance	cov
degree (angular)	°
degrees of freedom	df
expected value	E
greater than	>
greater than or equal to	≥
harvest per unit effort	HPUE
less than	<
less than or equal to	≤
logarithm (natural)	ln
logarithm (base 10)	log
logarithm (specify base)	log_2, etc.
minute (angular)	'
not significant	NS
null hypothesis	H_O
percent	%
probability	P
probability of a type I error (rejection of the null hypothesis when true)	α
probability of a type II error (acceptance of the null hypothesis when false)	β
second (angular)	"
standard deviation	SD
standard error	SE
variance	
population	Var
sample	var

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by

Alaska Department of Fish and Game, Division of Subsistence, Anchorage

Alaska Department of Fish and Game
Division of Subsistence
333 Raspberry Road, Anchorage, AK 99518-1599

1995

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This document should be cited as:
ADF&G (Alaska Department of Fish and Game). 1995. Report on implementation of the 1992 subsistence law. Alaska Department of Fish and Game Division of Subsistence, Special Publication No. SP1995-001, Anchorage.

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Report on Implementation of the 1992 Subsistence Law

Contents

I. Overview of Alaska's Subsistence Management Program, 1978-1994.....2
The 1978 Subsistence Law.....3
The 1986 Subsistence Law.....4
The 1992 Subsistence Law.....5

II. Implementing Actions Taken by ADF&G and the Boards of Fisheries and Game 7
Regulation Review: Establishing Consistency of pre-1992 Regulations With the 1992 Law.....7
The Regulatory Process: Proposals for Change to Subsistence Regulations.....9
Nonsubsistence Areas: Actions by the Joint Boards.....9

III. Summary of Legal Challenges Affecting the 1992 Law.....10

IV. Dual Federal - State Subsistence Management Update 11
The Federal Subsistence Program.....12
Legal Challenges to Federal Management of Subsistence in Alaska.....13

V. Appendices.....16
A. Text of the 1992 Subsistence Law.....16
B. Subsistence Management Chronology.....25
C. Listing of Customary and Traditional Use Findings.....29
D. Record of Implementing Actions Taken by the Boards of Fisheries and Game, 1992 - 1994.....36

Alaska Department of Fish and Game
Division of Subsistence
January 1995

Introduction

Alaska's subsistence law, enacted in 1992, calls for a review in 1994 by the Governor and the Legislature of "the operation of this Act and the regulations adopted under the Act" (Sec. 9, ch. 1, SSSLA 1992). The 1992 Subsistence Law also contains "sunset' provisions effective October 1, 1995 (Secs. 5, 9, 12, ch. 1, SSSLA 1992). If the legislature does not address the subsistence law during the 1994 legislative session, the "sunset' provisions will effectively repeal the 1992 law in October 1995, and the subsistence law will revert to the provisions of the 1986 subsistence law (Secs. 3, 5, ch. 1, SSSLA 1994).

This report has been prepared to facilitate review of the 1992 law. It will describe the Board of Fisheries' and the Board of Game's implementation of regulations under the 1992 law, operation of the subsistence law under these regulations, and important legal issues that have arisen. In addition, the report will summarize key provisions of the 1978, 1986, and 1992 subsistence laws, and provide a chronology of subsistence management in Alaska since 1960, including recent federal management on federal public lands.

An important aspect of the 1992 law is the absence of the "rural preference" for subsistence. This is due to the 1989 decision of the Alaska Supreme Court in McDowell v. State (785 P. 2d 1 [Alaska 1989]), where the Alaska Supreme Court found the rural residency preference in the 1986 state subsistence law to be violative of several provisions of the Alaska Constitution. On remand to the superior court, the rural preference provisions were severed from the 1986 subsistence law. This legal decision rendered the state law inconsistent with the rural preference provisions of ANILCA, the federal subsistence law. Subsequently, in July of 1990, the federal government took over management of subsistence hunting on federal public lands in Alaska. The state continued to manage for subsistence hunting and fishing on state and private lands in Alaska under the 1986 state law without the excised "rural preference" provisions. This resulted in an application of the state subsistence law to all Alaskans who engage in subsistence uses, and not only those who resided in rural areas.

In 1992 the legislature passed the subsistence law currently in effect. The 1992 law provides a preference for the subsistence uses of all Alaskans regardless of where they reside in the state. The 1992 law has an additional provision that prohibits the Boards of Fisheries and Game from permitting subsistence hunting or fishing in areas identified by the boards as nonsubsistence areas.[1] The 1992 law is applied on state and private lands and ANILCA continues to be applied on federal public lands in Alaska.

In the two-and-a-half years since the 1992 law was passed, subsistence management in Alaska has grown enormously complex. The federal and state subsistence management programs illustrate alternative, and frequently competing, approaches to managing subsistence uses and integrating them with other uses of fish and wildlife. Though separate, the state and federal regimes are nonetheless co-dependent; each action of one has an effect on the other. In some cases,

[1] The nonsubsistence area provision was invalidated by the superior court in 1993 in Kenaitze v. State. The superior court decision has been appealed to the Alaska Supreme Court.

jurisdictions overlap or are unclear. Nonetheless, the regulations and policies developed by these two resource management programs significantly affect the lives of a great many Alaskans.

I. Overview of Alaska's Subsistence Management Program, 1978-1994

The 1978 Subsistence Law

When the Alaska legislature passed the first state subsistence law in 1978, it created a subsistence management concept that has endured to the present, notwithstanding the significant statutory changes that have occurred. The legislature found that "it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs, and traditions of Alaskan residents" (Sec. 1 ch. 151 SLA 1978). To carry out these objectives, the 1978 subsistence law did, essentially, four things. First, though leaving unanswered the question of who the subsistence *users* were, the law defined subsistence *uses* of fish and wildlife as,

> The customary and traditional uses in Alaska of wild, renewable resources for direct personal and family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption (AS 16.05.940 [26]).

Second, the statute required the Alaska Boards of Fisheries and Game to adopt regulations permitting subsistence uses to occur when a harvestable surplus of a resource was available (AS 16.05.251[b], AS 16.05.255[b]).

Third, the statute established that in times of resource shortage, subsistence uses be given a preference over other uses, such as commercial, sport, or personal use. This meant that subsistence hunting and fishing were to be restricted last whenever it became necessary to restrict harvest opportunities, for conservation purposes. The 1978 law read as follows:

> Whenever it is necessary to restrict the taking of fish [game] to assure the maintenance of fish stocks [game resources] on a sustained yield basis, or to assure the continuation of subsistence uses of such resources, subsistence shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:
>
> (1) customary and direct dependence upon the resources as the mainstay of one's livelihood;
> (2) local residency
> (3) availability of alternative resources (AS 16.05.251, AS 16.05.255).

Fourth, the 1978 subsistence law created the Division of Subsistence within the Department of Fish and Game with the broad mandate to "compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state (AS 16.05.094)."

