WHEN VALUES CONFLICT: ACCOMMODATING ALASKA NATIVE SUBSISTENCE

OCCASIONAL PAPER No. 22

THOMAS A. MOREHOUSE AND MARYBETH HOLLEMAN
INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH
UNIVERSITY OF ALASKA ANCHORAGE

SUPPORTED BY
THE HAROLD E. POMEROY
PUBLIC POLICY RESEARCH ENDOWMENT
WHEN VALUES CONFLICT: ACCOMMODATING ALASKA NATIVE SUBSISTENCE

by

Thomas A. Morehouse
Professor of Political Science

and

Marybeth Holleman
Research Associate

Institute of Social and Economic Research
University of Alaska Anchorage

June 1994

The Harold E. Pomeroy Public Policy Research Endowment is created by a generous donation to the Institute of Social and Economic Research at the University of Alaska Anchorage. The endowment supports faculty research on Alaska public policy issues.
ACKNOWLEDGMENTS

We owe a large debt of gratitude to the state and federal resource managers who generously provided most of the information for our discussion of subsistence management activities in the field. They are named in the notes to relevant parts of the text. The interpretations of this information are our responsibility, as are errors and omissions. We are also grateful to Elizabeth Andrews, Jack Kruse, Gerald McBeath, Patricia McMillan, and Gerry Nixon, who commented helpfully on previous drafts, and to Linda Leask and Monette Dalsfoist, who provided expert editorial and production support.

Thomas A. Morehouse is professor of political science at the Institute of Social and Economic Research. He has studied and written on Native policy issues for more than 20 years.

Marybeth Holleman is a research associate at the Institute of Social and Economic Research. She has written several papers and articles on Alaska subsistence and related issues.

WHEN VALUES CONFLICT: ACCOMMODATING ALASKA NATIVE SUBSISTENCE

Management of subsistence hunting and fishing in Alaska today is caught between federal law and the Alaska constitution. The federal Alaska National Interest Lands Conservation Act of 1980 (ANILCA) requires giving Natives and other rural residents subsistence preference—that is, first call on fish and game when they are scarce. But the Alaska Supreme Court's McDowell decision in 1989 held that a similar state law was unconstitutional, because the state's constitution prohibits granting such preferences based solely on place of residence. As a result, the federal government now manages subsistence on federal lands, the state on state lands, and it appears to some that the two management systems are headed toward an inevitable "horrific collision." 1

Subsistence may be the most deeply divisive issue in Alaska since statehood. Most controversy from the start has centered on Native subsistence claims. Urban interests call for equal rights for all individual citizens, while rural Natives claim special protection for the communal practices of subsistence that are at the core of their traditional cultures. This conflict of fundamental values—equal rights versus cultural survival—is likely to continue indefinitely, no matter what courts or legislators may do to resolve the subsistence preference issue. Even if the state eventually regains authority to implement the subsistence preference on federal lands, the value conflict is likely to continue, and pressures will remain on fish and game managers to satisfy conflicting demands.

This paper argues that although the fundamental value conflict between equal rights and cultural survival cannot be resolved, it can be circumvented and at least partially neutralized. Legislators, judges, and administrators can focus on
material or economic problems of resource conservation and allocation, which, unlike value conflicts, are more susceptible to compromise. Further, while accumulating experience in practical problem-solving, subsistence managers and users learn new ways of adapting and adjusting to one another. These adaptations in turn can be reinforced by legislators and courts, and the subsistence conflict can, in the longer term, be transformed into a relatively stable pattern of group competition.

Background

After many decades of extending special recognition to Alaska Native subsistence, Congress extinguished aboriginal hunting and fishing rights in the Alaska Native Claims Settlement Act (ANCSA) of 1971. Then it restored Native subsistence as a civil right in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. In a political compromise with the state, the act also extended the subsistence priority to non-Native residents of rural areas, but Congress made clear that its primary concern was protecting Native subsistence under its plenary constitutional authority for Indian affairs.

Legal and political attacks on state subsistence management started during the trans-Alaska oil pipeline boom years of the 1970s. Responding to the increased competition for resources, the state began to recognize the special claims of subsistence users. But as soon as state officials moved to accommodate non-Native as well as Native subsistence in rural areas, sport hunting and fishing groups based in urban areas began protesting and filing suits against these special provisions.

These attacks culminated in the state supreme court's 1989 decision in McDowell v. State of Alaska (785 P.2d 1) outlawing the rural preference. Attempting to resolve the issue, one governor backed a constitutional amendment and another proposed a doubtful administrative remedy. But the legislature, in two special sessions, failed to pass the necessary authorizing legislation. Then a federal court dismissed a second suit by Sam McDowell and others, which challenged the subsistence provisions of ANILCA on federal constitutional grounds. The result was that subsistence remained snared between the McDowell decision, which eliminated the rural preference on state lands, and Title VIII of ANILCA, which mandated the preference on federal lands.

What happens when public issues become conflicts over the fundamental values held by opposing groups? If, in such cases, the values themselves cannot be compromised and the highest authorities are stalemated, what can be done as a practical matter at lower levels to resolve group differences? What about the case of Alaska subsistence? Is the federal-state “dual system” breaking down because of the conflict of values and the differences in federal and state constitutional mandates? Or are practical means being found and devised to keep the system functioning?

In fact, Alaska's dual system of subsistence management continues to evolve and function—although with some difficulty—five years after the McDowell decision. It does not at all appear that the system is heading toward the disaster predicted by some Alaskans, nor does management seem “chaotic,” as some have claimed. Hunting and fishing seasons are still being scheduled, managers are making decisions, permits are being distributed, and commercial, sport, and subsistence harvesting goes on. Many Alaskans who hunt and fish do complain that they are not receiving their shares of the available resources, but there do not seem to be significantly more complaints than there have always been. Nor does it appear that wildlife populations are being put in jeopardy by dual management.

Given the value clashes, political struggles, legal constraints, and regulatory contradictions, how can it be that the system continues to work? What adaptations have been made in the management system, how effective are they, and what are the longer term prospects?

In the following section, we discuss the irreconcilable nature of the values involved in the legal-political conflict; we also outline an approach to accommodation. Then we review the legal-political history of Alaska subsistence, describing the increasing tension and ultimate break between state and federal policies because of contradictory constitutional mandates. These two early sections provide the basis for a more detailed discussion of the practice of dual management after McDowell. This discussion identifies basic issues of federal-state management and illustrates ways in which practical problems are handled under varying geographical, biological, and political conditions. Finally, based on this experience, we discuss some strategies for accommodation that can neutralize or reduce value conflicts and that might transform them into management problems that can be resolved.
When Values Conflict

On the one side of the Alaska subsistence conflict are those who argue that Alaska Natives have special "subsistence" rights to fish and wildlife because the Native peoples were here first and because their rights are constitutionally protected under the federal government's trust responsibility for Native Americans. They further contend that because subsistence is essential to Native ways of life, nothing less than the survival of Alaska Native cultures is at stake.

On the other side are those who argue that all citizens should have the same rights to harvest fish and wildlife because that is the only fair way of dividing up common property resources in a democracy. At stake, they say, is the fundamental principle of equality, which is integral to American political culture and enshrined in federal and state constitutions.

The feelings associated with these values have been expressed in popular forums including public meetings, legislative hearings, newspaper advertisements, letters to the editor, and opinion columns. Pro- and anti-subsistence debates were particularly intense during the first few years after the McDowell decision, when state legislators, governors, and their advisors sought elusive, middle ground solutions. None of these efforts, however, could surmount the obstacles presented by the McDowell decision on the one hand and ANILCA on the other, both strongly supported by well-organized and aggressive interest groups.

Within a few months after McDowell, one Southeastern Native leader stated the Native case succinctly at an emergency subsistence meeting in Juneau: "Subsistence is the birthright of Native people, and should be treated as an aboriginal right.... It all comes down to a conflict between our cultures and the law." ²²

Writing in the Anchorage Times immediately after McDowell, a longtime rural political activist and associate of Native organizations, himself non-Native, compared the Alaska Supreme Court not only to southern segregationist judges of another era but also to George Armstrong Custer. He declared that what these disparate actors had in common was the message: "There are more of us white guys than you natives, and the more of us there are, the less we will leave for you." ²³

An Aleut leader wrote in a similar vein in 1990 and 1991 opinion columns in the Anchorage Daily News: "I want the same white people who saw 'Dances With Wolves' and know that what happened to the Sioux was wrong to admit that those same injustices, using different and often more subtle means, are taking place in Alaska in the 1990s." And "[i]t is our cultures, and only our cultures, which are directly dependent on fish and wildlife." ²⁴

At a 1992 "Subsistence Summit" in Anchorage, a Native villager from Hooper Bay responded to a representative of the governor's office, who had just presented the governor's compromise subsistence proposal, a combination of individual permit and community population requirements: "The system you propose, I can't live by it. I'll live by my cultural way of life." ²⁵

A Southeastern Native villager summed up the cultural survival argument in an Anchorage Daily News letter to the editor in 1992: "I am following a way of life generations before me have followed. I want to follow in the footsteps of my ancestors. These are the roots I come from. I want to co-exist with the environment and know that my children can continue to do so." ²⁶

The president of the Alaska Federation of Natives, Julie Kitka, stated the case for cultural survival and against equal rights in a 1991 Anchorage Times editorial. Arguing that "[r]ural-subsistence is a socially justifiable policy," she went on to point out that it is the business of Congress to make "socially acceptable" distinctions among groups when it distributes benefits to some groups and withholds them from others, and that "Title VIII of ANILCA is no exception.... Congress knew full well that this was not an egalitarian social policy, but felt that such a limitation on the ideal of equal rights was necessary in order to advance the public purpose of allowing rural Alaska to survive." ²⁷

On the other side, the Alaska Outdoor Council, a statewide association of sport hunting and fishing groups, led the fight for equal rights and against the claims of Native or rural subsistence. In newspaper ads and public statements, the council defined the basic issue as one of "individual" versus "group" rights. As the 1992 special legislative session on subsistence began, the council ran newspaper ads proclaiming: "Any priority should be based on individual criteria. That means HOW YOU LIVE—need and resource dependency—NOT WHERE you live, not WHO your ancestors were." ²⁸

In an earlier article in the Anchorage Daily News, an official of the council attacked Title VIII of ANILCA because it conferred subsistence rights on Native and other rural residents regardless of their need for the resources and despite the modern technology used to harvest them. She concluded: 'If we support a
priority use, then it should go to those individuals who truly lead a resource-dependent lifestyle. A signed and witnessed affidavit...would set individual requirements for priority use.99

Many writers reiterated the sentiment that “subsistence” should mean just that—to subsist—and any priority should always be based on the “individual need” of the “true subsistence user” and never on Native or any other group rights. Moreover, their argument went, because Natives now have access to store-bought food and use motorized vehicles and other modern technology for hunting and fishing, they should be treated like everyone else. But if any priority is to be given, one writer concluded in a letter to the News in 1991, “let it be controlled by actual need, not by false claims of ‘traditional use.’”10

A variant on the equality theme in many letters was the sentiment that “we are all natives,” or descendants of “natives” of some kind, who also depended on subsistence resources. In other words, all have equal claims to the resources, based on traditional ways of life, and it is immaterial that Native peoples happened to occupy Alaska before white settlers. As one writer put it in a 1990 letter, “I am a native. My skin may be white but I am still a third-generation native of Alaska.”11 And another: “I am white. If we are going to add on this Native heritage to it, then let’s not forget mine.”12

The harshest arguments were expressed by writers who felt that Native cultures were things of the past, and that Natives had either forfeited any special statuses or lost them by default when they came under the control of the United States government. Thus, a former official of the Alaska Department of Fish and Game wrote in the Anchorage Daily News in 1990 that he was “not interested...in having the equal protection articles of either the U.S. or Alaska’s constitution abridged” in order to preserve elements of a “Stone Age culture.”13

A resident of Wasilla penned one of the angriest letters to the News in 1993, arguing that he was as “native” as anyone else and that his ancestors, moreover, had bought Alaska with their hard-earned tax money. Then they “gave” citizenship to the “Natives” even though they (his ancestors) had to “work for” theirs. His letter culminated in the cry, “I demand equality.”14

Finally, some writers related the cause of equal rights to “states’ rights” and to fears of increased federal control of Alaska lands and resources. This is an old and familiar theme arising from the division of federal-territorial and then federal-state authority in Alaska. The threat of a “federal takeover” of subsistence hunting and fishing after McDowell was, in fact, a principal motivation for the state government’s efforts to resolve the issue. One letter writer saw the urban-rural split on subsistence as an instance of a “divide-and-conquer strategy” on the part of federal wildlife management agencies that “have long wanted to increase their bureaucracies in this state.”15 Many others agreed, stressing “states’ rights” and calling on the state to sue the federal government.16 Governor Walter Hickel obliged in 1993, in Alaska v. Babbitt (No. A92-264 [D. Alaska]), charging that even if the state was not in compliance with ANILCA, it retained the authority to implement Title VIII on federal lands. (See further discussion of Babbitt case below)

Although there are many reasonable and moderate people on both sides of the subsistence conflict, the public debate has often been unreasonable and illogical. The “equal rights” advocates seem most inclined toward strident and absolutist claims. This may be due to several reasons—because their ideological position is so deeply ingrained in American tradition; because they fear loss of status and their “fair share” of scarce resources; and because they deny or are ignorant of Alaska Native history and of Native American rights under the federal constitution.

