HB

2088

File #1

House Resources Committee
Packets on HB 288
An Act Relating to the Taking of Fish and Game for Subsistence and Personal Use

TABLE OF CONTENTS

House Bill 288 and the Fiscal Note
Governor's Transmittal Letter

Comments by the Speaker of the House
Comments by the Chairman of the Bush Caucus
Letter from the House Special Committee on Fisheries
Floor Speech by House Special Committee on Fisheries Chairman

Memoranda from the Alaska Department of Fish and Game
Memoranda from the Attorney General
Board of Fisheries Findings

Supreme Court Decision, Madison vs. ADF&G
Briefs Submitted by the Attorneys in the Madison vs. ADF&G Case:
- Larri I. Spengler, Assistant Attorney General
- Donald C. Mitchell, Intervenor
- Martin Friedman, Arthur Robinson
- Martin Friedman, Arthur Robinson

Statutes and Regulations Pertaining to the Alaska State Subsistence Law
Pertinent Sections of the Alaska National Interest Lands Conservation Act

Letters in Support of House Bill 288
Letters in Opposition of House Bill 288
Other Letters and Comments

HOUSE BILL 228

AND

FISCAL NOTE

Introduced: 3/13/85
Referred: Resources and
Judiciary

IN THE HOUSE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

HOUSE BILL NO. 288

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that

(1) the taking of fish stocks and game populations for personal and family consumption and related uses is essential to the health, safety, and general welfare of Alaskans domiciled in rural communities or rural areas in which the taking of fish and game for such uses is a significant part of the economy of the community or area; and

(2) the taking of fish stocks and game populations for personal, sport, and commercial uses is also of economic and recreational importance to Alaskans who reside anywhere in the state.

* Sec. 2. AS 16.05.251(a) is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.-62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas, bag limits, harvest levels, and sex and

size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish, personal use fish, or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43;

(12) personal use fishing.

* Sec. 3. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the customary and traditional uses by rural [IN] Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel,

clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

* Sec. 4. AS 16.05.940 is amended by adding a new paragraph to read:

(28) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other similar means defined by the Board of Fisheries.

* Sec. 5. This Act takes effect immediately in accordance with AS 01.-10.070(c).

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 288

Title: An Act relating to the taking of fish & game for subsistence & personal use

Sponsor: Rules Comm. at Gov. request

Requestor: Rules Comm. at Gov. req.

Date of Request: March 13, 1985

FISCAL DETAIL

Agency Affected: Department of Fish and Game

Program Category Affected:

BRU, Program or Subprogram(s) Affected: All ADF&G BRU's

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING	0	0	0	0	0	0
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

Passage of bill will reduce management costs substantially. Failure to adopt will require a major increase in funds for monitoring growing subsistence fisheries.

If state is found to not comply with federal requirements, then state may lose federal matching grants and revenues

Prepared By: Steven R. Behnke Phone: 465-4147

Division: Subsistence Date: 3/12/85

Approved by Commissioner: Date: 3-12-85

Agency: Department of Fish and Game

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

GOVERNOR'S TRANSMITTAL LETTER

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 13, 1985

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill regarding the taking of fish and game for subsistence and personal uses. The purpose of this bill is to amend AS 16 to delegate to the Alaska Board of Fisheries and Alaska Board of Game the same authority to regulate the taking of fish stocks and game populations that the boards exercised before the recent decision of the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game, Supreme Court Opin. No. 2911 (February 22, 1985).

The bill does so in two ways. First, the bill would amend AS 16.05.940(23) to limit the identification of "subsistence uses" of fish stocks and game populations to hunting and fishing for personal and family consumption and related uses by residents of rural communities or rural areas, where the taking of fish and game for such uses is a significant part of the economy of the community or area. This change recognizes that in rural Alaska the taking of fish and wildlife is essential to the health, safety, and general welfare of Alaskans domiciled in many of the rural communities and rural areas of our state and to the economy of the community or area in which they reside. As the Alaska Department of Fish and Game has determined from its research on this subject:

> Alaska is characterized by a diversity of socioeconomic systems and patterns of resource use. ... It seems clear that the economic and social stability of many communities depend upon access to and utilization of renewable fish and wildlife resources. ... Disruptions of the relationships between the community and the resource base may affect the viability of these ways of life.

Alaska Department of Fish and Game, Division of Subsistence, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, technical paper No. 61, 274 (1983).

Second, the bill would establish a statutory definition of the term "personal use fishing" (proposed AS 16.05.940(28)). The Alaska Board of Fisheries has already established this category by regulation. This category of harvest, though not subsistence fishing, is important to Alaska residents. After the board has identified the "subsistence uses," if any, of particular fish stocks, AS 16.05.940(28) and the amendment to AS 16.05.251(a)(6) and addition of AS 16.05.251(a)(12), in sec. 2 of the bill, would authorize the board to adopt regulations allocating access to those stocks for the purposes of personal use, sport, and commercial fishing in a fair and reasonable manner consistent with its constitutional responsibility to adopt regulations to use, develop, and conserve fish stocks for the maximum benefit of all Alaskans.

As previously mentioned, this legislation is intended only to provide the boards the same regulatory authority which they exercised before Madison v. Alaska Department of Fish and Game. Consequently, I urge your expeditious consideration of this bill, since its enactment is essential to provide the boards sufficient regulatory flexibility to ensure that Alaskans are provided fair and reasonable access to our fish stocks and game populations. Enactment will also ensure that the State of Alaska remains in compliance with the provisions of Title VIII of the Alaska National Interest Lands Conservation Act and, consequently, retains full authority to regulate the taking of fish and game on all land and in all water of the state.

Sincerely,

Bill Sheffield
Governor

COMMENTS BY

THE SPEAKER OF THE HOUSE

REPRESENTATIVE
BEN GRUSSENDORF

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SITKA, ALASKA 99835
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RULES COMMITTEE
LEGISLATIVE COUNCIL

DISTRICT 3
E. FINGER
PELICAN
PORT ALEXANDER
SITKA
TENAKEE

Alaska State Legislature

WHILE IN JUNEAU
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JUNEAU, ALASKA 99811
(907) 465-3808
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House of Representatives

SPEAKER OF THE HOUSE

PRESS RELEASE #7

March 12, 1985

COMMENTS ON SUBSISTENCE BY REP. BEN GRUSSENDORF

Today the Governor introduced a proposed remedy for the recent court action on subsistence. We now have before us an unexpected, undiscussed issue which requires us to proceed carefully, calmly and constructively.

It appears that the court decision, unless remedied this spring, could cause signficant disruption in the livelihood of thousands of Alaskans. Not only subsistence users, but also sport and commercial fishermen, and big game guides could be very directly and deeply impacted. The court decision also raises the old and unwelcome issue of federal management of Alaska's fish and game. But, with appropriate action by the Legislature, these potential impacts can be minimized, if not avoided altogether.

We will begin by gathering basic facts and clearly identifying issues. We will also evaluate the immediate and longterm impacts on all the resource users. We recognize that there may be differing perspectives and perhaps competing concerns.

Throughout our discussions, we will seek a solution which recognizes the importance of subsistence fishing and hunting in our rural areas, and provides for the needs of personal users, guides, sportsmen and commercial groups as well.

We will provide, of course, for extensive public comment and, hopefully, at the same time, provide a forum for public understanding of what is really at stake in our deliberations. We will seek throughout this process to work on the basis of facts, not opinions; on the basis of reason, not emotion. Our goal will be to minimize any disruptions this unexpected and largely unwelcome change might cause. Only after fact-finding and public input will we decide what constitutes positive, reasonable action on our part.

COMMENTS BY THE CHAIRMAN OF THE BUSH CAUCUS

COMMENTS ON INTRODUCTION OF SUBSISTENCE LEGISLATION

MARCH 11, 1985

REP. JACK FULLER

465-3789

NOW THAT WE HAVE HAD SOME TIME TO DIGEST THE MADISON DECISION AND REALIZE ITS IMPACTS, IT IS CLEAR THAT THE LEGISLATURE MUST TACKLE THE SUBSISTENCE ISSUE THIS SESSION. IT MUST BE HANDLED IN A CAREFUL, REASONABLE FASHION, WITH PLENTY OF OPPORTUNITY TO HEAR FROM DIFFERENT AND PERHAPS COMPETING PERSPECTIVES.

FIRST, PEOPLE ACROSS THE STATE MUST HAVE THE FACTS. THEY MUST LEARN JUST WHAT THE COURT DECISION MEANS FOR ALL USERS OF OUR RESOURCES. THIS IS AN ISSUE AFFECTING ALL ALASKANS WHO HUNT, FISH, OR GUIDE NO MATTER WHERE THEY LIVE. FOR EXAMPLE, IN COOK INLET THE BOARD OF FISHERIES HAS LIMITED SUBSISTENCE USE TO THREE AREAS AND ESTABLISHED A PERSONAL USE FISHERY TO TAKE CARE OF THOSE PEOPLE WHO LIVE OUTSIDE THOSE AREAS AND HAD PREVIOUSLY FISHED. ALL USES AND ALL USERS WERE ACCOMMODATED. WHAT MAY VERY LIKELY HAPPEN NOW, IF NOTHING IS DONE, IS THAT SUBSISTENCE USERS WILL INCREASE TO SUCH AN EXTENT THAT SPORT AND COMMERCIAL FISHING WILL HAVE TO BE SEVERELY CURTAILED, AND PERHAPS ELIMINATED.

ANY SOLUTION MUST RECOGNIZE THE IMPORTANCE OF SUBSISTENCE TO RURAL ALASKA. PEOPLE IN DIFFERENT PARTS OF THE STATE USE RESOURCES DIFFERENTLY. IN RURAL ALASKA, SUBSISTENCE IS A VITAL PART OF THE CULTURAL HERITAGE AND THE BASIC ECONOMICS OF LIFE. THERE, CHOICES OF

HOW TO MAKE A LIVING ARE FEW. SUBSISTENCE IS SURVIVAL. IN URBAN AREAS, ALTHOUGH PEOPLE MAY GO OUT AND TAKE FISH OR GAME BY SUBSISTENCE MEANS, THERE ARE ALTERNATIVES.

SINCE THE 1978 LAW WAS ENACTED, THE BOARDS OF FISHERIES AND GAME HAVE IMPLEMENTED THE LAW IN A FAIR AND REASONABLE FASHION. THE EIGHT-POINT CRITERIA ADOPTED BY THE BOARDS PROVIDED THAT ALL [illegible]S WOULD BE MET. SUBSISTENCE USE WAS FAIRLY NARROWLY DEFINED, RURAL RESIDENTS WERE PROTECTED, AND ALL OTHER USES WERE STILL ACCOMMODATED. AFTER MADISON, ANYONE MUST BE CONSIDERED A SUBSISTENCE USER, WHICH WILL DRASTICALLY INCREASE THE AMOUNT OF A RESOURCE THAT MUST BE ALLOCATED TO SUBSISTENCE. THIS MAKES IS ALL TOO LIKELY THAT OTHER USES WILL BE SEVERELY RESTRICTED OR ELIMINATED.

THE DECISION PROBABLY PUTS THE STATE OUT OF CONFORMITY WITH FEDERAL LAW, SO THE UNFORTUNATE SPECTER OF FEDERAL CONTROL OF ALASKA'S FISH AND WILDLIFE RESOURCES LOOMS OVER OUR HEADS.

GIVEN ALL THIS, WE RECOGNIZE THE NEED FOR LEGISLATIVE CONSIDERATION THIS YEAR, BEFORE THE SUMMER SEASON BRINGS CHAOS TO WHAT HAS BECOME AN ORDERLY SYSTEM OF ALLOCATING FISH AND GAME RESOURCES. APPROPRIATE ACTION BY THE LEGISLATURE NOW WILL MINIMIZE THE NEGATIVE IMPACTS, AND PERHAPS AVOID THEM ALTOGETHER.

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LETTER FROM

THE HOUSE SPECIAL COMMITTEE ON FISHERIES

AND

MINUTES FROM

THE HOUSE SPECIAL COMMITTEE ON FISHERIES

SUBSISTENCE HEARINGS

REPRESENTATIVE
PETER GOLL

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4925

STATE OF ALASKA
HOUSE OF REPRESENTATIVES

M E M O R A N D U M

March 21, 1985

TO: Representative Dick Schultz
Representative Adelheid Herrmann
Co-Chairs, House Resources Committee

FROM: Representative Peter Goll
Chairman, House Special Committee on Fisheries

SUBJECT: Subsistence Hearings

The House Special Committee on Fisheries has been studying the impacts of the Madison decision since shortly after the Supreme Court made its ruling. I will be making a verbal presentation to the Resources Committee as you begin consideration of House Bill 288.

Attached is a letter from the members of the Fisheries Committee addressing the subsistence issue and a resolution adopted by the Joint Board of Fisheries and Game which urges adoption of the governor's subsistence legislation. A transcript of the Fisheries Committee's March 21 briefing on subsistence is being prepared and will be forwarded to the Resources Committee as soon as it is completed and reviewed. We also will transmit other information on the subsistence issue as it becomes available.

The Fisheries Committee found the briefings to be very helpful, particularly the hands-on perspective offered by members of the Board of Fisheries and regional fisheries managers. While the verbatim transcript of our hearings would be a useful research and reference tool, the document cannot replace the value of interaction between committee members and fisheries managers.

As your committee deals with the complexities of the Madison decision, I believe the perspective of those who are responsible for formulating and implementing management policies would be invaluable.

Add - Please let me know if I can be of any help and support.
PG

Official Business

Alaska State Legislature

House of Representatives

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-4924

Special Committee on Fisheries

DATE: March 21, 1985

TO: House Resources Committee

SUBJECT: Special Committee on Fisheries
Comments on Subsistence

The Madison decision by the Alaska Supreme Court on subsistence has the potential of seriously disrupting the management of Alaska's fish and wildlife resources. According to testimony before the Special Committee on Fisheries, the Madison decision could force radical shifts in established patterns of resource allocation, upsetting the carefully balanced approach to fish and game management achieved in recent years.

The Fisheries Committee received testimony on the Madison decision from the Department of Law, Department of Fish and Game, and chairman of the Joint Boards of Fisheries and Game. Although the state's fish and wildlife managers are still in the process of developing specific management strategies responsive to Madison, this much is clear:

1) Sport and commercial fishing in Cook Inlet may have to be cut back to accommodate anticipated increases in non-commercial net fishing.

2) The commercial drift net fishery in Prince William Sound may have to be sharply restricted to provide increased dip-netting opportunities in the Copper River.

3) Many of Alaska's big game guides may be forced out of business because of major decreases in non-resident hunting activities.

The members of the Special Committee on Fisheries believe that the subsistence issue must be addressed by the Legislature in a prompt but thorough manner. The committee respectfully requests the Resources Committee to take all possible steps to address this critical issue in a manner providing for action by the Legislature in the remaining weeks of the Legislative session.

Respectfully,

Peter Gøll, Chair

85-13-JB DRAFT

WHEREAS, the Alaska Board of Fisheries and Alaska Board of Game have been delegated responsibility and authority by the Alaska Legislature to regulate the taking of fish stocks and game populations for the maximum benefit of all of the people of Alaska; and

WHEREAS, prior to the decision of the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game the boards developed procedures which provided adequate regulatory flexibility, both to protect opportunities for subsistence hunting and fishing in rural communities and areas, and to provide hunting and fishing opportunities for recreational, commercial, and other uses; and

WHEREAS, it is unclear to what extent the boards may restrict subsistence harvest after the Madison ruling and as a result, substantial and significantly disruptive reallocations of opportunities to harvest fish stocks and game populations may be necessary. For example:

1. The commercial gill net fishery which is an important component of the Prince William Sound economy may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to accommodate both the historic commercial fishery and other users.

2. Sport fishing for king and other species of salmon on the Kenai and Naknek rivers and in the Susitna drainage may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to prevent that result.

3. Non-subsistence hunting, including commercial guiding activities may be significantly restricted and, in many cases, eliminated. Prior to the Madison decision the Board of Game had adequate regulatory flexibility to accommodate these users reasonably.

WHEREAS, prior to the Madison decision the State of Alaska was in compliance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). As a result of the Madison decision the federal government may now take control over game populations on public lands and fish stocks on public lands and within navigable waters; and

WHEREAS, if the State of Alaska is no longer in compliance with ANILCA, the state will lose the ongoing million dollar per year federal appropriation for the state's public participation system which is essential to the success of the state's regulatory and management activities; and

WHEREAS, the Alaska Board of Fisheries and Board of Game strongly believe that the potential restrictions, closures, reallocations

and loss of funding described above are not in the best interest of the fish and wildlife resources and the people of Alaska;

NOW THEREFORE BE IT RESOLVED, that the Alaska Board of Fisheries and Board of Game meeting in joint session respectfully, but strongly urge the Alaska Legislature to enact legislation during the current legislative session which returns to the boards the regulatory authority and flexibility which they exercised before the Madison decision; and

THEREFORE BE IT FURTHER RESOLVED, that the Alaska Board of Fisheries and Alaska Board of Game have reviewed SB 231 and HB 288, the legislation introduced by the Governor to accomplish this purpose, and urge that this legislation be enacted into law as expeditiously as possible.

House Special Committee on Fisheries
Governor's Conference Room
March 21, 1985
8:30 a.m.

Members Present: Representative Peter Goll, Chair
Representative Mike Navarre
Representative Kate Hurley
Representative Roger Jenkins
Representative Johne Binkley
Representative David Thompson

Members Absent: Representative Andre Marrou

Legislators Present: Representative Walt Furnace
Representative Jack Fuller
Representative Randy Phillips
Representative Steve Frank

Legislative Staff Present: Offices of Senators: Zharoff, Sturgulewski, and Senate Advisory Committee. Representatives: M. M. Miller, Sund, Binkley, Jenkins, Thompson, Wallis, Boucher, Navarre, Larson, Reiger, Grussendorf Herrmann, Szymanski, and Fuller.

COMMITTEE CALENDAR: Briefing on Subsistence and HB 288 by the Department of Law, the Department of Fish and Game and Alaska Board of Fisheries. Some members of the departments and Alaska Board of Fisheries participated via teleconference.

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ACTION NARRATIVE:
TAPE 12, SIDE A
Recording
Number 003 Chairman Goll called the special meeting on subsistence to order at 8:39 a.m. and listed those present: We have a number of distinguished guests representing a variety of organizations and interest groups. We are here today to receive a briefing by the Department of Fish

and Game, its various divisions, the Department of Law and to receive an announcement and some information from the joint boards of fisheries and game regarding their position on the subsistence bill and their guidance on the issue in general. So with that I would invite Mr. Ayers representing the Commissioner's office of the Department of Fish and Game to open our meeting.

Number 015 Jim Ayers, Alaska Department of Fish and Game: Thank you Mr Chairman, members of the committee and other Representatives. I appreciate this opportunity. My name is Jim Ayers, I'm Deputy Commissioner of the Department of Fish and Game. What we would like to do this morning is provide a framework from which we think that you will be able to construct and a reasonable discussion and action regarding the Governor's bill and most particularly as it relates to the Madison decision. We're here in the spirit of cooperation. We're here to assist in any way we can and to hopefully, help us all understand that the Madison Decision has removed the board's ability to achieve balance. It has removed the board's ability to obviate the potential devisiveness that was throughout our state for a while. We would like to discuss in this presentation three major aspects: One, a review of the Madison decision and the legal holdings; two, the implications that we think are there with some definition and some implications that are potentially there with regard to federal law; and the third aspect is of course, the potential impact on users as a result of the Madison decision. God willing there are participants in Anchorage at the board meetings who are going to make the majority of this presentation. And so I will become a pretty face and a listener as you all are. The participants in Anchorage are Bix Bonney, a member of the fish board, Beth Stewart, who is the director of our boards' division; Steve Behnke who is the director of the subsistence division; Larry Spengler who is assistant attorney general from the Department of Law; Ron Jolin, who is the chairman of the joint boards and chairperson of the fish board; Ken Florey who is a regional supervisor with the Department of Fish and Game; John Garner, who is a board member of the fish board; if there are others there that I have not mentioned, I'm sure they will identify themselves as the need arises. What we thought would be most helpful is if we began with a presentation from Ron Jolin who is the chairman of the joint boards. Ron, hopefully, is awaiting my silence and will then discuss with you what he believes the current situation is and give you the boards' perspective. I will mention one other thing and that is that we have distributed a copy of the resolution that was passed by the joint boards yesterday. And so Ron will know you have in front of you a copy of their resolution. With that said, Mr. Chairman, and with a gentle reminder that we are here in a spirit of cooperation and to work with you in any way we can to resolve this potential conflict. And with that I would hope, Mr. Chairman, that we can then move to Anchorage to hear from Ron Jolin.

Number 115 Chairman Goll: Thank you very much Mr. Ayers. Yes, we will move to Anchorage. I'd like to request of you and all the other participants today to the extent possible that you send us your comments in writing. What we'd like to do is make sure that other members of the House and Senate who are not present today are thoroughly briefed and by getting either your written comments or transcripts of your comments telecopied down to us here in Juneau, we would take it upon ourselves to get that distributed. Secondly, I'd like to say we were hoping to go until 11

o'clock this morning, but there's a majority caucus at 10:00 and things may wrap up earlier, so that gives us about an hour and a half, a little less to get our business done and I just wanted all participants to be aware of the schedules. Thank you very much and once again back to you and back to Anchorage.

Ayers: Ron Jolin are you in Anchorage?

Number 118 Ron Jolin: Yes, good morning Mr. Chairman and ladies and gentlemen of the House Committee on Fisheries. I'll give a little overview on what the boards' perspective is of the Madison decision. As you know under Title 16, the boards' responsibilities are the preservation and enhancement of the resource for the people of Alaska. And the allocation of those resources to the different user groups in the state of Alaska. I think the board feels that prior to Madison, we were following a process that was working fairly well. Maybe I can give you some of our perspectives of what the Madison decision means to the board or what we feel are some of the problems we would be facing under the decision. We would have some problems in trying to accommodate our commercial and sport users in the state of Alaska. I think that under the decision we are put in a position of having to allocate fish to one user group in preference over all user groups in the state, especially the commercial and sport fishermen. It's taken away a lot of flexibility of the board to regulate our fisheries. I think that as we move into this we will be getting a more indepth report on that from our legal staff, from the AG's office and from some of the people in the department. HB 288 would return the flexibility that we need to regulate and manage our fisheries resources. It's not an easy job in a state as large as Alaska to try and allocate all of the resources in an equitable manner to all of our user groups. But we really feel that we're doing the best job that could be done under the circumstances. I think that anything that we can do to return our regulatory authority to the balance that we had prior to Madison, would be in the best interests of all people and all user groups in the state. I suppose as we move into this we'll be getting into some of the worst-case scenarios and what might happen - what might not happen this year and in following years if we do indeed not get back to our previous position before Madison and if we do return to our position. If we can find the support that we need to pass both bills. With that maybe I'll turn it over to Larri and she can run through some of the AG's perspectives.

Number 167 Larri I. Spengler: Thank you. This is Larri Spengler with the Department of Law. What I'm going to do is give a very brief overview of Madison, the decision which put us all in this position and also of the series of events that led up to the Madison case and the holdings of Madison, generally how they impact the board's authority and also briefly how that has implications with regard to the federal subsistence law. After that, the different people from the Department of Fish and Game, and to whatever extent I can be of assistance in that, along with board members will talk about the various specific situations that we know we'll need to address under Madison if the Governor's bill does not pass. We thought it might be most useful for questions to be asked after each section, rather than waiting to the end of the whole presentation. So when I'm done with the legal overview, if there are any questions on that maybe we could take them then and then after we talk about each resource

situation, if the committee has questions on that we could take those questions at that time before getting into the next one.

The Madison case is the first time that the State Supreme Court has had an opportunity to evaluate the state's subsistence statutes and what it means. In doing that the court basically turned on its head the authority the board had thought it was exercising up to that point and made it very difficult for the board to continue the balance and the ability to accommodate all of the different uses that had been thought to rest in the board earlier.

Madison is a case that came out of Cook Inlet. It's a case that was filed by people living in Kenai and Homer. The board's approach to subsistence in Cook Inlet is perhaps a useful microcosm to how it has been approaching subsistence throughout the state as well. And therefore the chronology that led up to this case, to this lawsuit, provides a good background against which to look at Cook Inlet in more detail and also to look at the other situations.

The state subsistence statute was passed in 1978. Before 1978, the board of Fisheries had been delegated from the Legislature the authority to authorize commercial fishing, sport fishing and subsistence fishing in the board's discretion. Subsistence fishing at that time, before 1978, was simply described as fishing by net for personal use. Sport fishing was defined as fishing by rod and reel for personal use and commercial fishing was defined as fishing for profit. What the Legislature did in 1978 was take away some of the board's discretion with regards to subsistence fishing. The Legislature said that if there were subsistence uses on a fish stock or a game population, for the game board, then the board no longer had the discretion to authorize or not authorize that. It had to authorize fishing unless it would hurt the resource. So it removed some of the board's discretion and it also said that if there was a resource situation that required restriction, subsistence would have the priority. So, the law was passed in '78 and several years went by. No real effort was made or no real examination was made of the law and what it required by the board of fisheries. In 1980, there were three lawsuits filed by different individuals around Cook Inlet and communities.

And that brought the board's attention and the state's attention generally sharply into focus on the subsistence law and what it required. The state lost all three cases simply because the board had not really been looking up to that point at the subsistence law and what it required.

Those cases came from the Homer, Kenai and Tyonek areas. As a result of that summer, the board in a winter meeting of 1980 and the spring of 1981 examined the uses around Cook Inlet and examined which of those uses were subsistence uses of salmon under the state law and in order to do that they had developed criteria against which they would examine a use of salmon to determine if it was a customary and traditional use of salmon. That was, customary and traditional being some of the catch words in the definition of subsistence uses. Under those criteria, the board determined that in Cook Inlet only three communities qualified for subsistence uses: Tyonek, English Bay and Port Graham. The board

authorized subsistence uses for those communities and then looked at the rest of the Inlet. Elsewhere in the Inlet, there had been subsistence fishing authorized since statehood and before, under the definition of net fishing for personal use. Now, the board had determined that that fishing was not subsistence fishing because it did not meet the criteria that they had develcped and in the spring of 1981 before the 1981 summer the board did not authorize any net fishing for any one else in Cook Inlet for their own personal use except for the subsistence fishing which was to occur in Tyonek, English Bay and Port Graham. That summer, the summer of 1981, individuals from Homer and Kenai filed two different lawsuits. In both cases, the people claimed that they were subsistence fishermen and always had been, and should be able to continue to subsistence fish, But, also claimed that in any event, they ought to be able to have some kind of access to the fishery with nets because they had historically done so. The court in Madison at the lower level refused to overturn the board's assessment, that there were no longer subsistence uses existent in the Kenai area, but also said that the board had to treat those people fairly and could not eliminate that historic use without some good reason. And that basically that in treating them fairly they might have to set up some kind of personal use fishery that would allow those people, Mr. Madison, the plaintiff in that case, and others in the area, access to the fish. So, the board then established, after the summer of 1981, established the personal use fishing category in regulation. Personal use fishing was defined, basically the way subsistence fishing had been defined before the subsistence law was passed: fishing by net for personal use. Subsistence fishing was now defined as fishing for subsistence uses, customary and traditional uses for certain purposes. So subsistence fishing was a subset after 1978 of what subsistence fishing had been before 1978. It was, under the board's interpretation, narrowed. The definition of subsistence fishing had been narrowed in 1978 to protect the uses and harvests in rural communities and areas. Ok, so the board set up a personal use fishery and authorized personal use fisheries opportunities for Mr. Madison and everyone else in the Anchorage area, Kenai area Homer area on sockeye in the summer in Cook Inlet and some coho in the fall. What the lawsuit was filed over was a more extensive coho fishery in the fall, that's what the people had been seeking. The court, as I said in Madison, said these criteria that you've been applying are the right approach to identifying rural communities in the areas that are reliant on fishing for personal uses and a significant component of the economy of the community or area. And that's exactly what the Legislature meant in 1978. You're doing it right, board go ahead. So the board went ahead and in combination with the joint board adopted 8 criteria which eventually replaced the 10 criteria from Cook Inlet which both boards would use on a statewide basis to identify subsistence uses of fish stocks and game populations.

The board of fisheries applied those criteria in various situations, including the Copper River and we'll get into that a little bit more later. At the end of February the Supreme Court issued its ruling in Madison. All along since 1981, the case had been slowly winding its way through the court system and finally reached the State Supreme Court. The court said that the board's implementation of the statute was inconsistent with the statute. The court did not rule on any constitutional issues, but rather looked at what the court thought the Legislature in 1978 meant. And the court determined that the Legislature

in 1978 had not meant nor had authorized the board to identify subsistence uses as rural uses in rural communities and areas. That the Legislature had not authorized the board to look at the uses of communities or areas. And conversely that the Legislature had not authorized the board to look at individuals to see at first instance who gets in to be able to subsistence fish.

Mr. Jones can because he's lived here for 20 years, Mr. Smith can't because he's been here for two years is not a system that the board had ever tried, but the court said by the way, don't try it because that wasn't meant either. What this left us with is a situation where, under the court's ruling, if there has been a subsistence fishery at any time on a particular fish stock, the board has to authorize subsistence fishing on that stock unless any fishing would be dangerous to the stock. The board cannot say who can go and fish in that fishery. All Alaskans can go and fish until or unless all sport and commercial fishing on that relevant stock has been eliminated. So an example which we'll talk about more in the Cook Inlet section is the village of Tyonek across the inlet from Cook Inlet. The board established a subsistence fishery for which only residents of Tyonek could qualify on king salmon in the spring. They took approximately 2000 king salmon in a year in that fishery. Now, there is no question in that fishery is a customary and traditional fishery, the board will have to authorize it and cannot exclude anyone from participating in it. So anyone from Anchorage or from anywhere else can go over there and fish and the board cannot restrict that until and unless the sport fishery in the Susitna drainage afterwards and any relevant commercial fishery have been closed down.

The Madison case then left us with two different sets of problems. One is the potential disruption to the balance that the boards have achieved among the different use groups. And the other is a probably inconsistency with federal law. If it's acceptable, I'll go straight on into the federal law problem and then pause for questions, unless someone would like some now. (no questions)

The federal subsistence law, ANILCA Title 8, allows the state to continue its traditional management on all of the federal land in the state, which makes up 60% of the land, it's not just the parks and monuments, it's all federal land. If the state by a law of general applicability provides for three things which are specified in ANILCA: one is the advisory committee and regional council system, which the state already has; another is the subsistence priority which the state has; and the third is the definition of subsistence uses that is found in ANILCA. ANILCA defines subsistence uses identically to the state with the exception that it is specifically stated in the statute that subsistence are customary and traditional uses by rural Alaska residents. Up until the Madison decision, we were in compliance with ANILCA because the boards had been interpreting our subsistence law as the intention of the law was to protect the harvests of fish and game in rural communities and areas which were dependent on the resource. So, we were in compliance. Now the court has said that the boards are not authorized to identify subsistence uses as rural uses. If the boards cannot protect rural uses as subsistence uses, separately from other uses then we will not be in compliance with ANILCA and the federal government may be required to take some action to impinge upon the board's

regulatory authority over fish and game. There are several questions with regard to this. One aspect of this, as I mentioned, is taking over the management of the federal land in the state. Land is defined in the statute as water and there is an argument to be made, although the state has not and would not concede this, that navigable waters are included under the definition. So, if that were the case, then the federal government would have to exercise some management over all of the navigable water.

The other thing to keep in mind is that even if the federal government doesn't particularly want to take over management there is a section in the federal law that allows another private party to go into court and sue the federal government to make them do their duty as such under the law. So, a private party or group could go into court and sue the federal government and say: 'federal government, the state is not now authorized to protect rural uses as opposed to other uses and that means that you have to go in and do something.' And the court might well order them to do something.

Another consequence of this is financial. Because the statute says that if the state is in compliance we will receive and we have been receiving matching money in the amount of about $1 million dollars a year from the federal government to support the advisory committee and regional council system. And maybe Jim Ayers could summarize the financial consequences before we take any questions.

Number 376 Ayers: Thank you Mr. Chairman. I will do two things actually, I will mention Larri and to Beth Stewart who, hopefully, is waiting to discuss some other aspect of the impacts subsequent to this. We are under a time line here and maybe, Mr. Chairman, you could give us some direction.

Chairman Goll: Yes, Jim, thank you. Rep. Fuller has just come back and advised us that we will be able to continue until 10:30 a.m. So that's a little bit better, but we will still have to move rapidly if we are going to get through all of the facets of your presentation.

Ayers: Those of us who are inclined to enjoy the sound of our own voice will try to restrain ourselves. Thank you Mr. Chairman. The financial implications with regard to the federal funds are most specifically those ANILCA funds that we receive from the federal government to ensure that we carry out the intent of the federal language with regard to rural Alaskans and subsistence use. The subsistence way of life has given cause to the federal government to provide funds to the state of Alaska to ensure that the advisory committees and the regional councils have sufficient funds to address their own issues in the names of solving their own problems and bring those forward to the board. Those funds also assist the department through the division of Subsistence in providing support staff to address questions such as resource uses in rural areas, and those funds total a million dollars. Those are on a reimbursable basis, so what we have is a reimbursement from the federal government each subsequent year to the expenditure.

There's a million dollars of the ANILCA fund. A question that would arise is other federal funds - for example we have as some members who might have attended the finance discussions what is referred to as Dingell/Johnson or now Dingell/Johnson/Wallop/Breaux funds. Those funds come as support funds for the sport fishing industry from the federal government to us. It is not clear what the status of those funds would be and I won't belabor that point unless there are specific questions. There also Pittman/Robertson funds, those funds come from the federal government as a result of hunting activities. Both of those funds are based on a formula that have to do with hunting license and area and those kinds of things. So it's not clear what the status of those funds would be, although as the Department of Law has mentioned, there is some question about whether guiding, outside activity, sport fishing, hunting, what the results would be and therefore those funds could be called into question by the federal government. But we have no information at this time which direction the federal would go with regard to those funds.

Those funds total a little over $5 million. So you have a direct question on a little over a million dollars. There is a subsequent question of probably another $5 million. With that said, Mr. Chairman, perhaps the best thing to do is to answer any questions at this point and of Mr. Jolin, the board chair, Larri Spengler of the department of Law and her overview or of myself and then we'll go immediately to some specific concerns and potential impact on users.

Number 436 Representative Furnace: Mr. Chairman, a question.

Goll: Rep. Furnace.

Representative Furnace: Mr. Chairman, a request to Mr. Ayers. I'd like to have a more detailed breakdown on these federal funding sources. Perhaps you could track that over several years as to what those funds have been and the specific sources and conditions.

Ayers: Mr. Chairman, Rep. Furnace, we'll have that by tomorrow for you.

Goll: Mr. Jolin, do you have any other comments in behalf of the board that you're planning to make during this presentation. Are other board members going to be making further presentations?

Jolin: No, we're just going to talk about them in the context of each situation as we discuss them.

Goll: Then maybe it would be helpful to the people present if maybe you or I were to briefly read the resolution of the board of fisheries and game. Is that now the position of the board? Has that been officially voted on and are we to take this as the joint boards' stand on this issue?

Jolin: That was voted on yesterday by the joint boards and that is our joint resolution and our stand on the issue.

Goll: Then with the permission of the members I'll just quickly read this statement so that all the people with us today will be aware of where the boards stand and then go on as Mr. Ayers suggested. The statement reads:

WHEREAS the Alaska Board of Fisheries and Alaska Board of Game have been delegated responsibility and authority by the Alaska Legislature to regulate the taking of fish stocks and game populations for the maximum benefit of all of the people of Alaska; and

WHEREAS, prior to the decision of the Alaska Supreme Court in "Madison v. Alaska Department of Fish and Game" the boards developed procedures which provided adequate regulatory flexibility, both to protect opportunities for subsistence hunting and fishing in rural communities and areas, and to provide hunting and fishing opportunities for recreational, commercial, and other uses; and

WHEREAS, it is unclear to what extent the boards may restrict subsistence harvest after the "Madison" ruling and as a result, substantial and significantly disruptive reallocations of opportunities to harvest fish stocks and game populations may be necessary. For example:

1. The commercial gill net fishery which is an important component of the Prince William Sound economy may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the "Madison" decision the Board of Fisheries had adequate regulatory flexibility to accomodate both the historic commercial fishery and other users.

2. Sport fishing for king and other species of salmon on the Kenai and Naknek rivers and in the Susitna drainage may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the "Madison" decision the Board of Fisheries had adequate regulatory flexibility to prevent that result.

3. Non-subsistence hunting, including commercial guiding activities may be significantly restricted and, in many cases, eliminated. Prior to the "madison" decision the Board of Game had adequate regulatory flexibility to accomodate these users reasonably.

WHEREAS, prior to the "madison" decision the State of Alaska was in compliance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). As a result of the "Madison" decision the federal government may now take control over game populations on public lands and fish stocks on public lands and within navigable waters; and

WHEREAS, if the State of Alaska is no longer in compliance with ANILCA, the state will lose the ongoing million dollar per year federal appropriation for the state's public participation system which is essential to the success of the state's regulatory and management activities; and

WHEREAS, the Alaska Board of Fisheries and Board of Game strongly believe that the potential restrictions, closures,

reallocations and loss of funding described above are not in the best interest of the fish and wildlife resources and the people of Alaska;

NOW THEREFORE BE IT RESOLVED, that the Alaska Board of Fisheries and Board of Game meeting in joint session respectfully, but strongly urge the Alaska Legislature to enact legislation during the current legislative session which returns to the boards the regulatory authority and flexibility which they exercised before the "Madison" decision; and

THEREFORE BE IT FURTHER RESOLVED, that the Alaska Board of Fisheries and Alaska Board of Game have reviewed SB 231 and HB 288, the legislation introduced by the Governor to accomplish this purpose, and urge that this legislation be enacted into law as expeditiously as possible.

Thank you very much. Mr. Jolin and Mr. Ayers please proceed.

Ayers: Mr. Chairman, the next brief presentation that we have designed is from Beth Stewart, who is director of our board's division. We're going to ask Beth to talk a little bit about the boards approach in current potential problems from the perspective of proposals or petitions. Perhaps Beth could lead that off. Mr. Chairman, members of the committee - Beth Stewart, if you're in Anchorage.

Number 534 Beth Stewart: The boards have two situations facing them at this meeting. Some of the proposed changes to the regulations which are before them will have to be considered in light of Madison and the changes that it has imposed on the board. Also, the boards have situations that are not before them at this meeting, that were not regularly scheduled that they may have to contemplate changes in the regulations to for next summer. In both of those situations, the uncertainty about the status of the subsistence law, whether it remains as it currently is written and under the Supreme Court's interpretation or whether it changed makes the boards task extremely difficult. At this meeting, both boards are probably going to spend a great deal of time discussing alternative approaches to the proposals before them. Also, preparing alternative approaches to the situations that may occur this summer. For the fisheries board in terms of the situations that may occur this summer, there has been little or no opportunity for people to come before the board to request changes in the current regulations under Madison. We don't have the kind of regulatory time frame available to us that would allow a full-scale board of fisheries hearing and regulatory cycle. So if changes in the regulations must be made, to conduct fisheries this summer, the board most probably will not be meeting at the time those changes would need to be made. And under the delegation of authority to the commissioner of fish and game, the boards would ask Commissioner Collinsworth to adopt emergency regulations to conduct fisheries this summer.

Both boards plan to meet again in joint session, on March 25, which is the last day of the board meetings to discuss directions to the Commissioner for emergency regulations for this summer. Those

directions may not end up being very specific since neither one of the boards will have had the kind of public input that would guide them in making specific recommendations. I'll just stop here in a second. The way that people may have access to the regulatory system now that no call for proposals is out or no proposals are being solicited is through petition. The Administrative Procedures Act allows anyone to petition any regulatory agency in the state for a regulatory change.

That's the sort of unpredictable portion of what the board and the department may be facing this summer. We have no way of knowing whether people will petition us for changes in the regulations to authorize additional subsistence fisheries and no way to really predict how those can be handled come summer. And with that I'll just close.

Ayer: Thank you Beth. Are there any questions of Beth or Mr. Jolin about the issues confronting the board at this point? At least those that we can see?

Number 594 Representative Furnace: I'd like to pose a question to Ms. Stewart and perhaps Mr. Jolin of their specific intent of perhaps holding hearings, realizing that there is somewhat a shortage of time. It appears that this is an important issue which the public does deserve its ability to participate in.