The federal counterpart to Alaska's subsistence law was contained in Title VIII of ANILCA, passed by Congress in 1980. In Title VIII the definition of "subsistence uses" provided:

> "the term subsistence uses means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal and family consumption as food, shelter, fuel, clothing, tools, and transportation; for the making and selling of handicrafts articles out of nonedible by products of fish and wildlife resources taken for personal or family consumption; for barter or sharing for personal or family consumption; and for customary trade" (P.L. 96-487, December 2, 1980 [94 Stat. 2371]).

Title VIII applies to federal public lands, and provides the potential for two separate systems of fish and wildlife management to exist in Alaska. However, in Section 805, Congress inserted a provision that offered the state the option of continuing to manage subsistence on all lands in the state, if the Alaska legislature enacted "laws of general applicability which are consistent with and provide for the definition, preference, and participation specified [in the federal law]." This issue of consistency between state subsistence laws and Title VIII has been problematic since passage of ANILCA 1980.

The 1986 Subsistence Law

Following passage of ANILCA, the state legislature did not insert language into the state law that limited "subsistence uses" to rural residents, and as a result the state was initially not in compliance with Title VIII. In 1982, the Joint Boards of Fisheries and Game inserted a "rural' residency" provision in regulation, whereupon the Department of the Interior confirmed the state's official compliance. However, in 1985 the Alaska Supreme Court, in Madison v. Alaska Department of Fish and Game, found that this action by the boards was not authorized by the state subsistence law. As a result of Madison, the state was again out of compliance with the "laws of general applicability" requirements of Title VIII. The legislature enacted substantial revisions to the 1978 statute during the 1986 session.

The 1986 subsistence law amended the definition of "subsistence uses" to read:

> "the noncommercial, customary and traditional uses [IN ALASKA] of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption" (AS 16.05.940 [23]).

"Rural area" was defined as:

> "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area" (AS 16.05.940 [32]).

Other changes contained in the 1986 law more explicitly defined steps to be taken by the boards in providing for subsistence. Implementing the law now required that the boards first identify the rural areas of the state, and then identify the fish stocks and game populations that are customarily and traditionally used for subsistence in those areas. For the stocks and populations identified as having customary and traditional uses, the board must then determine the harvestable surplus, and the portion of that surplus needed to provide a reasonable opportunity to satisfy subsistence uses. Finally, the board must adopt the subsistence regulations necessary to provide for that opportunity.

This new law was promptly found by the Department of the Interior to be consistent with ANILCA, and by the end of 1986 the state once again managed fish and wildlife throughout the state. Beginning that year the boards engaged in an ambitious effort to identify rural areas, customary and traditional uses, and regulations that provided for reasonable subsistence harvest opportunity. This process was completed for most of the major subsistence hunts and fisheries in the state by 1990.

The 1992 Subsistence Law

The legal foundation for subsistence management changed abruptly in December of 1989 when the Alaska Supreme Court ruled in McDowell v. State that the rural subsistence priority was in violation of three sections of the Alaska constitution. The court prohibited the state from using rural residency as the basis for subsistence eligibility.[2] With this ruling, the state once again was out of compliance with the subsistence provisions of ANILCA, and the Secretary of the Interior began preparing for a federal "takeover" of subsistence management on federal lands.

In the spring of 1990 the Alaska legislature considered placing a constitutional amendment before voters that would enable the state to meet ANILCA's guidelines. That effort failed, as did a subsequent effort during a special legislative session in June of 1990. In that session, the Alaska Senate supported placing an amendment on the ballot, but in the House the measure fell just one vote short of the two-thirds majority required for its passage.

Governor Hickel convened a Subsistence Advisory Council in 1991, shortly after he took office. He then brought their recommendations for a new subsistence law to the 1992 legislative session. However, the legislature adjourned in May of 1992 having taken no action on subsistence, whereupon the governor called a special legislative session in the summer of 1992. Many subsistence management options were then considered by the legislature. The subsistence law that eventually resulted from the 1992 special session did not bring the state's program into compliance with ANILCA, but it made some important changes.

Consistent with the McDowell Decision, the 1992 law allows any Alaskan, regardless of residence, to participate in subsistence hunts and fisheries, provided that they use the fish or game for subsistence purposes. (After McDowell, all Alaskan's were eligible under the 1986 law as

[2] On remand, the superior court ruled that the 1986 subsistence statute could stand without the rural preference provision, and deleted that provision from the statute.

well.) The law also establishes a process by which the boards are directed to identify "nonsubsistence" areas where subsistence regulations cannot be adopted:

> "The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of the nonsubsistence areas. A nonsubsistence area is an area or community where dependence on subsistence is not a principal part of the economy, culture, or way of life of the area or community..." (AS 16.05.258 (c).

The 1992 law also makes explicit several provisions of the 1986 law which were often regarded as implicit. For example, the procedures to be followed by the Alaska Boards of Fisheries and Game in implementing the subsistence preference, contained in AS 16.05.258 (a), and (b) of the 1986 law, were rewritten in a more systematic format. This section directs that:

> "Except in nonsubsistence areas the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, that are customarily and traditionally taken or used for subsistence..." AS 16.05.258 (a).

> "The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistence with sustained yield. If a portion of a stock or population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses..." AS 16.05.258 (b)

Section (b) continues on to outline the steps that the board must follow in order to provide a reasonable opportunity for subsistence uses. These steps differ depending on whether the harvestable portion of the stock or population is sufficient to provide for all, some, or no other consumptive uses in addition to subsistence uses.

Other sections of the 1992 law provide definitions of "reasonable opportunity," "customary and traditional," and "customary trade:"

> "For purposes of this section, 'reasonable opportunity' means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking fish and game" (AS 16.05.258 [f]).

> "'customary and traditional' means the noncommercial, long term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of fish or game" (AS 16.05.940 [7]).

> "'customary trade' means the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game resources; the terms of this paragraph do not restrict money sales of furs and furbearers" (AS 16.05.940 [8]).

The 1992 law also calls for a review of the operation of the law by the governor and the legislature. Sections 5 and 12 provide that, effective October 1, 1995, AS 16.05.258 is replaced with its counterpart from the 1986 Subsistence Law and AS 16.05.940 (7) and (8) are repealed. These "sunset" provisions have the effect of requiring that the legislature either take action to change the law, reauthorize it, repeal it, or allow it to revert to the 1986 version.

II. Actions Taken by ADF&G and the Boards of Fisheries and Game to Implement the 1992 State Subsistence Law

Regulation Review: Establishing Consistency of pre-1992 Subsistence Regulations With the 1992 Law

Sections 6 and 7 of the 1992 Subsistence Law effectively repealed all existing (pre-1992) subsistence regulations at such time as either of the boards, or the boards acting jointly, enacted any new subsistence regulation. As a consequence, and in order to avoid a disruptive hiatus during which most subsistence regulations would be repealed, the Department of Law advised the Department of Fish and Game that it would be necessary for both boards to undertake an expedited, comprehensive review of the subsistence hunting and fishing regulations contained in the Alaska Administrative Code. This review of existing regulations had to take place on an expedited basis for two reasons. One reason was to minimize delays in addressing any new proposals for regulatory change that might be submitted by the public. Another reason was to meet the legislative intent, stipulated in Section 7 of the law, to "expeditiously adopt regulations necessary to implement the Act."