To the extent that some Natives also insist on exclusive Native subsistence rights as an absolute requirement of “cultural survival,” they also add to the problem, but such demands have been mostly limited and muted to date. Native leaders have tended to take compromise positions (for “rural” rather than exclusively “Native” preference, for example). Native villagers, instead of disputing the rights or attacking the claims of others, have typically told how subsistence defines themselves and their ways of life. This relative moderation may be due in part to deeply rooted cultural traits. But, particularly among Native leaders, it is also because they know that Alaska Natives, like Native Americans generally, are a political minority who, despite certain federal constitutional protections, cannot afford to press their claims too far in majoritarian political arenas where legal-constitutional protections are ultimately won or lost. In their minds, too, this political realism may be reinforced by the harsh and tragic history of Native Americans in the U.S.

The kinds of excesses in public debate that we have attributed to the more extreme advocates of “equal rights” have been described by Mary Ann Glendon, a professor of law at Harvard, as “rights talk.” This, according to Glendon, is a kind of public dialect that destroys possibilities for successful compromises because of the “distinctive features” of such talk: “its penchant for absolute, extravagant formulations, its near-aphasia concerning responsibility, its exces-
sive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity.” Glendon continues: “Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.” It is a “language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.”

To move the conflict toward resolution, subsistence “rights talk” must be converted into the language of negotiation and compromise, and attention needs to be diverted from the irresolvable debate about values to the practical work of conserving resources and accommodating material interests. In fact, movement from values to interests has already occurred within the subsistence management system, and it is resulting in accommodations scarcely conceivable in the “rights talk” surrounding the McDowell decision. As we will discuss in detail below, federal and state managers are finding ways of allocating and regulating access to fish and wildlife that accommodate competing interests while also enforcing the distinctive mandates of federal and state subsistence laws.

This shift to material competition does not necessarily mean that Alaska Native interests will be sacrificed to those of the majority, as they historically were in Indian-white competition for land and resources. In the first place, the politics of Indian-white relations have changed dramatically during the last third of the twentieth century. A new political consciousness has activated Native Americans and allied groups and has led to the growth of effective political organizations. In Alaska, these political developments are represented primarily in the land claims movement of the 1960s, and in the development of Native political organizations at village, regional, and statewide levels. These include the recent formation of the Alaska Inter-Tribal Council as well as the continuing evolution of the Alaska Federation of Natives.

Political organization is a necessary but not sufficient condition of Alaska Native effectiveness in the subsistence conflict. Also needed are the support of law and sufficient authority to enforce it. Sheer force and numbers are no longer the principal determinants of Indian-white relations in the U.S. Today, there is also the force of Indian law, which has progressively been elaborated to extend and protect Indian rights. There are federal authorities who are constitutionally bound to see that these laws are observed. And, although majority attitudes toward Native Americans have also become substantially more favorable, federal laws often need to be enforced over the objections of state governments and the non-Indian majorities they primarily represent. Native American rights and claims, and the work of their political organizations, need to be reinforced by the countervailing power of the federal government set against state governments. This is what is occurring in the case of Alaska Native subsistence.

It is within this framework of federal and state authority over Alaska lands and resources, and the competing interests of urban and rural, Native and non-Native residents, that federal and state managers have the responsibility of making the dual system work. In the absence of agreement between federal and state laws, under the pressures of competing interest groups, overseen by different sets of government officials, and exploiting the interstices of law that permit and encourage the exercise of administrative discretion, managers are accommodating and adjusting to make the system work.

Managers have the mandate to make the dual subsistence system work because that is the law; they have the opportunity because there is sufficient “give” in the law and maneuvering room on the land; and they have the incentive to coordinate with each other because coordination is often essential to their effectiveness as managers. This process is similar to what Yale political economist Charles Lindblom has called “mutual adjustment.”

Lindblom explains “mutual adjustment” as “the simple idea” that “people can coordinate with each other without anyone’s coordinating them, without a dominant common purpose, and without rules that fully prescribe their relations to each other.” An everyday occurrence provides an illustration of that kind of adjustment: “When two masses of pedestrians cross an intersection against each other they will slip through each other, each pedestrian making such threatening, adaptive, or deferential moves as will permit him to cross, despite the number of bodies apparently in his way.” A more pertinent example is the development of common law: “The law as laid down by different judges is coordinated, at least in part if not entirely, because the judges have an eye on each other. They are, of course, bound greatly by rules, but on those points at which new law is required, one cannot wholly explain its coordination as no more than a result of rule observance.”

Mutual adjustment is essentially an extension of the economic theory of individual behavior in the market to politics, law, and administration. In this paper we are adding the familiar political idea of countervailing power to Lindblom’s idea of mutual adjustment and calling the combined concept “accommodation.”
Like the judges in the example above, federal and state managers keep an eye on and coordinate with one another, and in the process accommodate each other and their competing constituencies. They coordinate and accommodate because it is administratively expedient to do so and because they share professional wildlife management norms. But they also coordinate because in order to fulfill their respective constitutional-legal mandates on federal and state lands, they must often regulate overlapping groups of subsistence users, and they must manage common wildlife populations that migrate across jurisdictional boundaries.

Thus, for most practical purposes, neither federal nor state managers have the prerogative simply to ignore or overrule the other. As Lindblom observes, this situation tends to force participants toward cooperation or agreement: “It is the relative lack of dominating power that turns participants [in mutual adjustment] to seeking agreement on decisions or outcomes.” To the extent that they recognize their own legal and political limitations, competing groups of fish and wildlife users share this incentive toward agreement.

The “accommodation” approach to the subsistence conflict discussed in this paper should be distinguished from arguments for Alaska Native “sovereignty.” In a valuable review and analysis of the issue, Richard Caulfield, rural development professor at the University of Alaska Fairbanks, concludes that “Native reliance on ANILCA alone may not be enough” because “[s]ubistence management by a federal bureaucracy may be no better (and could be worse) than that of the state.” He urges Natives to seek essentially a sovereignty solution to the problem: a “government-to-government relationship with the federal and state governments regarding co-management of fish and wildlife resources.” Caulfield believes that this would require “affirming political powers of tribal governments over land in and near indigenous communities, and asserting tribal powers over fish and game management.”

Although Caulfield acknowledges that this is a long-term solution that requires an incremental approach, his emphasis appears to be on the goal of Native sovereignty: federal and state recognition of Native political authority over land and resources now claimed by the state. This seems to us a remote goal and, given the political forces arrayed against it in the case of Alaska subsistence, a particularly elusive one. The emphasis in this paper is precisely on the incremental path of accommodation, on the necessity of countervailing federal authority exercised through ANILCA, and continuing federal support for Native rights in order to balance the majority forces represented in state government.

It is within this accommodation framework that longer term goals of Alaska Native sovereignty are most likely to be realized in practice, if not in the letter of federal and state law.

**State v. Federal Law**

The federal government has not always been a vigilant protector of Alaska Native subsistence rights. Unlike Indian tribes elsewhere in the United States, Alaska Natives did not have the protection of treaties, which usually included provisions for tribal rights to land and resources. It was such a treaty that provided the basis for the 1974 decision by Judge George Boldt, of the federal district court of western Washington, which awarded up to half of that region’s harvestable fish to a group of Indian tribes (United States v. State of Washington [384 F Supp. 312]).

Lacking even the limited protection that treaties provided, and in the absence of significant competition for fish and wildlife resources in most of the territory, Alaska Native subsistence needs commanded little attention from the federal government in pre-statehood days. In one region where significant commercial interests did exist—the rich salmon fisheries of Southeast Alaska—federal civilian and military authorities firmly supported the salmon industry’s encroachment into Tlingit and Haida subsistence fisheries, beginning in the 1870s.

Federal officials were not heedless of Native interests, however. Within a few years of the 1867 Alaska Purchase, Congress exempted Natives from a prohibition on the harvest of fur seals. Several other Native exemptions from fish and game laws followed in later years, including the Alaska Game Acts of 1902 and 1925, the Migratory Bird Treaty Act of 1916, and the White Act of 1924, which was the basic act governing the salmon fisheries until statehood. But it was not until the second and third decades of statehood, and the failures of state government to protect Native subsistence interests, that the federal government once again became a major force in Alaska fish and game management.

This federal-state struggle over Native subsistence rights ultimately engaged two distinct bodies of constitutional law. These were represented in the state supreme court’s McDowell decision, and the federal district court’s “McDowell II” decision, to be discussed below. Before the struggle reached that stage, however, there were clear signs of the trouble to come.
The first problem was that Congress had never clarified Native aboriginal rights to land and resources in Alaska, choosing instead to deal with the issue on a piecemeal basis, as indicated above. Then Congress extinguished aboriginal rights in exchange for specific grants of land and money under the Alaska Native Claims Settlement Act (ANCSA) of 1971, leaving Native subsistence dependent on the existing authority and good faith of the Secretary of the Interior and the State of Alaska. Having deleted previously extensive references to Native subsistence from the final version of the act, the conference committee on ANCSA expressed congressional intent: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." 31

Until the trans-Alaska oil pipeline construction boom of the 1970s, state government for the most part ignored subsistence hunting and fishing as distinctive activities. To the extent that they were regulated, this occurred as part of the broader task of regulating sport and commercial harvesting. The state's regulatory structure is headed by the Boards of Fisheries and Game, both consisting of seven members appointed by the governor and confirmed by the legislature. The Commissioner of the Department of Fish and Game serves as ex-officio secretary of the boards, while the department provides technical assistance, recommendations, and other staff support. While the department also has broad responsibilities for fish and wildlife management, the Division of Fish and Wildlife Protection of the Department of Public Safety enforces regulations in the field.

In 1975, with rapid population growth accompanied by increasing competitive pressures on Alaska's fish and wildlife resources, the legislature for the first time authorized the Board of Game to regulate subsistence hunting as a separate activity. 28 (There had been separate regulations for subsistence fisheries since 1960.) A year later, the fish and game boards adopted a joint policy statement assigning the "highest priority" to subsistence for the preservation of "the variety of cultures and life styles in Alaska." In the same statement, the boards also warned that "limitations on the productivity of fish and game must discourage continued increases in the numbers of subsistence type resource users." 30

One immediate threat was the decline of the Western Arctic caribou herd in northern Alaska. In keeping with the policy statement, the Board of Game by emergency regulation authorized 3,000 harvest permits to be distributed among hunters in Native villages; the distribution was to be based on the recommendations of the village councils. However, the Tanana Valley Sportsmen's Associa-

tion, a Fairbanks-based group that later had a lead role in forming the Alaska Outdoor Council, immediately challenged this regulation. Without ruling on the substantive question of the board's authority to issue such a regulation, the state court nullified the board's action on procedural grounds. 31

In 1978, the legislature passed the first comprehensive state law on subsistence, in anticipation of parallel action by the U.S. Congress, which was then deliberating on the Alaska National Interest Lands Conservation Act (ANILCA). By then it was apparent that despite the statement of congressional intent accompanying ANCSA, neither the Secretary of the Interior nor the state government were adequately responding to the increased competition for fish and game by protecting Native subsistence needs. Thus, ANILCA included a provision effecting a federal takeover of subsistence management in Alaska if the state did not have a subsistence program in place that indeed protected the subsistence needs of Natives and other rural Alaskans. The state act therefore directed the boards to give priority to subsistence uses, defining subsistence as "customary and traditional uses of... wild, renewable resources for direct personal or family consumption..." (Alaska Statutes 16.05.940 [26]). The state law did not, however, limit the subsistence priority to Natives or other residents of rural areas.