Number 643 Stewart: Mr. Chairman, the board doesn't have a special hearing scheduled at this time, the decision came out well after the board's regular announcements for public hearings and proposals had already been well underway. The board is going to provide an opportunity on the 25th, as I said, for people to come in and speak to the board about the Madison decision and what they think its implications will be. But at this point we have no plans to conduct hearings under any other circumstances. We don't have, for instance, the time to call for proposed changes to the regulations. The board of fisheries has a very complex and lengthy process that it undergoes for soliciting proposed changes to its regulations. About 120 days before the board meets, we issue a call for proposals. We have about a month and a half available for people to mail proposed changes in. Then we must compile those proposals and send them to the printer, then have them distributed to over, I think we have over 3,000 people on our mailing list now. We provide about another 2 months for people to comment on those proposed changes and hold advisory committee and regional council meetings. Then we actually conduct the board meeting and allow people to comment on specific proposals. At that point then, if the board adopts changes, the changes are reviewed by the Department of Law and then sent to the Lt. Governor and then become effective 30 days after the Lt. Gov. signs them. That time alone from when a change is adopted to the time it becomes effective is about 90 days, so as I said earlier, about the only way to change the regulations this summer would be through the emergency regulation process.

Goll: Thank you very much Ms. Stewart, would the next person now like to come forward and speak to the issues affecting their division?

Ayers: Mr. Chairman, there are division directors and as well as perhaps a board member in Anchorage and its my understanding that we would first like to speak about the Cook Inlet area. So, let's go directly to Anchorage, Mr. Chairman, and if people are prepared there why don't you introduce yourself and step right off.

Number 675 Mr. Chairman, this is Ron Jolin again, maybe we'll let everyone introduce themselves so you'll have an idea of who's here. (Anchorage participants introduce themselves, see witness register)

Jolin: I'd like to pose a question to Larri. Larri, under the Madison decision, do we now have to open all fisheries restricted to local to all residents of Alaska?

Spengler: Yes, Mr. Chairman, at least at the first instance. And in the Cook Inlet situation the management people can talk about this more specifically, I believe there are three fisheries currently which are open to residents of particular communities; Tyonek, English Bay and Port Graham. The Madison decision would require that those fisheries be opened to everyone until or unless any sport or commercial fisheries on the same stock had been closed. The Madison decision also requires that if there has been a subsistence use of fish that the board authorize that use and now that the court has said the board does not have the authority to speak in terms of rural uses. This would apply to any area of Cook Inlet, whether it was rural or not. Maybe what would be useful is for Ken Florey who is directly involved with Cook Inlet to talk about where those uses might be in Cook Inlet and what affects that might have.

Number 724 Ken Florey: Yes, thank you Larri. Well under your definitions you just gave we do have the three local area fisheries that were defined by the board after a 1981 board meeting as being subsistence fishing. Those being the early spring fishery in Tyonek for chinook salmon, king salmon; and then the two fisheries in Port Graham and English Bay which go on throughout the year, through the summer months - the spring through the fall months for local residents. Under my understanding or how it's been presented, those no longer would be open only to local residents or those domiciled in those areas, but anyone who's a resident of the state of Alaska can participate. As far as other fisheries in Cook Inlet, it's my understanding that those that we have called personal use would now be under a subsistence name and that those could also be opened and would be opened to any participants who wanted to get involved in that fishery. There are depending upon how far back you want to go with the old subsistence laws those would be primarily all the beach areas in Cook Inlet and taking to an extreme even some fresh water areas in Cook Inlet, primarily the Susitna drainage and Knik Arm, parts of Turnagin Arm that have been closed upwards to 25 years. And then all of the eastside beaches and the current setnet commercial areas in upper sub district and northern district of Cook Inlet.

Spengler: It might helpful for the committee if some of the board members could talk about what impact they would see that those fisheries being open would have on different use groups depending of course on the level of participation in those subsistence fisheries.

Number 752 Bix Bonney: Mr. Chairman this is Bix Bonney, board member and more or less representing the sport fishery groups in the Anchorage area. I was contacted by the two major groups the Kenai Sport Fishing Association and the Alaska Sport Fishing Association to attend steering committee and board meetings to get their thoughts out. Essentially their thoughts will be enclosed in a letter...

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Number 003 ... public hearings throughout this time information can be gathered to more definitively approach the subsistence problem. They essentially are worried that, in their words, "chaos and confusion" that result with no regulation going on and the short circuiting or the cutting off of the fish that would get into the traditional sport areas, particularly the Kenai River. Whether they are right or wrong they can foresee where there could be subsistence nets out on the eastside beaches cutting off the run of the king salmon as it approaches the Kenai River. They don't want that at all. They said they are not subsistence fishermen, never thought of themselves that way. They're sport fishermen and they want to continue that way. That's essentially what's happened. These two groups represent an aggregate made up membership of about approximately 2,000 sport fishermen and there will be letters from both groups going out, one went out yesterday and the other will be going out this afternoon. If there's any questions, I'll be happy to answer them.

Ayers: Bix, with your approval, I have a telecopy version of the letter of which you speak of the Kenai River Sport Fishing Association. If you would like I would distribute that if you think that there have been modifications, I'll hold it. It's at your pleasure.

Bonney: Jim, the first one that went out, that's complete. The second one is essentially the same as the first one, only the second one comes from the Alaska Sportfishing Association and the trend of their reasoning is just about exactly the same, they're just now getting the words put down they hope in a little cleaner manner than the first letter. But that's definitely there and it's coming.

Goll: Well, thank you very much. We are having that copied at this time and it will be distributed out to the folks present today.

John Garner: This is John Garner, a board member. I think that it might be useful, Larri, if you could explain to us what the Madison decision says about keeping the harvest limits on the subsistence fisheries, both as to the overall harvest and in terms of individual bag limits so that we can get some feel of the impact.

Number 103 Spengler: Yes, this is Larri Spengler with the Dept. of Law, The Madison decision basically requires that customary and traditional uses must be authorized and the people must be given a reasonable opportunity to participate in those uses unless sport and commercial have been eliminated first. Customary and traditional uses are spoken of by the court in terms of individual Alaskans reliance and dependence on resources and that is their reading of what the Legislature in 1978 was concerned

about. There are two different concepts of levels of tasks that I suppose would be considered. The first thing to understand is that the Madison decision does not mean that subsistence fishing would be unregulated. Regulation must reflect however, customary and traditional levels. So, for example, in Tyonek, the customary and traditional levels of the King salmon harvest has been 70 fish per household. So that is what is authorized under the current regulations. Because before the Madison decision came out only the people in Tyonek were fishing, as I mentioned before that fishery only took about 2,000 fish a year. If that fishery had to be opened to everyone as it does under Madison, then those 70 fish per family per household, bag limits must be retained, because that is the customary and traditional use level that is supposed to be perpetuated. The question of whether an overall allocation could be made to the subsistence fishery in Tyonek, say, so that, for example, perhaps the board might want to say well, this will open and everyone can go fish at 70 fish per household until the whole fishery has taken - I'll just make something up - 8,000 fish and then it will close. That question of whether a harvest cap can be put on a fishery was not addressed directly in the Madison decision. The strong implication in the decision is that that cannot be done. That is partly because the fishery then could conceivably be diluted in the sense that if there were a lot of people going to fish people would not get anywhere near the 70 fish per household that was customary/traditional or that if the first group of people all got 70 fish per household, then it would close and nobody else would get to go. So they'd be cut off from the opportunity entirely. It might be useful to ask Ken Florey or Ken Parker or maybe Bob Clasby what might help in Cook Inlet if the Governor's bill doesn't pass and the Tyonek Fisheries has to be opened to everyone at the normal limit and, assuming the board can't put a cap on it, which seems to be the implication of the case, what that might mean and what other fisheries might be affected by that.

Ken Parker: This is Ken Parker, director of commercial fisheries. It's difficult to anticipate exactly all the impacts of such an action. But, if you took the worst case scenario where we did have a large immigration of effort into that fishery, the first thing the department would have to do of course is very accurately monitor the harvests that are occurring in that area and then evaluate that in terms of our reproductive needs of the stocks that are contributing to the fishery. If we got to the point where we were pushing against our escapement needs then we would have to take regulatory actions on the fisheries that also impact that stock and of course under the Madison decision, it seems that the first fisheries that would have to be impacted would be commercial or recreational uses. So, I think in that we don't have any commercial activity in those Chinook stocks, of course we would have to direct our attention to the recreational fisheries and I would suspect that if we got to a point where we were concerned about our escapements, we would be obliged to close those recreational fisheries, until we were at least felt confident about our escapement levels in the various contributing stocks. Essentially that would be our action as a department: we would have to closely monitor the fishery, and then take appropriate regulatory action to ensure that our escapement needs are met. If we sense that the subsistence harvest was progressing at a rate that they were threatening escapement then we would also have to implement restrictions in that subsistence

fishery according to the law and restrict to the most dependent users as you mentioned earlier.

Spengler: Ken, where does the recreational fishery take place, on the same stocks at Tyonek fishing ground?

Florey: Yes, Larri, We don't have a sport fish division representative here, but maybe I can answer that. There's several tributaries within the Susitna System both on the east side and the west side; there's ....fisheries primarily in the Deshka River, Lake Creek, up several other systems on the other side being Willow Creek, Montana Creek, ..., some of those are open seven days a week and there's other smaller stocks primarily on the east side that are week end only fisheries. Depending on what the harvest level were those would be the fisheries we would have to watch quite closely. A question that we have is trying to determine how we would try to manage this if this were to be confined to the area we now have open for the Tyonek subsistence fishery is one thing, but if it were to be open to a large portion of the beach, I know we could not monitor it closely enough to have an accurate catch harvest. When we're faced with those situations, fisheries managers are normally more conservative, not knowing what's going on unless we could have accurate catch figures. I just know from the area we were talking about if it were extended beyond the current boundaries, that we could not accurately monitor that fishery.

Spengler: Before we move onto Copper River, maybe it would be useful to talk a little bit about what the effect would be on the east side of Cook Inlet and if the the eastside beaches were opened at various times during the summer, true subsistence fishing, depending on the level of participation in that fishery, which fisheries might be affected and what measures the department might want to consider.

Number 116 Representative Thompson: My question is addressed to Mr. Parker, I want to make sure I understood what you just said and I don't want to put words in your mouth, but I thought I understood you to say that Fish and Game would be obliged to close sport fisheries if there was an imbalance as a result of this decision. Is that correct?

Parker: If we sense exploitation at Tyonek, and that subsistence fishery was occurring at such a level and it was confined to a certain limited period of time that essentially would perhaps focus that exploitation on a few of the contributing stocks, we would be obliged to implement closures in the recreational fishery to ensure that our escapement objectives are achieved. Of course, this is our mandate under Title 16 to provide for the proper conservation and protection of the resource so that they can continue to support fisheries in future years. So we would have to react to those exploitations and take whatever appropriate actions we felt necessary given the data at hand. As Ken Florey points out, if the fishery was expanded beyond the confines of Tyonek, it would be essentially impossible for the department to accurately monitor that fishery. Then, I think in that situation we would also be compelled to take a very restrictive action in any other fisheries that may impact the stock.

Thompson: Could you give me some sense of your time... how long would it take Fish and Game to study an issue like that before it could lift such a ban?

Number 128 Florey: That is a very difficult question to answer, not knowing how expansive the fishery would be. If it were quite restrictive in an area we could easily monitor, we could get the information just based on interviews with the fishermen. If the area was very large, and we were really unable to monitor the amount of use say other than aerial surveys to get a generalized number, it would be extremely difficult within a timely manner where those fish are going to be available to those different sport fisheries to monitor in a fast enough manner where we could say close and reopen and have an effective fishery because within a very short period of time those fish move out of those areas that sport fishermen are allowed to participate in up into the closed waters. So it's almost impossible to answer your question any clearer than that. It's just a difficult situation to try to assess until we get into it. If we had lots of stocks of fish and very few participants, there probably wouldn't be any impact. If we had returns of chinook on that earlier run that were very weak, which we have not had, in the number of years we've had very good returns and we had a fair number of people over there trying to harvest them, then we'd have to be more conservative. But I just can't be more specific than that.

Goll: Thank you very much, if you care now Larri to proceed with the presentation on the issues that you were leading up to.

Larri Spengler: Thank you. Yes, I had just asked Ken Florey if he could please talk a little bit about what the effects might be if the board were required by Madison to open subsistence fishing on various stocks on the eastside beaches at various times during the summer.

Number 159 Florey: Currently within Cook Inlet we manage the summer salmon runs under a plan that was adopted by the board of fisheries, the Cook Inlet Salmon Management Plan, which specifically states periods of time when certain users will be given preference or primary use of the resource. During the times of July 1 through August 15, it's primarily for commercial uses and the stocks migrating through Cook Inlet at that time, especially on the eastside beaches are now primarily taken by commercial users with secondary uses on certain stocks by sport fishermen. I don't feel that we would have many problems managing those stocks during that time period just based on the fact that we now have a very intensive commercial fishery and were able to monitor them quite well and do very well at it. The problem that you would have would be the social problems between the subsistence net users trying to compete for or establish beach areas with the commercial users and that could be quite dramatic and traumatic for those that try to monitor it. Because it would be very, very difficult to do and I'm afraid you could have some real problems that way. From a biological standpoint I don't foresee any major problems during that time period. After August 15 and say prior to July 1, we're looking at a totally different situation. We have one sockeye stock moving in Cook Inlet at that time primarily destined for the Russian River on the Kenai Penninsula which is a heavily used Sport fishery. It's not a large returning number of fish. We haven't had a commercial fishery on it for a good

number of years. A net fishery on that stock could be very, very dramatic, on those beaches and would probably mean having to close the Russian River to sport fishing determining what the escapement levels are. The other stocks during that early time, would be the early Chinook return, a king return to the Kenai River, and some to the Crooked Creek which is a hatchery return on the Kasilof River. A large net fishery if it were effective and that is yet to be determined, by subsistence users early, could have an impact on the early returning Chinook or king salmon return to the Kenai River, probably not much of an impact on the hatchery supported return to Crooked Creek. In the late fall, the late coho return which is one that the original petitioners or subsistence users wanted to target on that would totally depend on run strength. Last year we had a very large return of coho to the Kenai River, over probably in the neighborhood of 70,000 harvest by sport fishermen. In a year like last year, I don't think it would be that big of a concern. But on years when we'd go back to an historic level if you had a large net catch or subsistence catch on that late run it would probably mean having to curtail the sport fishery within the Kenai River or close it.

Number 205 Bonney: One of the real worries that has come up is there's an extremely heavy fishery on the early run king, particularly on the Anchor River and the Ninilchik and Deep Creek. It's probably as big as the second largest city in the state during those particular weekends. It's worried that if the beaches are open to subsistence fishing could and would cut off the early kings in June going into these streams and effectively have those streams shut off to sport fishing. It would be rightly so because the run would be jeopardized. That's a real worry as well as having an early run into the Kenai River which is heavily fished also jeopardized by the possibility of subsistence nets along the beach. The subsistence nets could be mesh size that are equipped to specifically catch king salmon whereas now the commercial nets are set for sockeyes and its an incidental catch in the commercial nets. But if they were to get a specific mesh size that would select the king salmon it would be extremely detrimental to the runs in the recreational fishery that go on during June.

Number 213 Goll: One of the questions that has been posed to me as chairman and I think to some of the committee members as well has been whether or not the threat to sport fishing is a serious as it is described. But your comments suggest to me, and you are probably the most experienced in the sport fish industry present at this meeting today. We don't have the representative from the department, division of sport fish, so from your comments I gather that the threat to sport fishing is very real and significant and one way or another something that really should be dealt with before this summer season commences. Is that a correct understanding of your position?

Bonney: Yes, it certainly is. The potential is one that we can't really live with. We don't know what will happen, but the potential is there for the very worst scenario that you could think of. And one of the worst ones I can think of is when you have the large urban area of Anchorage sitting here is to have the subsistence fishery..right in so that it would have to have the recreational fishery shut off. That's the worst possible thing that could happen and the potential is very definitely there. Whether it would happen or not, is another story.

That's why we have to buy some time to start finding out where we are in this situation.

Goll: Thank you very much.

Number 241 Garner: I think that comment sort of summarizes the position that the board took in our resolution. Our concern is that it's unclear what kind of regulatory restrictions we can impose on customary and traditional subsistence users. If the worst case situation is correct, if Madison requires us to allow bag limits that are customary and traditional, if Madison does not allow us an overall quota on these fisheries then these kinds of impacts are very likely. It has the potential to remove the ability of the board to balance the interests of each of these groups.

Spengler: If there are any more questions about Cook Inlet, maybe this is the time to take them before we move on to the Copper River situation.

Number 259 Stewart: Mr. Chairman, maybe to make one thing a little more clear before we go into the Copper River, I spoke to you about petitions earlier. The question that board is having to deal with at this meeting and that the department will have to deal with throughout the summer is if someone walks in this summer with a petition to open a subsistence fishery in Knik, for instance, the department is struggling with whether or not that would have to be done instantly. During the time that the boards were dealing with applying the subsistence law in Cook Inlet, we received a great deal of testimony from people who had fished in various parts of Cook Inlet in the past with subsistence gill nets. One of those areas was Knik, another area was Eklutna. Virtually the records the board has behind it includes almost every place in Cook Inlet that was accessible. Perhaps Larri could speak to whether or not we would be in the position of having to authorize fisheries all summer long on demand.

Spengler: It is fairly clear from Madison that if a customary and traditional use has occurred it doesn't matter whether it's in a rural area or not and the board is mandated by the law to authorize that unless there's a biological problem and the sport and commercial fishery have been closed. So, given the record that the board has in Cook Inlet, a very thorough record, that indeed subsistence fishing has existed everywhere, basically. There would be practically no legal excuse not to grant those petitions as they came in and open fisheries throughout the summer and make any necessary adjustments in sport and commercial fisheries. Are there any further comments on Cook Inlet or questions from Juneau?

Number 289 Florey: As I earlier stated, depending upon the extent in Cook Inlet, we would have to open fisheries those limited number stocks both earlier in the summer and late in the summer now under the management plan are primarily recreational uses we feel would probably be the ones most impacted. That is not the case in the Copper River. It's a total reversal of that situation. In the Copper River we have an extensive gill net fishery that operates in salt water at the mouth of the river then almost two to three weeks delay time until we get to Chitina where we have a large dip net fishery which we last year defined as a personal use

fishery. And also a subsistence fishwheel fishery. Under our interpretation, or my understanding or as it's been told to me, now we have a subsistence fishery as it used to be in the Upper Copper River open to any resident who wants to. Under the current bag limits, which have been established by the board, if we did not have a lid on that, it could be a major impact trying to ensure that we could get enough fish through the commercial fishery, well, we could do it easily enough, close the commercial fishery, not knowing how many people we were going to have show up at Chitina two weeks later. We struggled with this and have struggled with it for years. We come up with a plan the last two years that has worked quite well. Now we have a quota for the old personal use fishery in the neighborhood of 60,000 sockeye salmon. The highest number that that fishery took prior to the new plan was about double that in the neighborhood of 120,000. We do not know how many people would show up, but given we had to give them an opportunity at current bag limits it would be very difficult to manage the Copper River commercial fishery to ensure those numbers would escape. First of all, our biological goals, by stock, second of all the subsistence fishery in the Chitina area from Chitina all the way up to Salana and thirdly then to provide for the Copper River fishery on the flats. One of the major problems we have is that although the Upper Copper River is a large component of that system it only contributes, or it has in the last few years, about 50% of the returning sockeye to the Copper River, the other being the Delta stock which do not have and have not had any fishery other than a commercial fishery on them to any extent. So we would have to forego a rather large portion of the harvest for the commercial fishermen on the Delta stocks to ensure we would have enough fish upriver for the subsistence users. It would be extremely difficult management situation, not impossible.

Number 333 Garner: Just to make it clear it's my impression that there's no other opportunity to harvest those Delta stocks. The only opportunity that we have is as they come in mixed with the upriver stock.

Florey: Yes, John that is correct. Only with the net fishery at the mouth of the river there is no other opportunity to harvest Delta stock.

Beth Stewart: Ken, at the time the board was dealing with the Copper River and the Chitina personal use or subsistence fishery there were a lot of questions about being able to know how many fish were coming out of that upper river harvest. Knowing exactly what the subsistence take is during the summer, maybe you could speak to that a little bit.

Florey: Yes, Beth, are you saying what's the upriver component in the commercial fishery is? I don't quite understand your question.

Stewart: I'm sorry Mr. Chairman. No, what the actual take is by subsistence fishermen, monitoring that catch.

Florey: Well, under the plan that we implemented this last year we set the days of the week that they could fish depending upon what our predetermined quota for that week would be and the fact that they

king salmon fishing. It's not a large stock, we're only talking anywhere from 10-15,000 king salmon. We could have an impact there and we would have to probably have to curtail the sport fishing in the Naknek River, but for sockeye, I don't anticipate any problem.

Spengler: Any questions on the Naknek fishery or any comments by anyone else here before we move on to Angoon?

Number 428 Bob Clasby: For southeastern Alaska, there are only two subsistence coho fisheries. That's one at Klukwan and the other one is in Angoon. The one in Angoon was opened by the board at its December 1980 meeting was restricted only to residents of Angoon. With Madison decision that fishery would now have to be open to all, I assume 12-month, Alaska residents. Certainly if my memory serves me right, the harvest level in the last year for Angoon has been around 1,000 or 2,000 coho salmon. The fishery takes place in Salt Lake and Mitchell Lake. Apparently that's also a very popular coho sportfishing area. I'd like to go back and say there's no way for us to even guess at what level of participation or harvest might come out of that fishery with it being opened to all Alaska residents. Because I think I mentioned before, except for Klukwan, there have been no subsistence coho fisheries allowed in Southeast. So, you don't have any past harvest data to even guess at. If one does get an increase in that harvest above probably the 2-4,000 level, it's probably going to result in closures to the sports fishery in that Salt Lake-Mitchell Bay area. The other harvesters on those stocks, of course, are primarily the hand troll fish fishery. Primarily the troll fishery on the inside that fishery occurs before the subsistence fishery so there'd be no time to react and make closures on that troll fishery ...probably to substantially increase the amount of coho moving in to Mitchell Bay. One would make the assumption if you carry the scenario that the fishery has to be open to all Alaska residents into the future and the harvest levels increase, it's going to mean reductions to the troll harvest. And of course that's probably going to have a very significant impact on the residents of Angoon also, because I think as far as cash income to that community, they are very heavily dependent on that hand/troll catch. I think that's about all I have to say on it if there's any questions from the committee members.

Number 478 Spengler: We will not go into detail about the Illiama-Lake Clark fishery which has a similar restriction as the Naknek fishery did, which is that currently only residents of Illiama-Lake Clark drainages can fish in those drainages and under Madison those would have to be opened to everyone. Also, in trying to give you a sense of the impact, it has been impossible to predict where as Beth Stewart mentioned in Cook Inlet, but in other places throughout the state people may petition to open areas which formerly had been closed and now the board will not be able to refuse to open them based on any criteria of ruralness or other concepts. For example, most of the road systems in the larger Southeast communities are closed currently to subsistence fishing and if petitions are received, those would probably have to be opened. I believe we're basically concluded with the Anchorage portion of the presentation. Ron Jolin, chairman of the joint board has a few concluding remarks and then we'll turn it back to Jim Ayers.

Number 493 Jolin: Thank you Larri. I really don't have an awful lot to put in at the conclusion of this meeting. I think I brought most of it up when we started. The crux is that the boards feel that we need the flexibility that we had prior to the Madison decision in order to regulate. In order to regulate our fisheries and game issues. We feel now that our hands are somewhat tied and we're really unsure what might happen in the following year. So, if we can get back to that position, it would certainly help the boards to do their job.

Number 509 Ayers: Do you have any further comments in Anchorage, Larri, or Ron or anyone else there? (none)

Number 511 Rep. Fuller: I think most people are aware, but on the 25th and 26th the Resources Committee will be having an informational hearing on HB 288. At that time we're going to ask to have nets open throughout the state so that people can be informed of what's going on. This is an informational hearing. Then after these hearings we're going to open it up throughout the state for people to participate in it. I just want to make everybody aware of that. I don't know whether Ron Jolin will be available on the 25th or not, because I know we're getting ready to adjourn, but I wanted everyone to know about it. Thank you, Mr. Chairman.

Goll: Thank you very much Rep. Fuller. I'd like also to assure people that this would be a good opportunity to Resources hearing to follow this issue as we move it through the House. Mr. Ayers?

Number 553 Ayers: Thank you Mr. Chairman. I will be brief in my concluding remarks. There have been a variety of rumors and comments regarding the effects of Madison and what we are trying to do, as I mentioned earlier, is work with you in a cooperative spirit to provide you the information and the framework that will allow you to take immediate action to return regulatory jurisdiction to the boards. Our effort and the governor's bill, HB 288, is focused on restoring harmony in the use of our fish and wildlife resources. Let me also say that that bill is basic and thorough in renewing a system that has been working. You've heard today from a variety of people talking about the Madison decision and the potential impacts and a plea for your assistance to restore that harmony. They have respectfully, but strongly, requested your assistance and guidance in restoring sufficient regulatory flexibility to the boards that will ensure all Alaskans that they are provided fair and reasonable access to our fish and game populations. Anything we can do Mr. Chairman, to assist you in moving this bill and restoring that harmony, we are at your pleasure. Thank you very much for this opportunity as well as the members in coming forward. We are available. Thank you.

Number 569 Goll: Thank you very much Mr. Ayers, and all of you in Anchorage. It's really a favor to us that you come forward and provided us with this information and we're very grateful and hope the people gathered here today have benefited from your presentation.

I'd like at this time to read a letter which I'd like to send to the House Resources Committee. The letter basically restates some of the comments made today and asks for expedient action in looking for a solution to these problems. It does not recommend specific action,

but simply asks that the Resources Committee move as rapidly as they can to get the issue solved. I'd like to read the letter for the record at this time and seek unanimous consent from the members of the committee. Also other members of the Legislature who wish to sign on the letter are certainly invited to do so.

"The Madison decision by the Alaska Supreme Court on subsistence has the potential of seriously disrupting the management of Alaska's fish and wildlife resources. According to testimony before the Special Committee on Fisheries, the Madison decision could force radical shifts in established patterns of resource allocation, upsetting the carefully balanced approach to fish and game management achieved in recent years.

The Fisheries Committee received testimony on the Madison decision from the Department of Law, Department of Fish and Game and chairman of the Joint Boards of Fisheries and Game. Although the state's fish and wildlife managers are still in the process of developing specific management strategies responsive to Madison, this much is clear:

1) Sport and commercial fishing in Cook Inlet may have to be cut back to accommodate anticipated increases in non-commercial net fishing.

2) The commercial drift net fishery in Prince William Sound may have to be sharply restricted to provide increased dip-netting opportunities in the Copper River.

3) Many of Alaska' big game guides may be forced out of business because of major decreases in non-resident hunting activities.

The members of the Special Committee on Fisheries believe that the subsistence issue must be addressed by the Legislature in a prompt but thorough manner. The committee respectfully requests the Resources Committee to take all possible steps to address this critical issue in a manner providing for action by the Legislature in the remaining weeks of the Legislative session."

I would ask unanimous consent from the members that I submit this letter to House Resources. Rep. Hurley...

Number 614 Rep. Hurley has moved the letter and asked unanimous consent. Are there any objections. Hearing none, then we will send this letter to House Resources today and distribute it to members of the Legislature and members of the public. I thank you.

I have a couple of brief announcements before we adjourn. Number one, I'd like to state that the next meeting of the House Fisheries Committee will be held at 4:30 p.m. on Friday a week from tomorrow. If any member has a problem with that. We will be getting in touch with you to firm up those arrangements.

(discussion of HESS committee schedule and the calendar for the next meeting)

Number 621 I'd also like to just take a moment to express in behalf of the committee our grave sadness at the passing of Mr. John Clark who was the director of the habitat division and one of the most dedicated and competent public servants I've ever met. And I'd like to just say in behalf of the committee, we would like to extend our sympathies to Mrs. Clark and recognize his contribution to the state.

Rep. Hurley: In that regard, I believe that I'd like the minutes to reflect the contribution of the late Senator Al Owen who appeared before this committee just one month ago. And who died last week in Kodiak.

Number 670 Goll: Let the record show that we recognize the passing of this Alaskan and his great contribution to the state. It's certainly been a tragic week and I hope that with this meeting will go on the upward track. Once again thank you all for attending today. This meeting of the Special Committee on Fisheries is adjourned, the time is 10:11 a.m.

FLOOR SPEECH BY

THE HOUSE SPECIAL COMMITTEE ON FISHERIES CHAIRMAN

REPRESENTATIVE
PETER GOLL

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STATE OF ALASKA
HOUSE OF REPRESENTATIVES

ALASKA'S SPORT AND COMMERCIAL FISHERMEN, BIG GAME GUIDES AND RURAL SUBSISTENCE USERS ARE FACING A CRISIS OF MAJOR PROPORTIONS THAT MAY ONCE AGAIN DIVIDE THE RESIDENTS OF THIS GREAT LAND.

OF COURSE, I'M REFERRING TO THE RECENT STATE SUPREME COURT DECISION ON FISH AND GAME ALLOCATION. TWO WEEKS AGO, THE COURT RULED IN WHAT HAS BECOME KNOWN AS THE MADISON CASE THAT FISHERIES MANAGERS CANNOT PRIORITIZE AMONG RURAL AND URBAN SUBSISTENCE USERS UNTIL ALL OTHER USES OF FISH AND WILDLIFE ARE ELIMINATED.

THE IMPLICATIONS OF THIS DECISION CAN BE FAR-REACHING. IF WE THE LEGISLATURE DO NOT ACT WITH CAREFUL DISPATCH, THE DECISION COULD CREATE MAJOR PROBLEMS FOR ALASKA.

WE KNOW THAT THE DECISION COULD HAVE CHAOTIC RESULTS FOR FISH AND GAME MANAGEMENT, AND COULD SERVE TO PIT ALASKAN AGAINST ALASKAN. I THINK THESE PROBLEMS CAN AND SHOULD BE AVOIDED.

THE COURT HAS RULED IN MADISON THAT UNDER EXISTING LAW, THE BOARDS CAN NEITHER ALLOCATE AMONG SUBSISTENCE USERS (INCLUDING THE PERSONAL USERS) NOR LIMIT SUBSISTENCE USES UNTIL ALL OTHER USES HAVE BEEN ELIMINATED. WHILE THE CONCEPT THAT EVERY ALASKAN IS A SUBSISTENCE USER MAY SOUND ATTRACTIVE ON ITS FACE, LET'S ANALYZE WHAT THIS MEANS IN APPLICATION.

PRIOR TO MADISON, THE BOARD OF FISHERIES RESTRICTED SUBSISTENCE FISHING TO THREE SMALL RURAL COMMUNITIES WHICH TOOK RELATIVELY SMALL AMOUNTS OF SALMON. HOWEVER, THE BOARD OF FISHERIES HAS DOCUMENTED HISTORIC NET FISHERIES FOR KING, COHO AND SOCKEYE SALMON FROM KACHEMAK BAY TO KNIK ARM AND ON THE WEST SIDE OF COOK INLET. ACCORDING TO THE DEPARTMENTS OF LAW AND FISH AND GAME, THE BOARD OF FISHERIES MUST NOW PROVIDE FOR SUBSISTENCE NET FISHERIES IN THOSE LOCATIONS FOR ALL ALASKA RESIDENTS WHO DESIRE TO TAKE FISH FOR THEIR PERSONAL USE. UNDER THE COURT'S INTERPRETATION OF EXISTING STATUTES, THIS PRIORITY FISHING EFFORT WILL DISPLACE THE SPORT AND COMMERCIAL FISHERIES, AND PROBABLY LEAD TO DRASTIC CUTBACKS FOR SPORT FISHERMEN AND SIGNIFICANT REDUCTIONS IN THE CATCHES OF COMMERCIAL USERS.

MADISON ALSO COULD CAUSE SUBSTANTIAL DISPLACEMENTS IN THE COPPER RIVER SALMON FISHERY. LAST YEAR, FISH AND GAME ISSUED 562 SUBSISTENCE PERMITS TO WATERSHED RESIDENTS AND 5,328 PERSONAL USE FISHING PERMITS TO OTHER ALASKANS. ALSO ACCOMMODATED WERE THE SPORT FISHERY AND THE COMMERCIAL FISHERY AT THE MOUTH OF THE COPPER RIVER WHICH IS THE MAINSTAY OF THE PRINCE WILLIAM SOUND ECONOMY. UNDER MADISON, THE PERSONAL USE DIPNETTERS ARE CONSIDERED SUBSISTENCE USERS AND MUST BE GIVEN THE SUBSISTENCE PRIORITY OVER COMMERCIAL AND SPORT FISHERMEN. ACCORDING TO FISH AND GAME, THE COMMERCIAL FISHERY PROBABLY WOULD HAVE TO BE CUT BACK SUBSTANTIALLY OR EVEN ELIMINATED.

THE IMPACT OF MADISON WON'T BE LIMITED TO THE SALMON FISHERIES, HOWEVER. THE DEPARTMENT OF FISH AND GAME REPORTS THAT THE COURT RULING PROBABLY WILL PUT MOST OR ALL OF THE STATE'S BIG GAME GUIDES OUT OF BUSINESS. THE GROWING GUIDING AND RECREATION INDUSTRIES WHICH DEPEND UPON OUT OF STATE USERS OF ALASKA FISH AND GAME CAN BE CRIPPLED BY THIS DECISION. I REGRET THAT IN TERMS OF PROBLEMS, THESE IMPACTS MAY REPRESENT ONLY THE TIP OF THE ICEBERG.

HISTORY SHOWS THAT THESE SITUATIONS CAN BE VERY DIVISIVE AND CAN CAUSE SIGNIFICANT DISRUPTIONS IN THE PRIMARY LIVELIHOODS OF THOUSANDS OF ALASKANS.

IN ADDITION TO UPSETTING THE DELICATELY BALANCED ALLOCATIONS AMONG USERS OF ALASKA'S FISH AND WILDLIFE RESOURCES, THE COURT DECISION RAISES THE SPECTER OF FEDERAL MANAGEMENT OF OUR FISH AND GAME. THE DEPARTMENT OF LAW REPORTS THAT THE MADISON RULING PROBABLY PUTS ALASKA OUT OF COMPLIANCE WITH THE PROVISIONS OF ANILCA WHICH GIVES SUBSISTENCE PRIORITIES IN FISH AND WILDLIFE MANAGEMENT TO RURAL RESIDENTS.

GOVERNOR SHEFFIELD HAS PROMISED TO INTRODUCE LEGISLATION EARLY NEXT WEEK THAT WOULD RETURN FISH AND WILDLIFE MANAGEMENT TO THE BALANCE ACHIEVED PRIOR TO THE MADISON RULING. AS WE CONSIDER THE BILL AND ATTEMPT TO RESOLVE THE PROBLEMS CREATED BY MADISON, THE LEGISLATURE MUST KEEP TWO THINGS VERY FIRMLY IN MIND:

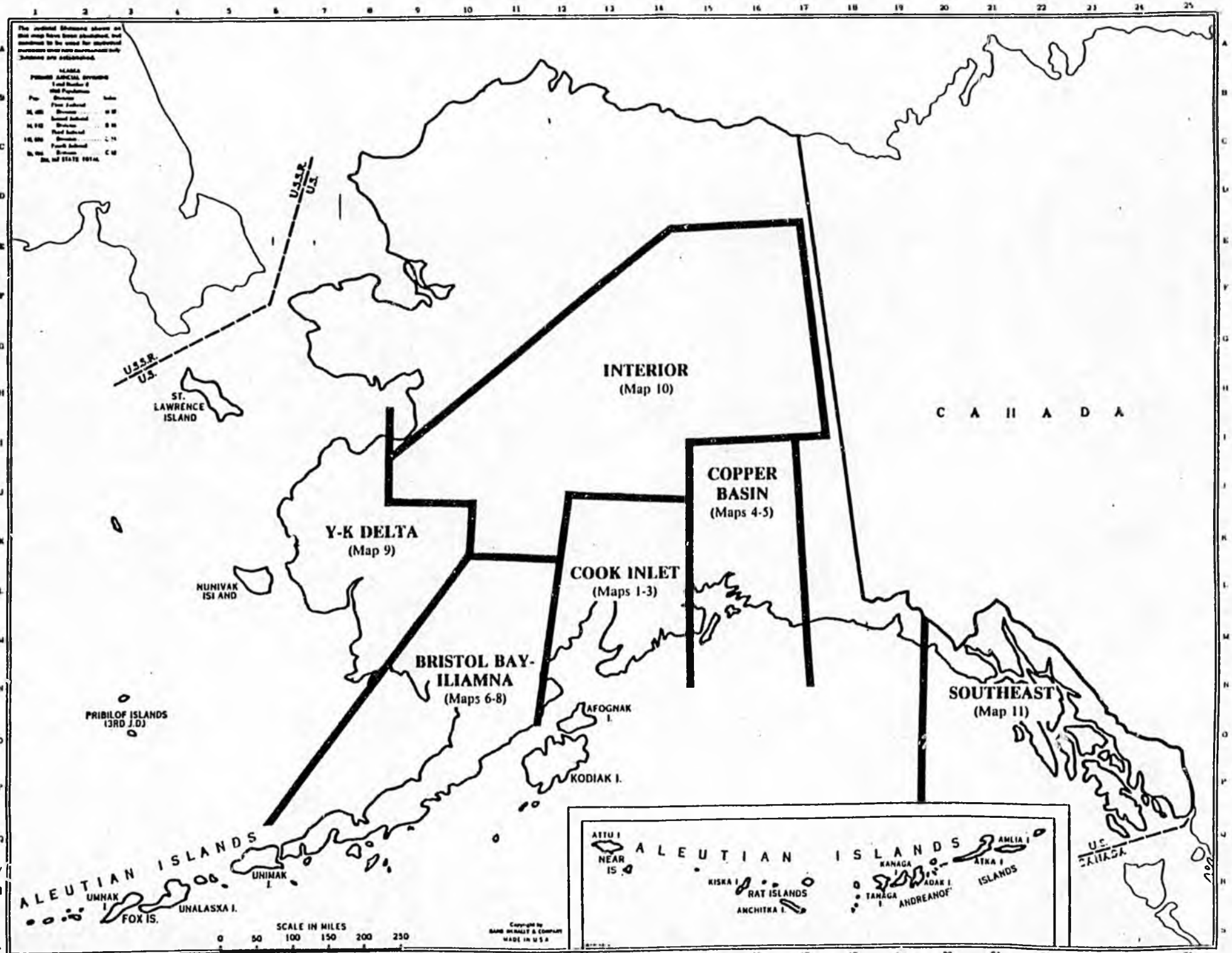
FIRST, SUBSISTENCE FISHING AND HUNTING ACTIVITIES REPRESENT THE PRIMARY ECONOMIC SYSTEM OF OUR RURAL AREAS. ALASKANS RECOGNIZED THAT REALITY WHEN THEY VOTED SO OVERWHELMINGLY TWO YEARS AGO TO RETAIN THE STATE'S SUBSISTENCE PRIORITY.

SECONDLY, THE BOARDS OF FISHERIES AND GAME HAD ACCOMPLISHED AN ADMIRABLE JOB IN PROVIDING FOR THE NEEDS OF URBAN AND RURAL ALASKANS PRIOR TO THE MADISON CASE. DISRUPTION OF THIS BALANCE WILL LEAD TO MAJOR SUFFERING BY ALL RESOURCE USING GROUPS: GUIDES, SPORTSMEN, PERSONAL, COMMERCIAL, AND SUBSISTENCE USERS ALIKE. GOVERNOR SHEFFIELD'S LEGISLATION WOULD RESTORE THAT BALANCE.

IT IS OUR JOB IN THE COMING WEEKS TO CAREFULLY WEIGH THE NEEDS OF PRESENT AND FUTURE GENERATIONS OF ALASKANS IN THE MANAGEMENT OF FISH AND GAME. LET US STRIVE TO RETAIN CONTROL OVER OUR MOST CRITICAL OF NATURAL RESOURCES IN A MANNER THAT PROTECTS THE RIGHTS AND LIVELIHOODS OF RURAL AND URBAN ALASKA.