The goal of the consistency review process was to determine whether existing subsistence regulations were consistent with the new law. If a board found that a regulation was consistent with the subsistence law, it could readopt the regulation. If the board found that that there was a conflict with the subsistence law in the regulation, or in its application, the board was directed to amend and readopt, or repeal it. For each regulation reviewed, it was necessary that the boards be provided with enough information to provide a basis for their determination. This information base is described in greater detail below.

The consistency review also was intended to assure that the board systematically applied the analytical steps contained in the 1992 law to all subsistence regulations. These steps are:

(1) the board must identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence
(2) the board must determine, for each stock or population, whether any portion can be harvested, consistent with sustained yield, and they must further determine the amount reasonably necessary for subsistence uses.
(3) if there is a harvestable surplus, the board must adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations.
(4) if the available surplus is insufficient to provide a reasonable opportunity for all subsistence needs, then the board must eliminate all nonsubsistence uses and must develop "Tier II" regulations that distinguish among subsistence users through limitations based on the three criteria contained in AS 16.05.258 (b) (4) (B) (i-iii).

Department of Law advice to ADF&G stressed the need for an adequate information base for board deliberations during the consistency review. Accordingly, ADF&G staff prepared several volumes of material for use by the boards, most notably:

- **Customary and Traditional (C&T) Use Worksheets** -- The subsistence law requires that the boards identify the fish stocks and game populations that are customarily and traditionally used for subsistence. These determinations are based in large part on materials presented on "customary and traditional use worksheets." These worksheets organize materials needed by the boards, organized according to the eight criteria that the boards developed to guide this process. C&T worksheets were prepared or updated for all fish stocks and game populations for which subsistence fishing or hunting regulations existed, as well as those for which C&T deliberations could be expected in the near future. A listing of the game populations and fish stocks for which customary and traditional determinations have been made by the boards is contained in the Appendix.

- **Regulatory Histories** -- ADF&G provided the boards with summaries of hunting and fishing regulations since statehood, for their use in understanding how harvest opportunities have changed over time. This information was used as reference material, particularly in determining if current regulations provide a reasonable opportunity for subsistence uses.

- **Harvest Data Summaries** -- ADF&G provided the boards with summaries of fish and wildlife harvests since statehood or whatever period such information had been gathered. These data were compiled, as available, for all of the fish stocks and game populations presently recognized as being used for subsistence; they derived from department harvest data collection programs of the divisions of subsistence, wildlife conservation, sport fish, and commercial fisheries.

- **Consistency Review Worksheets** -- In order to assist the boards in their deliberation, worksheets were prepared by ADF&G staff that enabled systematic review of proposals and groups of proposals. The worksheets provided information that was organized to address the following questions:

    1. Is the stock or population in a nonsubsistence area?
    2. Is the population customarily and traditionally taken or used for subsistence?
    3. Can a portion of the population be harvested consistent with sustained yield?
    4. What amount is reasonably necessary for subsistence use?
    5. Do the regulations provide a reasonable opportunity for subsistence uses?
    6. Is it necessary to reduce or eliminate other uses in order to provide a reasonable opportunity for subsistence uses?
    7. Does the adoption of regulations reducing or eliminating consumptive uses other than subsistence uses provide a reasonable opportunity for subsistence uses?
    8. Other regulations requiring action

As a consequence of the consistency review process, during the 1992-1993 boards cycle, the Board of Fisheries and the Board of Game accomplished a complete regulatory review of the state's subsistence hunting and fishing regulations. Actions taken by the Board of Fisheries and Board of Game in the course of the consistency review are listed in Appendix D, "Record of Implementing Actions by the Boards of Fisheries and Game, 1992-1994." The consistency review

actions were taken at Board of Game meetings on November 9-11, 1992 and January 19-28, 1993, and at Board of Fisheries meetings on January 5-11, 1993 and February 23-27, 1993.

The Regulatory Process: Proposals for Change to Subsistence Regulations

Following the regulation review process described above, the Boards of Fisheries and Game considered subsistence proposals that had been deffered from previous board meetings due to changes in the subsistence laws, and new proposals submitted during the 1992-93, 1993-94, and 1994-1995 cycles.

The boards' procedure for addressing subsistence proposals followed the steps described earlier for implementation of the 1992 Subsistence Law, and the requirements of the Administrative Procedures Act. Public proposals for change to subsistence regulations are solicited annually by the Department of Fish and Game, as are proposals for changing other hunting and fishing regulations. The current boards' policy is to address subsistence proposals each year, as they are submitted, rather than on the biennial or triennial cycle applied to other proposals.

Proposals other than those affecting subsistence regulations also may trigger review under the 1992 Subsistence Law. If a fish stock or game population (or portion thereof) has not yet been evaluated to determine whether it is subject to customary and traditional use, this finding is made prior to board action on any proposal affecting that stock or population. If a subsistence use is found to exist and there is a harvestable surplus, the board must determine the amount necessary for subsistence use (if any), and must provide regulations that provide a reasonable opportunity for that use to occur. Appendix C contains a listing of board findings, as of January 1, 1995, pertaining to customary and traditional uses and the amount necessary to provide for those uses.

Board deliberation on subsistence proposals, and on other proposals that may require a customary and traditional use determination, is accomplished using information provided by the public through oral and written testimony, and by staff of the Department of Fish and Game. The results of deliberations by the boards on all subsistence-related proposals are listed in Appendix D, "Record of Implementing Actions by the Boards of Fisheries and Game, 1992-1994."

Nonsubsistence Areas: Action by the Joint Boards

The 1992 Subsistence Law, in Section 2, prohibits the boards from allowing subsistence hunting and fishing in nonsubsistence areas. It requires the Joint Boards to identify nonsubsistence areas, and includes 13 criteria to be used by the boards in identifying those areas. A nonsubsistence area is defined as "...an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community" (AS 16.05.258 [c]).

Following passage of the 1992 law, proposals were developed by the department, at the request of the boards, for nonsubsistence areas in and around Fairbanks, the Matanuska-Susitna Valley, Anchorage, the Kenai Peninsula, Valdez, Whittier, Juneau, and Ketchikan. These initial

proposals, for the state's most densely populated areas, were thought to most closely meet the legislative intent of the nonsubsistence area provision. Information about each area proposal was compiled by the department, consistent with the 13 evaluation criteria contained in AS 16.05.258 (c) (1-13). These seven nonsubsistence areas were considered by the Joint Board at meetings held November 1-7, 1992 and March 6-8, 1993. The result of these sessions was that nonsubsistence areas were created around all of the proposed areas except Whittier, which was deleted from conideration for technical reasons.

The Joint Board was scheduled to take up public proposals to consider other nonsubsistence areas and changes to existing nonsubsistence area boundaries in February 1994. However, due to the invalidation of the nonsubsistence area provision of the 1992 subsistence law in Kenaitze v. State, the meeting was cancelled and the proposals deferred until the validity of the nonsubsistence area provision is resolved on appeal by the Aalska Supreme Court. The outcome of the Kenaitze appeal will determine whether nonsubsistence areas are permissable and whether the Joint Board will consider these or other proposals on the subject.