To support its implementation, the act also authorized a subsistence research program, which later became the Subsistence Division, in the Department of Fish and Game. Focusing on social science research, the division represented subsistence interests within a department dominated by fish and wildlife managers and biologists whose interests encompassed conservation and development of resources and responsiveness to sport and commercial users. As a staff unit, the Subsistence Division had responsibility only for producing baseline subsistence studies and giving advice to the managers and the boards of fisheries and game.

A department task force charged with determining means of implementing the 1978 law emphasized the "flexibility of the present regulatory system [that] can accommodate the changing needs of both subsistence and other resource users." Similarly, the two boards adopted a policy statement providing that "Whenever possible, the subsistence priority should be achieved by existing regulatory techniques, such as open and closed seasons, bag limits, control of methods and means of take, and controlled use of areas." 32 Neither the department nor the boards, in other words, felt it necessary to adopt fundamentally new approaches to a new set of responsibilities. They apparently viewed subsistence as another category of resource use requiring no significant changes in
established ways of doing business. While the Board of Fisheries, in keeping with previous practice, did adopt separate sets of regulations for sport, commercial, and subsistence users, the Board of Game applied a common regulatory framework to all harvests. 33

Stimulated by the passage of ANILCA in 1980 and advised by the departments of Law and of Fish and Game, the boards further developed and refined their approaches to subsistence management. ANILCA’s definition of subsistence uses was the same as that in the state’s 1978 law, except that ANILCA limited priority for the “customary and traditional uses” to “rural Alaska residents.” By 1982, the state boards had adopted regulations making the rural qualification explicit, clarifying when and how the “priority” would be effected, and outlining broad criteria for identifying “customary and traditional uses.” 34 As a result of these actions, Secretary of the Interior James Watt certified that the state’s subsistence program was in compliance with Title VIII of ANILCA, and control of Alaska’s fish and game resources remained unified under state management.

However, in the 1982 general election, urban sports hunters and fishermen led an initiative campaign to repeal the state’s 1978 subsistence law, charging that it discriminated against them. The repeal proposition was defeated by nearly a 3-to-2 margin statewide, with overwhelming majorities against it in the Southeast and particularly in rural Native regions. In the urban areas including Fairbanks, Anchorage, and the Kenai Peninsula, the split was close, with smaller majorities of voters opposing repeal. 35 Having failed in their repeal attempt, a group of urban sport hunters and fishermen filed a suit, McDowell v. State of Alaska, arguing that the law violated equal access provisions of the state constitution. It would be more than six years before the Alaska Supreme Court ruled in their favor.

In 1985, however, in Madison v. Alaska Department of Fish and Game (696 P.2d 168), the state supreme court struck down the regulation that limited subsistence uses to rural residents, holding that there was no basis for such a restriction in state law. So, to remain in compliance with ANILCA and thereby retain unified state authority for fish and wildlife management, the legislature passed a new subsistence law in 1986, limiting subsistence hunting and fishing to residents “domiciled in a rural area of the state.” The new law defined “rural” as “a community or area...in which the noncommercial, customary, and traditional use of fish and game for personal or family consumption is a principal characteristic of the economy...” (Alaska Statutes 16.05.940[25]).

With the revised law, it appeared that the legislature had at last crafted a subsistence statute that would hold up in state court as well as keep the state in compliance with ANILCA. Now in place was a state subsistence program that gave priority to customary and traditional uses of fish and game by residents of rural communities and areas.

Following the parallel terms of state and federal laws, the program worked generally as follows: First, the state boards identified communities and areas using a broad set of criteria related to the statutory definition of “rural.” This resulted in vast areas of the state qualifying for the rural priority. Excluded were most of the area along the railbelt (from Seward to Fairbanks), the Kenai Peninsula, and larger communities including Valdez in Southcentral and Juneau and Ketchikan in the Southeast.

Second, the board identified “customary and traditional uses” of fish and wildlife in specific areas (including communities and their residents) and by specific species. The criteria for such uses again referred to a broad set of characteristics, in this case including the timing, methods, locations of use, and the preparation, distribution, and nutritional and cultural role of the harvest in the community.

Third, based on the previous two steps as well as on the existing body of fish and game regulations, the boards adopted regulations to provide a “reasonable opportunity” for subsistence use. While the subsistence regulations would include the familiar restrictions applied to sport and commercial users—restrictions on seasons, bag limits, and harvest methods—these were to be generally less restrictive for subsistence users.

Then, to assure priority when some further limits on harvests were necessary, the regulations also provided for “Tier I” and “Tier II” levels of restrictions. Under Tier I conditions, other users would have to be limited before rural subsistence users were limited. Under Tier II, where rural subsistence users themselves had to be limited, priority would be based on their “direct dependence” on the resource, “proximity” to the resource, and their “ability...to obtain food if subsistence is restricted or eliminated” (Alaska Statutes 16.05.258(b)). These provisions corresponded directly to relevant terms of ANILCA (Section 804).

All of this would seem to have resolved the subsistence issue. The problem, however, particularly from a rural Native point of view, was the implementation of the law. As a practical matter, the whole structure of regulation depended on the judgments and actions of state boards and agencies that were largely con-
trolled or influenced by sport and commercial users and professional wildlife managers. Thus, vague or abstract statutory terms like “customary and traditional uses” and “reasonable opportunity” were defined and interpreted by regulators and managers whose values, interests, and experiences typically were not those of rural, and especially Native, subsistence users. The result was subsistence regulation based on a sport and commercial model, definitions of “customary and traditional uses” that reflected individual instead of group or collective interests and practices, and a management orientation that viewed subsistence more as a state-bestowed privilege than as a federally-guaranteed right.

Associated with this regulatory and management system was an advisory committee structure generally lacking incentives or capacities to represent subsistence interests effectively in most regions. Responding to provisions of state and federal subsistence laws, the state boards created seventy local committees and six regional councils to advise them on fish and wildlife resources and regulation. Outside the more remote rural regions, where subsistence users predominate, these committees and councils were not committed to subsistence uses in purpose or composition. They were also chronically understaffed, underfinanced, and lacking in clear, consistent procedures. In 1993, the state disbanded its regional advisory structures, and the federal government established a new set of ten regional councils focusing on subsistence. Although the state’s local advisory committees continue to function, their role in subsistence is even more clouded in the aftermath of McDowell, and their staffing, budgetary, and other organizational problems persist.

The principal remedy for either federal or state failure to enforce the subsistence priority is judicial, not administrative: section 807 of ANILCA authorizes an aggrieved party to file a suit in the federal district court “to require such actions to be taken as are necessary to provide for the priority.” Native subsistence users filed a number of such suits against state managers before McDowell, and other suits have been filed in both state and federal courts before and after that decision. Three federal cases involving disputed definitions of “rural areas” and “customary and traditional uses” were particularly important.

In Kenaitze Indian Tribe v. Alaska (860 E2d 942 [9th Cir. 1988]), the federal court ruled that the state’s definition of “rural,” which focused on the nature of the local economy, was unduly restrictive. Instead, the court suggested, a definition based on population size would be more in keeping with the intent of ANILCA. The appeals court chastised the state for using a more restrictive definition to deny subsistence fishing rights to Native residents of the Kenai Peninsula in a “transparent” attempt “to protect commercial and sport fishing interests” in this highly competitive fishery.

Two other federal cases directly challenged restrictive state interpretations of the “customary and traditional uses” protected under ANILCA and presumably under a responsive state law. In Bobby v. Alaska (718 F. Supp. 764 [D. Alaska 1989]), the court ruled against the state’s imposition of closed moose and caribou seasons and individual bag limits on the Athabaskan Indians of Lime Village in Southwestern Alaska. The court held that if such limits are imposed on subsistence hunting, “there must be substantial evidence in the record that such restrictions are not inconsistent with customary and traditional uses of the game in question.” In this case, the court found that individual bag limits unnecessarily undercut communal patterns of hunting and sharing the harvest, while the seasonal limits restricted traditional hunting patterns without sufficient biological justification.

Similarly, in Kwehluh IRA Council v. Alaska (740 F. Supp. 765 [D. Alaska 1990]), the court held that the state Board of Game could not arbitrarily apply the principle of “sustained yield” to prohibit residents of Kwehluh, a Yupik Eskimo village, from a subsistence hunt of the Kilbuck caribou herd. If used to limit legally protected customary and traditional uses, said the court, the principle required “an articulated and evenly applicable definition.” The board could not act “in ad hoc fashion, as though it had unfettered discretion to decide what meaning it would attribute to the sustained yield issue in any particular case.”

Responding to federal court pressures and learning from their own experience, state regulators were steadily if slowly adjusting the ANILCA-state management system to accommodate subsistence hunting and fishing. The Alaska Supreme Court abruptly derailed this process at the end of 1989, ruling in McDowell v. State of Alaska that limiting subsistence uses to rural residents was unconstitutional.

The supreme court held that the “equal access” clauses (Sections 3, 15, and 17) of the state constitution’s Article VIII on natural resources prohibit “exclusive or special privileges to take fish and wildlife.” The court observed that although the state has authority to allocate resources among users, this “does not imply a power to limit admission to a user group” in the first place. Yet the 1986 subsistence law excluded all urban residents from the subsistence user group while it qualified all rural residents, regardless of individual characteristics. (The court also noted that state regulators had not yet found it necessary to
invoke the Tier II priority, which accounts for individual characteristics of rural residents only.) “A classification scheme employing individual characteristics,” the court suggested, “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.”

Thus, the state supreme court seemed to legitimize the argument that urban sport hunting and fishing groups had been making all along: Alaskans had equal rights to resources, and the rural subsistence priority had to go. After the McDowell decision, although a general “subsistence priority” remained in state law, the priority could no longer be reserved exclusively for rural residents.

By mid-1992, another case had made its way to the top of the state’s judicial system, and the supreme court left no doubt that the prohibition it laid down in McDowell was a strict one. In State of Alaska v. Morry, the court ruled that after McDowell there was no basis left in state law for distinguishing among subsistence users at the Tier I level. Thus, “all Alaskans” qualified for the subsistence priority at Tier I. Any exclusions would have to be made at the Tier II level, where the legislature had authorized distinctions based on customary dependence, proximity or local residency, and availability of alternative resources. Any such distinctions, moreover, had to be made on an individual and not a group basis.

Driving the point home, the court repeated a ruling it had made earlier in its Madison decision: interpretations of customary and traditional uses could not be applied to distinguish among users at the first tier. In addition, “uses” mean just that: uses of resources after they are taken or harvested. Thus, concluded the court, the boards are not required to, although they may give consideration in their “customary and traditional use” regulations to traditional Native or other ways of taking or harvesting fish and game.

With Morry, the court distanced state management even further from Native subsistence practices than it had been after McDowell. Now it was clear that the state’s Tier I subsistence priority could not be based on place of residence, that all Alaskans qualified for consideration as subsistence users, that distinctions among users had to be based on individual and not group characteristics, and that “customary and traditional uses” need not take account of Native customs and practices of harvesting.