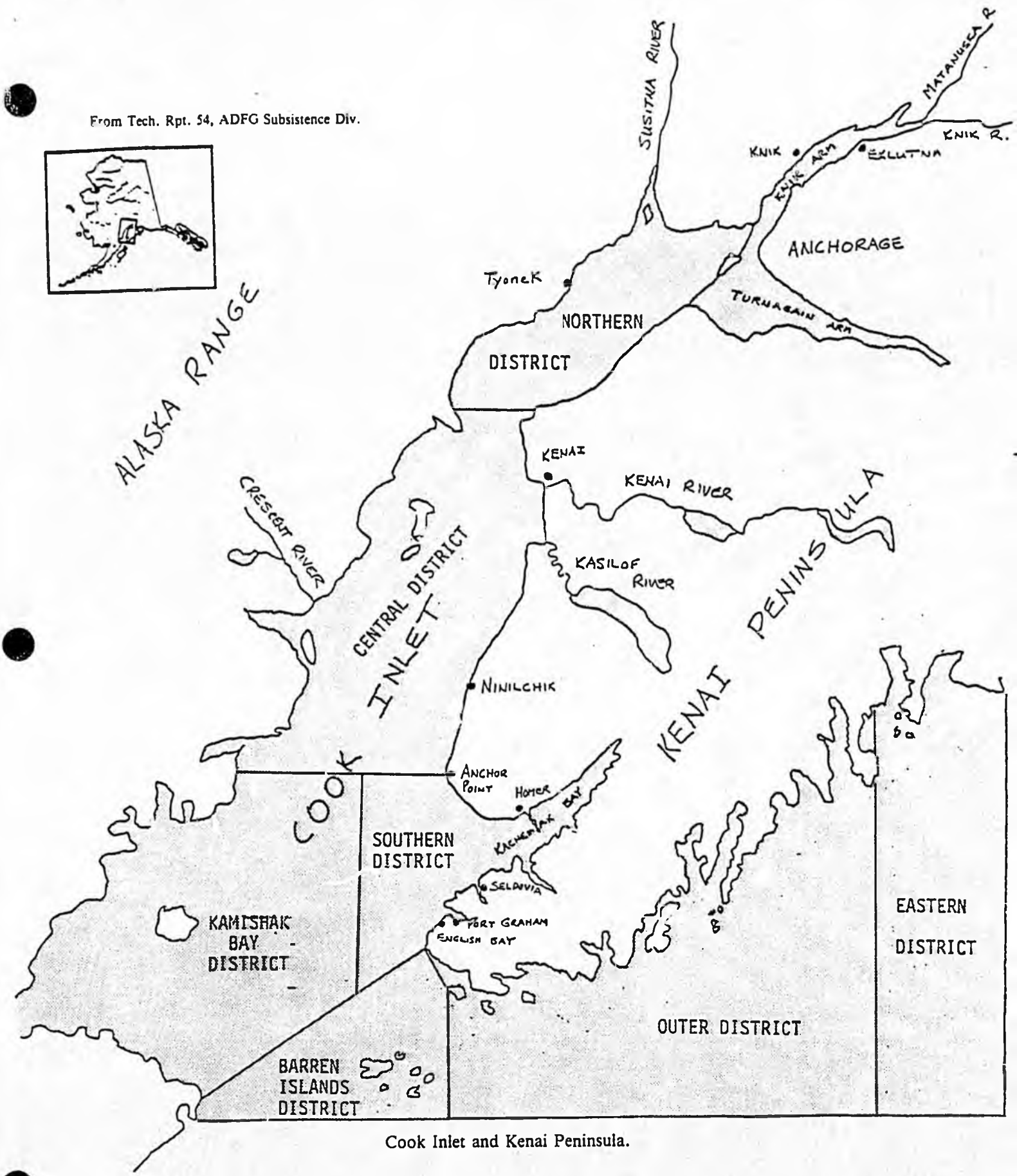
MEMORANDA FROM THE

ALASKA DEPARTMENT OF FISH & GAME


INTERIOR
(Map 10)
COPPER BASIN
(Maps 4-5)
Y-K DELTA
(Map 9)
COOK INLET
(Maps 1-3)
BRISTOL BAY-ILIAMNA
(Maps 6-8)
SOUTHEAST
(Map 11)
C A N A D A
U.S.S.R.
U.S.
ST. LAWRENCE ISLAND
NUNIVAK ISLAND
PRIBILOF ISLANDS (3RD J.D.)
AFOGNAK I.
KODIAK I.
ALEUTIAN ISLANDS
UNIMAK I.
UMNAK I.
FOX IS.
UNALASKA I.
ATTU I.
NEAR IS.
KISKA I.
RAT ISLANDS
ANCHITKA I.
KANAGA I.
ADAK I.
TANAGA I.
ANDREANOF ISLANDS
AMLIA I.
ATKA I.
SCALE IN MILES
0 50 100 150 200 250

Map 1

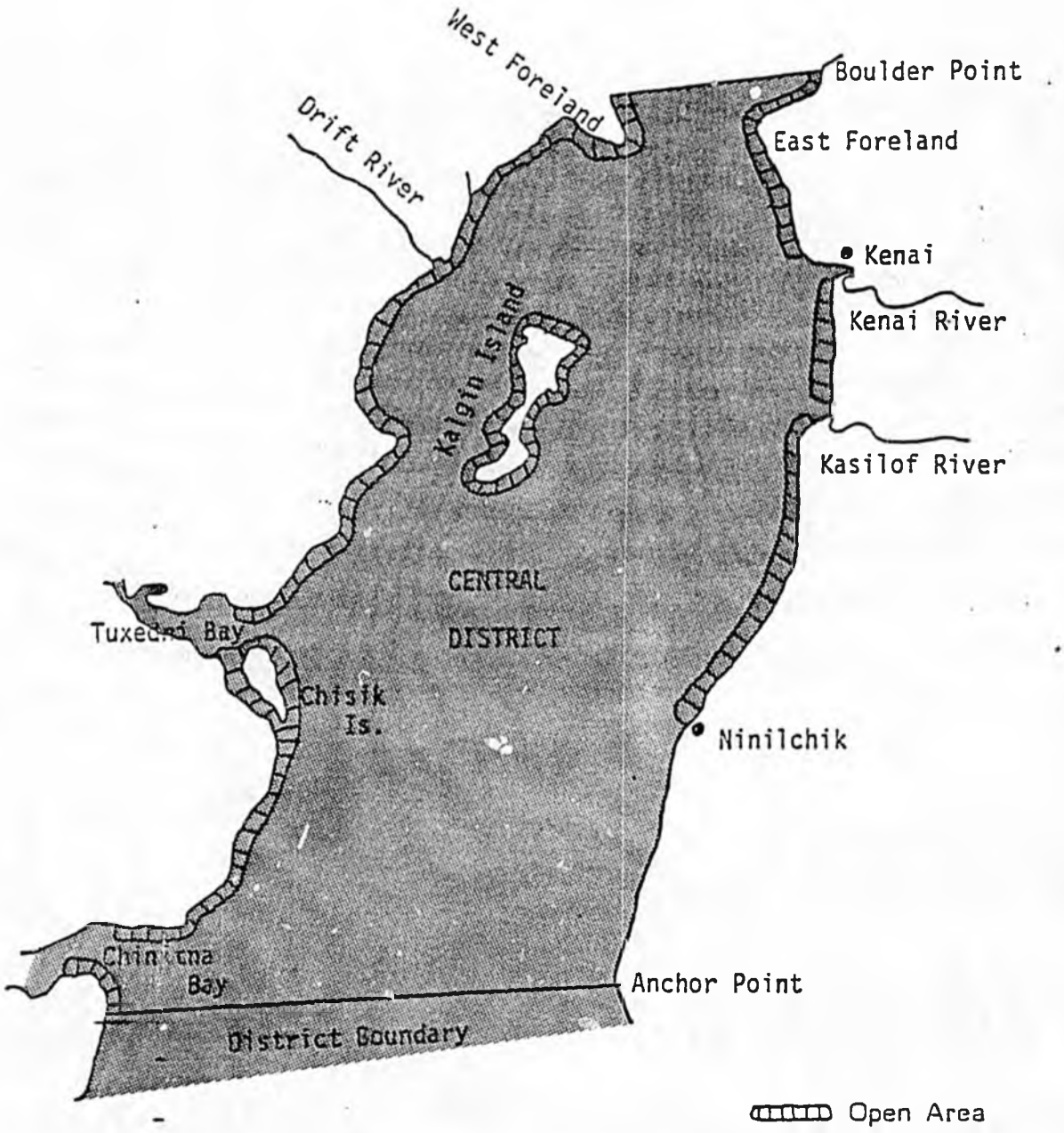
From Tech. Rpt. 54, ADFG Subsistence Div.



Cook Inlet and Kenai Peninsula.

Cook Inlet - Map 2

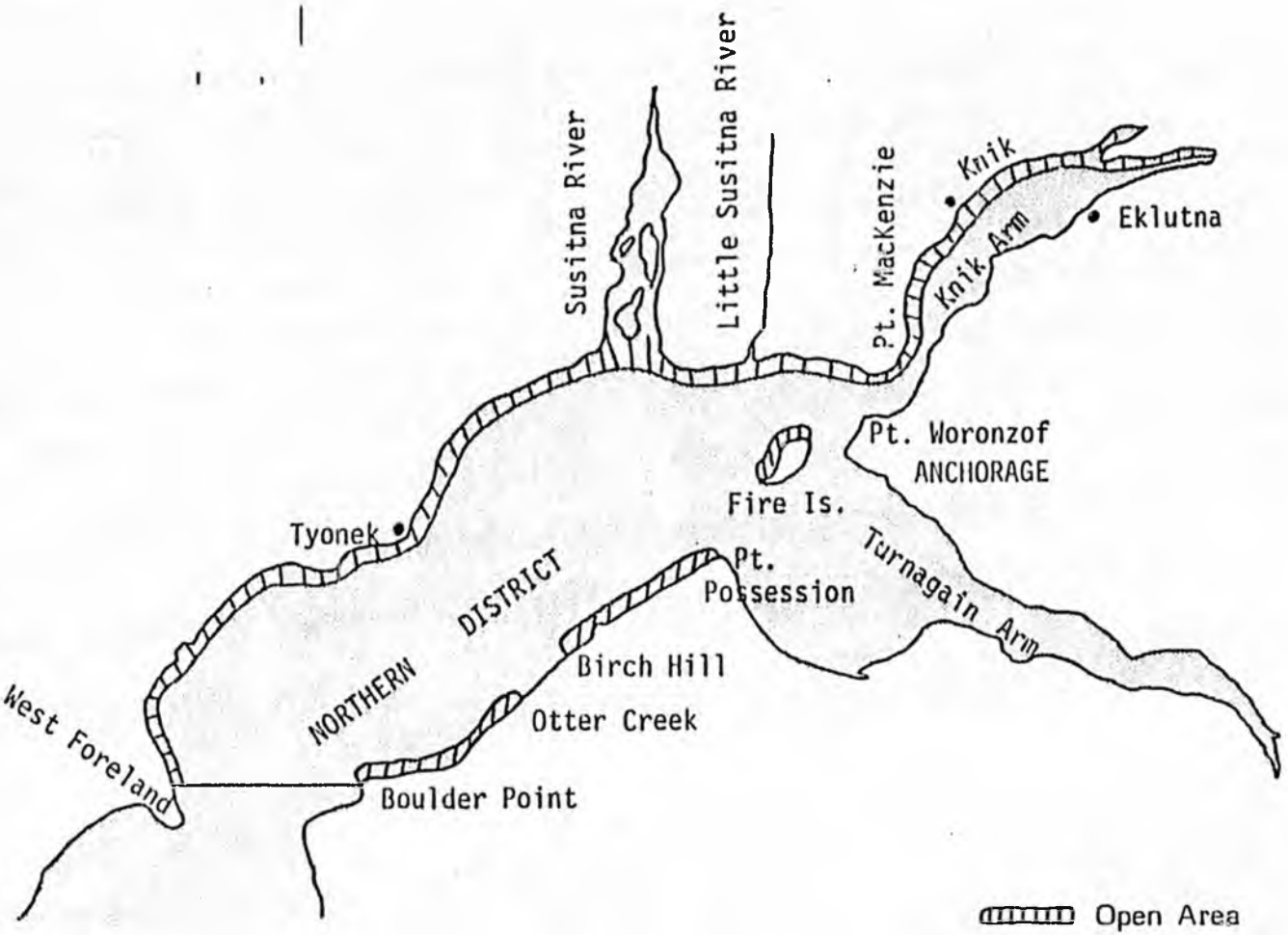
From Tech. Rpt. 54, ADFG Subsistence Div.



Area Open to Subsistence Fishing in the Central District of Cook Inlet, 1960-1978 (except closures within one mile of various river mouths).

Cook Inlet - Map 3

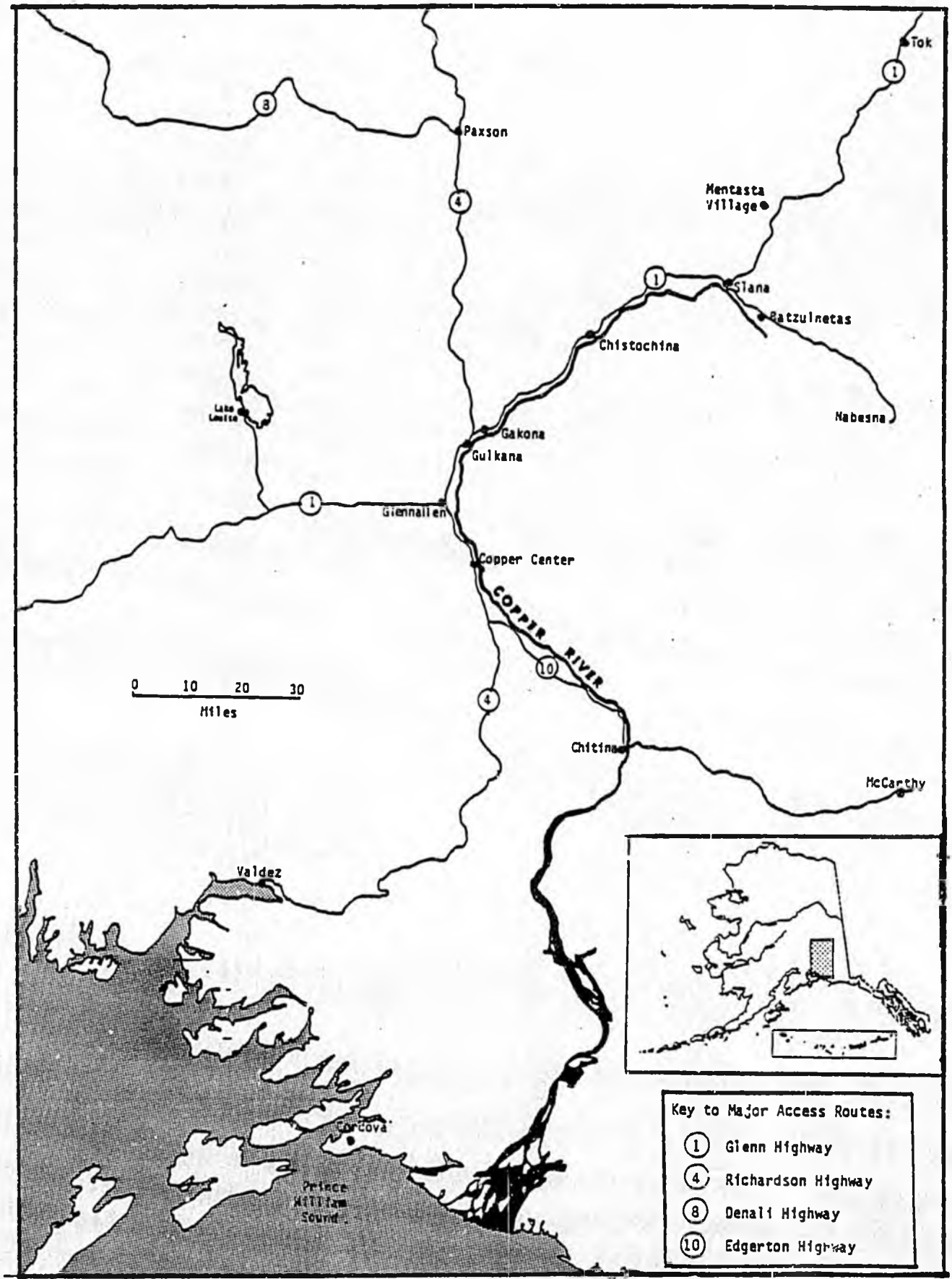
From Tech. Rpt. 54, ADFG Subsistence Div.



Area Open to Subsistence Fishing in the Northern District of Cook Inlet, 1960-1970 (except closures within one mile of various river mouths).

Cook Inlet - Map 4

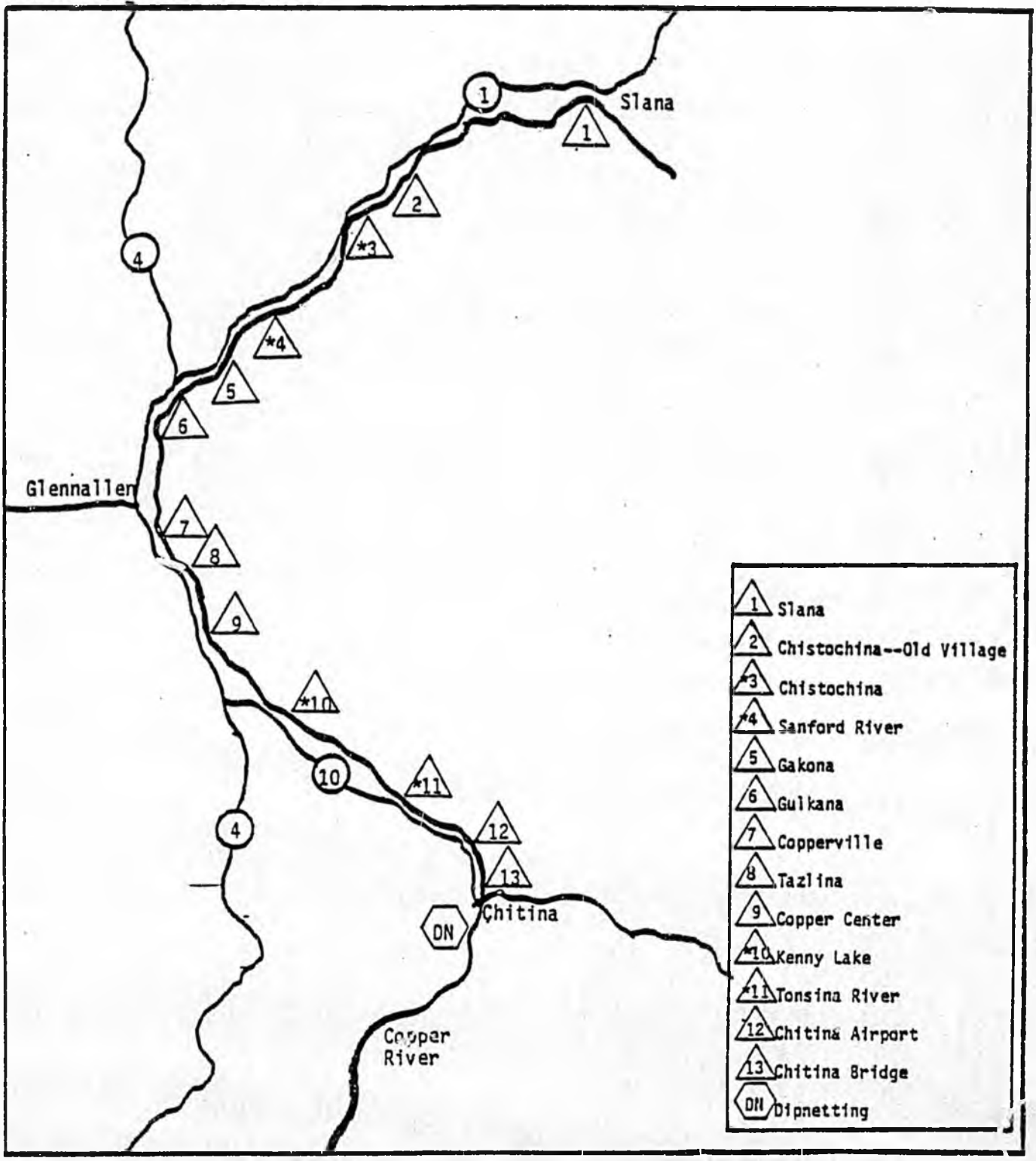
From Tech. Rpt. 37, ADFG Subsistence Div.



Copper Basin and Cordova.

Copper Basin - Map 5

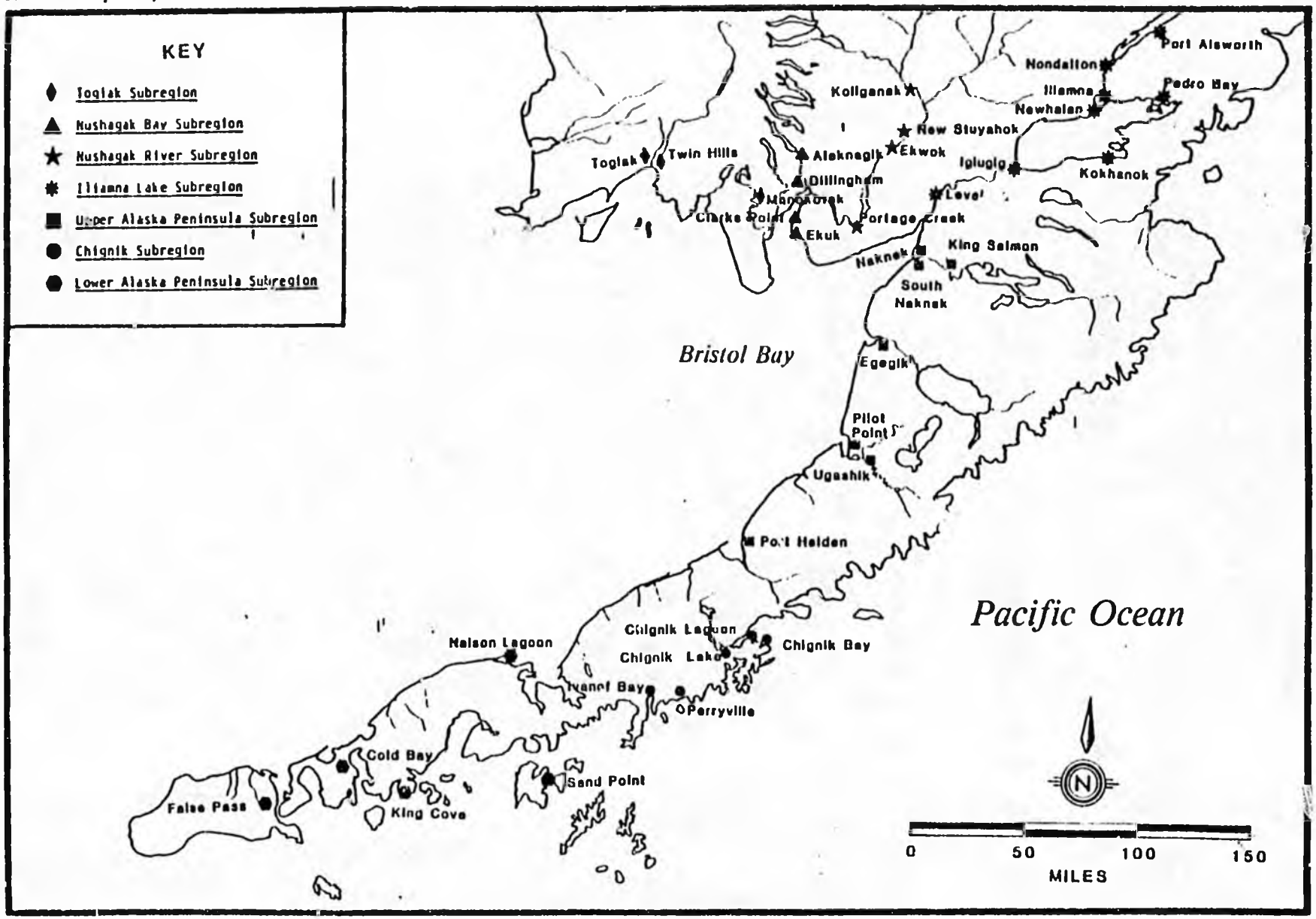
From Tech. Rpt. 37, ADFG Subsistence Div.



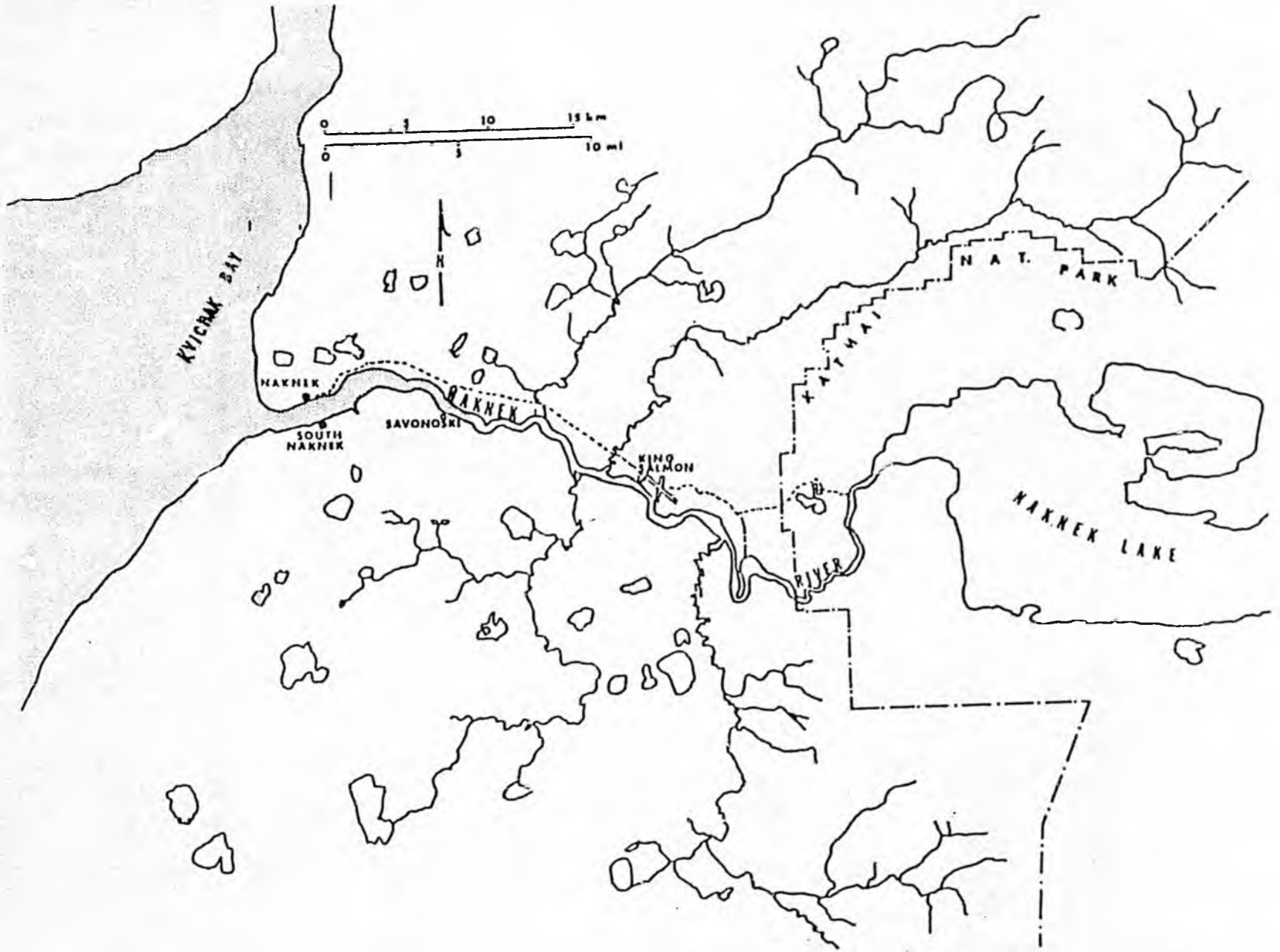
Fishwheel and Dipnet Areas, Copper Basin.

Copper Basin - Map 6

From Tech. Rpt. 114, ADFG Subsistence Div.


KEY
Togiak Subregion
Nushagak Bay Subregion
Nushagak River Subregion
Iliamna Lake Subregion
Upper Alaska Peninsula Subregion
Chignik Subregion
Lower Alaska Peninsula Subregion
Bristol Bay
Pacific Ocean
Port Alsworth
Nondalton
Pedro Bay
Iliamna
Newhalen
Kokhanok
Iguigig
Kokhanok
Kokhanok
Kokhanok

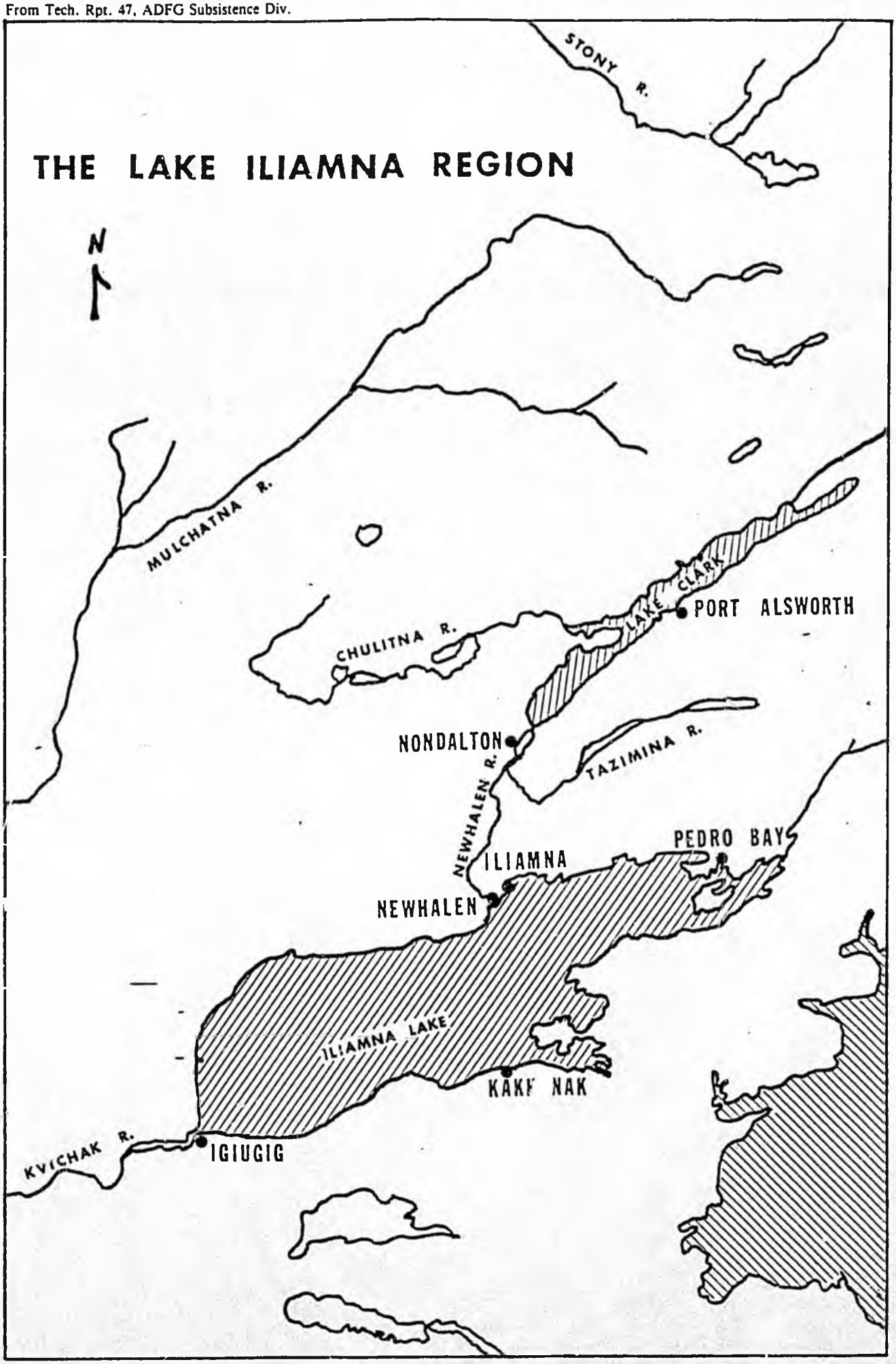
From Tech. Rpt. 48, ADFG Subsistence Div.



Naknek River Area.

Bristol Bay/Iliamna - Map 8

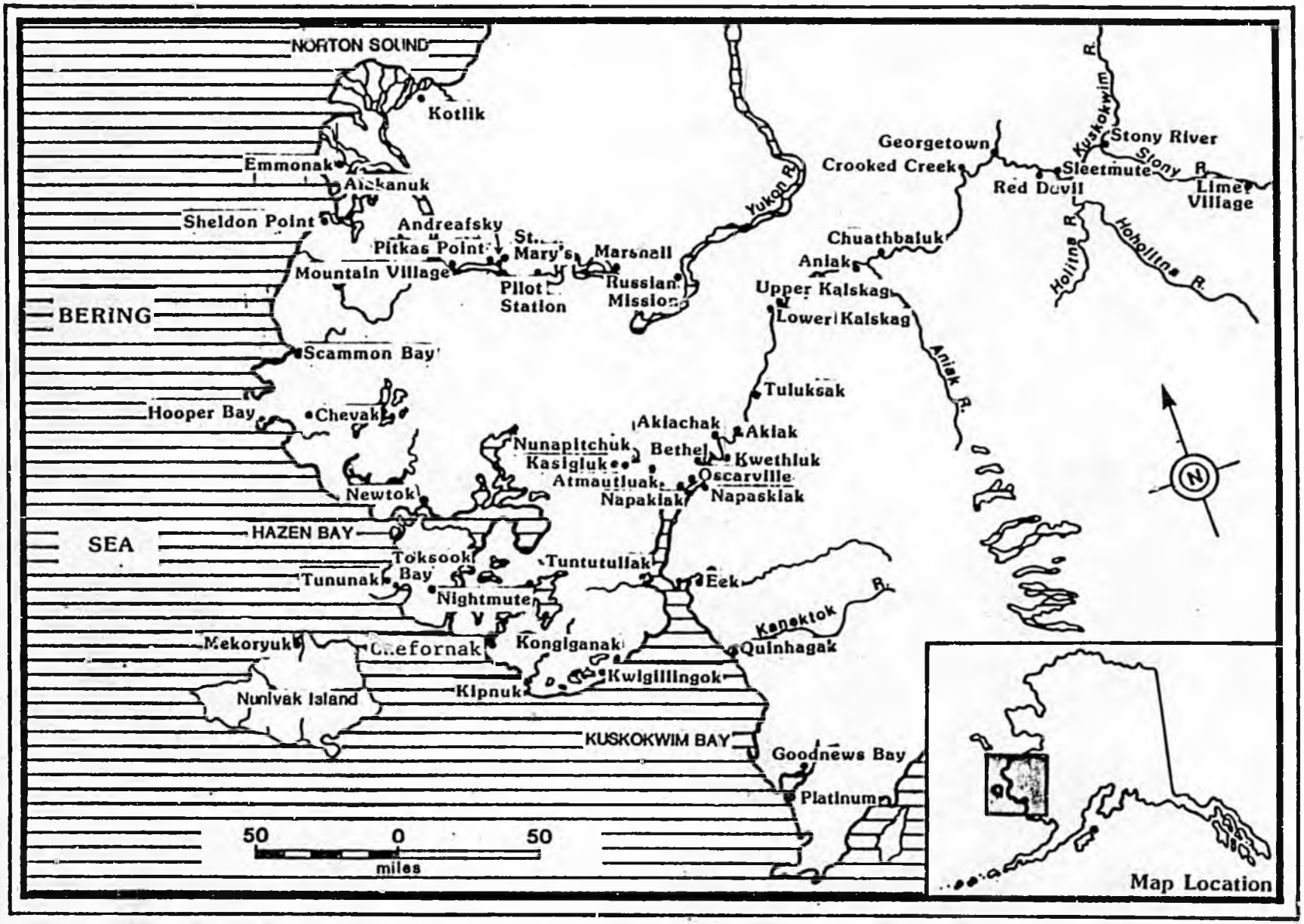
From Tech. Rpt. 47, ADFG Subsistence Div.



Lake Iliamna Region.

Bristol Bay/Iliamna - Map 9

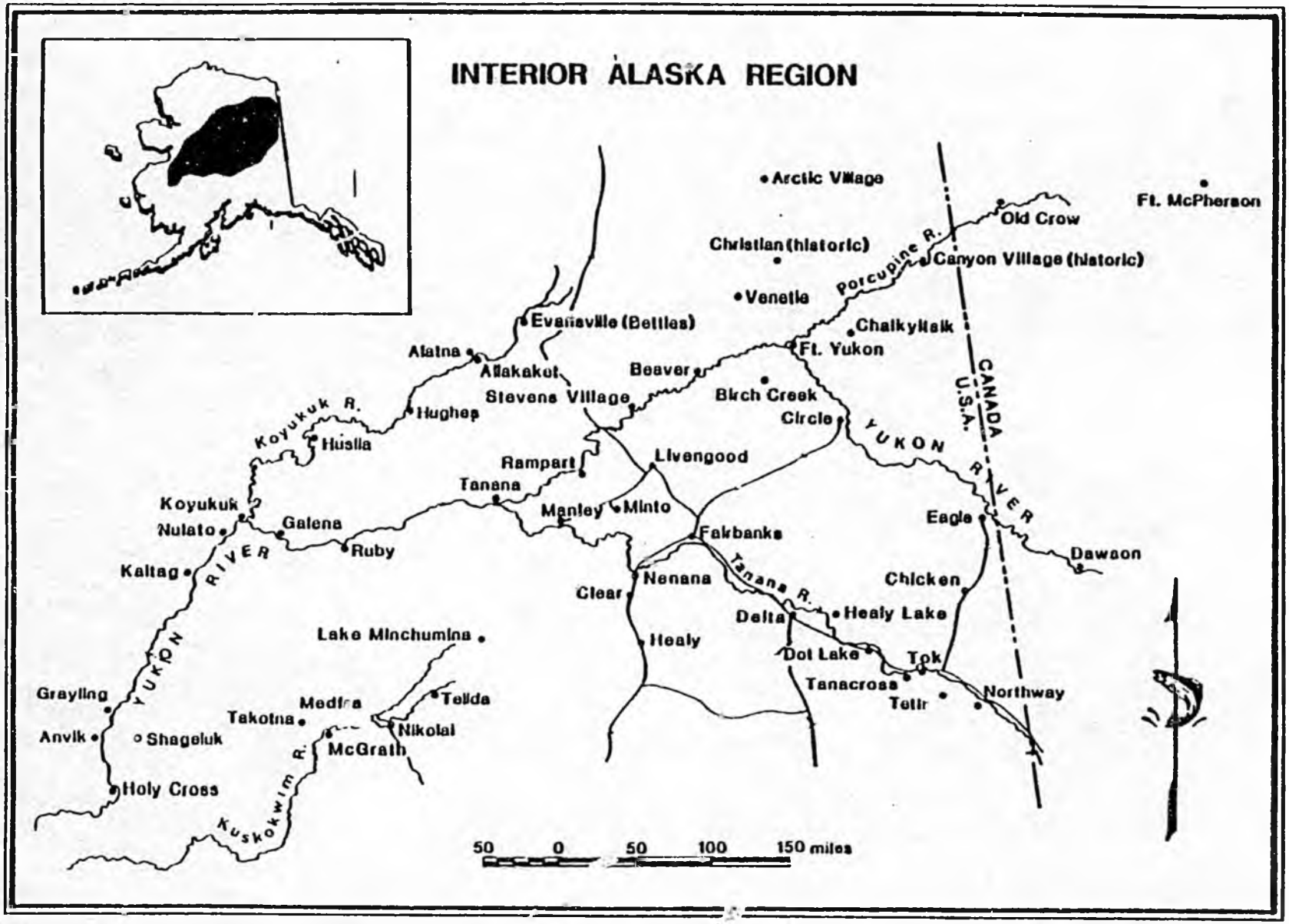
From ADFG Subsistence Div.



Yukon-Kuskokwim Delta Region.