To comply with the Kenaitze order, the Joint Board called a special teleconference meeting on April 28, 1984, to set aside the nonsubsistence areas they had created the previous year. After considering information provided by the Department of Fish and Game and the Department of Law, the boards set aside the nonsubsistence areas and approved regulations that in most cases reestablished the subsistence hunts and fisheries that had been in place in those areas from 1990 - 1992

III. Summary of Legal Challenges Affecting the 1992 Law

As with earlier versions of the State's subsistence law and state management under ANILCA, there continue to be legal challenges to the provisions and implementation of the subsistence law. Initially, it is important to note that the two earlier Alaska Supreme Court decisions, McDowell v. State, 785 P.2d 1 (Alaska 1989) and State v. Morry, 836 p.2d 358 (Alaska 1992), affected development of the 1992 law.

In McDowell, the Alaska Supreme Court found that the subsistence preference for rural residents in the 1986 law violated the equal access and equal protection provisions of the Alaska Constitution. On remand to the superior court, the rural provisions were severed from the 1986 law.[3] After the McDowell decision, the boards employed what has become known as the all-Alaskans policy. In practice under this policy the boards based subsistence regulations on the presumption that subsistence uses could not be limited to rural Alaska residents, but that all Alaskans who wished to engage in subsistence hunting and fishing were eligible under the law.

The all-Alaskan policy was tested in Morry. The Alaska Supreme Court ruled that under the 1986 subsistence law, all Alaskans were eligible to participate in subsistence hunting and fishing.

[3] The rural preference provisions still appear in the 1992 law at section 3, which provides that if the 1992 law sunsets, the provisions of the 1986 law will again become effective. Sec. 3, ch. 1, SSSLA 1994. Although the rural preference provisions remain in the 1986 version of the subsistence law, they have been invalidated by the Supreme Court and can not legally be implemented.

Neither the 1986 nor the 1992 subsistence laws provide for subsistence hunting or fishing in urban areas. Under the 1986 law (consistent with ANILCA) subsistence hunting and fishing was not provided in non-rural areas. The 1992 law directs the boards to identify nonsubsistence areas where subsistence is not a principal characteristic of the economy, culture, and way of life (Sec.2, ch. 1 SSSLA 1992). The 1992 law does not limit subsistence uses to rural Alaskan residents, but it does prohibit subsistence hunting and fishing from occurring in identified "nonsubsistence areas".

The nonsubsistence area provision of the 1992 law is currently ineffective after being invalidated by the superior court in Kenaitze v. State, as violative of the equal protection provisions of the Alaska Constitution.[4] The State has appealed the superior courts' decision to the Alaska Supreme Court, where it has been fully briefed and argued and a decision is pending.

Other legal challenges to the 1992 subsistence law in state superior court include issues of how customary and traditional findings should be made, whether the Tier II preferences are constitutional, how Tier II hunts should operate, and how the subsistence preference should apply when distant mixed stock fisheries are involved. Most of these are continued litigation of unresolved issues that were formerly in litigation under the 1986 State subsistence law and the State's management of subsistence under ANILCA.

IV. Dual Federal - State Subsistence Management Update

In July of 1990 the US Department of the Interior officially notified the state that Alaska's subsistence laws no longer were consistent with Title VIII of ANILCA, and that the federal land management agencies would be implementing a plan to assume management of subsistence hunting and fishing on federal public lands. Thus began what has become known as "dual management," a direct consequence of the decision of the Alaska Supreme Court in McDowell v. State, whereby the state and federal governments implement separate subsistence management programs on their respective jurisdictions.

The new federal subsistence management program takes its mandate and direction from a literal interpretation of Title VIII of ANILCA. The federal program has grown in a few years to the point where it is having a significant effect on the lives of many Alaskans, and upon the state's own wildlife and fisheries management programs.

Among the key differences between the state and federal programs is the basis for eligibility (federal: qualified rural residents, state: all Alaskans who engage in subsistence uses). Another is the exclusive subsistence focus of the Federal Subsistence Board, compared with that of the Alaska Boards of Fisheries and Game, with its long tradition and broad responsibility for considering the interests of all uses, and user groups.

[4] The Kenaitze case was not originally a challenge to the 1992 subsistence law. It arose under the 1986 subsistence law as a challenge to the all-Alaskans policy and the State's Post-McDowell subsistence fishing regulations on the Kenai Peninsula. The complaint was amended to challenge the nonsubsistence area provision of the 1992 law.

The state and federal governments agree that split federal-state management of fish and wildlife is undesirable. However, the way to regain unified state subsistence management remains elusive. Under almost any scenario, the federal subsistence management program can be expected to continue to grow over the next few years, while jurisdictions and authorities are clarified through administrative and judicial activity.

The Federal Subsistence Management Program

Since 1990 the federal government has designed and implemented a subsistence management program with the following major components.

Federal Subsistence Board: The Federal Subsistence Board (FSB) is comprised of five members. The board is made up of the Alaska regional directors of the four major federal land management agencies (National Park Service, Bureau of Land Management, Forest Service, and Fish and Wildlife Service) and the Alaska director of the Bureau of Indian Affairs. Initially the FSB adopted state subsistence regulations and customary and traditional determinations. The board also reviewed the state's rural area determinations, and evaluated the adequacy of public involvement through local fish and game advisory committees and regional councils. More recently, the Federal Subsistence Board has met in regular sessions to take up public proposals for regulatory change and to address administrative topics pertaining to the development of the federal subsistence management program..

Creation of a regulatory board with subsistence management as its exclusive responsibility is the most distinctive feature of the federal program. This contrasts with the state subsistence management regime, where the regulatory boards address issues pertaining to all uses of fish and game, whether sport, commercial, personal use, subsistence, or non-consumptive use.

Regional Advisory Councils: The federal program incorporates ten Regional Subsistence Advisory Councils, which provide the bulk of the public input to the Federal Subsistence Board.[5] The advisory councils were conceived in ANILCA as having significant influence in the regulatory process, and the FSB generally has concurred with regional council's recommendations for proposed regulatory changes.

Federal Subsistence Staff Committee: The federal agencies with subsistence management responsibilities (the National Park Service, Fish and Wildlife Service, Forest Service, Bureau of Land Management, and Bureau of Indian Affairs) have all assigned staff to the federal subsistence management effort. Subsistence proposals that are received by the Federal Subsistence Board are reviewed by this "Staff Committee," which gathers information and public comment and recommends actions to the board. To date, the FSB has rarely deviated from the recommendations of the Staff Committee.

[5] The state maintained a regional council system as part of its pre-McDowell subsistence program. Federal reimbursement funding for the councils ended in 1992, and the state councils were disbanded.

Office of Subsistence Management: Since 1991 the federal subsistence management program, with the Fish and Wildlife Service's Office of Subsistence Management (OSM) as the lead agency, has grown to include over 40 professional positions (in addition to the dozen or so that make up the "Staff Committee"). The Office of Subsistence Management has focused its efforts on four primary tasks:

- Providing technical support to the Federal Subsistence Board. This includes preparing background information on all regulatory proposals and taking care of the logistics associated with scheduling and conducting board meetings.