The Alaska Outdoor Council and its allies had won the McDowell case and beaten back an attempt in the legislature to place a constitutional amendment on the ballot, and now they had the reinforcement of the Morry decision. Moreover, in a special legislative session just preceding that decision, the legislature was unable to agree on a new subsistence law that might somehow combine a rural residency preference with individual eligibility criteria. This latter approach was suggested by a task force appointed by Governor Hickel. Not only did Native groups strongly oppose the idea, but many others doubted that such a law could be crafted that would pass judicial scrutiny under either ANILCA or the state constitution.

Many of the organized sportsmen believed that if they could eliminate the state subsistence law’s rural preference because it violated equal rights under Alaska’s constitution, they could similarly void ANILCA’s rural preference under the U.S. constitution. A few months after the state supreme court’s decision, a group of sport hunters and fishermen filed a suit, McDowell v United States of America (“McDowell II”), in federal district court. They claimed that Title VIII of ANILCA was unconstitutional because it violated the constitution’s equal protection guarantees, exceeded the powers of Congress to act on such a matter, and encroached on “states’ rights.”

Judge Russell Holland of the federal district court issued his decision in 1992, denying virtually every claim the sportsmen had made. Calling the equal protection argument “the crux of the plaintiff’s case,” Holland held that ANILCA’s rural preference violated no “fundamental rights” and clearly met the constitutional test of being “rationally related to a legitimate governmental interest.” The judge found that “[p]roducting the nutritional, economic, traditional, and cultural needs of rural Alaskans is a legitimate purpose,” and that “[a]lthough the urban/rural classification is not perfectly tailored to the congressional purpose, it bears a rational relationship to a permissible governmental goal.

Concerning Congress’s power to act, Judge Holland found multiple sources, noting that in enacting ANILCA Congress explicitly invoked “its powers over Native affairs and under the Property Clause and the Commerce Clause.” In the first place, “Congress’s authority to enact legislation regarding the well-being of Alaska Natives and other native Americans is plenary.” Second, “ANILCA’s subsistence preference clearly impacts the sport hunting and commercial fishing industries,” and these are “an integral part of Alaska’s commercial relationship with the other forty-nine states.” Thus, ANILCA’s subsistence provisions fall
within Congress's powers over interstate commerce. Third, the U.S. Supreme Court has clearly "upheld Congress's power to enact legislation affecting the management of wild animals on federally owned public lands."46

McDowell II plaintiffs also made several other claims based on familiar Alaska notions of "states' rights." Among them were that ANILCA's subsistence provisions violated the Alaska Statehood Act and the "Equal Footing Doctrine," the idea that Alaska should have the same rights and privileges as any other state. The judge ruled that the statehood act provision granting fish and wildlife management authority to the state on federal lands provided no permanent guarantees against further congressional action on the question, regardless of the state's "expectations." Nor was such authority an "enforceable right." As for the "equal footing" argument that Alaska was being treated differently from the other states, Holland found that the doctrine simply did not apply: "ANILCA does not affect the State of Alaska's right to regulate hunting and fishing on private or state owned lands," and the federal government has the authority to manage federal lands in any state.47

The result was a federal-state constitutional standoff over the issue of subsistence preference in Alaska. The state supreme courts McDowell decision firmly supported the "equal rights" values of Alaska's constitution, and the federal district court's McDowell II decision just as strongly upheld Congress's authority to protect Native and other rural subsistence rights, particularly on federal public lands. Moreover, because ANILCA's subsistence provisions were aimed primarily at Alaska Natives, McDowell II invoked the trust relationship under which the federal government protects the rights of all Native Americans, including Alaska Natives.48 Thus, the constitutional standoff reinforced the political stalemate in Alaska, provided legitimacy to both sides in the conflict over fundamental values, and buttressed the dual system of federal-state management of Alaska subsistence resources.

The choices for subsistence policy seemed to be reduced essentially to two: the legislature and Alaska voters could amend the state constitution to restore the rural preference in state law, or Congress could amend ANILCA to eliminate or substantially modify the rural preference in federal law. Alaska's congressional delegation has consistently advised, however, that amending or substantially limiting ANILCA's rural preference is not a realistic alternative.49 First, Alaska Natives would strongly oppose any significant reduction of ANILCA's subsistence protections. Also, in Congress, delegations from mid-western and western regions have to deal with the reservation- and treaty-based hunting and fishing claims of Indians in their states, and there may be some feeling among them that Alaska should similarly face up to the subsistence claims of its own aboriginal peoples. Further, congressional delegations from other states without pressing Indian hunting and fishing problems may be even less supportive of the State of Alaska's case and more sympathetic to the cause of Native American rights. Finally, environmental interest groups would likely weigh in on the side of more rather than fewer federal controls on the uses of federal lands and resources in Alaska, including such intensely disputed areas as the Arctic National Wildlife Refuge.

The table on pages 22 and 23 summarizes the major laws and court decisions affecting subsistence in Alaska since 1971.

Managing the Dual System

Federal agencies took control of subsistence management on federal public lands in Alaska on July 1, 1990. This meant federal control of subsistence hunting on all federal lands, and federal control of subsistence fishing only on some limited federal lands not containing navigable waters, which remained under state jurisdiction. In April 1994, however, Judge Holland of the federal district court further restricted state control of subsistence fishing as well as hunting in a decision on the combined cases of Katie John and State of Alaska v. Babbitt. Holland ruled in Katie John that the Secretary of the Interior does have authority to regulate subsistence fishing in navigable waters, and that limiting his authority to non-navigable waters "thwarted Congressional intent" and "abandoned to the [non-complying] state subsistence program the largest and most productive waters used by rural Alaskans who have a subsistence lifestyle."50

The companion case of Babbitt challenged the Secretary's authority to directly manage subsistence fishing and hunting in Alaska. Here, the judge ruled that Congress had "unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement [the rural subsistence preference] in the absence of a state program." This, together with "the clarity of the congressional policy and purpose of ANILCA" and "the clear grant of general regulatory power to the Secretary" led to the conclusion that the Secretary, not the State of Alaska, has the authority to manage subsistence hunting and fishing on federal lands in Alaska.51 Both the Katie John and Babbitt decisions have been appealed by the state. (Text continues on page 24.)

1971—Alaska Native Claims Settlement Act (ANCSA): The federal law settling aboriginal land claims of Alaska Natives makes no provision for subsistence rights, but the accompanying conference committee report says "The Conference Committee expects both the Secretary (of the Interior) and the State (of Alaska) to take any action necessary to protect the subsistence needs of the Natives." (S. Rpt. 92-581, 92nd Congress, 1st Session, December 14, 1971.)

1978—State Subsistence Preference Law: The state government enacts legislation giving subsistence hunting and fishing priority over other uses and describing subsistence as "customary and traditional uses of... wild, renewable resources for direct personal or family consumption...." (Alaska Statutes 16.05.940 [26].)

1980—Alaska National Interest Lands Conservation Act (ANILCA): The federal law designating large tracts of federal land in Alaska for inclusion in the national conservation system also gives priority to subsistence hunting and fishing on federal land. Subsistence uses are defined as "customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption...." (ANILCA Section 804, 16 USC A, 3114.)

1982—Ballot Initiative on State Subsistence Law: Alaska voters are asked whether they want to repeal or keep the state law giving subsistence uses priority over other uses. Alaskans vote to retain subsistence priority by 58 percent to 42 percent.

1985—Madison v. Alaska Department of Fish and Game: The Alaska Supreme Court rules that existing state regulations limiting subsistence users to rural residents are inconsistent with the state law (and therefore invalid) because the law itself does not restrict subsistence users to rural residents. (696 P. 2d 168.)

1986—State Subsistence Law Revised: The Alaska Legislature revises state law to say that subsistence hunting and fishing are limited to residents "domiciled in a rural area of the state." The revised law also defines rural as "a community or area...in which the noncommercial, customary, and traditional use of fish and game for personal or family consumption is a principal characteristic of the economy..." (Alaska Statutes 16.05.940[25].)

1988—Kenaitze Indian Tribe v. State of Alaska: The federal Ninth Circuit Court of Appeals rules that the state's definition of rural in the 1986 statute is inconsistent with the federal definition in ANILCA. The court interprets ANILCA's definition to include all "sparsely populated" areas without particular reference to whether the economies of those areas are subsistence-oriented. (860 F.2d 312, 314.)

1989—McDowell v. State of Alaska: The Alaska Supreme Court rules that the state law basing subsistence rights on place of residence is unconstitutional. The majority opinion says "the grant of special privileges with respect to game based on one's residence" violates provisions of Alaska's constitution that guarantee all Alaskans equal access to fish and game and prohibit the state from creating "exclusive or special privileges with respect to fish and game" (Sections 3, 15, and 17 of Article 8). However, the court upholds the state's right to grant subsistence users priority, and says that criteria other than just place of residence might be constitutional. (Opinion, Supreme Court of the State of Alaska, No. 3540, December 22, 1989.)

1990—Federal Takeover of Management on Federal Lands: In the wake of the McDowell decision, state law no longer complies with provisions of ANILCA restricting subsistence users to rural residents. The federal government takes over management of subsistence hunting and some fishing on federal lands. The state retains management of fish and game on state and private lands and of fisheries in navigable waters and in intertidal areas.

1992—State of Alaska v. Morry: The Alaska Supreme Court rules that all Alaskans qualify for subsistence preference at the Tier I Level and that distinctions among them at Tier II must be made on an individual and not a group basis. Also, "customary and traditional uses" refers to uses of fish and wildlife after harvesting. (Opinion, Supreme Court of the State of Alaska, No. 3866, July 10, 1992.)

1992—McDowell v. United States of America: The federal District Court rules that ANILCA's rural preference meets equal protection standards under the U.S. constitution, that Congress has ample powers to act on the issue, and that states' rights are not impaired. The case is currently on appeal. (Order, U.S. District Court for the State of Alaska, No. A92-531 Civil, October 6, 1992.)

1993—Kenaitze Indian Tribe v. State of Alaska: The state Superior Court rules that the 1992 state law authorizing "non-subsistence" areas is unconstitutional because it violates the equal access clauses of Article 8 of the Alaska Constitution. Subsequently, the Alaska Supreme Court denies a request for a stay of the lower court's ruling pending the supreme court's decision of the appeal. (Order, Superior Court of the State of Alaska, Third Judicial District, No. 3AN-91-4569 Civil, October 26, 1993, and Order, Supreme Court of the State of Alaska, No. S-6162, April 11, 1964.)

1994—Katie John v. United States of America: The federal District Court rules that "For purposes of Title VIII [of ANILCA], 'public lands' includes all navigable waterways in Alaska," and that it is consistent with "the congressional purpose and policy of ANILCA" that the Secretary regulate subsistence fishing in navigable waters. The case is currently on appeal. (Decision, U.S. District Court for the State of Alaska, No. A90-0484-CV, March 30, 1994.)

1994—State of Alaska v. Bruce Babbitt: The federal District Court rules in a case consolidated with Katie John that although Congress "unintentionally and inadvertently" failed to provide explicit authority, "the clarity of the congressional policy and purpose... coupled with the clear grant of general regulatory power to the Secretary," leads to the conclusion that "the Secretary, not the State of Alaska," is entitled to manage fish and wildlife on [federal] public lands in Alaska for purposes of Title VIII of ANILCA." This case is currently on appeal. (Decision, U.S. District Court for the State of Alaska, No. A92-0264 CV, March 30, 1994.)
Many Alaskans had predicted that splitting control between federal and state managers would result in chaos and disaster. In 1990, urging the legislature to action just before the federal takeover, Governor Steve Cowper predicted that “it’s going to be an absolute nightmare.” Two years later, Governor Walter Hickel told the legislature that at stake was “whether we will have a peaceful Alaska or one torn apart by bitterness and violence.” Native law attorneys labeled post-McDowell management as “an unworkable system producing much litigation and little negotiation.” These predictions and assessments were to some degree politically motivated: to build support for amending the state constitution, state subsistence law, or Title VIII of ANILCA. There were also good substantive reasons for thinking that the dual system might fail and cause great damage.