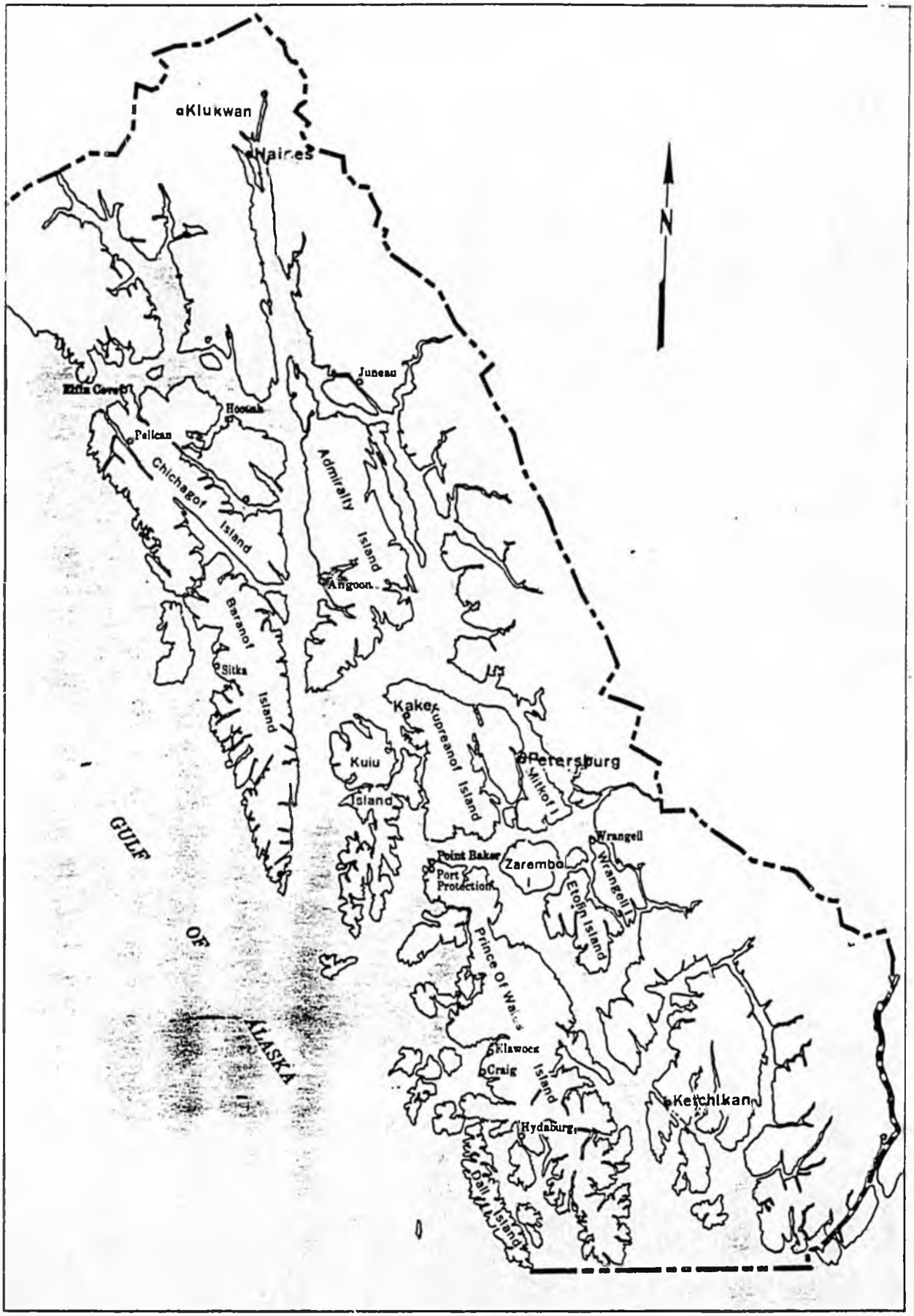
Y-K Delta - Map 10

From: ADFG Subsistence Div.



Interior Region.

From Tech. Rpt. 103, ADFG Subsistence Div.



Southeast Region.

Southeast - Map 12

Don W. Collinsworth, Commissioner

Public Communications
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Juneau, Alaska 99802
(907) 465-4113

Alaska Department of Fish & Game NEWS

FOR IMMEDIATE RELEASE MARCH 21, 1985

Boards of Fisheries and Game to Discuss Madison

JUNEAU--The Board of Fisheries will take public testimony on March 25, 1985 during its spring meeting in Anchorage regarding impacts of the recent Madison decision. On February 22 the Alaska Supreme Court handed down its decision on Madison vs. ADF&G, reversing lower court decisions on the board's interpretation and application of Alaska's 1978 subsistence law. Although the court case was brought by Cook Inlet fishermen, the decision affects the Board of Fisheries and Board of Games interpretation of the 1978 subsistence law in all of the state's subsistence regulations.

The boards had interpreted the 1978 law as a mandate to protect customary and traditional uses of fish by rural Alaskans. This interpretation was consistent with the standards set out in Alaska National Interest Lands Conservation Act.

-MORE-

The Alaska Supreme Court held that the board's interpretation was incorrect, and said that under the current statute the board must allow all Alaskans to participate in subsistence fisheries, unless fish stocks have declined to the point that commercial and sport fisheries have been eliminated. Unless the statute is amended many of the board's regulations will need revision.

At a minimum, the court's ruling apparently means that the board must recommend a regulatory plan for the 1985 fishing season. It is unclear whether the board will be asked to reauthorize every subsistence net fishery which existed, but board records indicate that this could include set net fisheries on king, sockeye and coho on the the east and west sides of Cook Inlet. The board may also have to examine subsistence salmon fishing regulations for the Copper River, Naknek--Kvichak, Lake Iliamna--Lake Clark, Angoon, and other areas.

Department of Law reviewed the Madison decision for the Board of Fisheries and the Board of Game during their joint meeting March 18, 1985, at the Captain Cook Hotel in Anchorage. This gave the boards an opportunity to discuss the regulatory impacts of the Madison decision. After

public testimony on March 25, 1985 at the Captain Cook Hotel, the Board of Fisheries will discuss plans for this summer's fisheries. The Board of Game may hold similar discussions on April 2, 1985 (also at the Captain Cook Hotel in Anchorage).

######

MEMORANDUM State of Alaska

TO: Ron Jolin, Chairman
Joint Boards of Fish and Game

DATE: March 15, 1985

FILE NO:

TELEPHONE NO: 465-4100

FROM: Don W. Collinsworth
Commissioner
Department of Fish and Game

SUBJECT: Management Issues Arising From the Madison Decision

INITIAL ASSESSMENT

As you requested, my staff has completed an initial assessment of the Madison decision's implications for fish and wildlife management. This memorandum uses the Cook Inlet, Naknek River, and Copper River fisheries as examples, but Madison also affects existing Board of Fisheries regulations for Angoon and Lake Iliamna-Lake Clark and existing Game Board regulations for permit hunts.

Although the Game Board has not applied the eight criteria in the same way the Board of Fisheries has, Department of Law has said that the Game Board may be unable to continue providing permit hunts restricted to particular communities unless guided hunting and hunting by non-residents have already been eliminated. Further the legal analysis concludes that Madison may require the Game Board to discontinue non-state-resident and guided hunting for all permit hunts.

Department of Law and the management divisions are continuing to analyze Madison impacts and more information will be developed. However, this memorandum is intended to alert you to some of the anticipated area impacts.

COOK INLET/KENAI RIVER/SUSITNA RIVER SALMON

Testimony and data presented to the Board of Fisheries indicate that within the last 20-30 years, almost every part of Cook Inlet, including Knik Arm and Turnagain Arm, has been open to subsistence set-net fishing for salmon (Braund, 1980). The open season for fishing varied from location to location, as well as through time, but included the period May through September. Until 1978, 50 fathoms of net could be used in many areas. Species harvested in these set-net fisheries included primarily kings, sockeye, and coho.

As Anchorage and the Kenai Peninsula grew, subsistence salmon seasons were gradually restricted until only small areas remained open for very short periods with limited gear. Since 1980, subsistence fisheries have been authorized in very limited areas for residents of Tyonek, English Bay, and Port Graham only.

The impacts of the Madison decision on existing Cook Inlet fisheries depend on how many people decide to participate, and where and when they

fish, which makes it difficult for us to precisely assess immediate or long term effects. At a minimum, however, we would expect to see an increase in the gill net harvest of west side and Susitna River king salmon, since any Alaskan will be able to participate in the Tyonek district subsistence king fishery. This fishery begins in May, and has limits of 70 kings per household. Presently, this fishery is restricted to persons domiciled in Tyonek, and on average, 2,000 kings have been harvested annually.

It is impossible to predict how much new effort would occur, but any significant increase in this fishery will require compensating reductions in the expanding sport fishery of the Susitna drainage. This, of course, would mean reductions in seasons, bag limits, or even closures of certain areas to fishing if the subsistence harvest grows substantially.

In addition, the Kenai Peninsula subsistence net fisheries which existed in the late 1970s, and which have been closed since 1980, may have to be reopened to all Alaskans. This would include set net fisheries on king, sockeye, and coho stocks which enter all of the Kenai Peninsula drainages. King and coho stocks, which are already the focus of major allocation conflicts between sport and commercial users, will now have to be shared with another user group, which will have a priority. Additional harvest restrictions on sport and commercial fisheries in Cook Inlet may have to be imposed either before the fishing season or in-season as we determine whether escapements are being achieved.

Because of recent regulatory constraints, past harvests are a poor indicator of the potential demand for subsistence fishing in Cook Inlet. Further, recorded harvests probably underestimate the actual historical subsistence harvest due to inadequate catch reporting systems. If accessible beach areas are opened to net fishing, we would expect a substantial interest, similar to that in the Copper River dip net fishery. One indicator of this demand is the fact that participation in the Cook Inlet subsistence fishery increased from less than 100 people to more than 1,300 between 1977 and 1980, before the Board adopted the regulations restricting subsistence use. An additional indicator of demand are the requests the Fisheries Board has received from people wanting to fish with nets in Knik Arm and other parts of Cook Inlet.

In an extreme scenario, the Board could be required by a court to authorize subsistence fishing wherever it has occurred in Cook Inlet, Turnagain Arm, and Knik Arm, throughout the summer, by any Alaskan. The Madison decision clearly states that sport and commercial uses must be eliminated before subsistence uses can be restricted. Therefore, it seems unlikely that the Board or department could impose subsistence harvest limits or quotas to ensure that commercial and sport uses could continue.

In summary, we see major demands being imposed upon the department for in-season monitoring and management of all harvests to ensure adequate escapements in Cook Inlet. We also see the potential for confusion and controversy over Cook Inlet salmon management escalating and making it more complex.

NAKNEK RIVER SALMON

The Naknek River is currently open to subsistence fishing only by residents of the Naknek and Kvichak river drainages. This regulation was adopted in 1981 because of concern about growth in the Naknek subsistence salmon fishery by other Alaskans. From 1976 to 1980, participation and king harvests in the Naknek subsistence fishery doubled as more people learned about the fishery and came to the Naknek-King Salmon area to take part in it.

The Board, local residents, and sport fishermen all became concerned that this growing harvest was beginning to affect the allocation of the Naknek River's limited king salmon stocks. By restricting the fishery to local residents, the Board of Fisheries was able to allow continued development of the Naknek sport fishery on kings, which has become increasingly significant to guides and transportation services. By creating a personal use sockeye fishery on the Naknek, the Board was able to accommodate non-local fishing demand and shift it to more abundant species.

The Madison decision appears to open the Naknek net subsistence fishery again to all residents of the state. If significant effort occurs, it seems quite likely that restrictions will have to be imposed on the sport fishery in order to ensure king salmon escapement.

COPPER RIVER/PRINCE WILLIAM SOUND SALMON

Historically, Copper River sockeye have been harvested by commercial fishermen in Prince William Sound, residents of the Copper Basin and other interior communities, as well as Fairbanks and Anchorage residents. With population growth and increased publicity, the Chitina dip net fishery grew dramatically; harvests more than tripled from 1980 to 1983. Additionally, many urban dip net fishermen preferred to fish the early portion of the Copper River run, which posed potentially severe management problems for early run sockeye. About 50 percent of the Copper River run passes through the commercial fishery district in the first two to three weeks of the season, which means any management decisions to restrict the fishery must be made on very short notice.

As subsistence harvests increased in the 1970s, the board began restricting fishwheel and dip net harvests in the Copper River. In 1984, the board examined subsistence dip net and fishwheel fisheries in the Copper River. It authorized subsistence fishing for Copper Basin residents. Harvest by the subsistence fishery was predicted to be approximately 20,000 salmon and individual bag limits could go as high as 500. The board then established a personal use fishery for people who did not reside in the communities identified as having subsistence uses. The personal use fishery had bag limits of 15 salmon for individuals and 30 for households. The total catch was limited to 60,000 sockeye plus twenty-five percent of any excess escapement. The in-river sport fishery was predicted to harvest approximately 5,000 sockeye and the Prince William Sound commercial drift gill net fishery was managed to provide for these known harvest and escapement levels.

Under Madison, the Fisheries Board may have difficulty in predicting harvest levels for the Copper River fishwheel and dip net fishery, due to uncertainty about how many people will participate and how many fish they will take. Additional management problems are posed by the timing of the sockeye run and the heavy dip net harvest, which occurs on the early part of the run. These considerations seem to require more conservative management of the Prince William Sound commercial fishery.

In summary, we see a number of complex management issues arising from the Madison decision. Regulation specialists for Commercial Fisheries and Game Divisions are presently identifying the specific regulatory options which the Boards could address for the upcoming season.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

PO BOX 3-2000
JUNEAU, ALASKA 99802
PHONE: (907) 465-4100

September 6, 1984

Mr. Robert Willard, Chairman
Legislative Affairs Committee
Alaska Native Brotherhood
320 West Willoughby Avenue
Juneau, Alaska 99801

Dear Mr. Willard:

Thank you for your August 15, 1984, letter regarding the personal use fishing category. I am pleased to have this opportunity to help clarify this topic for your shareholders. Since you plan to run my responses in your newsletter, perhaps it would be best to answer the questions in the order you presented.

1. Before 1978, "subsistence fishing" was defined as fishing with a net for personal use, and "sport fishing" was defined as fishing with rod and reel for personal use. Thus, the difference between "subsistence" and "sport" fishing was based on the type of gear used.

   After the state subsistence law was passed in 1978, subsistence fishing was defined differently. It was no longer defined in terms of "personal use," but rather, in terms of "subsistence uses." In 1978, the legislature also enacted a definition of subsistence uses which hinged upon "customary and traditional uses."

   The other important change brought about by the state subsistence law was that before 1978, the Board of Fisheries could authorize subsistence fisheries at its discretion. Since 1978, the board has been required to authorize subsistence fishing if subsistence uses have been associated with a particular fish stock, unless the sustained yield of that stock would be jeopardized by fishing. Additionally, if fishing must be restricted to protect a certain fish stock, sport, commercial, and personal use fisheries must be curtailed before the subsistence harvest could be cut back.

   As the Boards of Fisheries and Game began to implement the subsistence law, they developed 5 AAC 99.010 -- a regulation which interprets the statute. This regulation

contains eight criteria by which subsistence uses can be identified.

When the board examines salmon uses in a particular area, it looks at these eight criteria to determine whether communities or areas demonstrate subsistence uses. If subsistence uses are found, then the board authorizes subsistence fishing. In some cases, communities or areas which had fished a particular stock of salmon did not qualify under the eight criteria, generally because their use of the salmon could not be called "customary and traditional." Neither could these uses be classified as sport fisheries since the primary gear type was nets rather than rods and reels.

Thus the board had to find a "new" category of fishing for those who had previously fished under the subsistence category but could not continue to do so. The "personal use" category was established to remedy this problem. All personal use fishing regulations may be found in 5 AAC 77. This category simply provides continued access to fishery resources for those whose uses do not meet the eight criteria and cannot be classified as commercial or sport.

Perhaps the Copper River salmon fisheries can provide a useful example. In February 1984, the Board of Fisheries examined the uses of salmon in the Copper River. The board determined that under the eight criteria subsistence uses could be found in the communities of the Copper River Basin and five other nearby communities. The board then authorized a subsistence fishery for the individuals living in these areas. However, this finding meant that a large number of people, primarily from Fairbanks and Anchorage, who had been able to dip net or use fishwheels for Copper River salmon, no longer qualified for subsistence fishing permits. In order to treat those people fairly and not exclude them entirely from a fishery resource which they had harvested for many years, but not by definition customarily or traditionally, the board authorized a personal use fishery for those people who do not live in the Copper Basin or the five nearby communities.

2. Subsistence fishermen need not be concerned that the personal use fishery category will jeopardize subsistence fishing by establishing a new user group. As you can see from the answer above, personal use fisheries are not really new. They are essentially fisheries that used to be called subsistence before the 1978 law.

3. Only subsistence fisheries have a statutory priority. Personal use, sport, and commercial fisheries have no

statutory priority. It is up to the board to allocate reasonably between these three categories.

4. So far the Fisheries Board has established personal use salmon fisheries for the Copper River, Cook Inlet, and Bristol Bay. As the board applies the subsistence criteria to more and more fisheries, they will probably continue to create personal use fisheries. The Game Board has not established a personal use hunting category.

5. Unlike subsistence fisheries, where eligibility hinges on the boards eight criteria, there are no special eligibility requirements for personal use fisheries other than general requirements -- for finfish, a resident Alaska sport fishing license and for aquatic plants or shellfish, a resident or non-resident Alaska sport fishing license.

6. Reporting requirements for personal use fisheries are set by the board when each fishery is established and are generally similar to subsistence fishing reporting requirements.

7. No one may legally fish unless the board has authorized the fishery by regulation.

8. In southeastern Alaska, the board has not yet established personal use fisheries. As mentioned above, so far personal use fisheries have only been authorized for salmon in Bristol Bay, Cook Inlet, and the Copper River. As noted above, the Game Board has never established a "personal use" hunting category.

9. The subsistence law clearly mandates that where harvestable surpluses occur, the board must provide for subsistence uses first. Likewise, when the harvestable surplus is not great enough to satisfy all uses, subsistence uses are the last to be cut back. Therefore, under the law, subsistence allocations could not be reduced to protect personal use allocations.

10. There are areas open for personal use fisheries that are not open for subsistence fishing. For example, in Cook Inlet, the board found that only the communities of Tyonek, English Bay, and Port Graham met the criteria set out for subsistence fisheries. Since no other communities qualified for subsistence fisheries, the board used the personal use category to allow historical non-commercial net fisheries to continue in areas where subsistence fisheries are no longer authorized. Anyone with an Alaska resident sport fish license may participate, including residents of Tyonek, English Bay, and Port Graham.

11. Advisory committees and regional councils always play an important role in the regulatory process and we certainly hope that they will continue to do so. The information they provide the board is critical to the board's ability to analyze regulatory proposals relating to all fishing--subsistence, commercial, sport, and personal use.

12. The primary difference between subsistence and personal use is that subsistence uses are defined as customary and traditional uses and must be authorized, with a priority as necessary. Authorizing personal use and sport fishing is left to the board's reasonable discretion and no statutory priority applies. Sport fishing is restricted to hook and line gear attached to a pole, whereas personal use fishing primarily includes nets.

13. The annual southeast salmon catch for 1982 and 1983 is as follows (there are no personal use salmon fisheries in Southeast):

	COMMERCIAL	SPORT	SUBSISTENCE
1982	29,536,800	138,486	40,180
1983	42,202,700	138,510	not available

14. The board sets bag and possession limits for personal use fisheries as they are established or modified just as it does for sport and subsistence fisheries. The Game Board has not established a personal use hunting category.

I hope that these responses will help your readers understand the personal use category. While it is a new term, it simply describes fisheries that have long been conducted, but which no longer fit under the 1978 definition of subsistence.

Please let me know if my staff and I can be of any further assistance. We greatly appreciate your efforts to help people better understand fish and game regulations.

Sincerely,

Don W. Collinsworth

Don W. Collinsworth
Commissioner

Grand Camp
Alaska Native Brotherhood

320 West Willoughby Avenue
Juneau, Alaska 99801
(907) 586-2049

1984 Officers
Grand President ANB
Ronald O. Williams
1st Vice President
William Thomas
2nd Vice President
James Martinez
Secretary
Albert Kookesh
Treasurer
Paul Young
Sergeant-At-Arms
Lawrence Sweet
Grand President ANS
Ethel Lund

August 16, 1984

Honorable Donald W. Collinsworth
Commissioner
Alaska Department of Fish & Game
Post Office Box 3-2000
Juneau, Alaska 99802

Dear Commissioner Collinsworth:

There is some confusion among the people of Southeast Alaska regarding the Personal Use fishing category, and its interaction with subsistence law. It would be much appreciated if you could clarify the situation by providing answers to a series of questions.

In an effort to avoid a major confrontation these questions and your responses will be printed in the SEALASKA Shareholder, a monthly publication which goes out to the 16,000 + shareholders. We feel that if our contituents are informed they are less likely to react to some of the letters to the editor(s) appearing frequently in Alaska Newspapers.

Please provide answers to the following questions:

Past ANB Grand Presidents
Dr. Alfred Widmark
Patrick J. Paul
Thomas Jackson

John Hope
Frank See
Dr. Walter Soboleff

Richard Stitt
Steven V. Holch
Nelson D. Frank

Frank O. Williams
Herbert Hope
Robert R. Martin

Roy Peratrovich, Grand President Emeritus
Dr. Cyrus Peck, Sr., Grand Secretary Emeritus
Dr. Mildred Sparks, ANS Grand President Emeritus

1 ° "Personal use fishing" is not a category of fishing mentioned in the Alaska Statutes. Could you please explain the origin of this category of fishing?

2 ° Is there any foundation to concerns that personal use fishing could jeopardize subsistence fishing by establishing a new and competing use group?

3 ° What is the relative priority that personal use fishing has with relation to subsistence fishing, commercial fishing, and sport fishing?

4 ° Are there any Personal Use regulations that cover: waterfowl, shellfish, aquatic plants, fur bearing animals, deer, moose, wild roots, berries and vegtables, bottem fish and trout species?

° Can any person participate in personal use fishing? In other words, are there any eligibility requirements?

° What are the reporting requirements for Personal Use fishing? for Game?

7 ° Can people engage in personal use fishing if the Board of Fisheries has not authorized personal use fishing by regulation?

8 ° What seasons have been instituted by regulation on salmon, halibut and other bottom fish, wild game, waterfowl?

- Will Personal Use cause a reduction of allocation for Subsistence?

- Are there areas that are open to Personal Use, but closed to Subsistence?

- Will the advisory councils/committees have a role in Personal Use in their areas, and of the region?

- What is the difference between Personal Use and Subsistence? Sports?

- Since 1982, what has been the annual take of salmon in the Southeast in the following categories? Commercial, Sports, Subsistence, Personal Use.

- Is there a limit for fish taken for Personal Use? Game? Waterfowl?

Commissioner, so often correct information can eliminate misunderstandings and problems before they occur. We will appreciate your help by responding to the above questions, and done so timely for this being published.

Thank you in advance for your cooperation.

Sincerely,

ALASKA NATIVE BROTHERHOOD

RONALD D. WILLIAMS
GRAND PRESIDENT

By: _____

Chairman ANB
Legislative Affairs Committee

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 3-2000
JUNEAU, ALASKA 99802
PHONE: 907 / 465-4100

March 22, 1985

The Honorable Peter Goll
Alaska State House
Pouch V
Juneau, AK 99811

Dear Representative Goll:

We appreciated the opportunity to have our department, the Department of Law, and the Boards representives meet with your committee and believe it went well. In response to the inquiry of Representatives Furnace and Phillips concerning Federal Funding available under ANILCA, Dingell/Johnson (D-J), and Pittman/Robertson (P-R), following is an outline of the Federal Funding that was available for the past three years:

	ANILCA	D-J	P-R
FY 85	$1,000.0	$1,639.0	$4,600.2
FY 84	$1,000.0	$1,569.0	$3,804.5
FY 82/83	$ 960.0	$1,753.0	$3,387.4

The ANILCA funding, which is available specifically for the implementation of subsistence provisions, required 100 percent matching funds from the State of Alaska, and the D-J and P-R funds require a 25 percent match.

It is our understanding that the solicitor of the Department of Interior is reviewing possible compliance questions, including funding ramifications, related to the Madison decision. The ANILCA funds are directly related to subsistence provisions as mentioned. However, the D-J and P-R funds are only indirectly potentially affected.

I hope this provides the information requested. If you have additional questions, please call me.

Sincerely,

Don W. Collinsworth
Commissioner

11-K11LH

MEMORANDA FROM THE

ATTORNEY GENERAL

MEMORANDUM State of Alaska

TO: Honorable Bill Sheffield
Governor

DATE: March 6, 1985

FILE NO: 366-375-85

Thru: John Shively
Chief of Staff

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Briefing memorandum: subsistence

I. Suggested Attendees

A. Governor Sheffield and appropriate staff

B. Department of Fish and Game

1. Don W. Collinsworth, Commissioner
2. Dennis D. Kelso, Deputy Commissioner
3. Steven R. Behnke, Director, Division of Subsistence

C. Department of Law

1. Norman Gorsuch, Attorney General
2. Larri Irene Spengler, Assistant Attorney General

II. Issue Summary

-- For several years, the Boards of Fisheries and Game have implemented the state subsistence law in a way which protected fishing and hunting by rural Alaskans.

-- At the same time, the boards provided reasonably for other uses, such as personal use net fishing by non-rural Alaskans, sport fishing, and commercial fishing.

-- This exercise of regulatory authority had been certified as complying with the federal subsistence law, ANILCA.

-- On February 22, 1985, the Alaska Supreme Court declared that the boards lacked statutory authority for the regulatory approach used in implementing the subsistence law. Madison v. Alaska Department of Fish and Game, No. 7410.

-- Madison means that all Alaskans may participate in subsistence uses, and that those uses cannot be restricted until sport and commercial fishing, and non-resident hunting and big game guiding are eliminated.

- Example: The Prince William Sound commercial fishery may need to be restricted or even closed if necessary to accommodate the dip net fishery in the Copper River.

- Example: The Kenai River and Susitna drainage sport fisheries may need to be restricted or even closed if "subsistence fishing" by gill net must be allowed in large areas of Cook Inlet closed in recent years.

-- If the boards cannot protect fishing and hunting by rural Alaska residents under the state statutes, noncompliance with ANILCA could mandate some federal action.

III. Necessity for Governor's Briefing

A decision is required from the Governor on whether the state should proceed under the statutes as interpreted by the court in Madison, or whether an amendment to the state statutes should be sought to return the regulatory authority the boards exercised before this court decision.

IV. Background

A. Pre-Madison: The state's position on the Alaska statutory and regulatory framework before this court decision was:

1. The legislature in 1978 intended to protect fishing and hunting by individuals who reside in rural areas and communities in which the taking of fish stocks and game populations for personal and family consumption is a significant part of the local economy.

2. The eight criteria developed by the joint boards correctly identified subsistence uses in rural areas and communities.

3. Fishing by net for personal use by people from other areas of the state could be accommodated through the personal use fishing category established by the Board of Fisheries in regulation.

4. Personal use fishing did not have a priority over sport fishing and commercial fishing.

B. Madison: The court held with regard to the statutory and regulatory framework in Alaska

1. The legislature in 1978 did not intend that subsistence uses were to be limited to hunting and fishing by rural Alaska residents.

2. The legislature in 1978 did not intend subsistence uses to be identified in terms of the uses of an area or community.

3. Conversely, the legislature in 1978 did not intend a "grandfather" rights, limited entry-type system to control eligibility for subsistence.

4. The legislature in 1978 intended that subsistence uses could be restricted only if it is necessary for sustained yield purposes and if non-subsistence uses -- sport and commercial fishing, and by analogy, non-state-resident and trophy hunting, and big game guiding -- have already been eliminated.

5. If a situation requires restriction of subsistence uses, distinctions among subsistence users will be based on the three criteria contained in the statute: customary and direct dependence on the resource, local residency, and availability of alternative resources.

V. Relevant Laws

A. State law: Because the court ruled on statutory construction and legislative intent alone, without reaching any constitutional issues, the legislature may act on this issue.

B. Federal law:

1. The Alaska National Interest Lands Conservation Act allows the state to continue exercising its traditional management prerogatives on all land and water in Alaska if the state in a law of general applicability provides, among other things, the definition of subsistence uses contained in ANILCA.

a. ANILCA defines subsistence uses as uses of fish and game by rural Alaska residents.

b. It is unclear precisely what federal management would entail, but it has been argued that all navigable waters would be included, and that possibly some state lands would be included if migratory species were involved.

2. The Marine Mammal Protection Act also requires that if the state is to resume management, state law must define subsistence uses as uses of fish and game by rural Alaska residents.

VI. Alternatives

A. Implement the current statutes as interpreted by the court. Consequences:

1. All hunting and all net fishing for personal use by all Alaskans is now defined as "subsistence uses," which must be authorized unless the resource will be harmed, and which must be given a priority over sport and commercial uses.

2. As participation increases in a subsistence fishery, sport and commercial fishing must be closed before subsistence fishing can be restricted. (For example, theoretically the Prince William Sound commercial fishery could be closed because of an increase in "subsistence fishing" in the Copper River.)

3. Similarly, all commercial big game guiding and all non-state-resident and trophy hunting would have to be eliminated before subsistence hunting by Alaska residents could be restricted.

4. Subsistence fishing would probably have to be authorized any place in the state where it had been authorized in the past, unless the resource would be harmed. (For example, Madison could require areas in Cook Inlet closed to subsistence fishing for years to reopen, possibly affecting the Kenai River and Susitna drainage sport fisheries.)

5. Assuming non-compliance with ANILCA, the following could result:

   a. Federal management of some kind on all federal lands and possibly all navigable waters of the state could be asserted by the Department of Interior, or sought through judicial action.

   b. One million dollars in matching federal funds authorized by ANILCA would be lost to the state.

6. It would not be possible for the state to resume marine mammal management.

B. Amend the current statutes to return the regulatory authority that the boards exercised before Madison. Consequences:

1. By inserting the words "rural Alaska residents" into the definition of subsistence uses, the scope of uses qualifying for the protection and priority of the subsistence law would be narrowed.

2. By inserting the words "rural Alaska residents" into the definition of subsistence uses, compliance with ANILCA could be assured.

3. By establishing the personal use fishing category in statute, harvest opportunities for people who do not qualify for subsistence uses could be protected, without giving those uses a priority over sport and commercial fishing.

MEMORANDUM State of Alaska

TO Ron Jolin, Chairman
Joint Boards of Fisheries and Game

DATE March 11, 1985

FILE NO 366-375-85

TELEPHONE NO. 465-3600

FROM Norman C. Gorsuch
Attorney General

SUBJECT Subsistence

The State subsistence law must be implemented by the Boards of Fisheries and Game in a new and problematic way under Madison v. Alaska Department of Fish and Game, No. 7410, a decision issued by the Alaska Supreme Court on February 22, 1985. The precise holdings of the court could be interpreted by extrapolation to affect the entire state and regulation of game as well as fish.

The state statutes require:

-- That subsistence hunting and fishing be allowed, unless the resource would be harmed.

-- That subsistence be given a priority, if restrictions are necessary.

Before Madison:

-- These special protections applied to fishing and hunting by rural Alaskans.

-- Because subsistence consisted only of those rural harvests, the boards were able to accomodate non-state resident and guided hunting, personal use net fishing by non-rural Alaskans, sport fishing, and commercial fishing.

-- The state was in compliance with ANILCA.

After Madison:

-- All Alaskans may engage in subsistence fishing or hunting.

-- Subsistence fishing or hunting on a resource by all Alaskans cannot be restricted unless all non-subsistence uses are first eliminated.

- Example: The Prince William Sound commercial fishery may need to be restricted or even closed if necessary to accommodate the dip net fishery in the Copper River.

- Example: The Kenai River and Susitna drainage sport fisheries may need to be restricted or even closed if "subsistence fishing" by gill net must be allowed in large areas of Cook Inlet closed in recent years.

- Example: All Alaskans could subsistence fish near Tyonek for kings, near Angoon for cohos, in the Naknek River for kings, sockeye, and coho, and in the Iliamna-Lake Clark drainage for sockeye, unless any associated sport or commercial fishery were closed.

- Example: For any permit hunt, non-state resident and guided hunting may need to be eliminated.

-- If the boards cannot protect fishing and hunting by rural Alaska residents under the state statutes, non-compliance with ANILCA could mandate some federal action.

- It is unclear precisely what federal management would entail, but it has been argued that besides all federal land, all navigable waters would be affected, and that possibly some state lands would be affected if migratory species were involved.

NCC/LIS:rn

MEMORANDUM State of Alaska

TO: Honorable Bill Sheffield
Governor, State of Alaska

DATE: February 22, 1985

FILE NO: 822-642-82

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Madison v. Alaska Dept. of Fish & Game

The Alaska Supreme Court today issued an opinion in Madison v. Alaska Department of Fish and Game, file No. 7410, which holds that the regulatory approach of the Boards of Fisheries and Game to subsistence is inconsistent with Alaska's subsistence statutes. A copy is attached.

The state's position on the Alaska statutory and regulatory framework before this decision was that:

-- The legislature in 1978 intended to protect fishing and hunting by individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area.

-- The eight criteria developed by the board correctly identified subsistence uses in rural, reliant areas.

-- The harvest of people in other areas of the state could be accommodated through the personal use fishing category created in regulation by the Board of Fisheries.

-- Personal use fishing did not have a priority over sport fishing and commercial fishing.

With regard to the statutory and regulatory framework in Alaska, the court in Madison held:

-- The legislature did not intend that subsistence uses were to be limited to rural uses, and the boards do not have the authority to do so.

-- The legislature did not intend subsistence uses to be identified in terms of the uses of a community or area.

-- The legislature did not intend that people qualify for subsistence fishing on an individual basis, and there is no authority to develop a "grandfather" rights system with respect to subsistence.

-- The legislature intended that subsistence uses coul be restricted only if it is necessary to restrict harvest for sustained yield purposes and if sport and commercial uses have already been eliminated.

-- If a situation requires restriction of subsistence uses, distinction among subsistence users will be based upon the three statutory criteria, customary and direct dependence on the resource, local residency, and availability of alternative resources.

With regard to the federal subsistence law:

-- Federal management of fish and game on all federal lands in Alaska is mandated if the state does not by a law of general applicability define subsistence uses as uses of rural Alaska residents.

-- It is unclear precisely what federal management would entail.

LIS:rn

cc: (with attachment)

Don Collinsworth
John Shively
Lenny Boston
John Greeley
Molley McCammon

MEMORANDUM State of Alaska

TO: Hon. Bill Sheffield
Governor

DATE: February 25, 1983

FILE NO: 166-448-83

TELEPHONE NO:

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Subsistence law: real and perceived problems

I recently asked the attorneys on my staff who work in the fish and game area to prepare an overview of the current status of the state subsistence law, with relevant background information for your review. The material which follows is the result of that effort. I have reviewed it personally and concur fully with its content.

OVERVIEW

The framework for the implementation of the subsistence law is now in place. The approach codified in regulation by the Joint Boards of Fisheries and Game is fairly straightforward, and with one notable exception, the definition of "rural," it is likely to be upheld by Alaska courts. See Madison v. ADF&G, 3KN 81-542, CIV; Glosund v. ADF&G, 3HO 80-92, 77-22104 Homer. This memorandum will explain the state statutory and regulatory framework and its relationship to federal law. It also will discuss three actual problems and twelve perceived "problems" in the current situation and identify specific issues that require attention.

STATE LAW

The Alaska Boards of Fisheries and Game are authorized by the legislature to allocate Alaska's fish and game resources among various uses, so long as sustained yield will not be jeopardized. Since statehood, the boards and their predecessor, the Board of Fish and Game, have had the discretion to decide which non-subsistence uses (for example, sports, commercial) should be allowed in each area of the state, and to what extent. Under AS 16.05.251(b) and 255(b), the boards are required to adopt regulations allowing subsistence uses, unless sustained yield will be jeopardized. Attachment A.

Although contained in the same statute, the requirement to allow subsistence uses is separate from the priority for subsistence uses over non-subsistence uses, which is triggered only by a relative resource shortage. The boards must accord the priority to subsistence uses whenever "it is necessary to

restrict the taking" of a fish stock or game population in order to assure maintenance of sustained yield or continuation of subsistence uses. AS 16.05.251(b) and 255(b). Attachment A. As discussed below, the mere existence of regulations authorizing subsistence uses does not mean that taking is "restricted" so as to trigger the priority. Rather, the priority comes into play only in relative resource shortage, when restrictions on non-subsistence uses must be imposed because harvest competition among user groups or decline in numbers of fish or game would jeopardize sustained yield of the resource or subsistence uses of the resource.

The legislature has defined subsistence uses as "customary and traditional uses" of wild, renewable resources for certain purposes. AS 16.05.940(26). Attachment B. The state statutory definition of "subsistence uses" is practically identical to that found in Title VIII of the federal Alaska National Interest Lands Conservation Act (ANILCA). Virtually the only difference is ANILCA's specification that subsistence uses are "customary and traditional uses by rural Alaska residents." ANILCA §803 (emphasis added). Attachment C.

However, the boards have determined that the state definition of "subsistence uses" also is limited to customary and traditional uses by "rural Alaska residents." 5 AAC 99.010(a). Attachment D. Not all uses of fish and game by rural Alaska residents are "subsistence uses." Rather, subsistence uses by rural Alaska residents are customary and traditional uses, which can be identified by eight criteria. 5 AAC 99.010(b). Attachment D. See April 1, 1982, memorandum from our office to Clint Buckmaster, Chairman of the Joint Boards of Fisheries and Game, A66-432-82. These criteria are based upon the ten criteria in 5 AAC 01.597 which the Board of Fisheries has employed to identify which uses of salmon in Cook Inlet are subsistence uses. The ten criteria have been upheld by two state superior court judges in the last year. Madison v. ADF&G, supra; Giosund v. ADF&G, Supra. In approving the ten criteria, the court in Madison concluded at page 4 of the March 5, 1982, findings of fact and conclusions of law that:

> The intent of AS 16.05.251(b) and .940(26) is to provide for and protect personal use ... fisheries conducted by persons who reside in rural communities which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community. (Emphasis added.)

The boards determine on a case by case basis whether a use qualifies as a subsistence use by evaluating information presented by the public, the advisory system, and the Department of Fish and Game in light of the criteria. Attachment D. The joint board regulation also sets out the procedures each board will follow in allocating between subsistence uses and other uses. 5 AAC 99.010. In brief, if a fish stock or game population can be harvested without jeopardizing sustained yield, the board will provide reasonable opportunities for subsistence uses of that resource. If the resource population is adequate, the board may permit opportunities for other uses as well. Attachment D.

FEDERAL LAW

ANILCA established a procedure for the state to continue managing fish and game on federal lands and in all the waters of Alaska if the state meets certain standards. In particular, ANILCA §805(d) requires the state to have "laws of general applicability" which mirror the federal provisions in three areas: (1) the definition of "subsistence uses," (2) a preference for those uses in times of relative resource shortage, and (3) public participation which includes advisory committees and regional councils. The Department of the Interior has determined that the state statutes, together with the boards' procedural regulation (5 AAC 99.010) and the regulations governing fish and game advisory committees and regional councils (5 AAC 96), satisfy the requirements of ANILCA. See December 2, 1981, and April 28, 1982, letters from our office to Governor Hammond, A66-120-82. Thus, under the approach now in place, the state is authorized to continue to regulate the taking of fish and game on federal lands and in all the waters of Alaska.

ACTUAL PROBLEMS

There are three actual problems with the implementation of the subsistence law which have not yet been resolved.

1. "Rural": When the joint boards adopted the criteria and procedures specified in 5 AAC 99.010, they also adopted a definition of "rural" in 5 AAC 99.020, Attachment E:

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> In this chapter 'rural' means outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more as determined by the Alaska Department of Community and Regional Affairs.

The definition poses serious equal protection problems under state and federal constitutions, in part in that whether an area of the state is "rural" is to be determined by whether the area has or has not organized as a borough. Equal protection requires that persons similarly situated be treated alike. Ketchikan Gateway Borough, Alaska v. Breed, 639 P.2d 995 (Alaska 1981). A definition of "rural" keyed to the presence or absence of a borough appears to violate that principle. For example, the Matanuska-Susitna Borough boundary bisects game management unit 13. Under 5 AAC 81.055(c)(3), rural residents of game management 13 who meet certain other requirements qualify for a subsistence permit to hunt Nelchina caribou. If the definition of "rural" in 5 AAC 99.010 is applied, residents of game management unit 13 living outside the borough are eligible, and those living inside are not. Information supplied to the Department of Law by the Alaska Department of Fish and Game would probably lead a court examining the classification to conclude that persons living inside and outside the borough are apparently similarly situated, except for the location of the borough boundary line. That boundary appears to be entirely unrelated to factors considered important by the boards in identifying subsistence uses, such as available opportunities. Consequently, a court would probably conclude that classification of land as being within a borough is a factor which does not reflect a difference in the pattern of harvest and use of resources and that different treatment of Alaskans based only on their residency in a borough violates equal protection principles. See June 17, 1982, memorandum from our office to Ronald Skoog, Commissioner of Fish and Game, J99-098-82.