- Coordinating the federal regional subsistence advisory councils. OSM staff coordinators, assigned to each of ten regional councils, are responsible for scheduling meetings and providing technical support. The OSM also works to integrate actions of the separate regional councils.

- Negotiating cooperative agreements with regional Native organizations. OSM staff have entered into cooperative agreements with several Native organizations for the purpose of gathering information, such as harvest data, for subsistence activities on federal public lands.

- Coordinating implementation of a process for making federal determinations on customary and traditional (c&t) use and eligibility.

Legal Challenges to Federal Management of Subsistence in Alaska

Alaska v. Babbitt: the State Challenge to the Extent of Federal Jurisdiction Under ANILCA

In 1992 the state challenged regulations adopted by the Secretaries of Interior and Agriculture to implement Title VIII of ANILCA (subsistence uses on federal "public lands"). The state alleged that the regulations exceed the United States' authority insofar as they assert jurisdiction in nonnavigable waters located off "public lands," or on navigable waters anywhere in Alaska. The state also claimed that ANILCA does not provide statutory authority for the Secretaries' implementation of a comprehensive scheme for fish and wildlife management on the "public lands." The case has been consolidated with Katie John v. State.

In 1993, the district court decided to manage the following ANILCA jurisdictional cases jointly: Kluti-Kaah Native Village of Copper Center v. Alaska (consolidated with Arctic Fish and Game Council v. Babbitt), Katie John v. United States (consolidated with Alaska v. Babbitt), Fish and Game Fund v. Alaska, Native Village of Stevens Village v. McVee, Peratrovich v. United States, Native Village of Quinhagak v. United States, and Ketzler v. Alaska. The court decided to deal with the scope of the federal government's authority (the "who" issue) and whether navigable waters are "public lands (the "where I" issue) first.

On March 30, 1994, Judge Holland ruled that the Secretaries of Interior and Agriculture have authority to manage the taking of fish and wildlife on "public lands." The Ninth Circuit Court of Appeals accepted interlocutory appeals on this issue. Judge Holland stayed his decision pending appeal. The parties agreed to stay proceedings in the other cases until the Ninth Circuit renders its decision in Babbitt.

The Babbitt and John appeals have been consolidated, and a motion to expedite the appeals was granted. In January 1995, the state stipulated to withdraw its appeal of the "who" issue. It was dismissed February 7, 1995.

Katie John v. United States: Deciding the Extent of Federal Jurisdiction Over Fisheries in Navigable Waters

In this case the plaintiffs claim that ANILCA requires the federal government to manage fisheries in navigable waters of Alaska, and accordingly, that the Federal Subsistence Board should take over management of the Copper River and authorize a subsistence fishery at Batzulnetas.

On March 30, 1994, Judge Holland ruled that navigable waters are "public lands" because the navigational servitude is an interest to which the United States has title. (The navigational servitude is a power that enables the federal government to regulate navigable waters for purposes of commerce, navigation, and national defense). The Ninth Circuit Court of Appeals has accepted interlocutory appeals on this issue. Judge Holland stayed his decision pending appeal. The parties agreed to stay proceedings in the other cases until the Ninth Circuit renders its decision.

On appeal, the state argues that "public lands" includes only waters in which the United States owns the submerged lands. This includes nonnavigable waters on federal lands and some navigable waters. The federal defendants agree that the navigational servitude is not a property interest to which "title" may attach, and therefore does not provide the United States with a basis for regulating navigable waterways as "public lands." However, the federal defendants argue that "public lands" includes navigable waters in which the United States has reserved water rights. (Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- its reservation of that land includes an implied reservation of water rights necessary to fulfill the purposes for which the land was reserved.) The federal defendants are asking for Judge Holland's order holding that "public lands" includes all navigable waters in Alaska be reversed, and the case remanded to the Departments of Interior and Agriculture to determine what waters may be subject to federal reserved water rights.

Oral arguments were held on February 8, 1995.

V. Appendices

A. Text of the 1992 Subsistence Law

B. Subsistence Management Chronology

C. Listing of Customary and Traditional Use Findings by the Boards of Fisheries and Game, as of January 1995

D. Record of Implementing Actions by the Alaska Boards of Fisheries and Game, 1992-1994

Appendix A. Text of the 1992 Subsistence Law

AN ACT

1 Relating to the taking of fish and game; and providing for an effective date.

2

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

4 (1) there are Alaskans, both Native and non-Native, who have a traditional,

5 social, or cultural relationship to and dependence upon the wild renewable resources produced

6 by Alaska's land and water; the harvest and use of fish and game for personal and group

7 consumption is an integral part of those relationships;

8 (2) although customs, traditions, and beliefs vary, these Alaskans share ideals

9 of respect for nature, the importance of using resources wisely, and the value and dignity of

10 a way of life in which they use Alaska's fish and game for a substantial portion of their

11 sustenance; this way of life is recognized as "subsistence";

12 (3) customary and traditional uses of Alaska's fish and game originated with

13 Alaska Natives, and have been adopted and supplemented by many non-Native Alaskans as

14 well; these uses, among others, are culturally, socially, spiritually, and nutritionally important

15 and provide a sense of identity for many subsistence users;

1 (4) while Alaska's fish and game are generally still plentiful, these resources
2 are not unlimited and cannot provide for every desired use, now or in the future; competition
3 for and the level of effort on these resources have required the legislature and the Board of
4 Fisheries and Board of Game to establish a preference for subsistence among the various
5 beneficial uses of fish and game in the state; and
6 (5) in most areas of the state, a preference for subsistence can be provided
7 without an overly burdensome intrusion upon other consumptive uses of fish and game.
8 (b) It is the purpose of this Act
9 (1) to develop and maintain healthy fish stocks and game populations through
10 management based on the sustained yield principle; and
11 (2) to provide for a preference for subsistence uses over other consumptive
12 uses of fish and game resources.
13 (c) It is the intent of the legislature that
14 (1) subsistence uses of Alaska's fish and game resources are given the highest
15 preference, in order to accommodate and perpetuate those uses; and
16 (2) this Act not result in significant reallocations of fish and game in Alaska.
17 * Sec. 2. AS 16.05.258 is repealed and reenacted to read:
18 Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND
19 GAME. (a) Except in nonsubsistence areas, the Board of Fisheries and the Board
20 of Game shall identify the fish stocks and game populations, or portions of stocks or
21 populations, that are customarily and traditionally taken or used for subsistence. The
22 commissioner shall provide recommendations to the boards concerning the stock and
23 population identifications. The boards shall make identifications required under this
24 subsection after receipt of the commissioner's recommendations.
25 (b) The appropriate board shall determine whether a portion of a fish stock
26 or game population identified under (a) of this section can be harvested consistent
27 with sustained yield. If a portion of a stock or population can be harvested consistent
28 with sustained yield, the board shall determine the amount of the harvestable portion
29 that is reasonably necessary for subsistence uses and
30 (1) if the harvestable portion of the stock or population is sufficient
31 to provide for all consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) shall adopt regulations that provide for other uses of those stocks or populations, subject to preferences among beneficial uses; and

(C) may adopt regulations to differentiate among uses;

(2) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) may adopt regulations that provide for other consumptive uses of those stocks or populations; and

(C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

(A) determine the portion of the stocks or populations that can be harvested consistent with sustained yield; and

(B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and

(4) if the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses, other than subsistence uses;

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or game population by the subsistence user for human

consumption as a mainstay of livelihood;

(ii) the proximity of the domicile of the subsistence user to the stock or population; and

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

(c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

(3) the extent and the kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

(4) the amount and distribution of cash income among those domiciled in the area or community;

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

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

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those domiciled in the area or community;

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

(11) the geographic locations where those domiciled in the area or community hunt and fish;

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

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

(d) Fish stocks and game populations, or portions of fish stocks and game populations not identified under (a) of this section may be taken only under nonsubsistence regulations.