Wildlife populations pay no heed to political boundaries in their seasonal migrations and wanderings. Indeed, hunters and fishermen themselves might not know on whose land they happen to be, and what rules apply where, given the complex patchwork of federal, state, and private lands. Under such conditions, how could managers assure that moose and caribou herds would be adequately protected from overhunting? State managers confronted the prospect of a surge of newly qualified subsistence users (the “all Alaskans” policy after the state court’s Morry decision) on state and private lands. How would the state boards of fisheries and game allocate scarce resources among ever larger numbers of users, especially along the railbelt and in other populous areas? Federal managers now had a relatively narrow but strong mandate to protect the interests of rural subsistence users on federal lands, while state managers had the broad mission of meeting needs of sport and commercial users on all of Alaska’s lands and subsistence users only on state and private lands. How would these overlapping jurisdictions and inconsistent priorities be reconciled?

We will address these questions, first by reviewing the structure and process of the dual management system and second by discussing several cases that illustrate how federal and state managers actually practice dual management in the field.

**STATE STRUCTURE AND PROCESS**

The state boards of Fisheries and Game continue to head the state management system, with the support of the Alaska Department of Fish and Game. As discussed earlier, the state’s regional advisory council system was abandoned in 1993. The local advisory committee structure continues to function, but scarcity of funds, staff, and other organizational support limits its effectiveness, particularly in the area of subsistence management. These committees advise the boards on all fish and game matters, not just subsistence, and, as noted, commercial and sport interests tend to dominate committee composition and decision-making outside the more remote rural regions.

Before the McDowell decision, as described earlier, the state boards made rural area designations, determined “customary and traditional uses,” and then adopted regulations providing “reasonable opportunities” for subsistence use. After McDowell, state managers eliminated the step of designating rural areas and deleted references to place of residence in their “customary and traditional use” designations. Because all Alaskans are now eligible for subsistence, only nonresidents are excluded at the level of Tier I customary and traditional use determinations.

Although the boards have the final authority, Department of Fish and Game staff carry out the studies needed to make these determinations. They collect primary and secondary data from surveys, special studies, hunting and fishing records, and other available sources. The boards then use that information to evaluate the community or area as a whole and compare it to other places. The process is not highly quantified or precise, because the criteria used and the information available for making determinations themselves vary considerably in precision and completeness.

When managers determine that resources are insufficient for all eligible claimants to customary and traditional uses, the boards are authorized to implement a “Tier II” process. This gives priority to users based on customary dependence, proximity, and availability of alternative resources. State managers did not find it desirable or necessary to impose the Tier II criteria before McDowell. Use of Tier II to restrict subsistence presumably would have entailed even more restrictive limits on sport hunters as well. Now that both urban and rural residents can qualify for state subsistence hunts, Tier II has in some cases been the state’s solution to the constraints of the McDowell and Morry decisions.

An important shortcoming of Tier II designations is that they are not easily verified. The department requires interested hunters to fill out forms that ask questions about past hunts; the completed forms are scored using the three criteria of dependence, proximity, and alternative resources. Applicants with a sufficient number of points get hunting permits. The state lacks the capability to verify information submitted by large numbers of urban and rural hunters. According to staff of the department’s subsistence division, the Tier II process,
initially written into the 1978 statute, was never intended to apply to urban hunters. It was designed exclusively to differentiate among rural residents (then the only eligible subsistence users) when subsistence resources were insufficient to meet all their needs.57

Some hunts, such as the Nelchina moose hunt in the southcentral region near Anchorage, did not immediately become Tier II hunts after the McDowell decision, even though the game population could not support the expanded subsistence demand. Board members were concerned that a Tier II hunt there, in isolation, even though the game population could not support the expanded subsistence, seasons, quotas, or other variables—such as antler size—to assure conservation of the resource. Concerning such practices, the Alaska Native Law Section of the Alaska Bar Association has commented that the state's adoption of shorter seasons and smaller bag limits in subsistence areas "bear[s] little resemblance to customary and traditional hunting practices."58 These are in fact the same kinds of practices that drove Native subsistence users to the federal courts for relief from restrictive state interpretations of subsistence laws before McDowell.

FEDERAL STRUCTURE AND PROCESS

Federal subsistence management falls under the authority of the Federal Subsistence Board (FSB). The board is comprised of the state or regional directors of the Fish and Wildlife Service, the National Park Service, the Forest Service, the Bureau of Land Management, and the Bureau of Indian Affairs, as well as a chair appointed by the Secretary of the Interior. One representative from each of the five agencies and the staff of the Fish and Wildlife Service's Office of Subsistence Management serve as staff to the FSB. The staff provides background information and makes recommendations on agenda items.

In 1993, the FSB established ten regional advisory councils with a total of 84 members, appointed by the Secretary of the Interior. The size of each council is related to the size of its region. Five regional coordinators, who are federal employees, facilitate work between the councils and the FSB and serve as primary contacts. The councils collect local information and ask about local concerns, and they develop, review, and present recommendations to the FSB.

As of early 1994, each council had met once. At the October 1993 meeting of the FSB, the regional council representatives made recommendations for board action, and the FSB concurred with three of four council requests. In contrast to the state's advisory structure, the federal councils are concerned only with subsistence issues, and Alaska Natives appear to be well-represented. In addition, the FSB apparently has taken seriously the ANILCA requirement that, if the cognizant regulatory board does not follow a council's recommendations, the board must explain why.

Like the state management process before McDowell, the federal subsistence process begins with rural designations, proceeds to "customary and traditional use" determinations, and then may consider the Tier II option.

The FSB makes rural designations based on communities or areas that are economically and socially integrated. In making these designations, the board attempts to be consistent with the federal court's Kenaitze decision discussed above. Communities with populations of 2,500 or less are defined as rural; communities with populations of 7,000 or more are defined as non-rural. Communities with populations between 2,500 and 7,000 are considered individually, based on their use of fish and game, development and diversity of economy, community infrastructure, transportation and educational systems, and similarities or differences with non-rural and rural communities. A community's designation is adopted with a five-year grace period. For example, if the FSB were to determine that Kodiak is now non-rural, this redetermination would not go into effect for another five years.

The FSB initially adopted the states' "customary and traditional use" determinations as they existed in 1990, with references to rural residency. Shortly thereafter, the FSB concluded that some of the state's determinations should be reconsidered based on further information. As of early 1994, the FSB began refining "customary and traditional use" criteria and identifying areas to reconsider. Likely to be on the first-round list are parts of the Kenai Peninsula and the Upper Tanana-Copper River region. Both currently are without "customary and traditional use" status.51

The FSB has made several interim determinations and has denied others. It appears that the federal board will make an interim determination more readily if the request comes from Natives or Native groups, and particularly where there is the possibility of a lawsuit. For example, the board approved the Association of Village Council Presidents' request to reconsider rainbow trout fish-
ing by residents of seven villages in Western Alaska, while it denied a request from residents of McKinley Village for moose hunting in an addition to Denali National Park. In contrast to the organized representation of the Native villagers' interests, the McKinley Village case was presented to the FSB by one local hunter, without a lawyer, on behalf of a dozen non-Native residents.

As of early 1994, the FSB had yet to consider establishing formal Tier II hunts that would exclude some subsistence hunters when game is scarce. Section 804 of ANILCA, like the state's subsistence law, provides for discriminating among subsistence users based on dependence, local residence or proximity, and alternative resources. But like the state Board of Game, the FSB tries to avoid the difficult and controversial task of discriminating among subsistence users, all of whom are rural residents by federal definition.

**STATE v. FEDERAL MANAGEMENT GOALS**

The state's primary management goal is long-term conservation of resources to assure adequate levels of harvests for all qualified users—sport, commercial, and subsistence. This means, for example, that in the case of the Fortymile caribou herd northeast of Tok, state managers are more willing to start wolf reduction than to restrict "all Alaskan" resident hunting as a means of maintaining the "allowable harvest." Their management plans are aimed at increasing the caribou or moose populations to levels that will allow indefinitely for "all Alaskan" resident hunting as well as Tier II subsistence hunting.62

State managers believe that by providing sufficient opportunity for subsistence users, state Tier II hunts can make separate federal hunts unnecessary. In the case of the Nelchina caribou herd, for example, state managers argue that the Tier II mechanism provides adequate subsistence preference for local rural residents by recognizing "customary and traditional use" based on past resource dependence. Similarly, in the case of the Yukon Flats moose hunts north of Fairbanks, state managers requested that the FSB adopt state seasons and require state Tier II permits instead of federal subsistence permits for moose hunting on federal land. Federal managers rejected this request because rural residents would have to compete with larger numbers of urban residents and, in their view, the state's Tier II falls short of compliance with the rural preference requirement of ANILCA.

The primary goal of federal managers is to assure that rural subsistence users have priority over all other hunters, including state Tier II hunters. The FSB takes actions to provide first for subsistence hunters, with or without the agreement of the state. Yukon Flats moose, for example, are within reach of urban Fairbanks hunters, while the Kilbuck caribou in the remote rural southwest are far from any urban area. Still, in both places, the FSB has banned state Tier II hunts from federal lands where such hunts do not coincide with federal seasons. Their concern is that the game populations might not support both federal subsistence hunters and state permit holders, even though in rural areas the two groups of hunters largely overlap. Also, the federal board has argued that, because wildlife roam across federal-state land boundaries, a state hunt may reduce federal subsistence users' opportunities.

Although they agree on the overall priority for rural subsistence, the agencies represented on the Federal Subsistence Board have distinct missions, and they differ in their wildlife management objectives. The National Park Service, for example, places more restrictions on use of resources on park lands than either the Fish and Wildlife Service or the Bureau of Land Management do on their lands. (Section 808 of ANILCA authorizes "subsistence resource commissions" to adopt special conditions for subsistence hunting in national parks.) Consequently, as a general rule, the FWS and BLM may be more flexible in making "customary and traditional use" determinations than is the Park Service.

Residents of McKinley Village, as noted earlier, petitioned the FSB for an interim "customary and traditional use" determination allowing them to hunt moose in Denali National Park. Instead of making an interim determination, as it had for Native villagers who wanted to hunt Kilbuck caribou on wildlife refuge land, the FSB decided to await the outcome of a formal determination process, a delay that could in effect dilute the McKinley Village residents claim to "customary and traditional use."63

In general, Native subsistence users seem to prefer the federal management system to the state's, because, so far, federal interpretations of "customary and traditional uses" are more consistent with Native subsistence practices. Although the regional council advisory system has existed for only a very short time and the record could change, the FSB has also agreed with most of the rural subsistence councils' recommendations.64
MANAGEMENT GOALS AND QUOTAS

Given their commitment to assuring the rural subsistence priority, federal managers are reluctant to set overall harvest quotas. This avoidance of quotas is the source of one of the state's major complaints about federal management. State managers argue that they cannot effectively manage unless the FSB adheres to the "allowable harvest" numbers that the state has set in order to meet the management goals of sustained yield and continuing harvests for all users. The state's goal of increasing the size and range of the Fortymile caribou herd, for example, is meant to increase opportunities for all hunters, urban and rural alike. The state therefore wants to set lower quotas now in order to allow more people an opportunity to hunt the herd later.

The FSB does not necessarily share the management goals as interpreted and implemented by the state. This is not because the federal board does not favor resource conservation or even because it disagrees with the state's biological assessments of the game populations. It is rather because the FSB's first priority is to provide for current rural subsistence users. Thus, in the case of the Fortymile caribou, the FSB wants to maintain a "healthy population" so that the herd can continue to meet demands of subsistence users, but it is not concerned with providing for sport, non-rural, nonresident hunters. The FSB is less inclined to set lower quotas—or any quotas—in the present as a means of providing for more hunters in the future. In the federal managers' view, conservation and sustained yield, or maintenance of "healthy populations," might better be served by limiting urban and non-local users than by accepting state quotas that limit subsistence harvests. The latter, they believe, can be contained within necessary conservation limits mainly through enforcement of open and closed seasons.

Patterns of Conflict and Accommodation

Probably the single most important factor affecting working relationships between federal and state managers is location: whether the hunting and fishing grounds are near urbanized areas, such as the railbelt, or are in remote, rural regions far from the cities. Accommodations are easier in rural regions because there is less competition for limited stocks and because rural hunters and fishermen qualify under both federal and state subsistence regulations.

