COMMONWEALTH NORTH

Illuminating Alaska's Issues

Urban Rural Unity Implementation Study

Subsistence Report

Adopted by the Commonwealth North Board 8/28/01

Committee members: David Case, Betty Emerick, Sheila Gallagher, Dave Kester, Janie Leask (Chair), Joette Storm and John Strachan with participation by Sarah Barton, Chris Cooke, Duane Heyman, and Jon Kumin.

The purpose of Commonwealth North (CWN) is to educate its members and all Alaskans on relevant public policy issues, and assist in their resolution. This Subsistence Committee grew out of the Urban Rural Unity Study (UR US) which was co-chaired by Rick Mystrom and Janie Leask. The Study dealt with a broad variety of topics: economic survival and development, access to fish and game (subsistence), and delivery of services such as police protection and education to name a few.

The final UR US report included six "action items" for which CWN was committed to further action. Exploring a solution to the subsistence gridlock was one of the six action items. In charting out its course, the Committee decided to examine the four "legs" of the issue: maintaining the status quo, congressional changes, legal challenges, and state legislative action.

BACKGROUND

(Portions taken from the original UR US Study)

One of the major flash points in the urban/rural divide has been subsistence. Despite a presumed majority approval of the Alaskan population in general, the Legislature has failed to allow Alaskans to vote to adopt a constitutional amendment that would bring Alaska law in compliance with federal law. This resistance goes back to 1990 and includes five special sessions and two regular sessions of the Legislature. As noted in the UR US Study:

Whether it is through a constitutional amendment, or through other means, resolving priorities in access to fish and game, along with related management issues, is central to bridging the urban/rural divide (emphasis added).

711 M Street, Suite 104 Anchorage, AK 99501
Tel: (907) 276-1414
http://www.commonwealthnorth.org

COMMONWEALTH NORTH
Illuminating Alaska's Issues

Urban Rural Unity Implementation Study

The Alaska National Interest Lands Conservation Act's (ANILCA) administrative scheme required the State to provide for the subsistence uses of rural Alaskans with a priority over other uses and a network of regional advisory councils. So long as the State adhered to the subsistence priority it would be permitted to manage fish and game on all federal lands and waters in Alaska. However, if the State departed from the subsistence priority for rural residents then ANILCA provided that the federal government would take over regulation and management on all federal lands and waters.

In 1978, the State enacted legislation establishing a general subsistence preference. A ballot measure seeking to repeal that statute was defeated by a wide margin in 1982. In 1986, to comply with ANILCA, the State's subsistence statute was amended to limit the preference to rural residents. However, in 1989 the Alaska Supreme Court ruled in McDowell V. State that this statute violated the Alaska Constitution.

Federal agencies took over management of fish and game on federal lands in Alaska starting in 1990 with game, and in 1999 with fish. Federal courts have ruled that the State is not in compliance with ANILCA. Efforts to place a rural subsistence preference amendment to the Alaska Constitution on the ballot have been repeatedly stymied in the Legislature even though public opinion surveys consistently show that Alaskans favor such an amendment.

In the Katie John case, federal regulatory power was extended to most navigable waters as well as federal lands in Alaska. Federal takeover deadlines were repeatedly set, and then extended, but eventually the deadline passed without State compliance with ANILCA.
On October 1, 1999, the Federal Subsistence Board -- composed of representatives from the U.S. Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Bureau of Indian Affairs and the US Department of Agriculture (Forest Service) -- initiated expanded management of subsistence fisheries on 60% of Alaska's lakes and rivers. The Federal Subsistence Board manages game on 200 million acres of federal land in Alaska, over one-half of Alaska's landmass.

Subsistence and sport users combined consume only about 3% of the fish harvested annually in Alaska, but a majority of the wildlife. Regardless of the use patterns, recent surveys have shown that most Alaskans support a rural subsistence priority. However, failure of the state to bring itself into compliance with federal law will lead to vastly more difficult conflicts in the future.