The current definition of "rural" is also potentially flawed by vagueness. Regulations must be precise enough to enable the agency implementing them and the public to know what is intended. Woodards v. State, 604 P.2d 250 (Alaska 1979). For that reason, the Department of Law discourages the use in regulations of words like "adjacent" or "near", since courts have found that other such relative terms are too vague to be enforceable. Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972). Similarly, in the definition of "rural" the term "road connected area" is potentially vague. There is no way of knowing whether the definition of "road" was intended to include frozen

rivers in winter, logging roads, animal trails, or railroads. Nor is there any information on the amount of "area" anticipated to be included in terms of specific distances in yards or miles from a "road." It should also be mentioned that even if specific guidelines were set out, a differentiation in treatment based on proximity to a road also would have to bear a fair and substantial relationship to a legitimate governmental purpose under an equal protection analysis. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

A definition of "rural" is not required by state law. The April 2, 1982, letter from our office to Representative Ramona Barnes, J66-561-82, points out that it is not necessary under federal law either. ANILCA requires only that subsistence uses be rural customary and traditional uses, not that "rural" be defined. ANILCA §803, §805(d). As the April 2, 1982, letter discusses, the legislative history of ANILCA indicates that Congress envisioned subsistence uses occurring in rural areas, and rural areas being places where subsistence uses occur. Although seemingly circular, that approach enables the state to provide for subsistence uses on a case-by-case basis through the operation of criteria which have the effect of limiting those uses to rural areas. The joint boards' eight criteria for identifying subsistence uses and their acknowledgement in 5 AAC 99.010(a)(2) that subsistence uses are rural uses would probably be sufficient under ANILCA to accomplish the rural focus. For example, Madison, supra, and Giosund, supra, held that the Board of Fisheries' ten criteria, which are similar to the joint boards eight criteria, identified rural subsistence uses in the Cook Inlet area.

In addressing the concept of "rural," consideration also should be given to the term "residents" as used in section 803 of ANILCA and 5 AAC 99.01)(b). Enforcement of the subsistence regulations will require a definition of residency for subsistence purposes. A possible model is the definition of "domicile" recently approved by the Board of Fisheries at its January meeting. See 5 AAC 39.975(30) (not yet filed with Lt. Governor's office).

2. Avoiding disruption of non-subsistence harvest opportunities: Another problem related to implementation of the subsistence law is the authorization and use of a workable system to avoid disrupting harvest opportunities of those whose uses are no longer classified by the boards as subsistence uses and are not commercial or sport. A solution to this problem is the personal use category established by the Board of Fisheries in 5 AAC 77.001-015, in response to the court's action in Madison,

143257

supra. */ This category is intended to authorize regulations which provide access to fishery resources for those whose uses do not qualify under the criteria as subsistence uses, and cannot be classified as commercial or sport.

This personal use category has generated concern among some members of the public. There are those who fear that it will receive a disproportionately high allocation of the resource, and others that it will consistently be relegated to the lowest position. If the relationship between personal use and sport and commercial use can be resolved, the application of the personal use category as the board addresses different fisheries can be a useful tool to assure the adequacy of harvest opportunities when a particular use is not classified as subsistence use. For example, suppose a fishery has been conducted on a particular fish stock under subsistence fishing regulations for a number of years. As the Board of Fisheries considers proposals for regulations, the uses of that fish stock are examined, and only some of the uses are identified under the criteria as subsistence uses. In addition to providing for the identified subsistence uses, the board could authorize a personal use fishery to continue the uses no longer eligible to be classified as subsistence uses. Assuming the target stock and the continuation of subsistence uses would not be jeopardized. the personal use harvests could be regulated as before, except

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*/ In 1981 in Cook Inlet, the board had identified the non-commercial gillnet fisheries in Port Graham, English Bay and Tyonek as subsistence use fisheries. Gillnet fisheries had long occurred in other parts of Cook Inlet under previous subsistence regulations, but the board in 1981 simply eliminated those other harvests. In Madison, the court did not find that the subsistence law was flawed, nor that the board had erred under the law or the constitution in identifying subsistence uses in Cook Inlet. However, the court ruled at the preliminary injunction stage that the board's action in eliminating the other gillnet harvests which did not qualify as subsistence uses violated due process, in that all use groups had not been treated fairly. In response, the board established the personal use category. For 1982, a personal use gillnet fishery was permitted in Cook Inlet for gillnet harvests not qualifying as subsistence uses. 5 AAC 77.547.

under a new name. If it ever became necessary to restrict the harvest of that particular fish stock, the board would then of course treat the personal use and subsistence fisheries differently.

3. Apparent reluctance to follow Attorney General's advice and confusion among state officials:

There has been reluctance by some board members and some Department of Fish and Game personnel to follow the advice of the Department of Law in implementing the subsistence law. For example, that department chose to ignore our recommendation that the flawed definition of "rural," Attachment E, be severed and not be applied in issuing permits for the subsistence hunt of the Nelchina caribou herd. Such a procedure would have allowed any qualifying resident of game management unit 13 to apply for a subsistence permit, rather than only those living outside the Matanuska-Susitna Borough. That would have avoided the equal protection problem discussed above which was caused by the use of the borough boundary in the classification of uses. See July 23, 1982, memorandum from our office to Ronald Skoog, Commissioner of Fish and Game, 366-042 83.

Another example is the refusal to publish a legal notice for the March 1982 meeting of the Joint Boards of Fisheries and Game which was adequate to allow action at that time to bring the state into compliance with ANILCA. Under the Administrative Procedure Act, state agencies are required to give notice to the public at least 30 days before taking action adopting proposed regulations. The notice must be specific enough to give a clear idea of the area in which action may be taken. AS 44.62.190, .200. For the March 1982 joint board meeting, despite advice from our office, a decision was made not to publish a notice sufficient to give the boards the flexibility to adopt regulations to meet the specifications of ANILCA at that session.

An additional ongoing problem is confusion among some board members and department personnel about what is possible or necessary under the subsistence statutory and regulatory framework. For example, some board members continue to insist that partial compliance is sufficient under ANILCA. As discussed earlier, ANILCA §805(d) requires the state law to be the same as the federal law in three areas: (1) the definition of "subsistence uses," (2) preference for those uses in times of relative resource shortage, and (3) a public participation system (advisory committees and regional councils). Although this has

143255

been explained on a number of occasions by our office, suggestions have continued to be made by some board members that Alaska could fail to comply in one or more of the areas specified and somehow still retain management on federal lands and in all the waters of Alaska.

Another example of ongoing confusion is the discussion outline prepared by the boards' executive director for the joint board meeting which began on November 30, 1982. The thrust of the outline is the purported need to formulate a "policy" on subsistence when, in fact, as discussed earlier, 5 AAC 99.010 already clearly sets out the boards' approach. Attachment D. It is now simply a matter of following those procedures.

PERCEIVED "PROBLEMS"

Numerous other "problems" which are perceived as stemming from the subsistence law are based on misinformation and misinterpretation.

1. Misperception: unconstitutional: In an April 1, 1982, memorandum to Clint Buckmaster, Chairman of the Joint Boards of Fisheries and Game, A66-432-82, our office analyzed the most commonly alleged constitutional flaws in the state subsistence law and concluded that the law was constitutionally sound.

Article VIII, section 4, of the Alaska Constitution allows for preferences "among beneficial uses." Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 904 (Alaska 1981), affirmed the authority of the Board of Fisheries to provide for "different treatment of such diverse user groups as commercial, sports, and subsistence." That authority is not diminished by Article VIII, section 15, of the Alaska Constitution, which prohibits exclusive fisheries and was derived from 48 USC §222, The White Act. 1961 Op. Att'y Gen., No. 3. The intent of the White Act, and Article VIII, section 15, was to preclude creation of classes of use of Alaska's fisheries for which some individuals could never qualify. Hynes v. Grimes Packing Co., 11 Alaska 564, 165 F.2d 323 (9th Cir. 1947), vacated and remanded on other grounds, 23 Alaska 348, 337 U.S. 86 (1949). As discussed below, the subsistence law is not the equivalent of exclusive use, nor does it create a class closed to participation by people who wish to qualify.

The constitutionality of the subsistance law also is not affected by Article VIII, section 3, of the Alaska Constitution, which reserves fish and wildlife to the people for common use. As the April 1, 1982, memorandum explains in more detail, the record of Alaska's constitutional convention shows that section was intended to prohibit private ownership of fish or game still in their natural state. This does not occur under the subsistence law.

The April 1, 1982, memorandum also concluded that identifying subsistence uses as rural uses was permissible under state law. The classification does not violate the equal protection clause of the Alaska Constitution, since the boards have received substantial evidence that basic differences exist between rural and urban areas with respect to economies, social and cultural systems, and resource use characteristics. Indeed, in another context the state supreme court has acknowledged the great differences. In Alvarado v. State, 486 P.2d 891, 894 (Alaska 1971), the court described the differences:

> ... economies which rely on hunting, fishing, and gathering activities, strong kinship bonds, isolation from those parts of Alaska that approximate mainstream America, different seasonal activity patterns, concepts of time and scheduling, which, in accordance with other cultural divergences, may be quite different from those of mainstream America, and finally, very limited participation in the cash economy.

2. Misperceptions: exclusive use: Participation in subsistence uses is not restricted to a closed class. This means eligibility is not limited in a way that precludes entry; it is not limited to individuals who have lived here since statehood, or to Alaska Natives. For example, in Cook Inlet the Board of Fisheries has determined that the uses of salmon by English Bay, Port Graham, and Tyonek are subsistence uses, and that any person domiciled in those communities may participate. 5 AAC 01.580(a). The class is not closed, since individuals may move to one of the communities and enter the subsistence system, or may move away.

The subsistence law also does not automatically preclude non-subsistence uses, for example, sport and commercial fishing. As always, no harvest is allowed if sustained yield would be jeopardized, but the legislature obviously intended non-subsistence uses to continue, and the boards have the discretion to authorize them. AS 16.05.251(a) and .255(a). For

143253

example, when the Board of Fisheries provides for subsistence uses identified by the eight criteria, some fisheries which previously have been termed "subsistence" may not qualify. That does not mean those harvests will cease to exist. As discussed above, the personal use category can be employed at the board's discretion to permit continued resource harvest opportunity.

If relative resource shortage, which is described earlier, occurs and the priority must be implemented, the boards still have available all their traditional management options to restrict non-subsistence uses and to continue regulating subsistence uses, such as altering seasons or prohibiting use of aircraft. These options can be used to implement the priority in ways that do not exclude non-subsistence uses, although that option is available to the boards in extreme cases.

3. Misperception: harm to resource: Under the regulations, statutes, and Article VIII, section 4 of the Alaska Constitution, maintaining sustained yield of the resource is always the paramount consideration. No uses, including subsistance uses, are allowed to interfere with that. If any harvest of a fish stock or game population will jeopardize sustained yield, no harvests, subsistence or otherwise, may be authorized on that stock or population.

4. Misperception: dilution of advisory committee effectiveness and creation of regional council regulatory authority: Created by the boards to assist in gathering information on resource issues, fish and game advisory committees have existed in all regions of Alaska long before the state or federal subsistence laws. Currently, there are 67 of these advisory committees, each of which is represented on one of the state's six regional councils, which were formed by the boards before passage of ANILCA.

In order to satisfy the public participation requirements of ANILCA §805, modifications were made to the advisory system regulations, some of which strengthened the regional councils' role in the regulatory process. Two concerns have since emerged regarding the regional councils. The first is that the councils will replace the committees, and thus hinder public access to the boards. However, under the current regulations, individuals may express their views directly to the boards, councils and committees. Committees may channel information both to the councils and to the boards. The councils supplement, rather than replace, communication with the boards by individuals and committees.

The second concern is that the councils will have undue authority over the boards, or will have separate regulatory authority. In conformance with the specifications of ANILCA §805(d), the boards now give limited deference to council recommendations concerning subsistence uses, although they receive council recommendations on all fish and game issues. The boards may reject the recommendations concerning subsistence uses if they are not supported by substantial evidence, if they would violate conservation principles, or if they would harm subsistence uses. 5 AAC 96.610(e). The regional councils have no authority to promulgate regulations; rather, they are authorized to make recommendations to the boards.

5. Misperception: courts managing resources: Although the subsistence law was enacted in 1978 (ch 15, SLA 1978), the boards did not begin implementing it immediately. In fact, the boards' actions were often inconsistent with the law. As a consequence, the state lost four lawsuits in 1980. For example, Tyonek v. Alaska Board of Fisheries, 3AN 80-3073, ruled that it was improper for the board to authorize a sport fishery on Susitna River king salmon while not allowing a subsistence fishery on those stocks, when sustained yield would not be jeopardized by harvest of the fish.

However, once the boards began articulating and applying standards for implementation of the subsistence law, recent litigation has been more successful. For example, the Board of Fisheries' approach to subsistence uses in Cook Inlet has been upheld completely in Madison, supra, and in large part in Glosund, supra. The state's success in such cases hinges primarily on the boards' reasonableness in following the requirements of the law.

6. Misperception: waste permitted: The subsistence law does not authorize waste, which is prohibited separately by statute and regulation. See, for example, AS 16.05.831. Waste is not allowed by any use, subsistence or otherwise.

7. Misperception: racial criteria: The requirements of the subsistence law are race neutral. This is true of both the state statute and ANILCA.

8. Misperception: guaranteed take: 5 AAC 99.010(c) requires that "reasonable opportunities" for subsistence be provided. Attachment D. No participant is guaranteed a harvest.

143251

9. Misperception: subsistence harvests may not be regulated without triggering the priority: AS 16.05.251(b) and .255(b) require the boards to "adopt regulations" allowing subsistence fishing and hunting. Attachment A. However, the fact that a subsistence harvest is regulated does not automatically trigger the priority. The priority becomes active if "it is necessary to restrict the taking" of fish and game, because of relative resource shortage, which is described earlier. AS 16.05.251(b) and .255(b). Attachment A. See February ___, 1983, memorandum from our office to Don Collinsworth, Commissioner of the Department of Fish and Game, 166-423-83. This is also true under ANILCA §804. See S. Rep. No. 413, 96th Cong., 1st Sess. 269 (1979).

Just as with other uses, subsistence harvests can be regulated by specified areas, openings, and other management measures. Indeed, regulation of subsistence uses has been and is part of sound resource management, and it was expected by the legislature. For example, the legislature indicated in section 1, ch. 151, SLA 1978, the intent section of the subsistence law, that beneficial uses of fish and game by all state residents "should be carefully monitored and regulated." Historically, the Board of Fisheries has adopted regulations denominated "subsistence." The Board of Game has generally regulated subsistence uses without designating the regulations as "subsistence."

10. Misperception: requirement for precipitous change: As discussed in the March 22, 1982, memorandum regarding subsistence regulations from our office to Clint Buckmaster, Chairman of the Joint Boards of Fisheries and Game, the regulatory process contemplated by ANILCA is ongoing. Under ANILCA §806, the Department of the Interior will monitor the state's subsistence program on a continuing basis. Accordingly, instantaneous regulatory change in all fishing and hunting situations statewide is neither necessary nor desirable. As potential problems are identified and as data become available, the boards should act according to the procedures in 5 AAC 99.010. Attachment D. See May 4, 1982, memorandum to Milstead Zahn, Executive Director, Boards of Fisheries and Game, regarding effect of joint boards' subsistence regulations.

11. Misperception: limited entry system threatened and commercial sale or subsistence harvested fish or game allowed: Both state and federal laws include "customary trade" as a component of "subsistence uses." AS 16.05.940(26), Attachment B; ANILCA §803, Attachment C. However, legislative history indicates that Congress was mostly concerned about trapping, and neither state law nor ANILCA authorizes significant commercial activity. The state law limits the scope of customary trade by the phrase "for personal or family consumption." AS 16.05.940(26). Attachment B. Although those words do not modify "customary trade" in ANILCA §803, legislative history is clear that Congress did "not intend that 'customary trade' be construed to permit the establishment of significant commercial enterprises under the guise of 'subsistence uses'." S. Rep. No. 413, 96th Cong., 2nd Sess. 234. See December 2, 1981, letter from our office to Governor Hammond, A66-120-81, p. 26-29. Thus, under the subsistence law any exchanges involving cash which are eventually authorized by board regulation would be of a very limited nature, perhaps recognizing established exchange and distribution networks within subsistence economic systems.

The inclusion of "barter" as a component of "subsistence uses" as defined in AS 16.05.940(26) does not authorize commercial exchanges, either. "Barter" is defined in AS 16.05.940(27) as the exchange of fish or game taken for subsistence uses for other fish or game, or for "other food or nonedible items other than money if the exchange is of a limited and noncommercial nature."

12. Misperception: flexibility to define subsistence uses by economic need: It has been suggested that either the legislature or the boards should narrow the definition of subsistence to encompass only economic need, based, for example, on individual income level. Whatever the policy advantages or disadvantages of that approach, it is not an amendment that can be made if the state is to remain in compliance with federal law. An economic need requirement would be inconsistent with the language of ANILCA and with Congressional intent, as amply evidenced in legislative history. For example, in discussing the policy expressed in ANILCA §802(1), Representative Udall noted that it "also requires that regulatory systems which employ income requirements not be imposed upon rural residents." 126 Cong. Rec. H10546 (daily ed. November 12, 1980).

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CONCLUSION

State regulations and statutes provide a framework for implementing the subsistence law in a manner consistent with ANILCA. Many "problems" which have been perceived with the framework actually arise from misinformation and misinterpretation. Providing the public with correct information on the law would dispel the impression that these "problems" exist.

One problem which needs to be addressed is the authorization and use of a workable system to avoid disrupting harvest opportunities for those whose uses are no longer classified by the boards as subsistence uses. The personal use category established by the Board of Fisheries is a potential solution, though its relation to sport and commercial uses needs to be resolved. For example, Cook Inlet is a highly populated area where all four categories of fishery -- subsistence, sport, commercial, and personal use -- occur. Examining the appropriate application of the personal use category in Cook Inlet could develop a model not only for Cook Inlet but for other areas in the state.

Another problem is the current definition of "rural", which is vulnerable to equal protection and vagueness challenges. The definition could be amended, or even repealed, since a definition of "rural" is not required by either state or federal law.

If I can provide any further information or assistance, please let me know.

BOARD OF FISHERIES FINDINGS

1985

ALASKA BOARD OF FISHERIES FINDINGS
SUBSISTENCE REGULATIONS FOR THE 1985 FISHING SEASON

The Alaska Board of Fisheries, meeting in Anchorage, Alaska on March 26, 1985, finds that the Alaska Supreme Court decision in Madison v. Alaska Department of Fish and Game will require a revision of certain subsistence, personal use, sport, and commercial fishing regulations. However, the board finds insufficient time exists before the smelt, herring, bottomfish, shellfish and salmon seasons to allow for an orderly, comprehensive review of all regulations which may be impacted, considering the need to provide an adequate opportunity for public comment and review. Therefore, to ensure an orderly process allowing the opportunity for all members of the public to participate, and implement the count's decision in Madison as possible in the interim, the board finds:

(1) The board will, by emergency regulation, authorize the subsistence take of smelt, herring, shellfish and bottomfish as they were allowed under the 1978 subsistence regulations.

(2) The board will, by emergency regulation, authorize access by all Alaska residents to existing Tyonek, Port Graham, and English Bay subsistence salmon fisheries in Cook Inlet. Existing bag and possession limits, time, gear and area regulations and overall guideline harvest will not be adjusted for the 1985 season. The board finds that such regulations promote an orderly harvest which will reasonably satisfy anticipated subsistence uses. Modification of these regulations at this time is not in the best public interest of the public given the inadequate opportunity for public comment at this time, and uncertainty about 1985 participation levels.

(3) During 1985, the board will continue the following presently authorized personal use salmon fisheries in Cook Inlet as personal use fisheries:

the spring Kasilof gill net fishery,
the Kasilof and Kenai River sockeye dipnet fishery,
the China Poot hatchery sockeye fishery,
and the shellfish, herring, and smelt fisheries.

The board cannot reasonably modify or eliminate these fisheries without an opportunity for public comment, which is not possible under the present time frame.

(4) The fall coho set gill net personal use fishery will however, by emergency regulation, be identified as a subsistence fishery, as required by Madison, and will be managed under the regulations used during the 1981 season, except that current reporting requirements will apply.

(5) The Kachemak Bay salmon set gill net fishery will, by emergency regulation, be identified as a subsistence fishery, as required by Madison, and will be managed under the regulations

developed for the court ordered fishery. Alaska residents will be able to participate in both of these fisheries.

(6) The board will, by emergency regulation, allow access by all Alaska residents to the following existing subsistence fisheries:

Copper River (salmon)
Iliamna/Lake Clark (salmon)
Naknek River (salmon), and
Angoon (salmon).

The bag and possession, time, area, gear, and overall harvest guidelines of each of these fisheries shall remain as described in existing regulations. The board finds that such regulations are necessary to conduct an orderly fishery and to provide a reasonable opportunity for subsistence needs. Modification of these regulations at this time in not in the best interest of the public given the inadequate opportunity for public comment at this time.

(7) As to the Copper River subsistence and personal use salmon fisheries, which will combined into a subsistence fishery by emergency regulation, the board will retain existing regulations as to bag and possession limits, time, area, gear, and overall harvest guidelines, except that rather than separate regulations based on domicile, the regulations developed for those domiciled in the Copper Basin and other specified communities will be applied to the fishwheel fishery and those developed for those not so domiciled will be applied to the dip net fishery. The board finds these regulations to be necessary to conduct an orderly fishery and to provide a reasonable opportunity for subsistence needs. Further, the overall harvest guidelines, bag limits, and areas represent historical harvest. The dip net portion of this guideline represents a total harvest which was not taken during the 1984 season. The harvest lid is necessary to manage the downriver commercial salmon drift gill net fishery to ensure escapement for reproductive needs and the upriver subsistence fishery. The bag and possession limits, while different for dipnetters and fishwheel fishermen were developed by the board after extensive public testimony and information demonstrating that the differing bag limits reflected historical use by each group.

The board hereby calls for proposals from the public on all subsistence and personal use regulations to be considered at the fall/winter 1985 finfish meeting. The board will consider all proposals to establish, eliminate or modify any or all subsistence or personal use regulations any any changes in commercial or sport fishery regulations required by such regulations.

Ron Jolin, Chairman Board of Fisheries — March 27, 1985

SUPREME COURT DECISION

MADISON V. ALASKA DEPARTMENT OF FISH AND GAME

SUPREME COURT OPINION NO. 2911, FILE NOS. 6824/7181/7410

ALASKA COURT SYSTEM NEWS RELEASE

For release Friday, February 22, 1985, 12:30 p.m.

Court Strikes Down Fisheries Regulation

Madison v. Alaska Department of Fish and Game

Supreme Court Opinion No. 2911, File Nos. 6824/7181/7410

Contact: David A. Lampen
Clerk of the Appellate Courts
Anchorage (907) 264-0607

[The following was prepared by the office of the Clerk of the Appellate Courts and is not an official statement of the Alaska Supreme Court.]

The Alaska Supreme Court Friday struck down a Board of Fisheries regulation designed to identify eligibility for subsistence fishing in the Cook Inlet region.

Under the regulation, certain residents of the Kenai coastline and an area near Homer were forbidden to fish for subsistence purposes. The regulation had been declared valid by Superior Court Judges Victor D. Carlson and Paul B. Jones.

The supreme court, in an opinion by Justice Daniel A. Moore, Jr., held that the board erred in denying subsistence permits to certain residents who had fished with set nets for personal and family use for many years.

The supreme court found that the board's regulation on subsistence uses was inconsistent with Alaska law because the regulation was too restrictive.

The opinion stated: "Under a statute designed to protect subsistence uses, the board has devised a regulation to disenfranchise many subsistence users whose interests the statute was designed to protect."

END

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN McGAHAN, SR., ANDY JOHNSON, MARGIE KIVI, J. W. WARE, DICK FRANCIS, DON GROLESKE, KEN JORDON and SHIRLEY DEVAULT, Appellants, v. ALASKA DEPARTMENT OF FISH AND GAME, and ALASKA BOARD OF FISHERIES, Appellees, and THE ALASKA FEDERATION OF NATIVES, Intervenor.	File Nos. 6824/ 7181 O P I N I O N
ALASKA DEPARTMENT OF FISH AND GAME, RONALD SKOOG, ALASKA BOARD OF FISHERIES, Appellants, v. LOUIS GJOSUND, DORA MULCH, and KACHEMAK BAY SUBSISTENCY GROUP, INC., Cross-Appellees.	File No. 7410 [No. 2911 - February 22, 1

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge, and Third Judicial District, Homer, Paul B. Jones, Judge.

Appearances: Martin Friedman, Homer, Arthur Robinson, Soldotna, for Appellants/Cross-Appellees. Larri Irene Spengler, Assistant Attorney General, Norman C. Gorsuch, Attorney General, Juneau, for Appellees/Appellants. Donald C. Mitchell, Anchorage, for Intervenor/Amicus Curiae.

Before: Rabinowitz, Chief Justice. Burke, Matthews, Compton and Moore, Justices.

MOORE, Justice.

This case arises as a consolidated appeal of two cases. It concerns the validity of a Board of Fisheries' (hereafter board) regulation designed to identify eligibility for subsistence fishing in the Cook Inlet region.

Appellants (hereafter Madison and Gjosund) are two groups of Alaskan residents who live along the Kenai coastline and near Homer. For many years, they have fished with set nets for salmon for their personal and family use. Nonetheless, the board denied subsistence permits to Madison and Gjosund because their use of salmon did not meet the board's regulatory definition of subsistence. Both Madison and Gjosund challenged the regulation as exceeding the scope of the state's subsistence law. In both cases, the trial courts upheld the regulation as consistent with the

statutory grant of authority. We hold the regulation invalid since it is inconsistent with AS 16.05.251(b), AS 16.05.940(22) and AS 16.05.940(23) and contrary to the legislature's intent in enacting the 1978 subsistence law.

I. SUMMARY OF FACTS

Records indicate that subsistence fishing in Cook Inlet was minimal through the mid-1970s.[1] However, a core group of residents of each Cook Inlet community has traditionally fished for Cook Inlet salmon for subsistence. Participation in the subsistence salmon fishery is most visible in the smaller, more isolated villages, where the subsistence group represents a larger percentage of the population.

In 1977 the board established a comprehensive management policy for Cook Inlet, 5 AAC 21.363, which essentially allocated specific salmon stocks to sports fishermen and commercial fishermen on the basis of seasonal fish movements. See Kenai Peninsula Fisherman's Cooperative

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1. From 1971 to 1977, the average number of subsistence permits issued annually for the Upper Cook Inlet was 87 and the average catch was 405 salmon. Commercial harvest averaged about two million fish per year. However, this statistical data does not necessarily reveal the total subsistence use since many people did not obtain permits and some commercially caught salmon were used for subsistence.

Ass'n v. State, 628 P.2d 897 (Alaska 1981). Although the policy did not specifically refer to subsistence uses of salmon in Cook Inlet, it had a substantial impact on subsistence fishing. Commercial fishermen, accustomed to taking subsistence salmon from their commercial catch, instead obtained subsistence salmon fishing permits in order to fish for their personal and family use after the commercial season was over.

Before 1978, subsistence fishing was defined in AS 16.05.940(17) as fishing for "personal use and not for sale or barter."[2] In 1978, the Alaska State Legislature enacted ch. 151 SLA 1978 (hereafter the 1978 subsistence law). Subsistence fishing was redefined as fishing for "subsistence uses."[3] Subsistence uses were defined as "customary and

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2. Section 4, ch. 131 SLA 1960:

> "subsistence fishing": the taking, fishing for or possession of fish, shellfish, or other fishery resources for personal use and not for sale or barter, with gill net, seine, fish wheel, long line, or other means as defined by the Board.

3. AS 16.05.940(22), (formerly AS 16.05.940(17)), states:

> "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by

(Footnote Continued)

traditional uses . . . for direct personal or family consumption, and for the customary trade, barter or sharing. . . ." AS 16.05.940(23).[4] Furthermore, the legislation required the board to adopt regulations permitting "subsistence uses" of fish stocks, absent a showing that this use would jeopardize the sustained yield principle. AS 16.05.251(b).[5] Under AS 16.05.251(b), subsistence uses have

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(Footnote Continued)

the Board of Fisheries.

4. AS 16.05.940(23), (formerly AS 16.05.940(26)), states:

> "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis.

5. AS 16.05.251(b) states:

> The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board

(Footnote Continued)

priority over sport and commercial uses if the board finds it necessary to restrict the taking of fish to assure the maintenance of fish stocks or to assure the continuation of subsistence uses. If further restrictions are necessary after giving priority to all subsistence uses, the legislature established specific criteria to restrict subsistence uses based on the subsistence user's customary and direct dependence on the resource, local residency and availability of alternative resources. Id. As a result,

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(Footnote Continued)

> determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:
>
> (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
>
> (2) local residency; and
>
> (3) availability of alternative resources.

the board could no longer allocate for subsistence uses at its discretion pursuant to AS 16.05.251(a).[6] The

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6. AS 16.05.251(a) states:

> The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedures Act (AS 44.62) for
>
> (1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;
>
> (2) establishing open and closed seasons and areas for the taking of fish;
>
> (3) setting quotas and bag limits on the taking of fish;
>
> (4) establishing the means and methods employed in the pursuit, capture and transport of fish;
>
> (5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;
>
> (6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;
>
> (7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;
>
> (8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(Footnote Continued)

legislature mandated in AS 16.05.251(b) that the board regulate for the protection of subsistence uses as the priority use of fish and game.

The passage of the 1978 subsistence law, combined with adoption of the board's 1977 management policy, heightened public awareness of the state's subsistence fishing provisions. This public interest resulted in a

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(Footnote Continued)

> (9) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish research, management, education and information and to train persons for fish management;
>
> (10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;
>
> (11) establishing seasons, areas, quotas and methods of harvest for aquatic plants;
>
> (12) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.

2911

substantial increase in the demand for subsistence permits and a corresponding increase in total catch.[7] The board responded to the permit increase by restricting subsistence fishing; it limited areas open to subsistence fishing, length of fishing periods and maximum length of gill nets. Several lawsuits were filed, all of which resulted in decisions unfavorable to the board.

In December 1980, the board held hearings to respond to the 1978 subsistence law and received a considerable amount of testimony on subsistence uses in Cook Inlet. The meeting resulted in the establishment of characteristics for identification of "customary and traditional uses" of Cook Inlet salmon.[8] In addition, the

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7. This chart reflects the trend in Upper Cook Inlet:

	Subsistence Use		Commercial Harvest
	Permits Issued	Salmon Caught	
1978	323	3,735	5,118,041
1979	1,161	9,923	1,923,229
1980	1,331	14,775	4,138,648

In 1980, household permits were issued instead of individual permits.

8. With some modification, these characteristics became the basis of 5 AAC 01.597, which states:

> CHARACTERISTICS OF SUBSISTENCE FISHERIES.
> (a) The Board of Fisheries finds that certain customary and traditional practices

(Footnote Continued)

board decided to "adopt a set of criteria drawn from the

(Footnote Continued)

> and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:
>
> (1) a long-term, stable, reliable pattern of use and dependancy, excluding interruption generated by outside circumstances, e. g., regulatory action or fluctuations in resource abundance;
>
> (2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;
>
> (3) a use pattern associated with specific stocks and seasons;
>
> (4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;
>
> (5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;
>
> (6) a use pattern occurring in locations with easiest and most direct access to the resources;
>
> (7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;
>
> (8) a use pattern which includes the intergenerational transmission of activities and skills;

(Footnote Continued)

characteristics . . . and apply [them] to communities, subcommunities, groups and individuals who wish to continue to participate in an established customary and traditional fishing effort in Cook Inlet."

At its March 1981 meeting, the board received written testimony from the public about subsistence uses of Cook Inlet salmon stock. Subsequently, it decided to apply all of the ten criteria to determine "customary and

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(Footnote Continued)

> (9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and
>
> (10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.
>
> (b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.
>
> (c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests.

traditional uses" eligible for the subsistence priority. When the board applied the ten criteria, it determined that no group or community in the Cook Inlet region other than Tyonek, English Bay and Port Graham satisfied all ten of the criteria. The board limited the 1981 subsistence catch to these three communities. As a result, the board eliminated from the protection of the state's subsistence statute the majority of Cook Inlet fishermen who formerly fished under subsistence regulations.

Madison and Gjosund challenged the validity of the board's subsistence criteria (now 5 AAC 01.597) on several grounds. They claimed that: (1) the criteria were inconsistent with the statutory language and legislative intent of the 1978 subsistence law; (2) the board failed to comply with the Administrative Procedure Act in adopting the criteria; and (3) their equal protection and due process rights were violated by the board's action.[9] Both courts issued preliminary injunctions compelling the board to authorize personal use fishing for Madison and Gjosund similar to that allowed in the previous year. The board

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9. Since we hold the regulation invalid because it is inconsistent with AS 16.05.251(b) and AS 16.05.940(22) and (23), and contrary to the legislature's intent in enacting the 1978 subsistence law, we need not consider the APA, due process and equal protection issues raised regarding the regulation's validity.

moved for summary judgment on the plaintiffs' first claim. Both trial courts granted summary judgment to the board, after finding the subsistence criteria consistent with the legislative intent "to provide for and protect personal use . . . by persons who reside in rural communities. . . . "

On appeal, Madison and Gjosund seek reversal of the two trial court decisions. They claim that the board did not act within the legislative authority granted by AS 16.05.251(b) and AS 16.05.940(22) and (23) when it adopted the ten characteristics ultimately codified as 5 AAC 01.597.[10]

II. STANDARD OF REVIEW

We first consider the appropriate standard of review for this case. The legislature enacted AS 16.05.251(b), which requires the board to adopt regulations permitting the taking of fish for "subsistence uses." The legislature then defined subsistence uses as "customary and traditional" uses in AS 16.05.940(23), but it never defined

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10. Madison and Gjosund also contend that the board exceeded its statutory authority under AS 16.05.251(a) when it established a personal use fishery to accommodate people excluded from the subsistence fishery by 5 AAC 01.597. Because we hold 5 AAC 01.597 invalid, we need not address the issue of the board's authority to establish a personal use fishery.

"customary and traditional." The board developed the ten criteria (now codified as 5 AAC 01.597) to identify customary and traditional uses qualifying for a subsistence priority under AS 16.05.251(b). Therefore, the board interpreted the 1978 subsistence law and devised its regulatory criteria accordingly.

In Kelly v. Zamarello, 486 P.2d 906, 917 (Alaska 1971), we stated that the "reasonable basis approach should be used for the most part in cases concerning administrative expertise as to either complex subject matter or fundamental policy formulations." However, the issues in this case concern statutory interpretation of the words "customary and traditional" and the question whether the board has acted within the scope of its statutory authority. Such issues "fall into the realm of special competency of the courts." Alaska Public Utility Commission v. Municipality of Anchorage, 555 P.2d 262, 266 (Alaska 1976). See also State, Commercial Fisheries Entry Commission v. Templeton, 598 P.2d 77, 80 (Alaska 1979).

In this instance, we are dealing with a question of statutory interpretation and will apply the substitution of judgment standard.

> The substitution of judgment standard is applied when the questions of law presented do not involve agency expertise, and, thus, a court need not take the deferential stance embodied in the rational basis test. . . . The standard is appropriate where the

> knowledge and experience of the agency is of little guidance to the court or where the case concerns "statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience."

Earth Resources Co. v. State, Department of Revenue, 665 P.2d 960, 965 (Alaska 1983), quoting Kelly v. Zamarello, 486 P.2d at 916 (emphasis added). Application of this standard allows the reviewing court to substitute its judgment about a statute's meaning for the board's interpretation, even if the board's interpretation had a reasonable basis in law. In this case, both trial courts erred by applying the rational basis standard to the board's statutory interpretation.

III. LEGISLATIVE HISTORY OF THE 1978 SUBSISTENCE LAW

Before 1978, subsistence fishing was defined as fishing for "personal use and not for sale or barter." Formerly AS 16.05.940(17). The 1978 subsistence law redefined subsistence fishing as fishing for "subsistence uses." AS 16.05.940(22). "Subsistence uses" were defined as "the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption . . . and for the customary trade, barter or sharing . . . . " AS 16.05.940(23). The board argues that the legislature intended to narrow the scope of subsistence fishing to mean fishing by individuals residing in those

rural communities that have historically depended on subsistence hunting and fishing. Under this interpretation, the board asserts that its criteria are consistent with the legislature's intent.

The board's argument reveals a fundamental misconception about the structure of the 1978 subsistence law. There are potentially two tiers of subsistence users under AS 16.05.251(b). The first tier includes <u>all</u> subsistence users. Under the statute, all subsistence uses have priority over sport and commercial uses "whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources. . . ." AS 16.05.251(b). If the statutory priority given all subsistence users over commercial and sport users still results in too few fish for all subsistence uses, then the board is authorized to establish a second tier of preferred subsistence users based on the legislative criteria expressed in AS 16.05.251(b), namely, customary and direct dependence on the resource, local residency, and availability of alternative resources.

Criteria like the ten criteria of 5 AAC 01.597(a) could be used to distinguish first-tier general subsistence users from second-tier preferred subsistence users, since most of the criteria relate to either "customary and direct

dependence" or "local residency," two of the three criteria set out in AS 16.05.251(b). However, before there is any occasion to restrict subsistence fishing to second-tier preferred subsistence users as distinct from all subsistence users, the board must make two findings. It must find: (1) that it is necessary to restrict the taking of fish for sustained-yield purposes; and (2) that eliminating sport and commercial uses will not assure the maintenance of fish stocks on a sustained-yield basis and, thus, establishing a priority among subsistence users is also necessary. The board erred because it applied the ten criteria without making these findings.

The board argues that the words "customary and traditional" in AS 16.05.940(23) authorize it to define first-tier subsistence users by their area of residence. We reject this argument for several reasons. First, the argument ignores the two-tier structure of AS 16.05.251(b) that defines only the second-tier subsistence users in terms of residency. If the legislature had intended to define the class of first-tier general subsistence users by area of residence, it would not have expressed that factor with respect to only the second tier of preferred subsistence users. Moreover, the phrase "customary and traditional" modifies the word "uses" in AS 16.05.940(23). It does not refer to users. The 1978 subsistence law refers to

"customary users" at only one point, when it defines the preferred subsistence users of the second tier with the three statutory criteria in AS 16.05.251(b).

The House Special Committee on Subsistence drafted a letter of intent for House Bill 960[11] that supports our interpretation. With respect to AS 16.05.251(b) (which was § 6 of House Bill 960),[12] the letter of intent made clear the priority to be given subsistence uses in general over sport and commercial uses and explained the two-tier system among subsistence users.

> Sections six and seven: These two sections, which are virtually identical for the Boards of Fisheries and the Board of Game, are intended to statutorily set out the priority given to subsistence use of fish and game resources. . . . Further, these sections set forth a priority of users if restrictions are needed because of the unavailability of resources. The priority list is an attempt to insure that those with the most dependence upon the fish and game resources are the last to be restricted.
>
> If there is a need to restrict the taking of fish or game in order to avoid damaging the fish stocks or game populations, or in order to assure that subsistence users may continue to take fish or game, it is the intent of the Committee that sports or commercial use be restricted before

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11. HB 960 became the 1978 subsistence law, ch. 151 SLA 1978.

12. The committee also intended to provide a priority for subsistence hunting in AS 16.05.255, as indicated in § 6 of HB 960.

> subsistence use. If these restrictions are inadequate, restricting of subsistence use as well is authorized based upon the dependence on the resource, the local residence of the subsistence users, and the availability of alternate resources.

(Emphasis added).

Only in connection with AS 16.05.251(b) does the letter of intent discuss applying residence criteria to subsistence users, and it does so only with respect to second-tier subsistence users. With respect to the definition of subsistence uses in § 17 of House Bill 960 (now AS 16.05.940(23)), the letter of intent does not suggest that the phrase "customary and traditional" was meant to describe users as well as uses. The letter of intent states:

> Section seventeen: Subsection (26) defines what uses can be made of subsistence caught fish and game. It allows it to be used for direct personal or family consumption, for barter as defined in subsection (27) and for sharing the subsistence caught fish and game with other persons. This subsistence caught fish and game which is shared can then only be used for personal or family consumption. This subsection also broadens the definition of family to include the extended family situation.

The letter of intent clearly expressed the legislative resolve to establish a priority for subsistence use of fish and game. The 1978 subsistence law also increased the number of uses qualifying as subsistence fishing by including trade and barter.