A second important factor is the status of fish and wildlife populations, specifically the supply relative to demand, and whether populations are growing or declining. (This often involves conflicting opinions about the reliability of biological information.) Accommodation is obviously easier when there appears to be enough for everybody.

A third factor is land ownership patterns. Where the hunting or fishing grounds are all or mostly under the control of one or another agency, more consistent, unified management is possible. Conversely, where there is a patchwork of federal and state lands and related agency missions, management is more complicated and inconsistent.

Most of the cases discussed in the following sections focus on problems of game management on the land. This is where most "dual management" problems have occurred because, as indicated earlier, federal subsistence management has concentrated on the land while leaving most fisheries, which involve navigable waters, under state control. Whether under state or dual management, however, fisheries can present special circumstances because a very large and highly organized commercial fishing industry must be added to the mix of competing users. Further, widely dispersed fisheries must be managed interdependently because of the extensive migratory range of salmon.

After briefly reviewing several cases of dual management of game animals, we will also consider the problem of fisheries management. Much of the information in these sections is from interviews with state and federal wildlife managers (as noted in each section). The interpretations are those of the authors. Map 1 on the following page shows general locations discussed in the text.

NELCHINA CARIBOU AND MOOSE

Where hunters from urban areas are involved, such as in the Nelchina caribou and moose hunts northeast of Anchorage (GMU 13), the state's Tier II system opens the hunts to urban residents who are not eligible under ANILCA. These are highly accessible animal populations, with most hunting taking place from the road system. Anchorage and Fairbanks hunters compete with Native and non-Native residents of small rural communities in the Copper River Basin. This increases the probability that the Federal Subsistence Board will find that state Tier II hunters cannot hunt on federal lands without encroaching on rural subsistence harvests.

Above we noted the tensions between federal and state managers over the issue of urban crowding in these hunts, and the reluctance of federal managers to defer to the state's Tier II hunts for caribou. For their part, state managers
fear a domino effect if they use Tier II for moose hunts, while the alternatives of imposing bag limits and antler size restrictions appear too restrictive, especially to rural subsistence hunters. Further, these rural hunters fear they are being squeezed out of the hunts by ever larger numbers of well-equipped urban hunters. Indeed, according to one recent estimate, over 90 percent of the state's Tier II Nelchina caribou harvest is taken by non-local hunters.\textsuperscript{68}

Although most of the land involved in the Nelchina hunts belongs to the state, the FSB has authorized rural subsistence hunts that competed directly with state-authorized "all Alaskan" and Tier II subsistence hunts. State managers point out that federal subsistence hunters will find it difficult to hunt without straying onto state land and hunting illegally. Relatively distinct boundaries separate federal from state lands, however, and this simplifies state enforcement. Another factor reducing otherwise difficult management problems in this area is that there still seems to be a sufficient number of animals to go around. According to state managers, dual management has so far had no significant biological impact, but in such an intensively hunted region with fluctuating game populations, this judgment is subject to change.\textsuperscript{69}

**Fortymile Caribou**

Demand clearly exceeds supply in the case of the Fortymile caribou herd. In 1975 the herd hit an all-time low of 10,000 animals, from a high of 500,000 fifty years earlier.\textsuperscript{70} Since the low of the 1970s, the herd has grown under state management, and the state has increased seasons, bag limits, and quotas. This allows for more use by both urban and rural residents, who hunt the herd in the Tanana-Yukon uplands and along the Taylor highway east of Fairbanks. The caribou range is mainly on state lands, with federal lands comprising relatively small, scattered areas. Management problems focus on dual management, highway accessibility, and state efforts to increase herd size. When the state closes hunts early because quotas have been reached, federal managers do not necessarily close federal hunts. Consequently, federal subsistence hunters may stray onto state land, and state quotas may be exceeded.

In 1990, the FSB set federal subsistence hunting regulations similar to those of the state. The federal regulations differed in that they did not include a quota and, under the community population criteria, they recognized the Fort Greely military installation as a "rural community" and its residents as subsistence users. In the fall 1991 hunt, the state's allowable harvest was taken before the season ended. The Department of Fish and Game closed the hunt by emergency order
and the FSB soon did the same. However, the FSB did not follow the state’s lead in closing the winter hunt or the next year’s fall hunt. The FSB’s position was that the shortened state hunts had not met ANILCA’s requirement that subsistence hunters have a “reasonable opportunity” to meet their needs.

Similar disagreements continued into the 1993-94 seasons. Although these disagreements have not significantly affected herd size, they could in the future because of increasing hunting pressures and the characteristic massing of the herd along the Taylor Highway, which makes them relatively easy prey.

Despite these differences, federal and state managers have cooperated in the field, and they agree on the goal of increasing herd size. Agreement in the field, however, does not necessarily translate into consistent regulation, because field managers have limited authority. This is more a limitation of federal field managers, because federal regulatory authority is more centralized in the Federal Subsistence Board than is state authority in the Board of Game.

**Southeast Deer**

Chances are greater that the demand for animals will exceed the supply where hunts occur near urban areas, and this increases the likelihood of disagreements between federal and state managers. An example is deer hunting on Admiralty, Baranof, and Chichagof islands (GMU 4), which are accessible to urban hunters mainly from Juneau. Most of the area consists of federal lands in the Southeast’s Tongass National Forest. Under federal regulations, this area has been closed to all but rural subsistence hunters. (The state owns only narrow strips of tidelands.)

In 1993, the FSB determined that the deer population was insufficient to support demands from both Juneau hunters and rural subsistence hunters. The federal board reached this conclusion based on its own interpretation of data supplied by the state, despite state biologists’ claims that there were enough deer to support a state sport hunt in addition to the subsistence hunt.71

The Southeast deer case shows most clearly how land ownership patterns can affect the attitudes of federal and state managers toward each others’ assessments of whether animal populations can sustain both federal and state hunts. In the Nelchina and Fortymile cases, where state lands predominate, state managers appear more cautious and conservation-oriented. In the federally-dominated Southeast, where most land is under Forest Service control, federal managers seem more concerned about overhunting.

**Yukon Flats Moose**

In the case of the Yukon Flats moose (GMU 25[D][West]), there are state Tier II hunts, which draw hunters from Fairbanks, as well as federal rural subsistence hunts.72 The area consists of a portion of the Yukon Flats National Wildlife Refuge, Native lands around Stevens Village, Beaver, and Birch Creek, and state-managed navigable rivers. Management problems arise primarily from the mosaic of land ownership, two different permits with different seasons, a low-density moose population, and access from Fairbanks. Compared to the previous cases, however, the relative remoteness of this area tends to limit the urban competition and this eases management problems.

State ownership in this area is limited largely to lands under navigable waters below the mean high water mark, and many hunters hunt moose from river boats. Although the state manages hunting on private lands, these are Native corporation lands whose owners discourage hunting on their property by non-local hunters. Because resident Native villagers prefer the federal rural subsistence hunt to the state’s Tier II hunts, many Tier II permits are potentially available to outsiders. However, the factors of remoteness, scarcity of animals, and land ownership place practical limits on their use.

Despite their differences, federal and state managers have cooperated in this area. The FSB agreed to the state’s moose harvest quota for the 1993-1994 season. Federal and state field managers report that they have good working relationships and, within the constraints of the laws, they are working to simplify the regulatory system.

In 1993, the federal Regional Subsistence Office entered into a one-year cooperative agreement (authorized under Section 809 of ANILCA) with the Council of Athabascan Tribal Governments, and the state participates in the arrangement. Under the agreement, a resident in each of ten Yukon Flats villages collects information every two months on the subsistence activities of all households. Regional coordinators aggregate these data to the community level and submit reports to the federal subsistence office. State subsistence division staff conduct training sessions for the village “resource specialists.” In the past, the harvest reporting rate from this area has been so low that state managers have been unable to determine when the harvest quota has been met. Both federal and state managers have a stake in the success of this pilot project.
KILBUCK CARIBOU

Harvest reporting and other management problems led first to conflict and then to a model of federal-state-Native cooperation in the case of the Kilbuck caribou. Strongly contributing to this positive outcome was the remoteness of a region where there is little question about who qualifies as a rural subsistence hunter and there is no pressure to provide for urban sport or subsistence hunters.

The Kilbuck caribou herd ranges primarily in the Kilbuck Mountains (GMU 18) between the Kuskokwim River and Nushagak Bay in Southwest Alaska. Overlapping federal and state jurisdictions aggravate the problem of distributing a small number of caribou among the 18 Native villages recognized by federal managers for “customary and traditional use” of the herd. State managers believe that the FSB has stretched the meaning of the term to include more villages than necessary. A recent cooperative agreement between federal and state agencies and local residents, the Qauilgnuit (Kilbuck) Caribou Herd Cooperative Management Plan, appears to be addressing these problems effectively.

The Kilbuck herd declined in the late 1970s and early 1980s, and in 1985 the state Board of Game closed the caribou hunting season. Residents, believing that the state had underestimated the size of the herd, continued to harvest animals without reporting them. State managers saw that without local cooperation they had no control over herd management. In 1990, the Kwethluk IRA Council asked the state to allow a hunt because the villages of Kwethluk, Akiachak, Akiak, and Tuluksak had an urgent need for the meat. Although the state board agreed there was a real need, it rejected the hunt in the absence of a management plan. Kwethluk then filed the suit discussed earlier, Kwethluk IRA Council v. State, and the federal court allowed a limited hunt.

State managers realized they had to work with hunters if they were to have any control over the herd and, at the end of 1990, called a meeting to initiate cooperative planning. However, the state board did not establish a hunting season for 1990-1991, and the FSB agreed with the state. Consequently, several villages filed another suit, Native Village of Akiachak v. United States (No. A91-094 Civ. [D. Alaska] 1991), against the FSB. The FSB's position, like the state's, was that it could not authorize a hunt without a management plan. The villages agreed to participate in cooperative planning for subsistence hunting and, as the prospects for cooperation brightened, they subsequently dropped their suit.

The Association of Village Council Presidents represented the villages in the planning process. Staff of state and federal agencies provided biological data to ensure that the herd was managed for “sustained yield” and “healthy stocks.” For their part, the villagers identified subsistence uses and needs and agreed on seasons, bag limits, and a division of the harvest among the villages. In the fall of 1991, the cooperative planning group submitted a proposal to both the FSB and the state board for a subsistence caribou hunt covering all 18 villages in the area. The state provided for a Tier II hunt and the FSB authorized a rural subsistence hunt. With both boards opening hunts, concerns about overharvesting led the state board to close its season by emergency order.

Cooperative planning continued into 1992 and 1993, with all participants learning from and adapting to each other in the process. By the beginning of 1994, the state Board of Game had approved the management plan, the FSB had informally agreed to it, and the villages had adopted resolutions in support of it. Although the state and federal boards retain management authority, joint decisions are initially made by the planning team. Because proposals have already been agreed upon by local groups and federal and state representatives, the boards' roles are increasingly a formality.

Federal-state cooperation is demonstrated in federal regulations for 1993-1994, which close the season when a total of 130 bulls are taken “in either or both hunts administered by the Federal Subsistence Board or [the Alaska Department of Fish and Game].” At the local level, the Association of Village Council Presidents (AVCP) provides data on “customary and traditional uses” to the Fish and Wildlife Service under Section 809 of ANILCA, and the state fish and game department has also agreed to use this local expertise. In early 1994, the AVCP was negotiating with the federal agency to administer the management planning process itself.

Managing Urban and Rural Fisheries

Fisheries present management problems that are both similar to and different from those confronting managers of game. Fisheries are similar in that their urban and rural locations and the size and trends in their stocks can make management either easier or more difficult. One important difference is that commercial users dominate fish harvests, and this brings a higher level of organized interest group pressure to bear on fisheries management. Another is that as of mid-1994, almost all fisheries still remained under state control, which facilitates management. But there are many more commercial, sport, and subsis-
intensifies pressures on fisheries and complicates their management wherever they are located. This is best illustrated in the Kenai-Cook Inlet salmon fisheries, which are directly accessible to over half the state's population.