711 M Street, Suite 104 Anchorage, AK 99501
Tel: (907) 276-1414
http://www.commonwealthnorth.org

Alaska must find a way to reconcile the subsistence-based culture of its Native citizens with the general interest of all in using the fish and wildlife resources of our State.

In formulating a discussion path, the committee elected to hear from the following individuals: (a) Commissioner Frank Rue, Alaska Department of Fish and Game, February 22; (b) Alaska Attorney General Bruce Botelho, March 8 and June 27; (c) Attorney Heather Kendall-Miller, attorney for plaintiff Katie John; May 30, 2001; and (d) Tom Boyd, Alaska Director of US Fish and Wildlife Service, April 19.

SUMMARY OF TESTIMONY

I. Rue

The first speaker, Frank Rue, provided an abbreviated chronology of the federal-state dual subsistence management overview report starting in 1971 through 1999, together with a document entitled "Subsistence In Alaska the Year 2000 Update." His comments included an overview utilizing that chronology starting with the Alaska Native Claims Settlement Act (ANCSA) in 1971 and concluding with the 1999 Katie John case and the expanding federal programs. Mr. Rue acknowledged that this issue is not going away and it is an important issue with which Alaska will have to deal.

He acknowledged that the dual state/federal management system has in some instances been difficult. However, there has in fact been a substantial amount of cooperation between the two entities. One of the very positive aspects of federal management has been the strengthening of the regional council system required under Title VIII of ANILCA. The federal system acknowledges as its paramount goal the preservation of subsistence use over sport or commercial use. The State system strives to balance these uses.

The state and federal regulators have developed protocols to minimize conflicts between them. However, the difference in focus of the two entities by necessity creates conflicts. He also noted that implementation of diverse policies is costly and it was his opinion that state expertise probably is based on better science. Rue also expressed the opinion that the State is in a better position to react quickly to problems as they develop. The State's efforts, however, are somewhat hampered by the ability of the federal bureaucracy to hire away State employees. He

sees the regulatory confusion -- two sets of rules -- as inefficient and costly and a potential risk to resource conservation.

II. Boyd

Tom Boyd spoke with the committee on April 19, 2001. Mr. Boyd acknowledged that dual management by definition is awkward and difficult and that the federal government is very anxious to return management to the State of Alaska. The federal agencies actually began to implement federal subsistence management in 1990. This was the result of the McDowell case, which we will discuss later in our report.

In October 1999, federal responsibility was expanded to assume even greater fisheries management because of the Katie John decision. While technically the federal government has the responsibility to manage subsistence hunting and subsistence fishing on the federal lands and waters that are located in the State of Alaska, the thrust of federal management over the past two years has been in fact on managing subsistence fisheries. The mandate of the federal government is that it is responsible to ensure the subsistence priority for rural residents as outlined in Title VIII of ANILCA. Their primary mission is to protect subsistence even if that means restricting or disrupting non-subsistence uses.

They maximize cooperation as much as possible with the Alaska Department of Fish and Game and involve Native and other local organizations in a co-management approach. To do this the State and the Federal Government have entered into several different agreements --the operating protocols, the fisheries monitoring project where both agencies do research to get sufficient information to make proper management decisions for effective fisheries CO-management The federal government has also entered into a funding agreement with the state Department of Fish and Game to avoid overlap of financial resources in one area. The goal is to share information gathered by both agencies thereby making better decisions.

The problem is there are two different entities looking at the same set of statistics and they do not always come to the same result. This is part of the problem with dual management and why both Mr. Rue and Mr. Boyd have said that, while they are cooperating as much as possible, dual management is cumbersome and has lots of difficulties. To make the dual management system work between the federal and state governments means both agency heads and field personnel must consult and coordinate as much as possible. Dual-management has worked in some areas and he cited several examples, e.g., the Kuskokwim and Yukon Rivers

Salmon Management Agreement in 2000. Both agencies send staff members to each other's meetings and both are participating in the fisheries monitoring program.