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

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

* **Sec. 3.** AS 16.05.258 is repealed and reenacted to read:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

(b) The boards shall determine

(1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested consistent with sustained yield; and

(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is

1 determined to exist under (b)(1) of this section. If the harvestable portion is not
2 sufficient to accommodate all consumptive uses of the stock or population, but is
3 sufficient to accommodate subsistence uses of the stock or population, then
4 nonwasteful subsistence uses shall be accorded a preference over other consumptive
5 uses, and the regulations shall provide a reasonable opportunity to satisfy the
6 subsistence uses. If the harvestable portion is sufficient to accommodate the
7 subsistence uses of the stock or population, then the boards may provide for other
8 consumptive uses of the remainder of the harvestable portion. If it is necessary to
9 restrict subsistence fishing or subsistence hunting in order to assure sustained yield
10 or continue subsistence uses, then the preference shall be limited, and the boards shall
11 distinguish among subsistence users, by applying the following criteria:
12 (1) customary and direct dependence on the fish stock or game
13 population as the mainstay of livelihood;
14 (2) local residency; and
15 (3) availability of alternative resources.
16 (d) The boards may adopt regulations consistent with this section that
17 authorize taking for nonsubsistence uses a stock or population identified under (a) of
18 this section.
19 (e) Fish stocks and game populations, including bison, or portions of fish
20 stocks and game populations, not identified under (a) of this section may be taken
21 only under nonsubsistence regulations.
22 (f) Takings authorized under this section are subject to reasonable regulation
23 of seasons, catch or bag limits, and methods and means. Takings and uses of
24 resources authorized under this section are subject to AS 16.05.831 and AS 16.30.
25 * **Sec. 4.** AS 16.05.940 is amended by adding new paragraphs to read:
26 (36) "customary and traditional" means the noncommercial, long-term,
27 and consistent taking of, use of, and reliance upon fish or game in a specific area and
28 the use patterns of that fish or game that have been established over a reasonable
29 period of time taking into consideration the availability of the fish or game;
30 (37) "customary trade" means the limited noncommercial exchange,
31 for minimal amounts of cash, as restricted by the appropriate board, of fish or game

1 resources; the terms of this paragraph do not restrict money sales of furs and
2 furbearers.
3 * **Sec. 5.** AS 16.05.940(36) and 16.05.940(37) are repealed.
4 * **Sec. 6.** REGULATIONS. Notwithstanding the provisions of AS 16.05.258, as in effect
5 on the day before the effective date of sec. 2 of this Act, the Board of Fisheries, Board of
6 Game, and Department of Fish and Game shall adopt regulations necessary to implement the
7 provisions of secs. 1, 2, and 4 of this Act.
8 * **Sec. 7.** TRANSITION. (a) It is the intent of the legislature that the Board of Fisheries
9 and the Board of Game expeditiously adopt regulations necessary to implement secs. 1, 2, and
10 4 of this Act.
11 (b) Regulations adopted by the Board of Fisheries, Board of Game, or Department
12 of Fish and Game after July 1, 1992, may not be inconsistent with the provisions of secs. 1,
13 2, and 4 of this Act.
14 (c) Regardless of whether regulations in effect on July 1, 1992, and adopted under
15 the authority of AS 16.05.251, 16.05.255, or 16.05.258, as that statute read on the day before
16 the effective date of sec. 2 of this Act, are inconsistent with the provisions of secs. 1, 2, or
17 4 of this Act, they may continue to be implemented and enforced until the effective date of
18 sec. 2 of this Act.
19 * **Sec. 8.** TRANSITION. After January 1, 1995, the Board of Fisheries, Board of Game,
20 and Department of Fish and Game may adopt regulations to implement AS 16.05.258, as
21 amended by sec. 3 of this Act. Regulations adopted under this section may not take effect
22 before the effective date of sec. 3 of this Act.
23 * **Sec. 9.** REVIEW. (a) The legislature acknowledges and recognizes that this Act deals
24 with a subject of vital concern and that the subject merits review. Therefore, it is the intent
25 of the legislature that the operation of this Act and the regulations adopted under this Act be
26 fully reviewed by the governor no later than June 1, 1994.
27 (b) This review period is intended to allow for further research and to gain experience
28 in implementing this Act and regulations adopted under secs. 6 and 7 of this Act. It is the
29 intent of the legislature that the governor convene a representative group to provide
30 recommendations to the governor before the end of the review period. It is the intent of the
31 legislature that representatives of the legislature and persons with a history in the formulation

1 of subsistence legislation in this state participate in the group.

2 (c) It is the intent of the legislature that the review under this section occur with

3 public input and participation.

4 (d) No later than September 1, 1994, the governor shall provide a report to the

5 legislature on the results of the review and proposed recommendations for statutory

6 amendments.

7 * **Sec. 10.** Sections 6 - 8 of this Act take effect immediately under AS 01.10.070(c).

8 * **Sec. 11.** Sections 1, 2, 4, and 9 of this Act take effect on the effective date of

9 regulations first adopted under sec. 6 of this Act by the Board of Fisheries and the Board of

10 Game.

11 * **Sec. 12.** Sections 3 and 5 of this Act take effect October 1, 1995.