KENAI-COOK INLET FISHERIES

Before the 1989 McDowell decision, the Kenai-Cook Inlet salmon fisheries were mainly commercial, sport, or "personal use." The latter are dipnet and set net fisheries, open to both urban and rural residents, where fish are harvested for household food. The rural subsistence fisheries were limited to the Native villages of Tyonek, on the west side of Upper Cook Inlet, and Port Graham and Nanwalek (formerly English Bay), on the end of the Kenai Peninsula. After McDowell, the state Board of Fisheries replaced the personal use fisheries with much more extensive subsistence fisheries, now open to potentially large numbers of urban users. These expanded subsistence seasons and areas overlapped with commercial and sport fishing seasons and areas.

Unlike subsistence fisheries, personal use fisheries had no statutory priority. Accordingly, the state fisheries board permitted them only where they would harvest "surplus" fish and were not likely to affect commercial and sport uses. The post-McDowell subsistence fisheries (potentially open to all Alaskans), on the other hand, continued to give priority to subsistence users, who were expected to descend on the fishery in large numbers. Because of the expanded subsistence priority, managers concluded that they could not set overall quotas because that would essentially be "saving" fish for other, lower priority users, which would be illegal. Also, because all the stocks were already fully utilized, state managers looked for stocks that might withstand the impact of larger numbers of subsistence users.

The expanded subsistence fisheries in 1991 and 1992 concentrated on the July run of sockeye (red) salmon. This stock has yielded an annual harvest of two to three million fish, mostly to commercial users. In 1992, the state board issued 9,200 subsistence permits and recorded a subsistence catch of nearly 60,000 salmon. This was five to ten times more than any previous season of personal use fisheries. Despite the lack of "surplus fish" and the increased take by subsistence fishermen, the fisheries board made no significant changes in commercial and sport regulations. Although commercial and sport fishermen were concerned about the subsistence fishery, management of the combined fisheries was a "reasonably peaceful process," according to a state manager.

That returning sockeye stocks were abundant and commercial quotas were maintained undoubtedly contributed to the peaceful situation.

In 1992, with an eye particularly on the Kenai-Cook Inlet fishery, the legislature authorized the fisheries board to designate "non-subsistence areas." This law temporarily relieved the pressure on the fishery when the board designated as "non-subsistence" essentially the same areas that it had defined as "urban" before McDowell. This included the Kenai-Cook Inlet area except for the Native communities of Tyonek, Port Graham, and Nanwalek, which retained their subsistence fisheries. After the 1993 season ended, however, a state court ruled that the "non-subsistence" law was unconstitutional for basically the same reason that the supreme court had thrown out rural preference in the McDowell case: it violated the "equal access" rights of residents of the non-subsistence areas.

Looking toward the 1994 season, state fisheries managers expected that the court would ask them to work with the affected groups to structure a mutually acceptable subsistence fishery. In these negotiations, managers can make their case for maintaining escapement goals and reducing conflict among users. Much depends on the size of the runs and the extent of demand by subsistence and other fishermen. Unfortunately for management, sockeye stocks are now declining, while demands from urban users are likely to continue increasing.

KENAI-COOK INLET EDUCATIONAL FISHERIES

Before McDowell, as discussed earlier, the Kenaitze Indians successfully challenged in federal court the state's definition of "rural area," which was used to determine who could receive a rural subsistence preference under the state's 1986 subsistence law (Kenaitze Indian Tribe v. Alaska). The state had designated most of the Kenai Peninsula as urban, thus denying the tribe subsistence rights to a traditional salmon fishery. Shortly thereafter, the McDowell decision mooted the "rural area" question insofar as the state was concerned. In the meantime, under court order, the state accommodated the tribe's subsistence claims by providing for a small "educational fishery."

The Kenaitze permit, first issued in 1989, allowed a single gill net, imposed a low harvest level, and targeted a run of fish not included in commercial or sport fisheries. The permit must be in the possession of a person at the site of the fishery when fish are being taken, and the permit holder must submit daily records of catch by species. Educational activities take place at camps run by the tribe for Kenaitze children and for other Native tribes and groups through-
The Kenaitze educational fishery has been continued through the on-again, off-again subsistence status of the Kenai-Cook Inlet fisheries. In 1993 the state issued educational fishery permits to three other Cook Inlet Native groups as well: the Ninilchik Traditional Council, the Native Village of Eklutna, and the Knik Tribal Council. Although these fisheries respond to interests of a small number of Cook Inlet Natives, they are not necessarily a substitute for subsistence fisheries meeting ANILCA standards.

**Yukon-Kuskokwim Fisheries**

Rural fisheries, like rural game management units, present fewer obstacles to cooperative management than do fisheries and game units near urban areas, mainly because the rural areas involve smaller numbers and a more homogeneous group of users. In both urban and rural places, however, a common benefit of cooperative management is that managers and users who work together learn from one another and find shared interests in the conservation of the resource. These points are illustrated in two cases of cooperative management in the Kuskokwim and Yukon river salmon fisheries, both of which were initiated in response to threats of severely declining harvests.

With the Kuskokwim chinook salmon fishery in decline, state managers in 1988 recommended to the Board of Fisheries that the fishery be shut down. A group of fishermen from Bethel, the regional center on the lower Kuskokwim, prepared an alternative proposal to conserve the resource while continuing subsistence fishing. This initiative led to formation of the Kuskokwim River Salmon Management Working Group that same year. The group's board includes commercial and subsistence fishermen who work with state managers to develop management plans and make recommendations to the Board of Fisheries. The Kuskokwim working group assists state managers in making in-season decisions to open or close the commercial fishery. Together, they discuss fishery testing and commercial and subsistence catch data and reach decisions by consensus, although state managers retain discretionary emergency order authority.

International negotiations with Canada concerning the Pacific Salmon Treaty of 1985 led eventually to the formation of another cooperative management group, the Yukon River Drainage Fisheries Association. U.S. participants in the negotiations included Yukon River delegates who saw the need to continue to work together. The fall chum salmon fishery was fragmented into different management areas along the Yukon River. Until the association brought together subsistence and commercial fishermen, processors, and state fisheries managers in 1991, there was division and inaction in the face of a declining fishery. In 1993, the Board of Fisheries adopted the association's management plan amendments, and the Department of Fish and Game funded a two-year planning project for salmon management and restoration. In early 1994, the association was also working on the problem of the False Pass fishery bycatch, where it appears that commercial fishermen incidentally take chum salmon destined for the Yukon-Kuskokwim and Norton Sound fisheries.

**Strategies Of Accommodation**

When the participants in the subsistence policy and management process are working more or less together to reach accommodations, they are approximating Lindblom's process of "mutual adjustment." This is the "simple idea" that people can work together in the absence of agreement on goals and without definitive rules prescribing their relationships.

That fish and wildlife managers share professional norms and must take each others' actions into account promotes coordination in the case of Alaska subsistence. Professional managers presumably share across institutional boundaries a general commitment to maintaining acceptable relationships between the numbers of fish and wildlife available and the numbers of hunters and fishermen participating in their harvests. Managers are also trained to adjust their regulatory decisions to perceived changes in these relationships as well as to professional judgments and decisions made by their peers in other resource management agencies. Further, countervailing federal-state authorities reinforce the claims of Native minority as well as of majority interests. This helps assure that both sets of interests will remain active, legitimate participants in the competition for resources. Several other contextual and institutional factors also affect accommodations within the dual management system.

The above cases show that factors of urban-rural location, resource supply and demand, biological information, and land ownership affect the capacities of managers and users to reach accommodations within the constraints of law and politics. The cases also suggest a set of institutional strategies that managers can use in loosening the constraints and exploiting the opportunities of their varying management contexts. These strategies of accommodation can
be discussed under the headings of administrative discretion, regionalization, devolution, diversification, de jure/de facto implementation, and issue transformation. In using these strategies, managers generally require the support, or at least the acquiescence, of legislatures, agency executives, and the courts.

**Administrative Discretion**

This strategy is defined largely by the ambiguities, silences, and interstices of the laws. Widely varying and unforeseen conditions and inherent complexities of management require the use of discretion by managers, especially at the field level. Both state and federal managers are faced with defining and applying general concepts of “customary and traditional uses” and “reasonable opportunities” to harvest subsistence resources. Although there are precedents and rules, and courts looking over their shoulders, managers must continually adapt and adjust their applications of these and other concepts in the field. Where there is uncertainty or dispute about the validity of the state’s harvest quotas, state field managers have authority to issue “emergency orders” closing the harvest. For their part, federal managers can decide how their own interpretations of “healthy populations” compare to state managers’ estimates of “sustained yields,” and whether a particular situation requires federal and state regulatory actions to coincide or allows them to diverge. It appears that accommodation would be easier if federal managers had greater discretion in the field to match that of their state counterparts.

**Regionalization**

This is a key structural feature of accommodation. Regionalization separates different kinds of problems requiring diverse responses into separate administrative areas. With regionalization, the more difficult problems in and near urban regions, involving larger numbers of more intense competitors for scarce fish and game resources, can be isolated from those in rural regions. Thus, the problems of allocating Nelchina caribou or moose among large numbers of competing users in the urban raibelt are quite distinct from those of allocating Kilbuck caribou to villagers in the remote rural southwest. Managers in the Yukon and Kuskokwim river fisheries have the opportunity to work more closely with smaller numbers of users than do managers in the complex, intensely competitive Cook Inlet salmon fisheries. Cooperative management approaches can be used in both kinds of regions, and managers and users can develop distinctive responses to different regional conditions.

**Devolution**

The two previous strategies combine in many cases to facilitate devolution or decentralization of decision-making and encourage new approaches to cooperative management. In the Yukon Flats north of Fairbanks, an association of Native villages has a federal contract to collect data on all subsistence activities by villagers; these reports support both federal and state decisions on seasons and quotas. Another association of villages in the rural Southwest participates in making decisions on seasons, quotas, and distribution of harvests. Similar arrangements are evolving in the subsistence and commercial salmon fisheries of the Yukon and Kuskokwim rivers. Although more advanced forms of devolution may be possible in rural regions because of their smaller, more homogeneous populations, there are opportunities in urban regions as well. The principal obstacle in urban regions is the intense competition between sport, commercial, and subsistence user groups. Increased decision-making authority might nonetheless be delegated to regional advisory councils and subregional cooperative management institutions as these organizations evolve.

**Diversification**

There are potentially several ways of providing for subsistence preference hunting and fishing that can cut across divisions between rural and urban, Native and non-Native. Under existing laws and sometimes prodded by the courts, federal and state managers have already used a number of them. Lacking authority for a Native or rural preference in the highly competitive Cook Inlet salmon fisheries, state managers have established “educational” subsistence fisheries for small Native communities around the Inlet. Three relatively isolated Cook Inlet villages (Tyonek, Port Graham, and Nanwalek) have fully-authorized subsistence fisheries. Both Native and non-Native fishermen have had a limited equivalent of subsistence rights in the “personal use” fisheries alongside sport and commercial fisheries. State “Tier II” and federal “rural subsistence” and “Tier II” designations are similar approaches to qualifying overlapping groups of urban and rural subsistence users. There seems to be no reason why some form of limited subsistence preference cannot be extended to urban, non-Native Alaskans together with a rural, Native preference. Although the problem of allocating priority rights among these groups remains, subsistence rights need not be exclusive.
**DE JURE/DE FACTO IMPLEMENTATION**

This strategy probably has the most pitfalls, but it is nonetheless a useful one. Here, there can be several gradations of shading of the law: from practical conditions that limit the applicability of the law in specific cases, all the way to situations where managers “look the other way” when technically illegal activity is taking place. An example of the former is when a hunting season open to urban and rural, sport and subsistence, hunters is declared for an area, but as a practical matter, the area is accessible only to rural subsistence hunters who reside there. The latter case, of overlooking technically illegal activity, is much more controversial. An example is Yukon villagers taking silver salmon out of season, pending a state decision to open that fishery, after their subsistence chum salmon fishery was shut down because of unusually low returns. A more significant and continuing case is that of the Yukon-Kuskokwim Delta Native villagers’ spring harvest of migratory waterfowl in violation of international treaties, which are now being renegotiated. The hunts are occurring under a cooperative management plan agreed to by an association of Native villages, the federal government, and three state governments. While permitting Native harvests of certain species of waterfowl, the cooperative plan has protected threatened species of geese, which now appear to be recovering.