The board based its restrictive regulation, 5 AAC 01.597, on the words "customary and traditional." The legislature did not define these words in the 1978 subsistence law. In such a case, reference to legislative history may provide an insight into the legislature's intent and a statute's meaning. North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978). In the House floor debate on House Bill 960, Representative Cotton introduced an amendment to delete the words "customary and traditional" from the statute. The floor manager of the bill, Representative Anderson, opposed the amendment in the following speech:

> The two words are used in this context to put some guidelines around the uses of Alaska's freedom of resources. What we were afraid of, it was brought to our attention by people who were concerned that this would leave the field of the definition wide open. That newcomers just coming to the State of Alaska would automatically be able to establish not only residency in 30 days, but be able to go out and state that they have a customary and traditional use of Alaska's fish and game resources. The use of customary and traditional also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with the aboriginal uses, but also those that have come in, those people who have come in later. . . . [T]he nonnative people in the State of Alaska have established customary and traditional uses of Alaska's fish and game resources for subsistence purposes. And in order to give the Board of Fish and Game more clarification in the area, we have come up with the (inaudible) of customary and traditional rather than leaving that section

> wide open. The design is not to be restrictive but to provide guidelines and that is basically what I feel and many . . . members felt it was necessary in . . . adding or retaining those two words "customary and traditional."

(Emphasis added).

We consider statements made by a bill's sponsor in the course of legislative deliberations to be relevant evidence when a court is trying to determine legislative intent. Alaska Public Employees Association v. State, 525 P.2d 12, 16 (Alaska 1974). Anderson argued for the retention of "customary and traditional" for use as a guideline. His major concern focused on the potential pressure put on resources by newcomers. In his view, the words "customary and traditional" recognized and protected a historical subsistence use by both native and non-native Alaskans. The words were not intended to restrict subsistence use.

Another part of the House debate serves to clarify the statute's meaning. Representative Parr expressed concern that the board might use AS 16.05.251(b) to eliminate Fairbanks residents from subsistence use. Some Fairbanks residents often traveled to the Chitina Dip Net Fishery near the Copper River for their fishing. Representative Anderson responded to these concerns:

> If we get into a condition where the fish stock gets down to the point where there is no way that you can allow any take, the first people that you are going to cut off are the commercial and then the sports, first, and

> then the last people that you are going to cut off are the subsistence people who have the greatest reliance on the resource. . . . [I]f it were defined that dip net fishing were for subsistence uses and not for sale or any other purpose, that would be allowed and I would think that people from Fairbanks would fall under these categories. I don't know where else they would go to . . . where people from Fairbanks make it a custom to go down to the Chitina area and if it was determined that that resource was down to the point where only subsistence would be allowed, those people would be taken care of under this section. I don't see that it is eliminating.

(Emphasis added).

In the House debate, Anderson attempted to assure Parr that residents of urban Fairbanks could be considered priority subsistence users. Contrary to the board's interpretation of the subsistence statutes, there is no indication that legislators understood the 1978 subsistence law to restrict subsistence use to either a rural or a community context. In fact, the House debate indicates that the 1978 subsistence law was necessary to protect subsistence uses as a priority use of Alaska's fish and game resources. This intent is clearly expressed by the preamble to the subsistence law:

> [I]t is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents. The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated with as much input as possible from the affected

> users, so that the viability of fish and game resources is not threatened and so that resources are conserved in a manner consistent with the sustained yield principle.

(Emphasis added).

The legislative history indicates that the legislature intended to protect subsistence use, not limit it. The words "customary and traditional" serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans. In addition, subsistence use is not strictly limited to rural communities. For these reasons, the board's interpretation of "customary and traditional" as a restrictive term conflicts squarely with the legislative intent.[13]

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13. The board notes that the words "customary and traditional" in the 1978 subsistence law were taken from § 703 of HR 39, 95th Congress, 2nd Session (1978), which Congress passed in modified form in 1980 as the Alaska National Interests Land Conservation Act (ANILCA), Public Law No. 96-487, 16 U.S.C. § 3113. Therefore, the board argues that the words in the Alaska act should have the same meaning as the words in the federal act and limit subsistence uses to residents of rural Alaska. We reject this argument for several reasons. First, § 703 of HR 39 in its 1978 form did not contain the "rural Alaska residents" limitation now found in 16 U.S.C. § 3113. Second, the Alaska House floor debate reveals that Representative Anderson, the bill's floor manager, understood the 1978 subsistence law to allow the urban residents of Fairbanks to qualify as general subsistence users. Finally, in the preamble to the 1978 subsistence law, the Alaska Legislature expressed its intent to "recognize the needs, customs and traditions of Alaskan residents." While the legislature declared that beneficial use of fish and game resources "by

(Footnote Continued)

IV. THE BOARD'S ADOPTION AND APPLICATION OF 5 AAC 01.597

We now turn to the board's interpretation of the 1978 subsistence law. In December 1980, the board met to examine the uses of salmon in Cook Inlet and to determine which uses would qualify for the subsistence use priority. Tom Lonner, the director of the subsistence section of the Alaska Department of Fish and Game, presented the department's recommendations on the subsistence statute. He suggested that the board begin its analysis of customary and traditional uses with an assessment of user profiles and use patterns on a case by case basis. Lonner noted that such information was most lacking in the major Cook Inlet subsistence fishery because of the rapid growth of subsistence uses in recent years, and that obtaining such information would be expensive.

The board did not follow Lonner's suggested approach.[14] After the board heard extensive testimony on subsistence use, its chairman appointed a committee,[15]

(Footnote Continued)

all state residents" should be carefully monitored and regulated, it did not express an intention to limit subsistence uses to rural Alaska residents.

14. A board member, Nick Szabo, stated that the board's limited budget prevented implementation of a case by case approach.

15. The board stipulated in 1982 that it violated

(Footnote Continued)

consisting of board members and staff, to identify subsistence uses of salmon in Cook Inlet. The committee drafted ten criteria to identify subsistence uses and presented them to the board.

Lonner worked with the committee to develop the ten criteria and explained them to the board. He stated: "These tenets here are . . . based on . . . the evidence about four relatively self-contained communities. . . . If, however, you have individual applicants, . . . this might not suffice as a test." Therefore, the board was fully aware of the limitations of the proposed criteria.

At its March 1981 meeting, the board received further testimony on uses of Cook Inlet salmon from the area advisory committees and several individual witnesses. After deliberation, the board decided to apply all of the ten criteria "to determine which uses are customary and traditional and therefore are eligible for the subsistence priority." Only the fisheries associated with Tyonek, English Bay and Port Graham met all ten criteria.

In its findings of fact, the board applied the ten criteria to individuals such as Madison and Gjosund. In particular, the individuals failed to meet the second

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(Footnote Continued)

AS 44.62.310-12 (public meeting provision) at its December 1980 meeting.

criterion: "A use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use."[16] The board found:

> Although some users have shown the existence of a community of interest (e.g., the Kenaitze Tribe and the Kachemak Bay Subsistence Group), these persons either are too widely dispersed or are too heterogeneous to be considered an identifiable community, subcommunity or group. On the evidence presented, the Board cannot conclude either that activities are conducted in common or that sharing or other group interchange occurs in relation to the resource.

In other words, an individual subsistence user (such as Madison or Gjesund) would not qualify for a subsistence use priority from the board unless he were part of an identifiable subsistence community or group.[17] Under the

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16. See 5 AAC 01.597 set out in n. 8 above.

17. In contrast, the Commercial Fisheries Entry Commission issues commercial fishing permits on an individual basis. See AS 16.43.250. We do not, however, read the words "customary and traditional" as a grant of authority to the Department of Fish and Game and the Board of Fisheries to impose a "grandfather" rights system with respect to subsistence users. Imposing an equitable system of grandfather rights is an extremely complicated task, as Alaska's experience with such a system in the commercial salmon and herring fisheries has demonstrated. See AS 16.43.010-990 and the numerous, and ever increasing, judicial decisions interpreting this act noted in the annotations. Such a system would also be extremely controversial. It is preposterous to suppose that the legislature intended to create such a system merely by using

(Footnote Continued)

board's regulation, many individual users who have historically depended on subsistence fishing are eliminated from subsistence use at the outset.

The board's regulation, 5 AAC 01.597, is inconsistent with the legislative intent to provide guidelines for the protection of subsistence fishing. The regulation exceeds the authority delegated to the board because it operates too restrictively in its initial differentiation between subsistence and non-subsistence uses. Under a statute designed to protect subsistence uses, the board has devised a regulation to disenfranchise many subsistence users whose interests the statute was designed to protect.

The decision of the two trial courts that 5 AAC 01.597 is consistent with AS 16.05.251(b) and AS 16.05.940(22) and (23) is REVERSED.

(Footnote Continued)

the words "customary and traditional" in the definition of subsistence uses, with no more notice or guidance than is inherent in those words.

BRIEFS SUBMITTED BY ATTORNEYS

IN THE SUPREME COURT CASE

MADISON VS. ALASKA DEPARTMENT OF FISH AND GAME

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN McGAHAN, SR., ANDY JOHNSON, MARGIE KIVI, J.W. WARE, DICK FRANCIS, DAN GROLESKE, KEN JORDON and SHIRLEY DEVAULT, Appellant, v. ALASKA DEPARTMENT OF FISH AND GAME, and ALASKA BOARD OF FISHERIES, Appellees, and THE ALASKA FEDERATION OF NATIVES, Intervenor.	Supreme Court Nos. 6824/7181 Superior Court No. 3KN-81-542 Civil APPEALED FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT, HONORABLE VICTOR D. CARLSON
ALASKA DEPARTMENT OF FISH AND GAME, RONALD SKOOG, ALASKA BOARD OF FISHERIES Appellants, v. LOUIS GJOSUND, DORA MULCH, and KACHEMAK BAY SUBSISTENCY GROUP, INC., Cross-Appellees.	Supreme Court No. 7410 Superior Court Nos. 3HO-80-92 Civil 3HO-77-11014 Homer APPEALED FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT, HONORABLE PAUL B. JONES

BRIEF OF APPELLEES/APPELLANTS

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Filed in the Supreme Court in Anchorage of the State of Alaska this 27th day of January, 1984.

_____
ROBERT B. BACON
Clerk of Court

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. iii

AUTHORITIES PRINCIPALLY RELIED UPON vii

I. JURISDICTIONAL STATEMENT 1

II. ISSUES PRESENTED FOR REVIEW. 1

III. STATEMENT OF THE CASE. 3

IV. COURSE OF PROCEEDINGS IN THE TRIAL COURT 15

V. ARGUMENT 17

A. Summary 17

B. The Criteria for Identifying "Subsistence Uses" of Cook Inlet Salmon Are Consistent with the Intent of the Subsistence Law, and Are Reasonable. 18

1. Standard of review 18

2. Intent to narrow definition. 20

3. Criteria consistent with intent, and reasonable 26

4. Conclusion 32

C. The Board's Violation of the Public Meetings Law while Developing the Criteria in December 1980 Is Moot. 33

D. The Board May Use the Criteria to Identify "Subsistence Uses" of Cook Inlet Salmon, Regardless of the Biological Status of the Target Stocks 36

E. The Classifications Described by and Resulting from the Application of the Criteria Do Not Violate Equal Protection. 39

1. Equal protection standards 39

2. The classifications described by the criteria 40

Page

3. The classifications resulting from the application of the criteria. 41

F. The Board Is Authorized to Establish "Personal Use Fishing" as a Category for Regulatory Purposes. 44

G. The Board Has Not Violated Plaintiffs' Substantive Due Process Rights by Not Authorizing "Subsistence Fishing" Opportunities for Them, but instead Authorizing "Personal Use Fishing". 46

VI. CONCLUSION 52

TABLE OF AUTHORITES

Cases — Page

Borkowski v. Snowden, 665 P.2d 22 (Alaska 1983) 6

City and Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979) 41-42

Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980) 40, 41

Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972) 35

Green v. State, 462 P.2d 994 (Alaska 1969). 46

Hood v. State, Workmen's Compensation Board, 574 P.2d 811 (Alaska 1978). 27

Jefferson v. Asplund, 458 P.2d 995 (Alaska 1969). 36

Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971) 19, 20, 25, 26, 44, 46

Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981) 4, 41, 47, 50-51

Ketchikan Gateway Borough, Alaska v. Breed, 639 P.2d 995 (Alaska 1981). 40

Pan American Petroleum Corporation v. Shell Oil Company, 455 P.2d 12 (Alaska 1969). 25

Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154 (Alaska 1982). 40, 41

State v. Aleut Corporation, 541 P.2d 730 (Alaska 1975). . . . 19

State v. Bundrant, 546 P.2d 530 (Alaska 1976) 23

State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854 (Alaska 1978). 41

University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983) 34

Weaver Brothers, Inc., v. Alaska Transportation Commission, 588 P.2d 819 (Alaska 1978). 27

Constitution — Page

Alaska Const. art. I, § 1 39

Alaska Const. art. I, § 7 46

Alaska Const. art. VIII, § 4. 38

Alaska Const. art. VIII, § 17 40

Federal Statutes

Pub. L. No. 96-487 (1980) 30

16 U.S.C. § 3111-3136 30

16 U.S.C. § 3113. 30

Sec. 703, H.R. 39, 95th Cong., 2nd Sess. (1978) 30, 31

State Statutes

Ch. 131, SLA 1960 . . . . . 3, 20

Ch. 199, SLA 1975 24

Ch. 269, SLA 1976 24

Ch. 151, SLA 1978 5

AS 16.05.221(a) 3, 50

AS 16.05.241. 47

AS 16.05.251(a) 2, 3, 6, 13, 14, 37, 39, 45, 50, 52

AS 16.05.251(a)(2). 3

AS 16.05.251(a)(3). 3

AS 16.05.251(a)(4). 3

AS 16.05.251(a)(6). 44

AS 16.05.251(b) 2, 6, 12, 22, 37, 38, 39, 48, 50

AS 16.05.257. 23

State Statutes (cont.) — Page

AS 16.05.260. 8

AS 16.05.940(5) 3

AS 16.05.940(21). 3

AS 16.05.940(22). 6, 19, 20

AS 16.05.940(23). 6, 20

AS 22.05.010. 1

AS 44.62.310. 33

AS 44.62.310(f) 34

State Regulations

5 AAC 01.580(a) 42

5 AAC 01.597 . . . . . 1, 10, 13, 15, 17, 19, 29, 41, 42

5 AAC 01.597(a)(3). 39, 50

5 AAC 21.363. 3

5 AAC 77.001. . . . . 14, 44, 49

5 AAC 77.001(a) 45

5 AAC 77.001(b) 14, 45

5 AAC 77.015. 47

5 AAC 77.530(a) 15, 50

5 AAC 77.546. . . . . 14, 36, 47, 50

5 AAC 77.547. . . . . 14, 36, 47, 50

5 AAC 99.010. 15

5 AAC 99.010(b) 15

State Rules

Alaska Appellate Rule 202 1

Federal Legislative Materials — Page

H.R. Rep. No. 1045, 95th Cong., 2nd Sess. (1978). 31

H.R. Rep. No. 97, 96th Cong., 1st Sess. (1979). 31

S. Rep. No. 413, 96th Cong., 1st Sess. (1979) 31

126 Cong. Rec. H10546 (daily ed., Nov. 12, 1980) (statement of Rep. Udall) 32

State Legislative Materials

Recording of Proceedings, 9th Leg., 2nd Sess., tape 130H, index nos. 527-1276 (1976) 24

House Journal, 10th Leg., 2nd Sess. 1155 (1978) 23

Other Authorities

2A C. Sands, Sutherland Statutory Construction, §48.13 (4th ed. rev. 1978) 21

Webster's New Collegiate Dictionary (1981) 23

D. Kelso, "Legal Issues in Federal Protection for Subsistence on Proposed National Interest Lands," (unpublished) (1976), reprinted in H.R. Rep. No. 16, 95th Cong., 1st Sess. 273 (1977) 33

AUTHORITIES PRINCIPALLY RELIED UPON

State Constitutional Provisions

Alaska Const. art. I, § 1, cl. 2 (in pertinent part)

> that all persons are equal and entitled to equal rights, opportunities, and protection under the law; ...

Alaska Const. art. I, § 7 (in pertinent part)

> No person shall be deprived of life, liberty, or property, without due process of law.

Alaska Const. art. VIII, § 17

> UNIFORM APPLICATION. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Federal Statutes

16 U.S.C. § 3113

> DEFINITIONS. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term --
>
> (1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and
>
> (2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses --

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

Sec. 703, H.R. 39, 95th Cong., 2d. Sess. (1978) (the version of H.R. 39 passed by the House of Representatives in 1978).

As used in this Act, the term "subsistence uses" means the noncommercial (except as provided under paragraph (2)) customary and traditional utilization within the State of wild, renewable resources for --

(1) direct personal or family use for food, shelter, fuel, clothing, tools, or transportation;

(2) the making and selling of handicraft articles (including clothing), but only out of nonedible byproducts of fish and wildlife taken for such personal or family use; or

(3) customary trade, barter, or sharing among subsistence users for personal or family use.

State Statutes

AS 16.05.221(a)

For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

AS 16.05.251

REGULATIONS OF THE BOARD OF FISHERIES. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas and bag limits on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;

(7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish research, management, education and information and to train persons for fish management;

(10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(11) establishing seasons, areas, quota and methods of harvest for aquatic plants;

(12) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources.

Sec. 4, ch. 131, SLA 1960 (formerly AS 16.05.940(17))

"Subsistence fishing": the taking, fishing for or possession of fish, shellfish, or other fishery resources for personal use and not for sale or barter, with gill net, seine, fish wheel, long line, or other means as defined by the Board.

AS 16.05.940(22) (prior to renumbering, AS 16.05.940(17))

"subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, line line, or other means defined by the Board of Fisheries.

AS 16.05.940(23) (prior to renumbering, AS 16.05.940(26))

"subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the

purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living with the household on the permanent basis.

AS 44.62.310(a)

All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

AS 44.62.310(f)

Action taken contrary to this section is void.

State Regulations

5 AAC 01.597

CHARACTERISTICS OF SUBSISTENCE FISHERIES. (a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

(1) a long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g., regulatory action or fluctuations in resource abundance;

(2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;

(3) a use pattern associated with specific stocks and seasons;

(4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;

(5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;

(6) a use pattern occurring in locations with easiest and most direct access to the resources;

(7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;

(8) a use pattern which includes the intergenerational transmission of activities and skills;

(9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and

(10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.

(b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.

(c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests.

5 AAC 77.001(a)

The Board of Fisheries finds that

(1) before the enactment of the state's subsistence priority law in ch. 151, SLA 1978, an individual could fulfill his personal use needs for fish under subsistence fishing regulations;

(2) the state's subsistence priority law changed the definition of subsistence in a manner that now precludes some individuals from participating in customary and traditional subsistence fisheries and efficiently harvesting fish for their personal use;

(3) there presently are areas of the state with harvestable surpluses of fish in excess of both spawning escapement needs and present levels of subsistence, commercial and sport uses; and

(4) it is necessary to establish a new fishery classified as "personal use" because

(A) since the sale of fish is not appropriate or permissible, this fishery cannot be classified as commercial;

(B) since the use is not a rural customary and traditional use this fishery cannot be classified as subsistence; and

(C) since the gear for this fishery is often different from that historically associated with sport fishing, this fishery should not be classified as a sport fishery, to prevent confusion among the public.

5 AAC 77.001(b)

It is the intent of the board that the taking of fish under 5 AAC 77 will be allowed when that taking does not jeopardize the sustained yield of a resource and either does not negatively impact an existing resource use or is in the broad public interest.

5 AAC 99.010

JOINT BOARDS OF FISHERIES AND GAME SUBSISTENCE PROCEDURES. (a) In applying a subsistence priority, the Board of Fisheries and the Board of Game

will provide for conservation and development of Alaska's fish and game resources according to the following procedures:

(1) each board will assess the biological status of fish or game resources and determine whether a surplus may be harvested during a regulatory year consistent with the conservation and development of the resources on the sustained yield principle and compatible with the public interest;

(2) each board will identify subsistence uses of fish or game resources, recognizing that subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing.

(b) Customary and traditional subsistence uses by rural Alaska residents will be identified by use of the following criteria:

(1) a long-term consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in specific seasons of each year;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a

definable community of persons, including customary trade, barter, sharing, and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection; and

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and which provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

(c) After identifying subsistence uses based upon the criteria set out in (b) of this section, each board will determine the approximate amount of fish or game necessary to provide fully for reasonable opportunities to engage in these customary and traditional uses.

(d) Each board will adopt regulations that provide an opportunity for the subsistence taking of fish or game resources in amounts sufficient to provide for the customary and traditional uses identified in (b) of this section, and consistent with sound conservation and management practices. In no instance may the subsistence taking jeopardize or interfere with the maintenance of a specific fish stock or game population on a sustained-yield basis.

(e) Each board will, in its discretion, adopt regulations that provide an opportunity for non-subsistence uses of the resource, to the extent that the non-subsistence uses do not jeopardize or interfere with the conservation and development of fish or game resources on a sustained yield basis, or with the opportunity for taking these resources for customary and traditional subsistence uses as provided in (d) of this section.

(f) When circumstances such as increased numbers of users, weather, predation, or loss of habitat may jeopardize the sustained yield of a fish stock or game population, each board will exercise all practical options for restricting non-subsistence harvest before subsistence uses are restricted. If all available restrictions for

non-subsistence uses have been implemented and further restrictions are needed, each board will reduce the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who

(1) live closest to the resource;

(2) have the fewest available alternative resources; and

(3) have the greatest customary and direct dependence upon the resource.

(g) In no event, however, will a board allow uses which will jeopardize or interfere with the conservation and management of fish stocks or game populations on a sustained-yield basis.

I. JURISDICTIONAL STATEMENT

This is a consolidated appeal from two third judicial district superior court cases. The final judgments in Madison, et al. v. Alaska Department of Fish and Game and Alaska Board of Fisheries, 3KN-81-542 Civil (hereinafter, "Madison"), were entered on March 5, 1982 and January 26, 1983, by Judge Victor D. Carlson. The final judgment in Gjosund, et al., v. Alaska Department of Fish and Game, et al., 3HO-80-92 Civil and 3HO-77-11014 Homer (hereinafter, "Gjosund"), was entered on November 19, 1982, by Judge Paul B. Jones. This court has jurisdiction to consider this consolidated appeal pursuant to Alaska Appellate Rule 202 and AS 22.05.010.

II. ISSUES PRESENTED FOR REVIEW

The state intends to address the issues raised in this appeal in the context of the following questions: 1/

1. In enacting the subsistence law, did the legislature intend "subsistence fishing" to mean fishing by individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area, rather than

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1/ Plaintiffs list seven questions in their statement of issues, but the briefing in their argument sections does not entirely adhere to those seven questions, nor to the argument headings. The state submits that its list of questions subsumes all issues plaintiffs raise and brief from their appeal in Madison, as well as the issue that the state is appealling in Gjosund.

all fishing for personal use?

2. Is the Board of Fisheries' determination that "subsistence uses" of salmon in Cook Inlet can be identified on a community basis by the application of the ten criteria in 5 AAC 01.597 consistent with the intent of the subsistence law, and reasonable?

3. Did the promulgation in December 1981 of 5 AAC 01.597, codifying the ten criteria used to identify "subsistence uses" of salmon in Cook Inlet moot a violation of the public meetings law which occurred when the criteria were first formulated in December 1980?

4. Is the Board of Fisheries authorized by AS 16.05.-251(b) to identify "subsistence uses" of salmon in Cook Inlet in order that only fishing for those uses will be provided for as "subsistence fishing," regardless of the biological status of the target stocks?

5. Are the classifications determined by the ten criteria of individuals eligible and individuals ineligible to participate in "subsistence fishing" in Cook Inlet a reasonable means to accomplish a legitimate state purpose?

6. Is the Board of Fisheries authorized by AS 16.05.-251(a) to established "personal use fishing" as a category for regulatory purposes?

7. Has the Board of Fisheries treated plaintiffs fairly by not authorizing "subsistence fishing" opportunities for them, but instead authorizing "personal use fishing"?

III. STATEMENT OF THE CASE

This appeal in its most general perspective is about fishing. More particularly, about the different kinds of fishing that occur in the waters and tributaries of Cook Inlet. "Commercial fishing" is defined as fishing for profit; "sport fishing" is defined as taking fish for personal use, primarily by hook and line. AS 16.05.940(5) and (21). Before 1978, "subsistence fishing" was defined as taking fish for personal use, with, among other gear, gill nets. Sec. 4, ch. 131, SLA 1960. All three kinds of fishing occur in Cook Inlet. These lawsuits arose because the legislature in 1978 narrowed the definition of "subsistence fishing."

The Alaska Board of Fisheries ("board") is established in AS 16.05.221(a) to promote the "conservation and development" of state fisheries. Before 1978, the board had the discretion to determine whether and how much of a fish stock should be allocated to various uses. In AS 16.05.251(a), the legislature delegated to the board the authority to adopt regulations "the board considers advisable" on twelve different subjects, including establishing seasons, areas, quotas and bag limits, and methods and means. AS 16.05.251(a)(2), (3) and (4).

Under its discretionary authorities, in 1977 the board adopted a salmon management plan for upper Cook Inlet to address the annual allocation controversy involving sport fishing and commercial fishing. The plan, now 5 AAC 21.363, reflects the

board's determination that salmon stocks which move through Cook Inlet between July 1 and August 15 would be managed primarily for commercial uses, and those moving through the inlet before and after those dates would be managed primarily for sport uses. See Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981).

There was no need to address "subsistence fishing" in Cook Inlet, authorized as fishing with set gill nets for personal use, in the plan, because it was viewed as a minimal presence. Between 1971 and 1977, there were an average of only 87 "subsistence fishing" permits issued annually, with an average yearly total catch for the fishery for that period of 405 salmon. (G File 4, at 21) 2/ The area open to the "subsistence fishing" included most of the east side beaches in the northern district and central district (near Kenai) of Cook Inlet and the north shore of Kachemak Bay and the Homer spit in the southern district, all of which are relatively accessible by road. (G File 4, at 24, 29, and 70) 3/

Between 1978 and 1980, "subsistence fishing" experienced substantial growth in Cook Inlet. This was partly due to commercial fishermen obtaining "subsistence" permits after

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2/ The Madison and Gjosund records on appeal will be identified by "M" and "G".

3/ For a map of the Cook Inlet fishing districts, see M File 3, Exhibit S.

August 15, when commercial fishing was precluded under the upper Cook Inlet management plan, and partly due to increased publicity about the availability of "subsistence fishing." (G File 4, at 19 and 22) The number of permits rose in 19[illegible] to 323, and in 1979 it jumped to 1,161. In 1980, permits began to be issued on a household, rather than individual, basis, but still the number of permits increased to 1,331. The amount of salmon harvested by "subsistence fishing" increased as well, to 3,735 fish in 1978, 9,923 fish in 1979, and 14,775 fish in 1980. (G File 4, at 21)

Over the same period, the board instituted restrictions on "subsistence fishing." The east side beaches in the northern and central districts were closed to "subsistence fishing," except for a small open section, and in the southern district, the north shore of Kachemak Bay and the Homer spit were closed. (G File 4, at 25, 30 and 70) Beginning in 1980, permits were issued on a household, rather than an individual, basis, and the limits were modified from 50 fish per permit to 25 fish for head of the household plus 10 additional fish for each dependent. (G File 4, at 26, 27 and 70) The board also reduced the gear length in all three districts from the previously authorized 50 fathom total to 20 fathoms, and finally to 10 fathoms. (G File 4, at 26, 27 and 70)

In the meanwhile, the Alaska legislature in 1978 had enacted ch. 151, SLA 1978, the subsistence law, which made important changes in the statutes authorizing the board's activities, including the definitional change which brought about

these lawsuits. The legislature amended the definition of "subsistence fishing" so that it no longer meant the taking of fish for personal use with, among other gear, gill nets. Under the new definition, "subsistence fishing" means the taking of fish for "subsistence uses," with, among other gear, gill nets. AS 16.05.940(22). A definition of "subsistence uses" was established, which is more restrictive than simply "personal use."

> '[S]ubsistence uses' means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption [for specified purposes] ...

AS 16.05.940(33). (Emphasis added.) Thus, under the statutory definitions, simply fishing by gill net for personal use is no longer "subsistence fishing." Rather, "subsistence fishing" would be taking fish with gill nets for "customary and traditional uses."

The subsistence law also removed the board's discretion to determine whether or not to allocate salmon to "subsistence fishing." In AS 16.05.251(b), the legislature mandated that the board authorize "subsistence uses," unless sustained yield would be jeopardized, and also mandated that if a relative resource shortage occurred, "subsistence uses" would be the last to be restricted. (The board retains its discretion under AS 16.05.-251(a) to make allocation decisions regarding other fishing activities.)

Although the subsistence law was enacted in 1978, the board did not modify its authorization of "subsistence fishing" in Cook Inlet for the 1979 or 1980 seasons in response to the

law. As noted earlier, the board had promulgated restrictions, but they were in response to the growth of what was still being called "subsistence fishing" in Cook Inlet, rather than in response to the new definitions provided by the subsistence law.

During the summer of 1980, three lawsuits were directed at the board's actions in Cook Inlet, all alleging noncompliance with the subsistence law. 4/ (See, G File 3, Exhibit A)

Realizing that the "subsistence fishing" that it was authorizing in Cook Inlet was still simply taking fish with set gill nets for personal use, under the old statutory definition, in December 1980 the board began examining the uses of salmon in Cook Inlet, so that in the future it would authorize as "subsistence fishing" only that subset of fishing for personal use that involved "customary and traditional uses." It considered the report of the subsistence section (now the division of subsistence) of the Alaska Department of Fish and Game on a year long study on Cook Inlet, which detailed the number of fish taken, number of people participating, trends, etc. (M File 2, Volume 3, at 1-43) 5/ It listened to the explanation of the results of a survey taken by the division of subsistence of Cook Inlet

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4/ The three cases were Tyonek v. Alaska Board of Fisheries, 3AN-80-3073, Gjosund v. Alaska Department of Fish and Game, 3HO-80-92 Civil (the first phase of the Gjosund case on appeal here) and Francis v. Alaska Department of Fish and Game, 3KN-80-546 Civil.

5/ Hereinafter, the board transcripts contained in M File 2 will be designated by volume and page number alone.

"subsistence" permit holders. Volume 3, at 106-121. It was given a history of territorial and state "subsistence" regulations in Cook Inlet by the Department of Fish and Game. Volume 7, at 7-24. It also heard a presentations on behalf of Native groups. 6/

The local advisory committees, which are established by the board under AS 16.05.260, were asked to report on the uses of resources in their areas. 7/ Additionally, the board heard testimony on uses of resources in Cook Inlet from at least 18 other individuals, mostly from small and large communities and isolated areas on the shores of Cook Inlet, but from areas farther away as well. 8/

6/ There was a report by the North Pacific Rim (a nonprofit Native corporation) subsistence coordinator, explaining a survey which she had conducted of English Bay and Port Graham's use of resources, Volume 7, at 104-115, and by the president and chief of the Kenaitze Indians, accompanied by his resource and research person, who also presented the results of their information gathering activity on the use of resources by the Kenaitze Indians. Volume 7, at 171-201.

7/ Reports were received from the Anchorage committee, Volume 5, at 66-92, the Seward committee, Volume 5, at 93-107, the Homer committee, Volume 7, at 34-64, the Central Peninsula committee, Volume 7, at 70-78, and the Port Graham committee, Volume 7, at 87-93.

8/ The board heard testimony from individuals from North Kenai, Volume 4, at 74-99, from the Kenai Peninsula Fishermen's Cooperative, Volume 5, at 2-26, from the Cook Inlet Drift Association, Volume 5, at 26-32, from Tyonek (three witnesses), Volume 5, at 50-66, from the Isaac Walton League and Sports and Game Preservation Association, Volume 6, at 66-81, from the Parks Highway area, Volume 7, at 2-7, from a commercial fisherman from Bristol Bay, Volume 7, at 64-69, from English Bay, Volume 7, at 93-104, from the Homer Kachemak Bay Subsistence Group, Volume 7,

Thus, the board received a mass of information about the uses of salmon in Cook Inlet. The task remained to identify which uses were "customary and traditional uses" that must be provided for under the subsistence law. In order to facilitate that identification, the chairman of the board appointed a committee, which consisted of board members and staff of the Department of Fish and Game. Its meetings were announced at the board meetings, and were held during recesses in the board meetings. Volume 3, at 122-126.

This committee drafted ten criteria which could be used to identify "subsistence uses" of salmon in Cook Inlet, and presented them to the board for full review and consideration. Volume 11, at 2. The board generally concurred that the ten criteria restated in a manageable framework what had been discussed in the board meeting during the preceding two weeks. Volume 11, at 5. The board analyzed the proposed ten criteria in detail, and concluded that they formed a common thread which could be used to identify "customary and traditional uses" of salmon in Cook Inlet. Volume 10, at 8-54. 9/ The ten criteria

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at 115-155, from the west side of Cook Inlet, Volume 7, at 155-162, from Seldovia, Volume 7, at 201-211, from a Cook Inlet commercial fisherman, Volume 7, at 211-214, from Anchorage, Volume 7, at 224-228, from a commercial fisherman, Volume 7, at 228-237, from Resurrection Bay, Volume 8, at 9-29, and from Kenai, Volume 8, at 58-76.

9/ The contents of Volume 11 precede the content of Volume 10 chronologically; this is clear because both contain precedings from December 19, 1980, and Volume 10 begins at 7:00 p.m., while

were set out in the findings and policy regarding subsistence uses of Cook Inlet salmon. (M File 3, Exhibit H)

The criteria included a long term pattern of resource use by an identifiable community. Such uses targeted on specific stocks relatively close and accessible to the community. Efficient and economical methods of harvest were used, as well as traditional modes of preparing and storing the harvest. Skills were passed from one generation to the next, and sharing of the harvest product occurred on a community basis. Finally, there was a reliance on a wide range of resources. See 5 AAC 01.597.

The criteria have the effect of restricting the identification of "subsistence uses" of Cook Inlet stocks to fishing with set gill nets for personal use by residents of the rural communities around Cook Inlet which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community. (See unchallenged finding of fact entered in both Madison (M File 1, at 56, ¶ 10), and Gjosund (G File 2, at 258, ¶ 18).) This determination was certainly not agreeable to some witnesses who had testified to the board on behalf of sportsmen's groups. These witnesses argued that "subsistence uses" should encompass all personal use of the resource, the ultimate "use" being

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Volume 11 ends with a statement that the meeting would reconvene after dinner at 7:00 p.m. Volume 10, at 1, and Volume 11, at 20.

consuming the fish. 10/

In the spring 1981 meeting, further testimony on uses of salmon in Cook Inlet was received from the Cook Inlet area advisory committees. 11/ Much of it favored the ten criteria, although the view of the estimated 800 people who attended the Anchorage advisory committee meeting was that the term "subsistence uses" should apply to any personal consumption of noncommercially caught fish.

Seven witnesses were called by board members. Two represented political and sportsmen's groups, which advocated the view that all personal use of fish was "subsistence use." 12/ Other witnesses, some representing a Native group and a commercial fishing group, spoke directly to the ten criteria, and two

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10/ This was advocated in the December 1980 meeting by a representative of the Isaac Walton League and the Sports and Game Preservation Association, Volume 6, at 66-81, and by the Isaac Walton League, Volume 14, at 50-78, the Sports and Game Preservation Association, Volume 14, at 78-94, and the Alaska Sports Council, Volume 14, at 94-106.

11/ Advisory committees testifying were from Seward, Volume 20, at 102-110, mentioning the ten criteria, from English Bay and Port Graham, Volume 20, at 110-115, praising the ten criteria, from Homer, Volume 20, at 115-129, employing the ten criteria in its analysis, from the Matanuska Valley, Volume 20, at 129-133, from the Central Peninsula, Volume 20, at 134-138, from Anchorage, Volume 20, at 138-151, and from Kenai/Soldotna, Volume 21, at 230-232.

12/ Testifying were Dale Bondurant, from Alaskans for Equal Fishing and Hunting, Volume 20, at 163-168, and Sam McDowell, from the Isaac Walton League, and the Alaska Fisheries Resource Committee, Volume 20, at 182-191.

of the witnesses praised the criteria and urged their use by the board. 13/ Additionally, extensive written comments were received, and a long period of time was allotted for the board to review those. Volume 21, at 315.

After those deliberations, the board again embraced the criteria as a mechanism to identify "subsistence uses" in Cook Inlet. Volume 22, at 318-334 and Volume 29, at 6-16. The final wording was adopted on April 6, 1981. (M File 3, Exhibit I)

At the spring 1981 meeting, the board applied the ten criteria to the uses of salmon in Cook Inlet, and concluded that the uses in Tyonek, English Bay, and Port Graham were "customary and traditional uses." The board also concluded that, on the evidence before it, no communities on the Kenai Peninsula (other than English Bay and Port Graham) satisfied the criteria. The board developed findings of fact regarding subsistence fishing in Cook Inlet, reflecting those determinations. (M File 3, Exhibit L)

The board was not required by AS 16.05.251(b) to authorize the personal use gill net fishing which had been previously authorized as "subsistence fishing" on the Kenai Peninsula,

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13/ Testifying were Chief Alex and Dr. Elizabeth Shadura, of the Kenaitze Indians, Volume 20, at 169-181, Chuck Robinson, on behalf of the Kenaitze Indians, speaking to the ten criteria, Volume 21, at 277-314, Don Mitchell, speaking on his own behalf, Volume 20, at 191-201; and Volume 21, at 202-228, urging the board to ratify the ten criteria, and Rodger Painter, Executive Director of the United Fishermen of Alaska, Volume 20, at 154-159, speaking approvingly of the ten criteria.

since "customary and traditional uses" had not been evidenced there. The board did not authorize under its discretionary powers contained in AS 16.05.251(a) any personal use set gill net fishing on the Kenai Peninsula for the 1981 season.

During the summer of 1981, the Gjosund plaintiffs filed a "petition" in the superior court in Homer, and the Madison plaintiffs filed a complaint in the superior court in Kenai. (G File 2, at 1-9 and M File 1, at 1-5) Both lawsuits challenged the validity of the ten criteria, alleging that they were inconsistent with the intent of the subsistence law. Also, both lawsuits alleged that there had been procedural irregularities in the adoption of the ten criteria, and that the board's actions had violated plaintiffs' due process and equal protection rights. Gjosund additionally asked that the board be held in contempt. The Alaska Federation of Natives ("AFN") intervened as a party in Madison. 14/

In December 1981, the validity of the ten criteria was upheld in Madison, with the granting of motions for partial summary judgment filed by the state and AFN on that claim. (M File 1, at 45-49) The ten criteria were then codified into the Alaska Administrative Code after the board adopted them again at its December 1981 meeting. 5 AAC 01.597.

In March 1982, the validity of the ten criteria as a

14/ AFN's motion to intervene and the order granting the motion are not a part of the record on appeal.

mechanism for identifying subsistence uses in a manner intended by the subsistence law was also upheld in Gjosund. (G File 2, at 221-245) However, Gjosund inexplicably further concluded that the board could not apply the criteria to identify what personal use set gill net fishing should be authorized as "subsis ce fishing," unless it was necessary to do so because of the biological status of the target fish stock.

At the spring 1982 meeting, the board established a new category of fishing, "personal use fishing," to accommodate those activities which had formerly been termed "subsistence fishing," but which could no longer be so designated since the subsistence law had narrowed the definition to only those uses which were "customary and traditional." 5 AAC 77.001. The board specified that "personal use fishing" would not be authorized if sustained yield would be jeopardized, but other than that safeguard, maintained the flexibility to authorize "personal use fishing" whenever it would be "in the broad public interest." 5 AAC 77.001(b). Thus, "personal use fishing" joined "commercial fishing" and "sport fishing" as activities which can be regulated by the board in its discretion under AS 16.05.251(a).

At that same meeting, the board then authorized "personal use fishing" on the Kenai Peninsula for the 1982 season. A sockeye salmon fishery in June was established in the central district (near Kenai), 5 AAC 77.547, and a fall coho fishery was established in the southern district (near Homer), 5AAC 77.546, though the latter was superceded by the so-called "subsistence

fishing" authorized by the court in Gjosund. The harvest limits imposed on "personal use fishing" in these two locations were identical to the "subsistence fishing" limits previously in effect for those areas. 5 AAC 77.530(a).

In the spring of 1982, the board, together with the Board of Game, jointly adopted a procedural regulation which describes how "subsistence uses" will be identified and provided for under the subsistence law. 5 AAC 99.010. The joint regulation contains eight criteria which are to be used to identify "customary and traditional subsistence uses" throughout the state, and which are very similar to the ten criteria at issue here. 5 AAC 99.010(b).