However, along with those advantages Mr. Boyd also sees problems. The Alaska Department of Fish and Game, he opined, is under funded; they do not have enough staff to do everything they are supposed to do. The other conflict is that the Alaska Department of Fish and Game tries to balance sports, commercial and subsistence uses and that conflicts with the federal mandate to preserve and protect subsistence uses first. The conflict is particularly noticeable where there are fishing conflicts such as on the Yukon, Kuskokwim and Kenai Rivers.

III. Botelho

Bruce Botelho gave us an update on the Katie John decision and the state posture regarding that decision -- at least as much as he could tell us as of the date of our meeting. To help us understand the Katie John case, he went back to 1989 when the case was filed. That case arose when Mrs. John's right to take fish in her traditional and customary way on the Copper River was deemed to be illegal as a result of the McDowell case. The McDowell decision held that a preference for rural residents to take fish and game for subsistence purposes violated the Alaska Constitutional provisions prohibiting exclusive or special privileges in the taking of fish and wildlife.

The Katie John case has been the rallying cry --more or less the cornerstone of what people consider the subsistence problem. In actuality, as Mr. Botelho explained it, Katie John is just a very small part of the state land management issue and the relationship between states and the federal government. For example, when ANILCA refers to "public lands," does it really encompass the navigable waters of the state, or does it only encompass navigable waters that are on the federal lands; what happens when part of the navigable waters are on state lands? For instance, the Copper River from which this case evolves. How do you determine what is navigable? Does the federal government have "title" to waters flowing over state submerged lands? Does the doctrine of federal reserved water rights trump state management on navigable waters?

In 1995, the Ninth Circuit upheld federal management of subsistence fishing on federal reserved waters. In 2001, a divided panel of eleven Ninth Circuit judges affirmed federal authority on reserved waters. However, three judges would have held for the state and allowed federal regulation of subsistence fishing only on non-navigable waters on federal lands. Three other

judges would have allowed federal regulation of subsistence on all waters in the state. These conflicting opinions frame the arguments for a possible state appeal to the US Supreme Court.

IV. Heather Kendall-Miller

Heather Kendall Miller met with the committee on May 30. The lead attorney for Katie John, she presented the history of the case following the McDowell decision. She noted one solution to the dual management problem is state adoption of a constitutional amendment to eliminate the equal access provision of the state constitution. The issue opened by the Katie John decision is two-part: one is game management on federal land and second, which is more complicated, is the federal responsibility to manage fisheries on federal land and some or all waters within the state. Mrs. Miller discussed at some length the decision itself and the various dissents and concurring opinions that have added to the confusion. She discussed with the committee whether the State would appeal or not, and the time frame for doing so. Mrs. Miller sees the Katie John decision as an important leverage point to urge the state to solve the subsistence issue with a constitutional amendment.

V. Botelho II

Bruce Botelho again spoke to the committee on June 27th. He emphasized that while Katie John is the rallying cry for a solution to the subsistence problem, it really is in no way dispositive of the issue. It has been a symbol; therefore it is much harder for the governor to address the issue. The thrust of the attorney general's comments were whether or not the state would take an appeal and what form the appeal would take.

The governor has three choices. He can take a direct appeal to the Supreme Court; he can take a contingent appeal or no appeal. The "contingent appeal," as outlined by Mr. Botelho, means that the governor agrees to appeal the decision if the legislature agrees to convene and place the issue of a subsistence priority on the ballot as a constitutional amendment as a means of solving this subsistence issue. For this to be done in a timely fashion either the governor or the legislature would have to call a special session.

Before he makes a decision, he plans to convene a leadership summit involving people that have not been previously involved in this issue. He is also going to convene what is referred to as the "stakeholders summit" involving subsistence, sports and commercial users of fish and game. Mr. Botelho opined there are really only three ways to resolve this continuing conflict: one is to change the Alaska Constitution by amendment and the other is to attempt to get an

amendment to ANILCA which clarifies federal jurisdiction over the subsistence fisheries of the State. The third option is to continue the status quo.