**ISSUE TRANSFORMATION**

This strategy refers both to a process of defusing and transforming issues as well as to an ultimate payoff of accommodation. It can be stated in the form of a proposition: The more the subsistence issue can be defined and treated as a problem of conserving and allocating resources rather than as a conflict of fundamental values, the more likely it is that solutions can be reached. Issue transformation is an evolving, experimental, learning process, and it assumes that the participants have sufficient motivation to make it work. It also assumes that the opposing groups have a mutual interest in not pressing their cases to extremes, because they realize that none has the capacity simply to defeat and eliminate the others. In the end, the value conflict will still be there, but it will be displaced in the public arena by concerns about more resolvable problems of resource conservation and means of allocation.

The above strategies are in many respects cumulative and reinforcing. Regionalization, for example, broadens the path for devolution and diversification. Each of these, in turn, provides wider opportunities for the effective use of administrative discretion. And all of the preceding strategies contribute to the process of issue transformation. Although these strategies do not exhaust the entire management repertoire for reaching accommodations, they do suggest some of the main sources and types of available opportunities.

**Conclusion**

Despite predictions to the contrary after the McDowell decision, the federal-state dual system of subsistence management continues to function and to evolve. Although specific rules and legal structures will change because of court decisions or legislative actions, subsistence in Alaska is likely always to be under a “dual system” of one form or another. This is essentially because it is based on two separate constitutional foundations: the state’s commitment to equal rights—even if qualified by constitutional amendment— and the federal government’s trust responsibility for Alaska Natives. Given this dual foundation, which supports them both, Alaska Natives and equal rights advocates are more likely to approximate their goals if they engage in the process of negotiation and compromise instead of holding out for extreme positions in a clash of fundamental values.

Overall, Native and other rural subsistence interests seem to be better protected by the dual federal-state system than by the kind of unified state system that preceded McDowell. Under the dual system, federal court oversight is reinforced in the field by federal managers who focus exclusively on Native and other rural subsistence needs. This federal protection extends to intensely competitive hunting grounds near urban areas where state managers have been much more inclined to assure access for present and future sport hunters. If the federal court’s decisions in the Katie John and Babbitt cases are upheld on appeal, federal reinforcement of rural subsistence will be expanded into fisheries as well, where there are even greater numbers of sport users as well as a powerful commercial fishing industry.

On the other hand, the legislature may eventually authorize, and the voters may amend, the Alaska constitution to legalize a rural subsistence preference. Indeed, the prospect of losing control of subsistence fisheries under Katie John, with its attendant effects on commercial and sports harvests, could be the factor that tips the political balance in the state legislature toward authorization of a constitutional amendment that would restore a rural preference and unified state management. Such an amendment could concentrate management under state authority and thereby reassure urban sport and commercial fisherman.
While a constitutional amendment would simplify management, it is also likely to reduce the effective priority now provided rural users by federal managers under the dual system. State managers would continue to be responsive to sport and commercial interests and to “equal rights” pressures, despite a constitutional exception, just as they were before and since McDowell. Responsibility to protect Native subsistence in particular would be thrown back primarily on the federal courts. Although these courts have been supportive of Native subsistence, they are limited in the scope and speed of their decisions, and they clearly do not employ agents in the field.

In either case—whether under a dual federal-state system or a unified state system—mutual adjustment and accommodation between subsistence and other uses of Alaska’s fish and wildlife will occur. The question is, which system is better able to encourage adjustment and achieve stable accommodations that fairly balance the competing interests of subsistence and other uses of Alaska’s fish and wildlife? It appears from this study that the dual system of countervailing federal and state institutions—with their distinctive histories and mandates and their overlapping jurisdictions and interests—has greater capacities to accomplish this difficult task than does the kind of unified state system that it superseded.

The Alaska Native subsistence issue is both a competition for resources and a conflict over the values of equal rights and cultural survival. As the competition for resources is played out within the federal-state management system, problems of resource conservation and allocation will continue to displace the value conflict. Native Americans historically have lost the struggle for land and resources. In this case, however, Alaska Natives have federal constitutional authority behind them, and they have built effective political organizations in a more supportive political environment. These conditions, in turn, affect decisions by legislative, judicial, and administrative authorities—and they support movement toward accommodation of Alaska Native subsistence.

Endnotes

18. Ibid., p. 9.
19. Stephen Cornell, in The Return of the Native: American Indian Political Resurgence (New York: Oxford University Press, 1988), p.40, succinctly states the nineteenth century “Indian problem” in America as “how to gain access to Indian resources.” Richard White, in The Roots of Dependency (Lincoln: University of Nebraska Press, 1983), p. 315, summarizes the impact of colonization on subsistence systems: “... Indians actually starved because colonizers had come... they died in such prodigious numbers from disease in part because colonizers had wrecked their subsistence systems, and... these subsistence systems themselves were inextricably intertwined with the political, social, and cultural relations colonizers set out to undermine...”


22. Lindblom summarizes how mutual adjustment can moderate value conflicts as follows: "...partisan mutual adjustment encourages a never-ending reconsideration of values.... [M]otives to push toward agreement are powerful in partisan mutual adjustment, and this fact in itself accounts for reconsidering what one demands. But the need for allies reinforces a reconsideration and modification of demands; so also do the costs of attaining demands constitute a moderating influence. Moreover, because decision making is open ended, commitments are tentative and demands can be accommodating where they would otherwise be intransigent." (Intelligence of Democracy, p. 269.)

23. Ibid., p. 209.


31. Ibid. The case was State v. Tanana Valley Sportsmen's Association, 583 P2d 854 (Alaska 1977).


34. Ibid., pp. 13-24; also, Memorandum from Larri Irene Spengler, Assistant Attorney General, Natural Resources, to Don Collinsworth, Commissioner, Department of Fish and Game, Subject: "Legislative history of the term 'customary and traditional' in the subsistence law," Juneau, Alaska, October 20, 1989.


43. Ibid., pp. 23-29.
44. United States District Court for the District of Alaska, Complaint for Declaratory and Injunctive Relief, McDowell v. United States of America, Case No. 90-F Civil, June 22, 1990.


46. Ibid., pp. 30-33.

47. Ibid., pp. 20-23. As of mid-1994, McDowell II was on appeal in the federal courts.

48. In final congressional deliberations on ANILCA, Representative Morris Udall, chair of the House Interior Committee, which had principal jurisdiction over the legislation, stated the committee's intent on Title VIII: Referring to Congress's "constitutional authority to manage Indian affairs" and the federal government's "historic trust responsibility ... to the Alaska Native people," Udall pointed out that "the primary beneficiaries of the subsistence title ... are the Alaska Native people. Although there are many non-Natives living a subsistence way of life in rural Alaska, which may be an important national value, the subsistence title would not be included in the bill if non-Native subsistence activities were the primary focus of concern." (U.S. Congress, Congressional Record, Vol. 126, Part 22, 96th Congress, 2nd Session, November 12, 1980, p. 29278.)

49. Senator Ted Stevens and other members of Alaska's congressional delegation have repeatedly tried to discourage state lawmakers from attempting to change the federal law, suggesting that there was no political support for such action, and that the issue could backfire on the state. See, for example, lan Mader, "Stevens restates support for subsistence amendment," Anchorage Daily News, (April 8, 1994), p. B3.


55. Discussion of subsistence management experience in the field is based on extensive personal interviews and document searches from October through December, 1993. Most of these sources are cited in the notes that follow.

56. See note 37 above.

57. Interview with James A. Fall, Regional Manager, Subsistence Division, Alaska Department of Fish and Game, Anchorage Alaska, November 2, 1993. Following the state supreme court Madison decision in 1985 there were some Tier II hunts, but these were discontinued after enactment of the state's 1986 subsistence law.

58. Interviews with Fall and Ken Pitcher, Regional Manager, Wildlife Conservation, Alaska Department of Fish and Game, Anchorage, November 3 and December 21, 1993.


60. Federal Subsistence Board, Subsistence Management for Federal Public Lands in Alaska: Record of Decision, U.S. Fish and Wildlife Service, 1992. Communities or areas currently designated non-rural are the Municipality of Anchorage, Kenai Area, Wasilla Area, Fairbanks North Star Borough, Juneau Area, Ketchikan Area, Homer Area, Seward Area, Valdez, and Adak. In each of the "areas," two or more communities in the general vicinity are listed as non-rural. (Record of Decision, p. 20.)

61. Interview with Terry Haynes, State Liaison to Federal Subsistence Board, Alaska Department of Fish and Game, Fairbanks, November 18, 1993.

62. There is also an international dimension in the case of the Fortymile caribou herd. The state and the Yukon Territory Wildlife Branch informally agreed to a cooperative management plan in 1990 to increase herd size. When the state proposed to reduce the number of wolves and open a sport hunt, the Canadians took the position that human use should be curtailed before eliminating wolves. (Interview with Keith Woodward, District Office, Bureau of Land Management, Fairbanks, December 2, 1993, also, Alaska Department of Fish and Game, Report on Dual State and Federal Management of Fish and Wildlife Harvests: Examples of Problems and Related Issues, ANILCA Program, June 1993.)


64. Ibid.

65. These locational, resource, and jurisdictional factors parallel conditions that Elinor Ostrom and her colleagues have identified as among those critical to the emergence of effective organizations for the management of common pool resources, such as fish and wildlife. See Elinor Ostrom, "The Rudiments of a Theory of the Origins, Survival, and Performance of Common-Property Institutions," ch. 13 in Making the Commons Work, ed. by Daniel W Bromley (San Francisco: ICS Press, 1992), pp. 293-318. This volume and related recent work on common pool resources have important implications for the design of cooperative subsistence management institutions in Alaska and elsewhere.

66. As noted earlier, this situation may change, depending on the ultimate outcome of the Katie John case now under appeal.

67. This section is based in part on interviews with James Fall (see note 57); Ken Pitcher, Regional Manager, Wildlife Conservation, Alaska Department of Fish and Game, Anchorage, November 3 and December 21, 1993; and Bob Tobey, Area Biologist, Wildlife Conservation, Alaska Department of Fish and Game, Glennallen, November 17, 1993.

69. Biologists point out that the number of caribou calves born in 1993 was low, but also that this was probably due to an early winter in the fall of 1992 and cannot yet be considered a long term trend. (Interviews with Pitcher and Tobey.)

70. This section is based in part on interviews with Craig Gardner, Area Biologist, Wildlife Conservation, Alaska Department of Fish and Game, Tok, December 2, 1993; Keith Woodward, District Office, Bureau of Land Management, Fairbanks, December 2, 1993; and Kent Taylor (see note 72). Figures on herd size from Alaska Department of Fish and Game (see note 74).


72. This section is based primarily on interviews with Ted Heurer, Refuge Manager, Yukon Flats National Wildlife Refuge, Fairbanks, December 9, 1993; Elizabeth Andrews, Regional Manager, Subsistence Division, Alaska Department of Fish and Game, Fairbanks, October 20, 1993 and December 14, 1993; Bob Stevenson, Area Biologist, Wildlife Conservation, Alaska Department of Fish and Game, Fairbanks, December 8, 1993; and Kent Taylor, Management Coordinator, Wildlife Conservation, Alaska Department of Fish and Game, Fairbanks, November 30, 1993.

73. Interview with Mike Coffing, Subsistence Division, Alaska Department of Fish and Game, Bethel, December 21, 1993.


75. Interview with Coffing.


80. Interview with Paul Ruesch, Area Management Biologist, Upper Cook Inlet, Commercial Fisheries Division, Alaska Department of Fish and Game, Soldotna, November 10, 1993.

81. Ibid.


83. Interview with Ruesch.


86. Interview with Andrews.


88. Interview with Andrews.

89. Ibid.; also, Schwarber, Co-Management in Alaska, p. 8.