In August 1982, the court in Madison upheld the authority of the board to establish and authorize "personal use fishing," and determined that the authorization of "personal use fishing" in June on the coho salmon in the central district of Cook Inlet was reasonable and fair, despite the fact that plaintiffs would have preferred a fall coho fishery. The court also refused to second-guess the board's determination that none of the communities on the Kenai Peninsula met the ten criteria. Instead, it remanded that claim to the board with instructions to consider any properly submitted proposals to authorize "subsistence fishing" under the ten criteria contained in 5 AAC 01.597. (M File 4, at 293-295; M File 6, at 361-369)

IV. COURSE OF PROCEEDINGS IN THE TRIAL COURTS

The state adopts AFN's description of the proceedings

in Madison and of the consolidation. Although AFN's description of the proceedings in Gjosund is accurate, some further detail may be useful.

On May 29, 1981, the Gjosund plaintiffs filed a "petition" in the superior court in Homer, setting forth five claims for relief. (G File 2, at 1-9) A preliminary injunction was issued on August 4, 1981, which ordered the opening of a personal use set gillnet fishery in the southern district, which the court termed a "subsistence fishery." In December 1981, plaintiffs moved for summary judgment on all five counts, and the state moved for partial summary judgment on count I, and to dismiss count II as moot. Oral argument occurred on those motions on February 16, 1982. (G File 2, at 254)

On March 8, 1982, the court issued a decision resolving counts I and IV, and part of count II. (G File 2, at 221-253) On June 22, 1982, the parties stipulated to the disposition of counts III and V, and the remaining part of count II. (M File 6, at 328)

On November 19, 1982, the court entered amended findings of fact and conclusions of law, and an amended final judgment, setting out the disposition of all the counts. (G File 2, at 254-261 and 265, ¶ 8; M File 6, at 328-330) The state was granted summary judgment on count I (the validity of the ten criteria). Plaintiffs were granted summary judgment on counts II (procedural aspects) and IV (the application of the ten criteria). The court refused to dismiss count II as moot, and counts

III (contempt) and V (subsumed by count IV) were dismissed according to the stipulation.

On December 13, 1982, the state filed a notice of appeal from the court's ruling on count IV. (G File 2, at 262)

V. ARGUMENT

A. Summary

The legislative history of the subsistence law clearly indicates that the legislature intended to narrow the definition of "subsistence fishing" to mean fishing by individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area. To the extent that there is any question in that regard, the board's interpretation and implementation of the subsistence law, which is entitled to significant weight, resolve it.

In carrying out its delegated responsibilities under the subsistence law, the board determined that "subsistence uses" of salmon in Cook Inlet can be identified on a community basis by the application of ten criteria, and that determination is both consistent with the intent of the subsistence law and reasonable.

The promulgation by the board in December 1981 of 5 AAC 01.597, codifying the ten criteria used to identify "subsistence uses" of salmon in Cook Inlet, was a sufficiently new beginning to cure and moot a violation of the public meetings law which occurred when the criteria were first formulated in December 1980.

The board is authorized by the subsistence law to identify "subsistence uses" of salmon in Cook Inlet in order that only fishing for those uses will be provided for through "subsistence fishing," regardless of the biological status of the target stocks.

The classifications determined by the ten criteria of individuals eligible and individuals ineligible to participate in "subsistence fishing" in Cook Inlet are a reasonable means to accomplish the legitimate state purpose furthered by the subsistence law.

The board is authorized to establish "personal use fishing" as a category for regulatory purposes.

In not authorizing "subsistence fishing" opportunities for plaintiffs, but instead authorizing "personal use fishing" opportunities, the board has treated plaintiffs fairly.

B. The Criteria for Identifying "Subsistence Uses" of Cook Inlet Salmon Are Consistent with the Intent of the Subsistence Law, and Are Reasonable

1. Standard of review

Plaintiffs assert that the ten criteria which the board developed to identify "subsistence uses" of salmon in Cook Inlet are not consistent with the intent of the subsistence law. Plaintiffs' argument can be separated into two alternatives: 1) that the legislature did not intend the scope of what had been called "subsistence fishing" to be narrowed when it changed the definition of "subsistence fishing" and established the definition of "subsistence uses," or 2) that the legislature did intend

to narrow the scope, but that the board has not properly accomplished that result with the ten criteria.

The state contends that the 1978 amendments reflect a legislative intent to narrow the scope of "subsistence fishing," and that the method chosen by the board is both consistent with that intent and reasonable. The standard of review for each of the two questions is somewhat different.

There is no question that it is the court's job to construe statutes, and that the court is free to substitute its judgment for that of an administrative agency when reviewing a regulation which merely interprets a statute. However, it is also true that the court should give "consideration and respect" to the agency's construction, and substitute its judgment only if there are "weighty reasons" for doing so. Kelly v. Zamarello, 486 P.2d 906, 910-911 (Alaska 1971). Accordingly, this court should apply "the long-standing principle of statutory interpretation that special consideration will be given to the interpretations of the agency charged with administrating the statute," State v. Aleut Corporation, 541 P.2d 730, 737 n.15 (Alaska 1975), when determining whether the legislature intended to narrow the scope of fishing classified as "subsistence fishing" when it amended the definition of that term in AS 16.05.940(22).

However, assuming the legislature did intend a narrower meaning, the question is whether or not the ten criteria as established in 5 AAC 01.597 are "consistent with and reasonably necessary to carry out the purposes of the statutory provisions"

and are "reasonable and not arbitrary." Kelly v. Zamarello, supra, at 911. The court said:

> when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.

Id.

2. Intent to narrow definition

Before 1978, "subsistence fishing" was defined in terms of "personal use." Sec. 4, ch. 131, SLA 1960. Following the enactment of the subsistence law, it now is defined in terms of "subsistence uses," which in turn are defined as "the customary and traditional uses in Alaska of wild, renewable resources" for certain purposes. AS 16.05.940(22) and (23). Thus, "subsistence fishing" is now defined in terms of "customary and traditional uses," not just "personal use." On its face, it would seem that "subsistence fishing" now requires something other than merely catching fish to eat. If no change had been intended (as contended by plaintiffs), there would have been no need for the amendments.

The legislative history of the subsistence law supports this facial analysis and demonstrates that the legislature intended to narrow the scope of fishing which could be termed "subsistence fishing." In essence, the legislature determined that fishing for "subsistence uses" would include only fishing by

individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area, and not merely the taking of fish for personal use.

For example, during the House debate on the bill that became the subsistence law, proposed Amendment No. 3 to the bill would have eliminated the qualifying words "customary and traditional" from the definition of "subsistence uses." (M File 3, Exhibit U, at 8) Representative Anderson explained that the two words were used "to put some guidelines around the uses of Alaska's ... resources." (Id. at 9) The remarks of Representative Anderson, floor manager for the bill, assume a special role in determining legislative intent. See 2A C. Sands, Sutherland Statutory Construction, § 48.13 (4th ed. rev. 1973).

The fear was that without those modifiers, the field of definition would be "wide open." (M File 3, Exhibit U, at 9) Representative Anderson further commented:

> The use of "customary and traditional" also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with aboriginal uses, but also those that have come in, those people who have come in later. They have ... the non-native people in the State of Alaska have established customary and traditional use of Alaska's fish and game resources for subsistence purposes. And in order to give the Board of Fish and Game more clarification in the area, we have come up with the (inaudible) of "customary and traditional" rather than leaving that section wide open.

(Id. at 9-10) Representative Anderson certainly intended "customary and traditional" to encompass something narrower than all

personal use. By not adopting Amendment No. 3 (id. at 16), the legislature answered part of the question put by Representative Cotton:

> What is the difference between a sport fisherman who takes his fish home and eats it, and a subsistence fisherman who takes his fish home and eats it?

(Id. at 11) The answer is bound up in the historically significant role fish and game resources play in the social and economic life of certain rural areas of the state. In leaving the modifying terms "customary and traditional," the legislature showed that it intended something other than "personal use." 15/

A different provision of the bill requires the board in certain circumstances to distinguish among subsistence users, giving priority among them on the basis of customary and direct dependence upon the resource, local residency and availability of alternative resources. See AS 16.05.251(b). In discussing proposed Amendment No. 2, which eventually failed (id. at 7), but which would have deleted this requirement (id. at 1-2), Representative McKinnon asked what the difference was between those three criteria, and "subsistence uses" generally. (Id. at 4-5) Representative Anderson responded that in a very poor resource situation, sport and commercial fishing would be cut first, and

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15/ Nor was it relying on gear type as the controlling definitional element. Representative Gruening, in the House debate, made it very clear that "there are two questions here," referring to "methods of taking" and "customary and traditional use." (M File 3, Exhibit U, at 12)

the:

> last people that you are going to cut off are the subsistence people who have the greatest reliance on the resource.

(Id. at 5) (Emphasis added.)

The answer to Representative McKinnon's question is thus that "subsistence uses" are not defined in terms of individual dependence on the resources. This is relevant only in certain circumstances. (See discussion in section D.) Instead, "subsistence uses" are associated with all those living in rural areas in which the social and economic life of the area is reliant upon fish and game resources. That conclusion is supported by the letter of intent accompanying the subsistence law, which notes: "Presently, research is not being specifically directed toward the subsistence hunting and fishing economy of the state." House Journal, 10th Leg., 2nd Sess. 1155 (1978). "Economy" is defined most pertinently as "the structure of economic life in a country, area, or period ... an economic system." Webster's New Collegiate Dictionary 375 (1981). It is clear that the legislature intended the importance of fish and game to the economy of an area to be within the scope of "subsistence uses."

When a statute involves the same subject matter as a subsequent, but approximately contemporaneous statute, the legislative history of the first is indicative of the legislative intent of the second. State v. Bundrant, 546 P.2d 530, 545 (Alaska 1976). The subsistence law was preceded by AS 16.05.257,

the statutory basis for subsistence hunting areas. Ch. 199, SLA 1975; amended ch. 269, SLA 1976. In amending that statute in 1976, the legislature indicated that "subsistence uses" should not be considered to exist throughout all Alaska. For example, it found "that traditional dependence on fish and game resources is a continuing and necessary way of life in many areas of the state and that the protection of subsistence usage of these resources is essential to the health, safety and general welfare of the citizens of the state in those areas." Sec. 1, ch. 269, SLA 1976. (Emphasis added.)

The House debate on subsistence hunting area amendments in 1976 also indicates that proponents of the bill contemplated a limit to geographical scope. For example, Representative Miller, the floor manager for the House debate, indicated that "subsistence uses" which occurred in a particular area should not be subordinated to "pressures from outside sportsmen like myself." Recording of proceedings, 9th Leg., 2nd Sess., tape 130 H, index nos. 527-1276 (1976). Representative Huntington, the original sponsor of the bill which became chapter 199, SLA 1975, expressed concern about outside hunting pressure on people "in the area where they live." Id. He noted:

> Now, the Nowitna River on the Yukon River above Ruby, 30 miles above Ruby, has been hunted for many years. It was one of the finest hunting rivers in the area, and it was destroyed by hunting, there is not doubt about that. The people were flown in from airplanes and they cut the moose down to practically zero in two-year's time.

Id.

In light of this legislative history, it appears clear that the legislature intended the 1978 amendments to narrow the scope of "subsistence fishing." To the extent that there is any remaining question in that regard, however, it is removed by the board's subsequent action interpreting and implementing the subsistence law. Since board determined that the legislature intended by the definitional change to narrow the scope of what would be called "subsistence fishing," this determination should be given "great deference":

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

Pan American Petroleum Corporation v. Shell Oil Company, 455 P.2d 12, 22 (Alaska 1969).

Both Madison and Gjosund concluded that in in developing the ten criteria to identify "subsistence uses" of salmon in Cook Inlet and in focusing upon rural communities around Cook Inlet which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community, the board is acting consistently with legislative intent. (M File 1, at 57, ¶ 4; G File 2, at 260, ¶ 6)

There are no "weighty reasons" to overturn the board's determination. See Kelly v. Zamarello, supra, at 910-911. The

decision the board made was that "customary and traditional uses" amounted to something more than simply eating fish, and its decision is consistent with the amendments which occurred in 1978. In light of the ample legislative history supporting the board's determination, the court need not overturn it under a substitution of judgment analysis.

3. Criteria consistent with intent, and reasonable

The job of identifying which uses of fish and game resources are "customary and traditional" has been delegated to the board within specific guidelines. In fact, the legislature intended the words "customary and traditional" to give "a better handle for the board to work for in defining the range of subsistence." (M File 3, Exhibit U, at 12) (Emphasis added.)

Since the legislature delegated authority to the board to carry out the task of further clarifying the definition of "subsistence uses," its actions in that regard should be reviewed for consistency with the purposes of the statute, and for reasonableness. Kelly v. Zamarello, supra, at 911. This clarification concerns "administrative expertise" as to a "complex subject matter," and in such cases, the court will not substitute its judgment for that of the agency, as explained in Borkowski v. Snowden, 665 P.2d 22, 25 (Alaska 1983). That case involved an interpretation of a regulation for which the substitution of judgment test was used. The meaning of the term "findings" was at issue, as it appeared in the phrase "written findings on each issue shall be issued to the respondent." Id. at 26. The

interpretation of the term "findings" takes no particular expertise, unlike the clarification of the term "customary and traditional" as it relates to uses of Alaska's fishery resources. The legislature intended in the subsistence law to narrow the purview of "subsistence fishing." However, the legislature had established the board to deal with just such complex subject matter, and the board was delegated the task of selecting a mechanism to accomplish the legislature's intent, within the guidelines provided. As discussed, in developing criteria that identify "subsistence uses" with rural communities around Cook Inlet with historic reliance on fishing and hunting activities, the board is acting consistently with the intent of the subsistence law.

In formulating the ten criteria challenged in this appeal, and applying them on a community basis, the board is also acting reasonably. Some evidence of that is found in the adoption by the board in conjunction with the Board of Game of a joint regulation which sets out the procedures for identifying subsistence on a statewide basis. This regulation contains eight criteria, very like the ten in question here. 5 AAC 99.010(b).

Where an "agency decision concerns 'administrative expertise as to either complex subject matter or fundamental policy formulation, deference should be given to an administrative determination if it has a reasonable basis in law and in fact'." Weaver Brothers, Inc. v. Alaska Transportation Commission, 588 P.2d 819, 821 (Alaska 1978). See also Hood v. State, Workmen's Compensation Board, 574 P.2d 811, 813 (Alaska 1978).

In this instance, the board decision clearly was based on its factual expertise, as well as being consistent with the law. Information 16/ presented to the board in December 1980 and

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16/ That information is contained in the board record supporting the ten criteria in at least the following places:

1) long-term stability: Volume 4 at 84, 97; Volume 5 at 9, 47, 69-70, 85, 91-92; Volume 7 at 33, 53-54, 94, 130, 138, 139, 156, 160-162, 172; Volume 8 at 59-62, 75-76, 112, 113, 114-115, 116-117; Volume 10 at 18-19, 19-20, 32-35; Volume 12 at 77, 78, 81, 82; Volume 13 at 85-86; Volume 14 at 24-25, 31, 126-127; Volume 16 at 102-103; Volume 19 at 77, 78; Volume 20 at 103-104, 105, 108, 112, 115, 117-118, 123, 157, 170, 172-173; Volume 21 at 223-224, 278, 283-284, 296, 306; Volume 22 at 326;

2) community identification: Volume 1 at 70-71; Volume 5 at 22, 61-62, 85; Volume 7 at 33, 46-47, 64-65, 75, 87, 92, 100-101, 112-113, 115-116, 135-137, 144-146, 147, 154, 160-162, 179, 197; Volume 8 at 28, 59, 60, 75-76, 101-105, 107; Volume 12 at 79-80; Volume 13 at 86, 88; Volume 14 at 25-26, 27-28, 38-39, 114, 166, 168; Volume 19 at 77; Volume 20 at 158, 172, 177-198; Volume 21 at 203-205, 217-218, 220, 221, 225, 262-263, 267-268, 286, 288-289, 296, 301;

3) targeting on specific stocks: Volume 1 at 20-21, 33-37; Volume 7 at 19-20, 34-35, 36-37, 42-43, 44-45, 46-47, 57-58, 60, 63-64, 76, 87-89, 91, 96, 118, 141, 180-188, 228-229, Volume 8 at 59; Volume 12 at 29-30, 33-34, 96, 104; Volume 13 at 25-26, 32-38, 47; Volume 14 at 138, 217; Volume 18 at 269-273; Volume 21 at 234;

4) efficiency of harvest methods: Volume 3 at 41, 60, 92-93; Volume 4 at 85, 88; Volume 7 at 12, 34-35, 42-43, 46-47, 60, 76, 87-89, 92, 95-96, 96-98, 116, 121, 123-124, 180-188, 202; Volume 8 at 13, 14-15, 17; Volume 10 at 20-24; Volume 12 at 8, 31-32, 32-33, 92-96, 105; Volume 20 at 99, 104-105, 161-162, 196; Volume 21 at 236, 297;

5) proximity: Volume 3 at 40; Volume 4 at 79, 88-90; Volume 5 at 24-25, 75-76, 82, 84; Volume 7 at 42-43, 46-47, 49-50, 60, 77, 99-100, 101-102, 103, 105-106, 126, 147, 150, 158, 180; Volume 12 at 41; Volume 14 at 43-44, 182-183; Volume 20 at 104-105, 171; Volume 21 at 297;

6) access relatively good: Volume 4 at 79, 86; Volume 5 at

spring 1981, regarding the uses of salmon in Cook Inlet included evidence that "customary and traditional uses" could be distinguished from mere "personal use" by ten factors, which became the ten criteria of 5 AAC 01.597. 17/

The reasonableness of the board employing the ten criteria to identify communities 18/ in which "subsistence uses"

36, 41, 45, 76, 84; Volume 7 at 37, 39, 105, 126-127, 131, 132, 133, 213, 231-232; Volume 10 at 25; Volume 12 at 42, 44, 45-46, 52, 86; Volume 14 at 182-183; Volume 21 at 297.

7) relationship to historical methods of preparation: Volume 3 at 18, 21-22, 61; Volume 5 at 55-56, 59-61, 85, 91-92; Volume 7 at 53-54, 54-55, 76, 87-89, 91-92, 94, 158, 233; Volume 8 at 25; Volume 10 at 25-27; Volume 19 at 77; Volume 20 at 172; Volume 21 at 297-298;

8) inter-generational transmission: Volume 4 at 74, 87; Volume 5 at 59-61, 85, 91-92; Volume 7 at 53, 96; Volume 8 at 25, 58, 59, 75-76; Volume 10 at 27-30; Volume 13 at 86; Volume 14 at 126-127; Volume 17 at 153; Volume 20 at 112, 172; Volume 21 at 278;

9) community and family sharing: Volume 3 at 115; Volume 5 at 61-63; Volume 7 at 90, 117; Volume 8 at 27-28, 58; Volume 10 at 35-41; Volume 13 at 86; Volume 21 at 298; and

10) reliance on variety of resources: Volume 5 at 64-65, 75-76; Volume 7 at 87-89, 94, 101-103, 106, 116, 123-124, 147; Volume 10 at 41; Volume 13 at 27; Volume 20 at 172; Volume 21 at 216, 221, 283-284, and 299.

17/ Contrary to plaintiffs' assertions, the criteria are not racially based. Anyone living in a qualifying community in Cook Inlet, currently Tyonek, English Bay, and Port Graham, 5 AAC 01.580(a), may participate, regardless of race. Conversely, individuals living in communities in Cook Inlet for which the existence of "subsistence uses" of salmon under the ten criteria has not been demonstrated may not participate. Thus, the Kenaitze Indians, who live on the Kenai peninsula, are not authorized. (M File 3, Exhibit L, at 9)

18/ Plaintiffs assert that the method of applying the ten

occur is also evidenced by the fact that the federal subsistence law was clearly aimed at protecting communities reliant upon resources. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487 (1980). "Subsistence uses" of Alaska's fish and game are protected by ANILCA Title VIII, 16 U.S.C. § 3111-3126. The definition of "subsistence uses" in ANILCA is virtually identical to the state definition, including the critical words "customary and traditional uses." 16 U.S.C. § 3113. The version of ANILCA that was under consideration by Congress in 1978 when the state subsistence law was passed also contains in its definition of "subsistence uses" the key words "customary and traditional." Sec. 703, H.R. 39, 95th Cong., 2nd Sess. (1978). The state legislature was aware of that definition when it was debating, and deciding against, removing the words "customary and traditional" from the state definition. (M File 3, Exhibit U at 8)

The legislative history of ANILCA and its precursors indicates that Congress was concerned about communities reliant upon resources in Alaska. There are references to the "more than

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criteria in Cook Inlet, on a community-by-community basis, is a strategy of recent vintage, devised long after the criteria were formulated. In fact, the explanation accompanying the motion to adopt the ten criteria as the method of identifying "subsistence uses" of salmon for all of Cook Inlet in March 1981 emphasized the need to focus on "an identifiable community, subcommunity or group" rather than "a small group intermingled throughout the length and width of the Kenai peninsula with other individuals and groups." (Emphasis in original.) (M File 3, Exhibit R, at 1)

200 rural communities throughout Alaska" and "the economic importance of subsistence uses to the rural economy." H.R. Rep. No. 1045, 95th Cong., 2nd Sess. 182 (1978). Congress commented on the "subsistence-dependent villages in the area," and the tension over subsistence "between the rural and urban communities in the State." H.R. Rep. No. 97, 96th Cong., 1st Sess. 158 (1979). It was also intended that former residents of communities reliant on subsistence who were currently living in a larger population center would not be eligible to participate in "subsistence uses." Id. at 192.

Congress was concerned with the issue because "Alaska's more than 200 rural villages are unique in that they are the last communities in the United States in which a substantial number of residents are still dependent upon the harvest of renewable resources...." S. Rep. No. 413, 96th Cong., 1st Sess. 230-231 (1979). Additionally, Congress intended to protect "subsistence uses" which "have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation." Id. at 269.

Those are but a few examples of Congress's concern with communities reliant upon resources. The clearest statement of that is included in the remarks of Representative Morris K. Udall, the chief sponsor of H.R. 39, just before ANILCA became law in December 1980:

> It should also be noted that customary and traditional subsistence uses must be evaluated on a community or area basis rather than an individual basis.

126 Cong. Rec. H10546 (daily ed. Nov. 12, 1980) (statement of Rep. Udall). (Emphasis added.)

The fact that Congress was so concerned in enacting the federal subsistence law with communities reliant upon fish and game resources augments the evidence demonstrating that the board in adopting criteria which identified communities in Cook Inlet reliant upon fish and game resources was acting reasonably.

4. Conclusion

In providing guidelines for the board, the Alaska legislature created a definitional framework for "subsistence uses." The legislature thus avoided imposing a more rigid approach which would have entailed inherent risks identified by one commentator:

> [S]ome content for the term "subsistence" must be agreed upon before a management scheme can be developed. This does not mean that such agreement should necessarily be in the form of a legislative definition. A too-rigid meaning ... could impinge on at least three other criteria: flexibility and assurances to both subsistence ... and nonsubsistence interests.
>
> ....
>
> ... An exhaustive statutory list of harvestable resources and permitted takers, methods, and uses not only would be difficult to generate but also would be too narrow and too rigid for practical administration. Use of animals and plants has varied widely among geographical regions, cultural groups and time periods. Harvesting methods have continued to evolve--particularly since introduction of high-powered hunting arms and motorized vehicles. Concentrations and locations of

> resources, populations and users have also changed. These diverse factors will undoubtedly move rapidly in the future, and a legislative description of the uses intended to be permitted should provide both breadth and flexibility to deal with new conditions.

D. Kelso, "Legal Issues in Federal Protection for Subsistence on Proposed National Interest Lands," (unpublished) (1976), reprinted in H.R. Rep. No. 16, 95th Cong., 1st Sess. 273 (1977), at 407 and 412 (footnote omitted).

The board correctly determined that the legislature intended the definition of "subsistence fishing" to be narrowed by the 1978 amendments, and carried out its delegated responsibility to identify "subsistence uses" in a reasonable manner, consistent with the legislative guidelines of "customary and traditional."

C. The Board's Violation of the Public Meetings Law while Developing the Criteria in December 1980 Is Moot

As explained in the statement of the case, the board in December 1980 gathered a great deal of information about the uses of salmon in Cook Inlet. In order to sort through that information, a committee was appointed, and its meetings were announced during the board meetings, and held during board recesses. (Volume 3, at 122-126) However, the state has stipulated that the committee meetings in December 1980 were conducted in violation of AS 44.62.310, which requires public meetings to be open. (M File 7, at 371-372)

Action taken contrary to the public meetings

requirement is void. AS 44.62.310(f). In University of Alaska v. Geistauts, 666 P.2d 424, 430 (Alaska 1983), the consequences of such voidness are discussed. The court concludes that the process which led to the void result must "begin anew." Id. Since that has already occurred three times since the violation in December 1980, the Madison court correctly concluded that count II, alleging procedural irregularities, was moot. (M File 4, at 296)

The first rehabitation of the violation occurred in the same December 1980 meeting. After the committee reported to the board, with the first draft of the ten criteria, the board discussed the criteria and supporting reasoning in great detail. (Volume 10, at 8-54) The board concluded that the ten criteria accurately summarized the common threads that had appeared throughout the testimony and that had emerged from the information presented, and the full board then adopted the ten criteria. (M File 3, Exhibit H)

The second time the process began anew was in the spring 1981 meeting, which was noticed twice in regard to subsistence. The first notice was the board notice of proposed changes for March 1981, which stated in part:

> The issues that will be before the board are the establishment of a subsistence salmon fishing permit system for Cook Inlet ...

(M File 3, Exhibit O) The second notice was the Cook Inlet subsistence fishing special notice, which stated in part:

> The session will focus on the application of the State's subsistence law to salmon fishing in Cook

> Inlet. The law sets a priority on certain customary and traditional uses of subsistence resources. The board intends to examine different methods for providing the priority in Cook Inlet.

(M File 3, Exhibit P)

As set out in the statement of the case, additional oral and written testimony was received during the spring 1981 meeting, and the board readopted the ten criteria, after slightly amending them. (M File 3, Exhibit I)

The third time the process began anew was in the December 1981 board meeting. The general legal notice for that meeting listed the subjects open for consideration, including the Cook Inlet subsistence fishery, which was noticed broadly. (M File 3, Exhibit W) The board could adopt, amend, repeal or take no action on the following:

> set characteristics that describe or define subsistence uses and users that will be used by the board to identify subsistence fisheries; set locations open and closed to subsistence fishing; set fishing seasons, periods, gear requirements and restrictions; set conditions and requirements for obtaining subsistence fishery permits; set harvest limits; set fish marketing requirements.

(Id. at 3)

In addition to the general subject area being opened and noticed, a specific proposal in the board's proposal packet outlined the ten criteria already adopted by the board. (M File 3, Exhibit X)

Alaska law is clear that courts should not decide issues not actually in controversy. Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972).

Mootness precludes judicial determinations. Jefferson v. Asplund, 458 P.2d 995 (Alaska 1969). The consequence of the voidness resulting from the violation of the public meetings law during the December 1980 board meeting is that the process must "begin anew." Since that has occurred on three occasions since the violation occurred, the matter is moot, and the court should not consider it.

D. The Board May Use the Criteria to Identify "Subsistence Uses" of Cook Inlet Salmon Regardless of the Biological Status of the Target Stocks

As discussed, prior to the board's development and application of the ten criteria, the "subsistence fishing" which was authorized in Cook Inlet was simply fishing for personal use with set gill nets, under the pre-subsistence law definition of that term. After the board developed the ten criteria, and it determined that no communities on the Kenai Peninsula except English Bay and Port Graham had evidenced "subsistence uses" of Cook Inlet salmon. (M File 3, Exhibit L) Thus, "subsistence fishing" was not authorized. However, in 1982 the board did authorize "personal use fishing." 5 AAC 77.546 and 5 AAC 77.547.

The Gjosund court upheld the ten criteria as a mechanism to identify "subsistence uses" which is consistent with the intent of the subsistence law. (G File 2, at 260-261, ¶¶ 6-8) However, the court then concluded that the board could not apply the criteria to see if what had been authorized as "subsistence fishing" was still "subsistence fishing" under the new definitions supplied by the subsistence law unless the target fish

stocks were in such jeopardy that the fishing required restriction. (Id. at 261, ¶¶ 9, 10.)

In reaching this conclusion, the court misconstrued AS 16.05.251(b) by melding its three distinct statutory mandates to the board. In order to understand the misconstruction upon which the court's conclusion is based, it is necessary to understand how AS 16.05.251(b) operates.

The first sentence of AS 16.05.251(b) states:

> The Board ... shall adopt regulations ... permitting the taking of fish for subsistence uses unless ... adoption of the regulations will jeopardize ... sustained-yield....

Thus, unless sustained yield is jeopardized, the board is required to allow opportunities for "subsistence uses." Identifying these uses is implicitly authorized in the requirement to provided for them. At the same time, the board may, under AS 16.05.251(a) allow opportunities for nonsubsistence uses, such as "personal use fishing."

The second sentence of AS 16.05.251(b) states:

> Whenever it is necessary to restrict the taking of fish to assure ... sustained-yield ... or ... the continuation of subsistence uses of such resources, subsistence use shall be the priority use.

Thus, if increase in competition or decrease in harvestable surplus result in a relative resource shortage, restriction of some harvest opportunities may be necessary, and, if so, the priority for "subsistence uses" would come into play. The board can use any of the many management options available to it in imposing the needed restrictions on nonsubsistence uses and in

continuing to regulate "subsistence uses" in a way that protects the opportunity for "subsistence fishing." Of course, in extreme cases the option of precluding nonsubsistence uses would remain available.

The third sentence of AS 16.05.251(b) states:

> If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:
>
> (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
>
> (2) local residency; and
>
> (3) availability of alternative resources.

Thus, a more serious resource shortage resulting from greater increase in competition or decrease in harvestable surplus may require still further restriction of harvest opportunities, ever after only "subsistence uses" remain. At that point, the criteria listed in the statute would form a basis for distributing the allowable harvest among the participants in "subsistence uses."

The statutory mandate contained in AS 16.05.251(b) that sustained yield always be the paramount concern is consistent with the constitutional requirement contained in article VIII, section 4 of the Alaska Constitution. If the status of a fish stock is such that maintenance of sustained yield requires that all harvest cease, no use (including subsistence) may be allowed.

The first requirement of AS 16.05.251(b) is that the board authorize the taking of fish for "subsistence uses." The board has determined in the ten criteria that "subsistence uses"

of salmon in Cook Inlet are targeted on specific stocks during specific seasons. 5 AAC 01.597(a)(3). Thus, "subsistence fishing" must be permitted on those specific stocks during those specific seasons. No matter what the biological status of the stocks is, the board may wish to examine the fishing that has been called "subsistence fishing" to determine what segment of it is really "personal use fishing" that may be authorized reasonably on whatever stocks and in whatever seasons the board selects, under its discretionary authority in AS 16.05.251(a), rather than being mandated on specific stocks and in specific seasons.

It is implicit in the requirement that the board authorize "subsistence uses" that it have the authority to identify those uses. That task is separate from the later portions of AS 16.05.251(b) which come into play when the priority has been triggered and when the biological status of the target stocks is relevant. The Gjosund court confused the relevance of the biological status of the resource at the priority stage with the requirement that "subsistence uses" be provided at the first stage.

E. The Classification Described by and Resulting from the Application of the Criteria Do Not Violate Equal Protection

1. Equal protection standards

Although plaintiffs allege violation of both the state and federal equal protection clauses, their brief focuses only on the state test, which generally has been discussed in connection with article I, section 1 of the Alaska Constitution, providing

in part that "all persons are equal and are entitled to equal rights." See also Alaska Constitution art. VIII, § 17.

The equal protection guarantees are designed to ensure that those situated similarly with regard to the subject matter and purpose of a law will be treated equally under that law. Ketchikan Gateway Borough, Alaska v. Breed, 639 P.2d 995 (Alaska 1981). A classification must bear "a fair and substantial relationship to a legitimate governmental objective." Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1264 (Alaska 1980). However, equal protection does not demand absolute perfection in the classification system. Id. at 1267. As the court noted in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982):

> The focus of our inquiry under Alaska equal protection analysis is whether the legislative classification is a reasonable means to accomplish a legitimate state purpose.

2. The classifications described by the criteria

The basic classifications at issue in this appeal are those individuals eligible to participate in "subsistence fishing," and those individuals who are not. As discussed above in section B, use of the ten criteria results in the identification of rural communities reliant upon fish and game resources. The board has determined that people residing in rural communities reliant on fish and game resources in the Cook Inlet area are differently situated with regard to fish and game resources than individuals residing elsewhere in the Cook Inlet area. Again, as discussed above in section B, this determination is consistent

with the intent of the subsistence law, and is reasonable.

Not only is the identification of "subsistence uses" in Cook Inlet as uses by residents of rural communities reliant upon fish and game resources reasonable, but it also bears a fair and substantial relationship to a legitimate governmental objective, as required by the equal protection test. Commercial Fisheries Entry Commission v. Apokedak, supra, at 1264. State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854, 859-860 n.18 (Alaska 1978), acknowledged the critical importance in Alaska of preserving and protecting "subsistence uses," and in Kenai Peninsula Fisherman's Cooperative Association v. State, supra, at 903, the court noted that the subsistence law addressed the important issue on a statewide basis.

The classifications described by the ten criteria are "a reasonable means to accomplish a legitimate state purpose," and do not violate equal protection. Rose v. Commercial Fisheries Entry Commission, supra, at 160.

3. The classifications resulting from the application of the criteria

To the extent that plaintiffs challenge the specific results of the application of the criteria to their communities, and allege that they are "similarly situated" to those living in communities in Cook Inlet which are eligible under 5 AAC 01.597 for "subsistence uses," the equal protection issue is not ripe for review. A superior court decision which remands an issue for further proceedings is not a final judgment for purposes of appeal. City and Borough of Juneau v. Thibodeau, 595 P.2d 626,

629 (Alaska 1979). The Madison court remanded count IV, questioning the application of the ten criteria to the Madison plaintiffs, to the board with instructions to consider under 5 AAC 01.597, containing the ten criteria, any proposals to authorize "subsistence fishing" in Cook Inlet. (M File 4, at 293)

The remand occurred because plaintiffs were apparently claiming that they are similarly situated to those individuals residing in the qualifying Cook Inlet communities, English Bay, Port Graham, and Tyonek, with respect to their use of fish and game resources. See 5 AAC 01.580(a). However, on the evidence before it the board could not reach that conclusion, and neither could the Madison court. The board's findings of fact regarding subsistence fishing in Cook Inlet first discusses the communities of English Bay, Port Graham, and Tyonek, and measures them against the ten criteria, finding customary and traditional uses present. (M File 3, Exhibit L, at 1-9) Then, the board measures some of the other Cook Inlet communities against the ten criteria, and finds them all lacking on the evidence presented. (Id. at 9-10) The board's determination means that individuals residing in those communities are situated differently for the purposes of the subsistence law with regard to fish and game resources than individuals residing in English Bay, Port Graham, and Tyonek.

Specifically, the board finds that no showing had been made that a long-term, stable and reliable use pattern applied to

any community or subcommunity. The board finds that lack extremely important, viewing the other criteria which may have been demonstrated as less persuasive, in light of the absence of long-term, stable and reliable use patterns. The board acknowledges that some groups, such as the Kachemak Bay Subsistence Group, had shown the existence of a community of interest at the present time, but the board finds that the members were either too widely dispersed or were too heterogeneous to be considered identifiable as a community. The board acknowledges that in parts of Cook Inlet there was targeting on specific stocks, use of the most efficient and productive gear, reasonable geographic proximity to the town sites, and easy and direct access to the resource. However, the board points out that only the Kenaitze Indians had made an adequate showing of handling salmon by traditional modes (e.g., using all the parts of the fish, including the heads, fins, tails and eggs; drying, smoking). The board finds that no user concentration showed technique and skill transmittal within and between families, distribution throughout the entire user concentration, nor reliance on a wide range of wild resources taken in proximity to the community. (Id.)

The board did not close the door on further proposals seeking to demonstrate "subsistence uses" in Cook Inlet communities, and in fact stated:

> As with all its determination, the Alaska Board of Fisheries will consider additional information from the public during its next regulatory proposal cycle, if such information is offered. In the event adjustments to the findings or regulations are necessary, appropriate changes can be

> made at that time. However, no extension of eligibility ... is warranted on the present record.

(Id. at 10)

Since the board reasonably did not find on the evidence before it that plaintiffs were similarly situated to those residing in Cook Inlet communities authorized to participate in "subsistence fishing," and since the Madison court remanded this issue to the board, a violation of equal protection cannot be found in the board's application of the ten criteria.

F. The Board Is Authorized to Establish "Personal Use Fishing" as a Category for Regulatory Purposes

In 1982, the board established "personal use fishing" as a category which it can use in regulating fishing in the state. 5 AAC 77.001. This action is consistent with the board's statutory authorities and is reasonable, and thus, it should be upheld. Kelly v. Zamarello, supra, at 911.

AS 16.05.251(a)(6) authorizes the board to make regulations it deems necessary for "classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes." (Emphasis added.) Plaintiffs' assertion that the provision only authorizes the board to use categories established by the legislature is inconsistent with the language itself, which delegates that authority to the board.

Under AS 16.05.251(a)(6), the board may employ "other categories" only if to do so is "essential for regulatory purposes." In establishing the category of "personal use fishing," the board made specific findings on the necessity. The board

found that before the subsistence law, individuals could fulfill their personal use requirements by "subsistence fishing," but that now "subsistence fishing" is narrower in scope, and does not include all such previously authorized personal use fishing. The board found that "commercial fishing" was not the proper category for that activity, since the sale of fish is not involved. Further, "sport fishing" has become so associated with hook and line, rather than nets, that to classify personal use net fishing as sport fishing would be confusing to the public. Thus, it was necessary to establish "personal use fishing." 5 AAC 77.001(a).

Assuming the board is correct in its interpretation that the new definition of "subsistence fishing" is narrower than the previous one, it seems odd that plaintiffs would challenge the board's authority to establish "personal use fishing," since the category was established in order to provide for fishing which cannot now be called "subsistence fishing." Plaintiffs are incorrect in characterizing "personal use fishing" as a matter of "charity;" the board made clear that "personal use fishing" could be authorized whenever it "is in the broad public interest." 5 AAC 77.001(b). The board can thus authorize it in its discretion under AS 16.05.251(a), just as it does commercial fishing and sport fishing.

The board was authorized to establish "personal use fishing" as a category, since it is essential for regulatory purposes. Indeed, if it had not done so, there would be no mechanism for it to authorize fishing for personal use by set

gill nets by plaintiffs.

G. The Board Has Not Violated Plaintiffs' Substantive Due Process Rights by Not Authorizing "Subsistence Fishing" Opportunities for Them, but instead Authorizing "Personal Use Fishing"

Substantive due process, guaranteed in article I, section 7 of the Alaska Constitution, protects people against arbitrary governmental action, and encompasses "our traditional concept of fair play and substantial justice," "fundamental principles of liberty and justice," and "fundamental fairness." Green v. State, 462 P.2d 994, 996-997 (Alaska 1969). Thus, the board may not take arbitrary or unreasonable action. Kelly v. Zamarello, supra. Plaintiffs assert that they have been treated unreasonably; however, an examination of their allegations demonstrates that the board has not violated plaintiffs substantive due process rights, and has not treated them arbitrarily.

Plaintiffs first assert that they have been treated unreasonably because of the violation of the public meetings act which occurred during the December 1980 board meeting. As discussed above in section C, that violation has been cured, and is moot.

Plaintiffs next assert that they have been treated unreasonably because there was not a biological need to restrict the "subsistence fishing" that was authorized in Cook Inlet under the old definition. Plaintiffs refer to a report that purportedly confirms that "subsistence fishing" occurs in their part of the inlet, but that report speaks in the terms used in the years reported on, which were terms related to the old definition.

(G File 4, at 1-97) As discussed above in section D, the board may identify "subsistence uses," regardless of the biological status of the target stocks.

Plaintiffs third claim of unreasonable treatment is that the board in applying the ten criteria undertook an administrative function which the board is prohibited from engaging in under AS 16.05.241. That claim is based on a misconception that the board was granting and denying "subsistence fishing" opportunities to particular individuals. In fact, the board was identifying "subsistence uses," which can be participated in by anyone in Cook Inlet living in a community where "customary and traditional uses" exist. Kenai Peninsula Fisherman's Cooperative Association v. State, supra, at 901-902, noted that the board has no administrative powers, but simultaneously held that the board

> has the power to make decisions effecting the utilization of fishery resources in this state.

Id. at 903.