What is wrong with continuing the status quo, i.e., no appeal, no amendments and continued dual-management? Some of the problems that Mr. Botelho pointed to are: the disputes between the state and the federal government about how to handle the Lower Yukon River fishing problems; the dispute between residents of the Upper and Lower Yukon River; and the dispute between subsistence users and people who have sport lodges in that area. There is no agreement between the state and federal government about handling these problems, and probably by the time there is an agreement, the season will be long gone and nobody's interests will be served.

Mr. Botelho did acknowledge that even if the State were to again assume the sole authority over the fishing in this State, the "regional advisory councils" required under ANILCA are an excellent idea, and should be supported on a continuing basis if the state obtains jurisdiction over subsistence management.

CONCLUSIONS

Members of the committee met to discuss what type of report we should formulate. The committee concluded that the issues are very complex and not subject to a simple solution and this panel has not formulated any single solution that will satisfy all parties. We do, however, have several suggestions. We begin, as did CWN's UR US study, by acknowledging that the wild, renewable resources of what is now Alaska are of immense and continuing importance to both rural and urban Alaskans. For rural Alaskans they are part of a way of life that is inseparable from a daily round of existence that extends back, by some estimates, 10,000 years. Especially for Natives, they are part of a culture knit together by the bounty of the land and water. For many urban Alaskans, fish and game is not only a source of food, but they are also part of family life and of what it means to be an Alaskan. For both urban and rural people, access to fish and game has perhaps become a symbol of their freedom.

1. Constitutional Issues: The constitutional issues have been described as a state's rights issue. We believe it is, in fact, more complex than that. [1] The subsistence issue raises important questions about the State of Alaska's relationship to the federal government at the time it became a state and modifications to that initial compact. In simplistic terms the constitutional

argument is a balancing of the Alaska State Constitution provisions of Article VIII, Sections 3, 4, 15 and 17, against Article XII, Section 12 of the constitution and Section 4 of the Alaska Statehood Act, as amended. Section 804 of the Alaska National Interest Land Conservation Act (ANILCA) mandates that: "subsistence uses shall be accorded priority over the taking on ['public lands'] of fish and wildlife for other purposes." Only rural Alaska residents are entitled to the ANILCA subsistence priority. McDowell v. State, 785 P.2d 1 (1989) frames the issues under the state constitution and we believe it is helpful to recite the applicable provisions:

Section 3 of article VIII provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4 of article VIII provides:

Fish, forests wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:
Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

We suggest the Alaska Constitutional guarantee described as "equal right to access" does not necessarily equate to an equal use of the resource. An equal right of access applies when all factors are equal. Regulations made, and if drafted with sophistication, should provide for priorities where circumstances are not equal.

711 M Street, Suite 104 Anchorage, AK 99501
Tel: (907) 276-1414
http://www.commonwealthnorth.org

Justice Moore's concurring opinion in McDowell is helpful to frame the debate. He stated:

This is not to say that subsistence preference laws would be unconstitutional. I simply believe that for such a law to pass constitutional muster, it must be closely related to its compelling purpose. A law providing for individual determinations of eligibility would in my view be sufficiently tailored to the state's interest to withstand a constitutional challenge.

The majority opinion elucidates:

One purpose of the 1986 act is to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so. This is an important interest. However, the means used to accomplish this purpose are extremely crude. There are, as noted above, substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsistence users. Likewise, there are substantial numbers of Alaskans living in areas designated as rural that have no legitimate claims. 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.

Indeed, Article VIII, Section 4 of the Alaska Constitution seems to anticipate conflicting beneficial uses. It states:

Fish, forests wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses. (Emphasis added.)

