

# The Times of Shortage Myth

## The subsistence priority according to:

### **1. Senator Ted Stevens in 1978 as ANILCA passage was being debated before Congress:**

"Now, that is the one thing that I can assure the Alaska native people, and the rural Alaska, will mean, in any case where there's a limitation they will receive preference. And mind you, every annual regulation dealing with fish and game is a limitation."

*Public Hearing, 4/5/78, US Senate Committee on Energy and Natural Resources.*

### **2. Department of Interior in 1995 and State AG in 1981**

"all other uses must be eliminated before "customary and traditional" subsistence use by rural residents can be restricted."

*4/11/95 memo from three federal Solicitors to Anchorage Regional Solicitor and 12/2/81 letter from AG Condon to Governor Hammond.*

### **3. Federal Judge Russell Holland in 1989 -- when the state was in compliance with federal law -- BEFORE the Alaska Supreme Court ruled in McDowell the priority is unconstitutional.**

Alaska Legal Services successfully challenged 6-month moose and 8-month caribou seasons.

"the Board of Game must in the future proceed with scrupulous care and caution in imposing seasons and bag limits on subsistence hunting." (p.30 of 58)

"If bag limits and seasons are imposed on subsistence hunting, there must be substantial evidence in the record that such restrictions are not inconsistent with customary and traditional uses. It must be clear in the record that subsistence uses will be accommodated, as regards both the quantity or volume of use and the duration of the use. Need is not the standard. Again, it matters not that other food sources may be available at any given time or place. The standard is customary and traditional use of game." (p.32)

"the Board of Game shall review its subsistence hunting regulations for Lime Village, Alaska, and shall submit to the court for review reenacted subsistence hunting regulations in accordance with this decision." (p.42)

*Bobby v. Alaska, 718 F.Supp 764 (D.Alaska 1989)*

[Judge Holland eventually approved almost year-round seasons with community bag limit]

### **4. Alaska Federation of Natives "No Net Loss" policy of 1996 and '97:**

"There must be no net loss from the current level of federal subsistence protections, including, but not limited to, the following points: #7. The subsistence priority applies to all times, not just when there is a resource shortage. The Boards [of Fisheries and Game] are required to provide fully for customary and traditional uses before any non-subsistence uses may be allowed"

*AFN Board of Directors, 3/4/96 and Re-affirmed at October 1997 AFN Convention*

### **5. State of Alaska Attorney General in 1998:**

When the state says the priority exists in times of shortage, the state must mean whenever there are regulations.

In an exchange regarding the Administration's proposed '98 constitutional amendment (HJR 102) Rep. Con Bunde asked the AG: "Please define for me what [is] the Administration version of times of shortage?"

AG Stephen White responded: "Virtually, in my idea of times of shortage, demand versus supply, we're always there."

*Public Hearing 5/29/98 State House Judiciary Committee*

### **6. 9<sup>th</sup> Circuit Court of Appeals, Judge D.W. Nelson in a 2000 opinion re: moose regulations.**

"Because we are interpreting the meaning of a phrase that appears in a federal statute, (ANILCA), we owe the state regulatory agency's interpretation no deference.

"Deference to a federal agency's interpretation of a statute is based in part on the expertise it possesses in implementing federal policy ... Most fundamentally, unlike a federal agency, the state is delegated no authority under ANILCA...

"ANILCA provides for a number of important purposes all of which must be balanced by the Secretary of Interior. Subsistence living, although at the heart of ANILCA, is not a per se preemptive statutory priority. [Judge Nelson specifically negates the Interior Department's statement #2 above].

We hold that... the term "priority" within the meaning of [ANILCA] as allowing it to balance the competing aims of subsistence use, conservation, and recreation, while at the same time providing subsistence hunters with a meaningful use preference, is reasonable.

*Ninilchik Traditional Council v US. 227 F3d 1186(9<sup>th</sup> Cir. 2000)*

**ANILCA passed in 1980.**

**After 20 years of lawsuits, the 9<sup>th</sup> Circuit ruled that the language is not an absolute priority.**

**The Court ruled that "a meaningful use preference" must be given.**

**The priority is always present; a priority based upon "customary and traditional use".**

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