AUTHENTICATION

The following officers of the Legislature certify that the attached enrolled bill, CCS HB 601, consisting of 8 pages, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

Passed by the House June 22, 1992

Ben Grussendorf, Speaker of the House

ATTEST:

Kristin Gray, Chief Clerk of the House

Passed by the Senate June 22, 1992

R. I. Eliason, President of the Senate

ATTEST:

Nancy Quinto, Secretary of the Senate

ACTION BY GOVERNOR

Approved by the Governor _____ 19____

Walter J. Hickel, Governor of Alaska

Appendix B. Subsistence Management Chronology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix C. Listing of Customary and Traditional Use Findings by the Boards of Fisheries and Game

A. FINDINGS BY THE BOARD OF GAME[6]

Species/Unit	Finding: Positive	Finding: Negative[7]	Amt. necessary for subsistence use
Black Bear			
1(C)	positive		50-70; 1 bear limit
6	positive		80-120
17	negative		
other units	not present or no determination		
Bison			
11		negative	
19D		negative	
20D		negative	
other units	not present or no determination		
Brown Bear			
4	positive		5-10
5	positive		3-6
6		negative	
8		negative	
9(A)(C)(D)		negative	
9(B)	positive		10-20
9(E)	positive		10-15
11		negative	
12		negative	
13		negative	
16(B)		negative	
17	positive		Units 17, 18, 19A,B,D:
18 (s. of Kuskokwim)	positive		30-40 in management area
18 (remainder)	positive		10-15 outside management area
19A	positive		
19B	positive		
19C		negative	
19D	positive		
20E		negative	
21,22	positive		20-25
23,24,26	positive		25-35
25		negative	
other units	not present or no determination		
Caribou			
9 (N. AKP)	positive		1,200-1,900: 9C and 9E
9D,10 (Unimak. S. AKP)	positive		100-150
10 (Adak Is)		negative	
11 (Mentasta)	positive		closed

[6] As of January 1, 1995

[7] Negative findings are not in regulation; pre-1992 negative findings have not been reviewed for consistency with the 1992 Subsistence Law

Species/Unit	Finding: Positive	Finding: Negative	Amt. necessary for subsistence use
Caribou (cont.)			
12 (Chisana)		negative	
12 (Nelchina/40-mi.)	positive		350-400
13 (Nelchina)	positive		100% of allowable harvest
17 (Mulchatna)	positive		2,100-2,400, 2 caribou bag
18 (Kilbuck/Adreafasky)	positive		350-500
19BCD, 16B (Big R., Rainy Pass)	positive		70-90
19 (Tonzona)	positive		20-30
20D (40-mi., Macomb)	positive		10-40
20E (40-mi.)	positive		350-400
21, 22, 23, 26 (W. Arctic)	positive		8,000-12,000
25A, 25B, 25D, 26B, 26C (Porcupine)	positive		1,250-1,550
Delta and Yanert		negative	
Denali		negative[8]	
26B (Central Arctic)	positive		250-450
other units	not present or no determination		
Dall Sheep			
11	positive		60-75
12 (Tok Mgt. Area)		negative	
20D (Tok Mgt. Area)		negative	
23 (portion)[9]	positive		75-125: Units 23, 24, 25A, 26
23 (Baird Mts)	positive		
23 (remainder)	positive		
24 (Gates, John R.)	positive		
24 (remainder)	positive		
25A (portion)[10]	positive		
25A (remainder)	positive		
25B, C, D		negative	
26A (portion)[11]	positive		
26A (remainder)	positive		
26B, C	positive		
other units	not present or no determination		
Deer			
1A	positive		225-250
1B	positive		40-50
1C	positive		30-40
2	positive		1,500-1,600
3	positive		150-175
4	positive		5,200-6,000
5	positive		100% of allowable harvest
8	positive		3,600-4,100

[8] 1987 finding was for residents of McKinley Park only.
[9] That portion of GMU 23 north of Noatak River and east of Kelly River.
[10] That portion of GMU 25A draining into the north bank of the East Fork Chandalar River upstream from and including the Wind River drainage.
[11] That portion of GMU 26A west of the Etivluk River.

Species/Unit	Finding: Positive	Finding: Negative	Amt. necessary for subsistence use
Deer (cont.)			
other units	not present or no determination		
Elk			
8		negative	
Fur Animals[12]			
statewide	no determination		
Fur Bearers[13]			
statewide	no determination		
Goats			
1C	positive		25-30
6CD	positive		15-26
7, 15C (portion)	positive		17 or 100% of allowable hvst.
8		negative	
11		negative	
13D		negative	
Moose			
1B (Stikine R.)	positive		40
1C (Berners Bay)		negative	
1D (Haines)	positive		100% of allowable harvest
5	positive		50
6		negative	
9ABCE	positive		100-140
9D		negative	
17	positive		100-150
11	positive		30-40
12 (portions)	positive		60-70
13	positive		600
15C (portion)	positive		5-6
16B	positive		201-229[14]
18	positive		80-100
19 portion	positive		150-250
19 Lime Vill. mgt Area	positive		30-40
20A	positive		50-75
20B portion	positive		75-100
20B Minto mgt area	positive		20-40
20CF	positive		100-130
20D portion	positive		5-15
20D s. of Tanana R.	positive		5
21	positive		150-250
22	positive		250-300
23	positive		100-150
24	positive		450-550

[12] coyote, arctic fox, red fox, lynx, red squirrel (subject to taking with hunting license)

[13] beaver, coyote, arctic fox, red fox, lynx, marten, mink, weasel, muskrat, land otter, red squirrel, flying squirrel, marmot, wolf, wolverine (subject to taking with a trapping license)

[14] Kalgin Is: 2; Redoubt Bay: 10; Tyonek Area: 29-37; N. of Beluga R.: 160-180

Species/Unit	Finding: Positive	Finding: Negative	Amt. necessary for subsistence use
Moose (cont.)			
25A	positive		25-75
25D west	positive		25-50
25D east	positive		150-250
26	positive		60-80
other units	not present or no determination		
Musk Oxen			
18	negative		
26BC	positive		15
other units	not present or no determination		
Small Game:[15]			
grouse			
11,13,15,16,20D,22,23	positive		no determination
other units	not present or no determination		
ptarmigan			
11,13,15,16,20D,23	positive		no determination
other units	not present or no determination		
other species	no determination		
Tundra Swans			
22		negative	
other units	not present or no determination		
Unclassified Game:[16]			
bats (statewide)		negative	
other species	no determination		
Wolves			
6, 9, 10, 11-13, 16-26	positive		no determination
other units	not present or no determination		

[15] all species of grouse, hares, rabbits, ptarmigan, waterfowl, cranes, snipe
[16] shrew, rat, mouse, porcupine, raccoon, starling

B. FINDINGS BY THE BOARD OF FISHERIES[17]

Species	Area	Finding[18]	Amt. necessary for subsistence use
Salmon	Norton Sound-Port Clarence	positive	85,300 salmon
	Kotzebue-Northern Area	positive	43,500 salmon
	Yukon Area	positive	348,000 to 503,000 salmon
	Kuskokwim Area	positive	192,000 to 242,000 salmon
	Aleutian Islands Area	no determination	
	Alaska Peninsula Area	no determination	
	Bristol Bay Area	positive	157,000-172,171 salmon
	Chignik Area	positive	19,000 salmon
	Kodiak Area	positive	24,395 salmon
	Cook Inlet Area	positive[19]	[20]
	Prince William Sound Area	positive[21]	[22]
	Yakutat Area[23]	positive	1,200-3,000 salmon
	Southeastern Area[24]	positive	21,000-34,000 salmon
Freshwater Fish	Yukon Area	positive[25]	133,000 to 2,850,000 lbs
Dolly Varden	Cook Inlet Area[26]	positive	no determination
Smelt	Cook Inlet Area	positive	153,000 smelt
All Finfish	Northern Area	positive	no determination
Finfish other than salmon	Norton Sound-Port Clarence	no determination	
	Kotzebue Area	no determination	
	Kuskokwim Area	no determination	
	Aleutian Islands Area	no determination	
	Alaska Peninsula Area	no determination	
	Bristol Bay Area	positive[27]	38,000 lbs[28]

[17] As of January 1, 1995

[18] Negative findings are not in regulation, pre-1992 negative findings have not been reviewed for consistency with the 1992 Subsistence Law

[19] salmon in the Port Graham, Koyoktolik, and Tyonek Subdistricts, native coho salmon of the Fox River in Kachemak Bay in the Southern District, in the upper Cook Inlet Area north of Anchor Point, early run king salmon, late run king salmon, early run red salmon, late run red salmon, pink salmon, chum salmon, early run coho salmon, and late run coho salmon, excluding enhanced king salmon and hatchery salmon.