Justice Rabinowitz in his dissent summarized a different perspective:

In brief, the common use clause constitutionalized the doctrine that wild fish and game are held in trust by the state for the benefit of the public as a whole, rather than by the sovereign in exclusive possession. That principle is consistent with the view that the sovereign state may manage wildlife for the common good, including certain beneficial preferences. Thus I conclude that the challenged subsistence laws do not offend the anti-monopolistic, anti-exclusionist values underpinning the public trust and common use doctrines embodied in section 3 of article VIII of Alaska's constitution.

711 M Street, Suite 104 Anchorage, AK 99501
Tel: (907) 276-1414
http://www.commonwealthnorth.org

The justices in McDowell split on the question of whether "preferences among beneficial uses" must be allocated on an individual or general basis. Subsistence under ANILCA is the "customary and traditional use of wild, renewable resources by rural Alaska residents," but the majority in McDowell concluded this required some individualized regulation to pass muster under the Alaska constitution. Individualized eligibility, based on "need" for example, can quickly become a badge of poverty rather than a description of a dignified (even rigorous) way of life. In striking down state moose seasons and bag limits under ANILCA, Alaska Federal District Court Judge Holland noted in Alaska v. Bobby, 718 F. Supp. 764, 777 (D. Alaska1989): "Hunger knows nothing of seasons." The phrase aptly sums up the inherent difficulty of regulating subsistence by drawing distinctions among individuals. It could require us to confine hunger to a season. Doing otherwise would likely offend the concepts of individual freedom upheld by the McDowell decision.

2. A Social/Political Issue: The perceived effect of decisions made in the Katie John case and other cases have been interpreted to have greater implications than, in fact, we believe they do. The social and political question is how to minimize tensions at the same time giving full respect to legitimate subsistence needs. One of the optimistic outcomes of dual management is the use of the regional advisory councils which apparently all parties believe have been a good method of framing issues for a prompt review and decision. We believe there are other consequences of the dual management system (such as CO-management) that well may be incorporated into any eventual solution that will be further identified as time goes on. Conflicts bring forth solutions of necessity and, while not to be encouraged, ought to be appreciated for the solutions they forge.
3. The Katie John Appeal: The McDowell decision represents the debate about "who" should be eligible for subsistence. The Katie John case, arising out of an ambiguity in ANILCA, raises the question of "where" the subsistence priority applies - at least when it comes to fishing on federal lands and waters. The McDowell decision triggered federal assumption of jurisdiction on federal lands and waters and ousted the state from its hitherto established position of authority. That is perhaps why Katie John is seen as a test of state's rights that many believe requires the state to appeal.

A recent article in the Anchorage Daily News set out the governor's three choices: 1) to appeal the case to the US Supreme Court to address the issues raised by it; 2) appeal the case but only if the legislature votes to put a rural preference amendment on the ballot for the Alaskans to decide in 2002; or 3) to drop the case and let the federal rural preference continue.

In a later editorial the Daily News recommended that the governor appeal the case only if the legislature would call itself into special session and adopt a mandatory constitutional amendment requiring a rural resident preference for subsistence.

Thus far missing from the printed discussion, is much consideration of the pros and cons of an appeal. Both Heather Kendall Miller and Bruce Botelho alluded to these in their discussions with the committee. The greatest risk to either side is the typical zero sum game -- somebody wins and somebody loses. If the state wins, federal regulation of subsistence fishing is restricted to the non-navigable streams and lakes located on federal lands. Most of the salmon and other fish taken for subsistence swim elsewhere. If Katie John wins, it is possible, as articulated by three of the Ninth Circuit judges, that federal authority would extend to all waters within the state.

Beyond these narrow legal arguments, an appeal will almost certainly exacerbate the rural-urban divide, at least for the duration of the litigation and perhaps beyond. On the other hand, If the U. S. Supreme Court accepted such an appeal, it would hold out the promise of a final determination of the legitimacy and reach of ANILCA. There were strong opinions within the committee for and against such an appeal. These opinions mirror those that define the urban-rural divide. It was therefore the committee's conclusion, out of mutual respect for our diverse opinions, that we should take no position on the question of whether to appeal the Katie John decision.

4. Constitutional Amendment: Whether or not the state is successful in appealing the case, we also believe there is value in addressing a constitutional amendment and placing that before the voters as a way of defusing the social/political issues. But the proposition is not without risk. Favoring an amendment is the hope that it would allow the state to regain control of subsistence fishing and hunting on federal lands and waters and restore unified fish and game management to the state. It would also permit the state to once again implement ANILCA's subsistence preference and perhaps remove the single greatest barrier to rural and urban understanding. The uncertainty of the legislative process is the most often cited reason for not pursuing the amendment. As well, those who oppose ANILCA's rural resident preference also oppose a state constitutional amendment that would implement the preference.

Nonetheless, most on the committee believe a state constitutional amendment and appropriate implementing legislation are the most effective way to restore both state subsistence policy and unified state fish and game authority. If a state amendment were adopted, the committee believes that the implementing legislation should, among other things, ensure that the effective

regional council system developed under federal management is maintained and strengthened. The state should also implement a more decentralized system of regulation implemented through CO-management agreements with local interests.

5. State Legislation: We suggest there may be a fourth alternative resolution. The answer may be in the governor directing the attorney general to draft legislation taking into consideration the concerns expressed by the majority, concurring and dissenting opinions in McDowell. The legislation should address the necessity of affording a non-individualized or generalized subsistence preference even if it is not clear such a preference would pass all the McDowell tests. The new legislation might then afford the Alaska Supreme Court an opportunity to refine or even reconsider McDowell. If the governor chose not to take this approach, it may be possible for it to be addressed by initiative.

6. Federal Legislation: Federal legislation would inevitably require significant amendments to ANILCA. Although Senator Stevens was able to include some stopgap changes to ANILCA in the 2000 federal appropriation legislation, these have since expired. They were intended to encourage the state to adopt a constitutional amendment to comply with ANILCA. Permanent amendments to ANILCA would likely reopen all of ANILCA to potentially hostile amendments and were deemed by the committee not to be worth exploring further at this time.

7. No Action: Some on the committee support no action. To these observers, federal management has proven itself more willing and able to protect the subsistence way of life than did the state. Unlike the state, the federal agencies have only one mission -- to protect subsistence. The federal subsistence board's more effective use of the regional advisory councils has also proven itself. Expansion of local CO-management is a natural extension of the regional councils and a necessity given sometimes limited federal manpower. Some committee members believe that the difficulties of dual management will only be exacerbated with time.

We cannot conclude this report without one additional comment. Overriding all considerations is a basic sense that there is a substantial amount of cooperation between the state and federal agencies responsible for managing these difficult issues in a cooperative and sensible manner. The conflicts we see are built in and do add to the confusion. However, we do not perceive any extraordinary grab for authority exceeding what is reasonable under the circumstances. We have also been impressed by the candor and concern of all individuals we have interviewed and who have participated in our discussions. The overriding sense is that there is enormous goodwill in the state that ought to be expressed even though obviously people

711 M Street, Suite 104 Anchorage, AK 99501
Tel: (907) 276-1414
http://www.commonwealthnorth.org

think and feel passionately about the matter. While the situation is chaotic on the ground where it counts, there is a substantial amount of cooperation. On this point we note that the last time a vote was taken on a rural preference (1982) it was approved. We have not done demographic studies to determine whether there would be any change in that vote, but have every reason to believe that the desires of the people are to assure that all citizens utilizing subsistence as a way of life are protected in those endeavors.

[1] If public access to the resources of the state is a fundamental right of all citizens, then there's a question about the fairness of a referendum amending the constitution to restrict that right of all the citizens by a majority vote.

711 M Street, Suite 104 Anchorage, AK 99501
Tel: (907) 276-1414
http://www.commonwealthnorth.org