[20] UCI chinook: 797-1,737; UCI sockeye: 9,617-47,269; UCI pink: 878; UCI chum: 206; UCI coho: 113-4,552; LCI: all salmon: 4,663-8247; Tyonek: 850-3600 salmon; Port Graham and English Bay: 2500-7500 salmon

[21] Upper Copper River, Batzulnetas, SW District and Green Island, Tatitlek area

[22] Upper Copper R.: 35,000; Chenega area: 650-850; Tatitlek area: 600-950

[23] in areas described in 5 AAC 01.666

[24] Positive findings were made for specific portions of the Southeastern Area for salmon as detailed in 5 AAC 01.716. No findings were made for the area near Juneau. Negative findings were made for all other portions of the Area.

[25] sheefish, whitefish, burbot, grayling, pike, char, blackfish, sucker, lamprey

[26] Port Graham Subdistrict

[27] includes halibut, excludes herring and herring spawn on kelp

[28] finding is for the Togiak District only

Species	Area	Finding	amt. necessary for subsistence use
Finfish other than salmon (cont.)			
	Chignik Area	positive[29]	18,000 lbs
	Kodiak Area	positive[30]	500,000-620,000 lbs
	Cook Inlet Area	no determination	
	Prince William Sound	no determination	
	Yakutat Area	positive[31]	15,700 fish
	Southeastern Area	positive[32]	146,300 fish[33]
Herring	Norton Sound-Port Clarence	positive	66.58 short tons
	Kotzebue Area	positive	11.44 short tons
	Yukon Area	positive	3.0-7.3 short tons
	Kuskokwim Area[34]	positive	106-164 short tons
	Aleutian Islands Area	no determination	
	Alaska Peninsula Area	no determination	
	Bristol Bay Area[35]	positive	50,500 lbs[36]
	Cook Inlet Area[37]	positive	no determination
	Prince William Sound	no determination	
	Yakutat Area[38]	positive	[39]
	Southeastern Area[40]	positive	[41]
Bottomfish	Cook Inlet[42]	positive	no determination
	Yakutat Area[43]	positive	[44]
	Southeast Area[45]	positive	[46]
Halibut	Kuskokwim Area	positive	205,400 lbs.
	Aleutians/Ak Peninsula Area[47]	positive	302,000 lbs
	Chignik Area	positive	[48]

[29] except steelhead and rainbow trout; includes herring
[30] except steelhead and rainbow trout; includes herring
[31] Dolly Varden char, steelhead trout, and smelt in areas described in 5 AAC 01.666
[32] Positive findings were made for specific portions of the Southeastern Area for non-salmon finfish, as detailed in 5 AAC 01.716. No findings were made for the area near Juneau. Negative findings were made for other portions of the Area.
[33] this finding covers non-salmon finfish, herring, herring roe, halibut, and bottomfish
[34] along the coast between the westernmost tip of the Naskonat Peninsula and the terminus of the Ishowik River, and along the coast of Nunivak Island
[35] finding is for waters of the Togiak District only
[36] includes herring and herring roe on kelp
[37] in those portions of the Cook Inlet Area described in 5 AAC 01.566.
[38] in waters of Yakutat Bay, including Russell Fjord, within a line from the westernmost point of Point Manby to the southernmost point of Ocean Cape
[39] included with non-salmon finfish
[40] Positive findings were made for specific portions of the Southeastern Area for herring and herring roe, as detailed in 5 AAC 01.716. No findings were made for the area near Juneau. Negative findings were made for all other portions of the Area.
[41] included with non-salmon finfish
[42] in those portions of the Cook Inlet Area described in 5 AAC 01.566.
[43] waters of Yakutat Bay, including Russell Fjord, and in waters of Alaska from Point Manby to Ocean Cape bounded by Loran C lines 7960-Y-30630 and 7960-Y-30430
[44] included with non-salmon finfish
[45] Positive findings were made for specific portions of the Southeastern Area for bottomfish, as detailed in 5 AAC 01.716. No findings were made for the area near Juneau. Negative findings were made for all other portions of the Area.
[46] included with non-salmon finfish
[47] includes waters surrounding the Pribilof Islands
[48] included with non-salmon finfish

Species	Area	Finding	amt. necessary for subsistence use
Halibut (cont.)			
	Kodiak Area	positive	[49]
	Cook Inlet Area[15]	positive	no determination
	Yakutat Area[19]	positive	[50]
	Southeastern Area[51]	positive	[52]
Pacific Cod	Kuskokwim Area	positive	59,800 lbs.
Sheefish	Kotzebue Area	positive	no determination
Char	Kotzebue Area	positive	no determination
Shellfish			
miscellaneous shellfish			
	Bering Sea Area	no determination	
	Alaska Peninsula-Aleutians	no determination	
	Kodiak Area	no determination	
	Cook Inlet Area[53]	positive[54]	2,200-3,600 lbs clams
	Prince William Sound Area	no determination	
	Yakutat[55]	positive	18,000 lbs.
	Southeast Alaska[56]	positive	581,300 lbs.
king and tanner crab			
	Yakutat Area	positive	600-1,000 crab
	Kodiak Area[57]	positive	2,447-4,556 king crab

[49] included with non-salmon finfish
[50] included with non-salmon finfish
[51] Positive findings were made for specific portions of the Southeastern Area for halibut, as detailed in 5 AAC 01.716. No findings were made for the area near Juneau. Negative findings were made for all other portions of the Area.
[52] included with non-salmon finfish
[53] Port Graham Subdistrict
[54] clams only
[55] waters of Yakutat Bay and vicinity as described in 5AAC 01.650
[56] Positive customary and traditional use findings have been made in specific portions of the Southeastern Area for miscellaneous shellfish, excluding king and tanner crab, as detailed in 5 AAC 02.108
[57] except for the Semidi Is., the north mainland, and the mainland sections

D. Record of Implementing Actions by the Alaska Boards of Fisheries and Game, 1992-1994

I. Joint Board of Fisheries and Game

II. Board of Game

III. Board of Fisheries

NOTE: Appendix D consists of over 400 pages of text, detailing actions of the Boards of Fisheries and Game. In order to save paper, it has not been included in all copies of this report. If the material is not included here, it is available on request from the Division of Subsistence, ADFG, (907) 465-4147.