What the board did in applying the ten criteria was to identify "subsistence uses" and provide for them. For the 1982 season the board also identified and provided for "personal use fishing," for which any Alaska resident qualifies. 5 AAC 77.015, 5 AAC 77.546, and 5 AAC 77.547. Kenai Peninsula Fisherman's Cooperative Association v. State, supra, states that the board is not prohibited from:

> differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen.

Id. at 904. Thus, in identifying "subsistence uses" and

providing for them pursuant to AS 16.05.251(b), the board is not improperly exercising administrative powers. In fact, although plaintiffs suggest that somehow the Department of Fish and Game should apply the criteria (brief of appellant/cross-appellee at 45-46), that task has been delegated to the board, not the department.

Plaintiffs fourth assertion is that the board has treated them unreasonably by allegedly excluding them from fishing opportunities. It is true that after the board identified and provided for "subsistence uses" for the 1981 season, it did not authorize any other fishing for personal use with set gill nets for that season. At that time, the board had not yet established "personal use fishing" as a category under which it could accommodate individuals such as plaintiffs.

Additionally, the board was very cognizant of its responsibility in weighing biological factors with the interests of different user groups and making a decision that would be in the greatest public interest. The board extensively discussed its reasons for not authorizing any fishing for personal use with set gill nets for 1981, other than "subsistence fishing." (Volume 28, at 42-72) The board expressed concern that the net fishing was too efficient, and involved too many people, so that even though it had historically existed, it might not be reasonable to allow a large number of people to continue to use the most efficient gear type. (Id. at 51) The board felt that if the more efficient set gill nets harvested the fish before they

reached their home streams, a few people could benefit disproportionately, whereas the maximum benefit to the maximum people could be provided by restricting the fishing to rod and reel (sport fishing), thus allowing more fish to reach their home streams. (Id. at 44-45) The set gillnet fishing was compared to snagging, which has also been discontinued:

> I don't look at any differently then say, for instance, snagging in the sport fishery. For a long time snagging was -- was permitted in the sport fishery. The board came to a point where it was too efficient, there were too many people in it, there was harvesting at a higher rate than what the board felt was prudent as far as the conservation of the resource. And so, even though historically snagging had existed for a long time the board decided that it was just not something that could be justified as far as the conservation of the resource.
>
> And so, I look at this net fishery in a similar fashion, and in order to live up to the mandates of the constitution to -- for providing the resources for the maximum use of its people you can no long -- when you get to a point where you have a limited resource you -- you cannot continue to allow the most efficient means of harvest.

(Id. at 44) The board noted net fishermen had alternative means to meet their protein needs, and that they would have access to the resource by use of rod and reel. (Id. at 48)

In light of those reasons, the board for the 1981 season did not authorize fishing for personal use with set gill nets, other than "subsistence fishing," in Cook Inlet.

However, by the time the board considered the matter again for 1982, it had established "personal use fishing" as a category it could employ. 5 AAC 77.001. The board authorized "personal use fishing" in both the southern and central districts

of Cook Inlet, under the same individual harvest limits that had been in effect for what was called "subsistence fishing" in those areas previously. 5 AAC 77.530(a), 5 AAC 77.546 and 5 AAC 77.547.

The Madison plaintiffs would like to fish on coho salmon in the central district of Cook Inlet in the fall. Instead, the board authorized a fishery on sockeye salmon in the central district in June. (M File 6, at 365-366, ¶¶ 17, 18) A consequence of the absence of "subsistence uses" is that the board retains the discretion to authorize "personal use fishing" on whatever stocks and in whatever seasons it determines best serve the public interest, just as it retains discretion for when and where to authorize commercial fishing and sport fishing. AS 16.05.251(a). Kenai Peninsula Fisherman's Cooperative Association v. State, supra, recognized that the board is authorized to make allocation decisions. The factors upon which those allocations are based may change over time, and the allocations may shift accordingly. Such allocations are consistent with the board's statutory authority. AS 16.05.221(a) and AS 16.05.-251(b).

Thus, the board must authorize "subsistence fishing" on the specific stocks and in the specific seasons with which the "subsistence uses" are associated. See AS 16.05.251(b) and 5 AAC 01.597(a)(3). On the other hand, the board has the latitude to direct "personal use fishing" to any stock or season, as long as its decision is reasonable and not arbitrary. Kelly v.

Zamarello, supra, at 911. The Madison court determined that the shift from the fall coho to the summer sockeye was reasonable and not arbitrary. (M File 6, at 368-369, ¶¶ 11, 12)

The plaintiffs finally assert that they have been treated unreasonably because particular board members allegedly had a biased attitude toward them. 19/ The incidents that plaintiffs rely upon to attempt to demonstrate the "unreasonable" attitude of particular board members all involve board action that plaintiffs did not like. The board did not authorize "subsistence fishing" for plaintiffs, but the criteria that the board used in that process were consistent with the intent of the subsistence law and reasonable, and under the remand to superior court, plaintiffs are free to submit proposals to the board and show why, under the criteria, they do in fact engage in "subsistence uses." See sections B, D, and E above.

It is true that no fishing for personal use with set gill nets was authorized for plaintiffs in 1981, but as the earlier discussion shows, the board based that action on resource

---

19/ AFN asserts that plaintiffs are alleging that the board as an institution suffers from unconstitutional bias. (Brief of intervenor/amicus curiae at 37-45.) That is not an accurate characterization of plaintiffs' allegations, which instead are directed at the attitudes of particular board members. For example, the contempt allegations in Gjosund were dismissed by stipulation "based upon a significant change in the membership and leadership of the [board]..." (M File 7, at 371) AFN asks that the purported issue be remanded to superior court to develop a record. In fact, the reason there is no record is that no such issue has been raised or briefed in either Gjosund or Madison.

and allocation concerns. However, before 1982, the board reconsidered, and authorized "personal use fishing" in which plaintiffs can participate.

The "personal use fishing" authorized by the board in the central district of Cook Inlet is on the summer sockeye, instead of the fall coho preferred by plaintiffs, but, as discussed above, that decision is within the discretion of the board and reasonable. AS 16.05.251(a). (M File 6, at 368-369, ¶¶ 11, 12)

Plaintiffs may not have made the decisions that the board made on these matters. That does not mean, however, that the board decisions were arbitrary, and, in fact, as the discussion shows, the decisions were reasonable.

Thus, the actions objected to by plaintiffs do not violate substantive due process.

VI. CONCLUSION

This appeal is not about mere semantics. It is about important legislative changes in the definition of "subsistence fishing" which are being put into effect in a reasonable manner consistent with the legislative intent to protect rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area. In Cook Inlet, "subsistence fishing" is now being authorized for rural communities reliant upon fish and game resources, and "personal use fishing" is being authorized for individuals, such as plaintiffs, who do not live in such reliant communities.

The state requests that the holdings of the Madison court be affirmed, that the holding of the Gjosund court which is the subject of this appeal be reversed, and that the request by AFN for a remand on an issue that is not at issue in this consolidated appeal be denied.

DATED: January 26, 1984

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ATTORNEY GENERAL

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, et al., Appellants, vs. ALASKA DEPARTMENT OF FISH AND GAME and ALASKA BOARD OF FISHERIES, Appellees, THE ALASKA FEDERATION OF NATIVES, Intervenor.	Supreme Court No. 6824 No. 7181 Superior Court No. 3KN 81-542
ALASKA DEPARTMENT OF FISH AND GAME, et al., Appellants, vs. LOUIS GJOSUND, et al., Appellees, THE ALASKA FEDERATION OF NATIVES, Amicus Curiae.	Supreme Court No. 7410 Superior Court No. 3HO 80-92 No. 3HO 77-11014 APPEALED FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT, HONORABLE VICTOR CARLSON

BRIEF OF INTERVENOR/AMICUS CURIAE

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Filed in the Supreme Court
in Anchorage, State of Alaska
on this 27th day of December,
1983.

ROBERT B. BACON
Clerk of Court

TABLE OF CONTENTS

Page

TABLE OF CASES AND OTHER AUTHORITIES..... iii

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS..... vii

STATEMENT OF THE CASE..... 1

THE COURSE OF PROCEEDINGS IN THE TRIAL COURT..... 13

ISSUES PRESENTED FOR REVIEW..... 16

ARGUMENT..... 17

A. INTRODUCTION..... 17

B. THE CRITERIA ADOPTED BY THE BOARD OF FISHERIES TO IDENTIFY "SUBSISTENCE USES" OF COOK INLET SALMON STOCKS ARE CONSISTENT WITH THE INTENT OF A.S. 16.05.251(b) AND A.S. 16.05.940(26)..... 19

1. INTRODUCTION..... 19

2. IN DETERMINING WHETHER 5 A.A.C. 01.597 IS CONSISTENT WITH THE LEGISLATURE'S INTENT WHEN IT ENACTED A.S. 16.05.251(b) AND A.S. 16.05.940(26), THIS COURT MAY SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE BOARD OF FISHERIES..... 20

3. ALTHOUGH THE COURT MAY SUBSTITUTE ITS JUDGMENT FOR THE JUDGMENT OF THE BOARD OF FISHERIES, THE BOARD'S INTERPRETATION OF A.S. 16.05.940(26) IS A VALUABLE AID WHICH SHOULD BE AFFORDED CONSIDERABLE DEFERENCE..... 21

4. THE LEGISLATIVE HISTORY OF THE SUBSISTENCE STATUTE AND OF EARLIER STATUTES WHICH ARE IN PARI MATERIA WITH THE SUBSISTENCE STATUTE INDICATES THAT 5 A.A.C. 01.597 IS CONSISTENT WITH THE INTENT OF A.S. 16.05.251(b) AND A.S. 16.05.940(26)..... 22

Page

5. THE HISTORY OF THE TIMES DURING WHICH THE LEGISLATURE ENACTED THE SUBSISTENCE STATUTE INDICATES THAT 5 A.A.C. 01.597 IS CONSISTENT WITH THE INTENT OF A.S. 16.05.251(b) AND A.S. 16.05.940(26)..... 29

6. CONCLUSION..... 33

C. THE ALASKA FEDERATION OF NATIVES HAS NOT TAKEN A POSITION ON THE VALIDITY OF THE POLICY ADOPTED BY THE BOARD OF FISHERIES AT ITS DECEMBER 1980 AND MARCH 1981 MEETINGS..... 33

D. EQUAL PROTECTION..... 34

1. THE BOARD'S DETERMINATION THAT THE SET GILL NET FISHERY IN WHICH THE PLAINTIFFS PARTICIPATED PRIOR TO THE ENACTMENT OF THE SUBSISTENCE STATUTE IS NOT A "SUBSISTENCE USE" FISHERY DID NOT VIOLATE THE PLAINTIFFS' RIGHT TO EQUAL PROTECTION..... 34

E. DUE PROCESS..... 35

1. THE SUPERIOR COURT PROPERLY REMANDED THE FACTUAL QUESTION OF WHETHER THE SET GILL NET FISHERY IN WHICH THE PLAINTIFFS PARTICIPATED PRIOR TO THE ENACTMENT OF THE SUBSISTENCE STATUTE IS A "SUBSISTENCE USE" FISHERY..... 35

2. THE PLAINTIFFS' CLAIM THAT THE BOARD OF FISHERIES IS NOT AN IMPARTIAL TRIBUNAL SHOULD BE REMANDED TO THE SUPERIOR COURT..... 37

F. A.S. 16.05.251(a) AUTHORIZES THE BOARD OF FISHERIES TO ADOPT A REGULATION ESTABLISHING A "PERSONAL USE FISHING" CATEGORY FOR REGULATORY PURPOSES..... 46

Page

G. THE BOARD OF FISHERIES' DECISION TO AUTHORIZE A "PERSONAL USE" FISHERY IN THE CENTRAL DISTRICT OF COOK INLET WHICH TARGETS ON SOCKEYE SALMON RATHER THAN COHO SALMON DID NOT VIOLATE THE PLAINTIFFS' RIGHT TO DUE PROCESS OF LAW..... 48

H. WITH RESPECT TO THE PERSONAL USE SET GILL NET FISHERY WHICH THE BOARD OF FISHERIES AUTHORIZED IN THE SOUTHERN DISTRICT OF COOK INLET PRIOR TO THE ENACTMENT OF THE SUBSISTENCE STATUTE, THE BOARD IS AUTHORIZED TO DETERMINE WHETHER THE FISHERY IS OR IS NOT A "SUBSISTENCE USE" FISHERY, REGARDLESS OF WHETHER THE BIOLOGICAL STATUS OF THE SALMON STOCKS WHICH ARE THE TARGET OF THE FISHERY DOES OR DOES NOT REQUIRE IT TO DO SO..... 49

CONCLUSION..... 52

TABLE OF CASES AND OTHER AUTHORITIES

CASES

Alvarado v. State, 486 P.2d 891 (Alaska 1971)..... 26

Berryhill v. Gibson, 331 F. Supp. 122 (D.C. Ala. 1971)..... 43

Carter v. Carter Coal Co., 298 U.S. 238,

56 S.Ct. 855, 80 L.Ed. 1160 (1936)..... 42, 44

Carver v. Gilbert, 387 P.2d 928 (Alaska 1963)..... 30

Gibson v. Berryhill, 411 U.S. 564,

93 S.Ct. 1689, 36 L.Ed.2d 488 (1973)..... 43

Green v. State, 462 P.2d 994 (Alaska 1969)..... 36-37

Herscher v. State, 568 P.2d 996 (Alaska 1977)..... 35, 48, 51

Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977)..... 26

Horowitz v. Alaska Bar Ass'n, 609 P.2d 39 (Alaska 1980)..... 35

Isakson v. Rickey, 550 P.2d 359 (Alaska 1976)..... 35

Page

Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971)..... 21-22

Kenai Peninsula Fisherman's Cooperative Ass'n v. State, 628 P.2d 897 (Alaska 1981)..... 4, 46-47, 50-51

Kimotoak v. State, 584 P.2d 25 (Alaska 1978)..... 35

Northern Commercial Co. v. United States, 4 Alaska Fed. 245 (9th Cir. 1941)..... 29

North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978)..... 22

Sekinoff v. United States, 283 F. 38 (Alaska 1922)..... 30

State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 254 P.2d 29 (Calif. 1953)..... 41-42, 44

State v. Bundrant, 546 P.2d 530 (Alaska 1976)..... 25

State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978)..... 28

Timberlev v. Jeffries, Alaska Supreme Court No. 2765, (December 16, 1983)..... 27

Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)..... 22

Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982)..... 21-22

FEDERAL STATUTES

Pub. L. No. 96-487 (1980)..... 29

Pub. L. No. 85-508 (1958)..... 38-39

16 U.S.C. 3111-3126..... 29-31

STATE CONSTITUTION

Alaska Const., art. VIII, sec. 2 ..... 48, 50

STATE STATUTES

ch. 151 SLA 1978 5

ch. 269 SLA 1976 ..... 25-26, 28, 35

ch. 206 SLA 1975 ..... 1, 40

ch. 199 SLA 1975 25

ch. 131 SLA 1960 1

ch. 94 SLA 1959 ..... 1, 39-40

ch. 63 SLA 1957 38

A.S. 16.05.221(a) 44, 50

A.S. 16.05.221(b) 50

A.S. 16.05.251(a) ..... 12, 16, [illegible] 21, 41, 46-47, 50

A.S. 16.05.251(b) 6, 9, 11 20-22, 29, 33, 41

A.S. 16.05.255(a) 50

A.S. 16.05.255(b) 33

A.S. 16.05.257 ..... 25, 29

A.S. 16.05.940(17) 5

A.S. 16.05.940(26) 5-6, 11, 16, 20-23, 29-30, 33, 37

A.S. 16.43.050 45

A.S. 44.62.030 21

STATE RULES OF EVIDENCE

Rule 201 40

STATE REGULATIONS

5 A.A.C. 01.597 ..... 11-12, 16, 18-20, 22, 24, 28-29, 33-35, 37, 41

5 A.A.C. 77.001 ..... 12, 46

5 A.A.C. 77.546 12

5 A.A.C. 77.547 ..... 12, 48

5 A.A.C. 99.010 ..... 12, 19

FEDERAL LEGISLATIVE MATERIALS

House Report No. 95-1045, 95th Cong., 2d Sess. 1978 ... 30-32

Hearings on H.R. 39 et al. Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 1978 39-40

104 Cong. Rec. 9747-9750 (May 28, 1958) 39

126 Cong. Rec. H10545-H10547 (daily ed. November, 12, 1980) 32

STATE LEGISLATIVE MATERIALS

HB 804, 9th Leg., 2d Sess. (1976) 26-27

HB 960, 10th Leg., 2d Sess. (1978) 23

1975 House Journal, 9th Leg., 1st Sess. 25

1976 House Journal, 9th Leg., 2d Sess. 26

1983 Senate Journal, 13th Leg., 1st. Sess. 41

Report of the Special Committee on Subsistence, Alaska House of Representatives, 12th Leg., 1st Sess. (1981) 28

Alaska House of Representatives, Bill History and Journal Index, Tenth Legislature 1977-78 23

Recording of Proceedings, 9th Leg., 2d Sess., Tape 130 H 27

OTHER MATERIALS

Page

Chappell, Battle Over Kenai King Salmon Brews, Anchorage Daily News, July 29, 1983 45

Executive Order No. 10857 (January 5, 1960) 40

Rollins, Census Alaska: Numbers of Inhabitants, 1792-1970, University of Alaska Anchorage Library, (1978) 2

U.S. Dept. of Commerce, 1980 Census of Population and Housing (Alaska PHC80-V-3) 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

CONSTITUTIONAL PROVISIONS

Alaska Const., art. VIII, sec. 2

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

FEDERAL STATUTES

16 U.S.C. 3113

> As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term -
>
> (1) "family" means all persons related by blood, adoption, or any person living within the household on a permanent basis; and
>
> (2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses -
>
> (A) for other fish or wildlife or their parts; or
> (B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

sec. 703, H.R. 39, 95th Cong., 2d Sess. (1978)(The version of H.R. 39 passed by the House of Representatives in 1978).

As used in this Act, the term "subsistence uses" means the noncommercial (except as provided under paragraph (2)) customary and traditional utilization within the State of wild, renewable resources for -

(1) direct personal or family use for food, shelter, fuel, clothing, tools, or transportation;

(2) the making and selling of handicraft articles (including clothing), but only out of nonedible byproducts of fish and wildlife taken for such personal or family use; or

(3) customary trade, barter, or sharing among subsistence users for personal or family use.

STATE STATUTES

sec. 4, ch. 131 SLA 1960

"Subsistence fishing": the taking, fishing for or possession of fish, shellfish, or other fishery resources for personal use and not for sale or barter, with gill net, seine, fish wheel, long line, or other means as defined by the Board.

sec. 14, ch. 151 SLA 1978

A.S. 16.05.940(17) is amended to read:

(17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries.

A.S. 16.05.05.221(a)

For the purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

A.S. 16.05.251

(a) The Board of Fisheries may make regulations it considers advisable in accordance with the Administrative Procedure Act (A.S. 44.62.010 - 44.62.650) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishment of open and closed seasons and areas for the taking of fish;

(3) setting quotas and bag limits on the taking of fish;

(4) establishment of the means and methods employed in the pursuit, capture and transport of fish;

(5) establishment of marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;

(7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish research, management, education and information and to train men for fish management;

(10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(11) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(12) establishment of the times and dates during which the issuance of fishing licenses, permits and

registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under A.S. 16.43.010 - 16.43.380.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (A.S. 44.62.010 - 44.62.650) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources.

A.S. 16.05.940(26)

"subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis.

STATE REGULATIONS

5 A.A.C. 01.597

(a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used

to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

(1) a long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g. regulatory action or fluctuations in resource abundance;

(2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;

(3) a use pattern associated with specific stocks and seasons;

(4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;

(5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;

(6) a use pattern occurring in locations with easiest and most direct access to the resources;

(7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;

(8) a use pattern which includes the intergenerational transmission of activities and skills;

(9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and

(10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residence.

(b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.

(c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests.

5 A.A.C. 77.001

(a) The Board of Fisheries finds that

(1) before the enactment of the state's subsistence priority law in ch. 151 SLA 1978, an individual could fulfill his personal use needs for fish under subsistence fishing regulations;

(2) the state's subsistence priority law changed the definition of subsistence in a manner that now precludes some individuals from participating in customary and traditional subsistence fisheries and efficiently harvesting fish for their personal use;

(3) there presently are areas of the state with harvestable surpluses of fish in excess of both spawning escapement needs and present levels of subsistence, commercial and sport uses; and

(4) it is necessary to establish a new fishery classified as "personal use" because

(A) since the sale of fish is not appropriate or permissible, this fishery cannot be classified as commercial;

(B) since the use is not rural customary and traditional use this fishery cannot be classified as subsistence; and

(C) since the gear for this fishery is often different from that historically associated with sport fishing, this fishery should not be classified as a sport fishery, to prevent confusion among the public.

(b) It is the intent of the board that the taking of fish under 5 A.A.C. 77 will be allowed when that taking does not jeopardize the sustained yield of a resource and either does not negatively impact an existing resource use or is in the broad public interest.

(c) - (e) (These subsections are not pertinent).

(f) In this chapter, "personal use fishing" means the taking, attempting to take, or possession of finfish, shellfish or aquatic plants by an individual for consumption as food or use as bait by that individual or his immediate family.

5 A.A.C. 99.010

(a) In applying a subsistence priority, the Board of Fisheries and the Board of Game will provide for conservation and development of Alaska's fish and game resources according to the following procedures:

(1) each board will assess the biological status of fish and game resources and determine whether a surplus may be harvested during a regulatory year consistent with the conservation and development of the resources on the sustained yield principle and compatible with the public interest;

(2) each board will identify subsistence uses of fish and game resources, recognizing that subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing.

(b) Customary and traditional subsistence uses by rural Alaska residents will be identified by use of the following criteria:

(1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in specific seasons of each year;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community

of persons, including customary trade, barter, sharing, and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection; and

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and which provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

(c) After identifying subsistence uses based upon the criteria set out in (b) of this section, each board will determine the approximate amount of fish or game necessary to provide fully for reasonable opportunities to engage in these customary and traditional uses.

(d) Each board will adopt regulations that provide an opportunity for the subsistence taking of fish or game resources in amounts sufficient to provide for the customary and traditional uses identified in (b) of this section, and consistent with sound conservation and management practices. In no instance may the subsistence taking jeopardize or interfere with the maintenance of a specific fish stock or game population on a sustained-yield basis.

(e) Each board will, in its discretion, adopt regulations that provide an opportunity for non-subsistence uses of the resource, to the extent that the non-subsistence uses do not jeopardize or interfere with the conservation and development of fish or game resources on a sustained-yield basis, or with the opportunity for taking these resources for customary and traditional subsistence uses as provided in (d) of this section.

(f) When circumstances such as increased numbers of users, weather, predation, or loss of habitat may jeopardize the sustained yield of a fish stock or game population, each board will exercise all practical options for restricting non-subsistence harvest before subsistence uses are restricted. If all available restrictions for non-subsistence uses have been implemented and further restrictions are needed, each board will reduce the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who

(1) live closest to the resource;

(2) have the fewest available alternative resources; and

(3) have the greatest customary and direct dependence upon the resource.

(g) In no event, however, will a board allow uses which will jeopardize or interfere with the conservation and management of fish stocks or game populations on a sustained-yield basis.

I.

STATEMENT OF THE CASE

In 1959, the Alaska legislature established a Board of Fish and Game (hereinafter "the Board") and delegated the Board authority to adopt "such rules and regulations as it deems advisable" relating to the taking of fish stocks and game populations in Alaska. sec. 6, art. II, ch. 94 SLA 1959.[1] The 1959 statute also included definitions of "sport fishing" and "commercial fishing". In 1960, the legislature added the following definition of "subsistence fishing":

> "Subsistence fishing": the taking, fishing for or possession of fish, shellfish, or other fishery resources for personal use and not for sale or barter, with gill net, seine, fish wheel, long line, or other means as defined by the Board.
> sec. 4, ch. 131 SLA 1960 (Emphasis added).

Based on the language of that definition, any Alaskan who used a set gill net to obtain fish for personal use was "subsistence fishing" regardless of whether he lived in Selawik, Anchorage, or Kenai. And the "as it deems advisable" regulatory standard afforded the Board near unfettered discretion to allocate access to salmon stocks among subsistence, sport, and commercial fishermen.

This relatively simple regulatory system reflected Alaska's

1/ In 1975, the legislature divided the Board into two seven member boards. ch. 206 SLA 1975. However, the legislature retained the whatever regulations a board "considers advisable" rulemaking standard.. With respect to actions taken after 1975, "the Board" refers to actions taken by the seven member Board of Fisheries.

small population and abundant fishery resources. In 1960, the population of the Anchorage area was only 82,833 and the population of the Kenai Peninsula was only 6,097.[2]

Because of the lack of fishing pressure, the Board provided liberal opportunities for residents of Anchorage and the Kenai Peninsula to go "subsistence fishing". In the northern district of Cook Inlet the entire northern shoreline, the west side of Fire Island, and most of the shoreline between Boulder Point and the mouth of Turnagain Arm was open to "subsistence fishing". In the central district, Kalgin Island, most of the shoreline on the west side of Cook Inlet, and most of the shoreline on the east side of Cook Inlet between Ninilchik and Boulder Point was open to "subsistence fishing". In the southern district, the shoreline south of Anchor Point, around the Homer Spit, and then around Kachemak Bay was open to "subsistence fishing".[3]

But then the population of southcentral Alaska began to explode. Between 1960 and 1980 the population of the Anchorage area more than doubled to 173,017 and the population of the Kenai Peninsula almost quadrupled to 22,473.[4]

2/ Rollins, Census Alaska: Numbers of Inhabitants, 1792-1970, University of Alaska Anchorage Library (1978).

3/ See Gjosund File No. 4, pp. 24, 29, 69. The Madison and Gjosund Records on Appeal are hereinafter designated "MA" and "GJ". A map of the boundaries of the nothern, central, and southern districts of Cook Inlet is located at GJ File No. 4, p. 16.

4/ U.S. Dept. of Commerce, 1980 Census of Population and Housing (Alaska PHC80-V-3).

The major effect of such rapid population growth on the politics of fishery management was to bring tens of thousands of new sport fishermen to the rivers of the Kenai Peninsula to compete with commercial fishermen for access to valuable king and coho (silver) salmon stocks. The demands by sport fishermen for access to those stocks placed new and unfamiliar psychological and political pressures on members of the Board. And the relatively de minimus number of Alaskans on the Kenai Peninsula who engaged in "subsistence fishing" began to bear the brunt of the Board's inability to cope with those pressures.

For reasons known only to itself, in 1976 the Board closed the southern district of Cook Inlet to "subsistence fishing" for the 1977 fishing season. Homer residents filed a lawsuit challenging the closure and the Superior Court determined that the Board's decision to do so was without a substantiated rational basis. The Court then enjoined the Board from eliminating "subsistence net fishing" in the southern district and reinstated the regulations for the fishery which had been in effect prior to December 1976.[5]

In 1977, the Board responded to the political conflict between sport and commercial fishermen by adopting a comprehensive management policy for Cook Inlet salmon stocks. The heart of the policy was the Board's decision to manage all stocks which move through Cook Inlet before June 15th and after August 15th for the

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5/ GJ File No. 2, pp. 19, 22.

benefit of sport fishermen and to manage all stocks which move through Cook Inlet between those dates for the benefit of commercial fishermen. The practical effect of the policy was to allocate king and coho salmon (which move through Cook Inlet during the spring and fall) to sport fishermen and sockeye salmon (which move through Cook Inlet during the middle of the summer) to commercial fishermen. See Kenai Peninsula Fisherman's Co-operative Ass'n v. State, 628 P.2d 897 (Alaska 1981).

The third group of fishermen who harvested Cook Inlet stocks, i.e. Alaskans who engaged in "subsistence fishing", received little consideration during the development of the policy.[6]

Regulations implementing the policy were adopted by the Board for the 1978 fishing season. Id. The regulations closed the central district to commercial fishing after August 15th. However the district remained open to "subsistence fishing". As a result, some commercial fishermen who previously had harvested coho salmon for personal use during the now-closed commercial fishing periods applied for "subsistence fishing" permits.[7] That, combined with increased publicity about the fishery, resulted in a significant increase in the number of "subsistence fishing" permits issued during the 1978 fishing season.[8]

In response, the Board made a number of regulatory changes

6/ GJ File No. 4, pp. 19, 22.

7/ Id. 19.

8/ Id. 20.

for the 1979 fishing season intended to limit access to the "subsistence" fishery. The new regulations reduced the length of gill nets, the number of fishing periods, and the area of shoreline available for "subsistence fishing". The regulations also moved the "subsistence fishing" season in the central district from August 1 - September 21 to June 23 - August 15.[9] The effect of the latter change was to target the "subsistence" fishery on sockeye salmon (harvested primarily by commercial fishermen) rather than coho salmon (harvested primarily by sport fishermen).

At the same time the Board was responding to political pressures created by commercial and sport fishermen, the legislature enacted ch. 151 SLA 1978 (hereinafter "the subsistence statute"). The subsistence statute made a number of important changes to title 16 of the Alaska Statutes intended to identify and protect "subsistence uses" of fish stocks and game populations. Three important changes were:

1. The enactment of a definition of "subsistence uses" of fish stocks and game populations. A.S. 16.05.940(26).

2. The amendment of the definition of "subsistence fishing". A.S. 16.05.940(17).

3. The enactment of a statutory requirement that absent a showing that to do so would jeopardize sustained yield, the Board shall (as op-

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9/ Id. 26-27.

posed to "may") adopt regulations authorizing "subsistence uses" of fish stocks, and, if necessary, afford such uses a priority over other uses. A.S. 16.05.251(b). See also A.S. 16.05.255(b).

The subsistence statute altered the Board's authority to regulate fishing for Cook Inlet salmon stocks in several significant ways. Although the original definition of "subsistence fishing" included any Alaskan who fished with a set gill net for "personal use", the amended definition limited the purview of "subsistence fishing" to fishing with a set gill net for "subsistence uses". The definition of "subsistence uses" is considerably more narrow than "personal use":

> "Subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption... A.S. 16.05.940(26). (Emphasis added).

In other words, fishing with a gill net to obtain fish for personal use is no longer "subsistence fishing" unless the activity is also "customary and traditional". However, the subsistence statute does not define the phrase "customary and traditional" and during the 1979 and 1980 fishing seasons the Board did not attempt to do so.[10]

Prior to the opening of the 1980 season the Board did, how-

10/ Although the subsistence statute was enacted into law at the beginning of the 1978 fishing season, its effective date was October 10, 1978 - a month after the end of most fishing activity.

ever, renew its effort to restrict fishermen such as the plaintiffs who prior to the enactment of the subsistence statute had engaged in "subsistence fishing". The Board closed the entire shoreline of the Kenai Peninsula in the central district to "subsistence fishing" but opened a few miles of inaccessible, boulder strewn beach in the southern portion of the northern district which had not been used by commercial fishermen because among other reasons it was too dangerous to do so.[11] In the southern district the Board further reduced the length of gill nets and closed the Homer Spit and the shoreline immediately east of the Spit to "subsistence fishing".[12] The Board's actions produced two lawsuits.

The first was Gjosund v. Alaska Department of Fish and Game, 3HO 80-92 Civil, filed by Homer residents in an attempt to reopen the Homer Spit to "subsistence fishing" and to eliminate the restrictions on the length of gill nets. After a hearing, the Superior Court granted the requested relief.[13]

The second was Francis v. Alaska Department of Fish and Game, 3KN 80-546 Civil, filed by Kenai residents. Francis was settled out of court when ADF&G agreed to open several areas of shoreline in the central and northern districts for additional periods of

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11/ GJ File No. 4, p. 30.

12/ Id. 69.

13/ GJ File No. 2, pp. 185-186.

"subsistence fishing".

At its December 1980 meeting the Board for the first time began the work necessary to conform its regulation of "subsistence fishing" in Cook Inlet to the legislature's modification of that term in the subsistence statute. As part of that effort, the Board adopted a policy setting forth criteria for the identification of "subsistence uses" of Cook Inlet salmon stocks.[14] The criteria were intended to identify set gill net fisheries around Cook Inlet conducted by residents of rural communities in which the harvest of fish stocks and game populations for personal and family use is a significant part of the economy of the community.[15] Although the Board heard considerable testimony about the uses of Cook Inlet salmon stocks by residents of Kenai Peninsula communities, because the criteria were adopted at the same meeting during which the testimony was presented, residents of the Kenai Peninsula were not afforded a fair opportunity to present evidence that their communities satisfied the criteria.

At its March 1981 meeting the Board received written testimony from the public about "subsistence uses" of Cook Inlet salmon stocks, but limited oral testimony.[16] The Board then adopted a slightly revised version of the criteria[17] and written findings

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14/ GJ File No. 2, pp. 30-31.

15/ See GJ File No. 2, p. 258 (Paragraph No. 18); MA File No. 1, p. 56 (Paragraph No. 10).

16/ GJ File No. 1, pp. 2727-2784.

17/ MA File No. 3 (Exhibit "I").

which stated that no communities on the Kenai Peninsula satisfied the criteria.[18] The findings meant that none of the personal use set gill net fisheries on the Kenai Peninsula authorized by the Board prior to 1980 were "subsistence use" fisheries which the Board was compelled to authorize pursuant to A.S. 16.05.251(b). After arriving at that conclusion, the members of the Board then voted to eliminate all fishing with set gill nets for personal use on the Kenai Peninsula; a decision which resulted in a flurry of new lawsuits.

On May 29, 1981, the Gjosund plaintiffs filed a pleading in the Superior Court in Homer entitled a "petition" which requested injunctive and declaratory relief and an order holding the Board in contempt of the 1980 injunction.[19] On August 4, 1981, the Superior Court issued a preliminary injunction compelling the defendants to authorize "subsistence fishing" in areas along the shoreline of the southern district which had been open to such fishing during 1980.

On August 13, 1981, ten residents of the central district filed Madison v. Alaska Department of Fish and Game[20] in the

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18/ MA File No. 2, pp. 32-41. The Board did, however, determine that set gill net fishing for personal use by residents of the communities of Tyonek, English Bay, and Port Graham are "subsistence uses" of Cook Inlet salmon stocks. The validity of that determination is not at issue in this appeal.

19/ GJ File No. 2, pp. 1-9.

20/ MA File No. 1, pp. 40-43.

Superior Court in Kenai. The plaintiffs' first claim for relief alleged that the criteria adopted by the Board to identify "subsistence uses" of Cook Inlet salmon stocks were inconsistent with the intent of the statutory definition of "subsistence uses". The second claim alleged procedural irregularities in the Board's adoption of the criteria. The third claim alleged that the Board's decision to close the central district to fishing with set gill nets for personal use violated the plaintiffs' rights to equal protection and due process. And the fourth claim alleged that the closure violated the subsistence statute and several sections of the Alaska Constitution.

On August 19, 1983, the Superior Court issued a preliminary injunction which ordered the defendants to open a "non-commercial" set gill net personal use fishery in the central district.[21] Although it was requested by the plaintiffs to do so, the Court specifically refused to characterize the fishery which it had ordered opened as a "subsistence use" fishery.

The Alaska Federation of Natives (hereinafter "AFN") intervened as a party[22] and joined with the defendants in filing a motion for summary judgment on the first claim for relief. The plaintiffs responded by filing a motion for summary judgment on all four of their claims. On December 10, 1981, the Superior Court granted AFN's and the defendants' motions for summary judgment on the first

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21/ MA File No. 1, pp. 40-43.

22/ AFN's motion to intervene and the order granting the motion are not a part of the Record on Appeal.

claim.[23] The Court determined that the criteria were consistent with the intent of A.S. 16.05.251(b) and A.S. 16.05.940(26). The Court later adopted a Conclusion of Law which states that:

> The intent of A.S. 16.05.251(b) and .940(26) is to provide for and protect personal use, primarily net, fisheries conducted by persons who reside in rural communities which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community. 24

Shortly thereafter at its December 1981 meeting, the Board adopted the criteria as a regulation. 5 A.A.C. 01.597.

On March 8, 1982, the Gjosund Court issued an opinion which also upheld the validity of the criteria.[25] But the Court then inexplicably concluded that the Board can not apply the criteria to determine whether the personal use set gill net fishery in the southern district is a "subsistence use" fishery unless it first determines that the biological condition of the salmon stocks which are the target of the fishery requires it to do so. The Court also characterized the Gjosund plaintiffs' harvest activities as "subsistence fishing".

At its March 1982 meeting the Board recognized the unfairness of eliminating all personal use set gill net fishing on the Kenai Peninsula merely because such fishing may no longer be "subsist-

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23/ MA File No. 1, pp. 45-49.

24/ Id. 57 (Paragraph No. 4).

25/ GJ File No. 2, pp. 221-245.

ence fishing". But such fishing also is not "sport fishing" or "commercial fishing".

To alleviate the effects of that legislative oversight, the Board established a new category for regulatory purposes entitled "personal use fishing". 5 A.A.C. 77.001. The Board also adopted regulations authorizing "personal use fishing" on the Kenai Peninsula for sockeye salmon in the central district and coho salmon in the southern district. 5 A.A.C. 77.547 and 77.546.

The Board also met in joint session with the Board of Game and adopted a comprehensive joint regulation which establishes criteria for the identification of "subsistence uses" of all fish stocks and game populations in the state. 5 A.A.C. 99.010. The criteria were drawn in large measure from the criteria developed by the Board in 5 A.A.C. 01.597.

On March 5, 1982, the Madison Court dismissed the plaintiffs' second claim for relief as moot.[26] On August 30, 1982, the Court issued its decision, and later Findings of Fact and Conclusions of Law, relating to the third and fourth claims.[27] The Court inter alia determined that A.S. 16.05.251(a) delegates the Board authority to establish a "personal use fishing" category, that the Board's allocation of salmon stocks among personal use, sport, and commercial fishermen must be done in a manner consistent with due process considerations of fundamental fairness, that the

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26/ MA File No. 4, p. 256.

27/ MA File No. 6, pp. 361-369.

Board's decision not to authorize any "personal use fishing" in the central district during the 1981 fishing season was fundamentally unfair and a violation of the plaintiffs' right to due process of law, but that the Board's decision to authorize "personal use fishing" in the central district during the 1982 season for sockeye salmon rather than coho salmon was not fundamentally unfair and not a violation of the plaintiffs' right to due process of law. The Court remanded the fourth claim to the Board with instructions to consider any regulatory proposals, and any evidence presented by the plaintiffs, that persons who fish in the central district with set gill nets for personal use are engaged in "subsistence uses" of Cook Inlet salmon stocks.[28]

II.

THE COURSE OF PROCEEDINGS IN THE TRIAL COURT

A. Madison v. Alaska Department of Fish and Game

On August 13, 1981, the plaintiffs filed a complaint in the Superior Court in Kenai setting forth four claims for relief.[29] After a hearing on the same day, the Court issued a preliminary injunction which ordered the opening of a "non-commercial" set gill net fishery in the central district of the Kenai Peninsula.[30] AFN participated as amicus curiae in the hearing on the injunction and later intervened as a party.

28/ MA File No. 4, p. 293.

29/ MA File No. 1, pp. 1-5.

30/ Id. 40-43.

On September 18, 1981, AFN and the defendants filed motions for summary judgment on the first claim for relief. The plaintiffs then filed a motion for summary judgment on all four of their claims. On October 28, 1981, the Court heard oral argument on the cross-motions for summary judgment on the first claim.

On November 9, 1981, the defendants moved to dismiss the second claim as moot.[31]

On December 10, 1981, the Court granted AFN's and the defendants' motions for summary judgment on the first claim.[32] On March 5, 1982, the Court entered Findings of Fact and Conclusions of Law relating to the first claim and dismissed the second claim as moot.[33] final J MA # 1, p 57

On June 21, 1982, the defendants filed a motion to remand the fourth claim to the Board.[34] On August 30, 1982, the Court denied the plaintiffs' motion for summary judgment on the third and fourth claims and granted the defendants' motion to remand the fourth claim.[35] [illegible] findings - Jun 24, 1983 MFile 6 361-369

The plaintiffs timely filed Notices of Appeal.[36] final J - MA # 5-322

31/ MA File No. 4, p. 296.

32/ MA File No. 1, pp. 45-48.

33/ MA Files No. 1, pp. 54-57, and No. 4, p. 296.

34/ MA File No. 4, p.293.

35/ Id. 293-295.

36/ MA Files No. 1, p. 50, and No. 4, p. 297.

B. Alaska Department of Fish and Game v. Gjosund

On May 29, 1981, the plaintiffs filed a pleading entitled a "petition" in the Superior Court in Homer.[37] On August 4, 1981, the Court issued a preliminary injunction which ordered the opening of a personal use set gill net fishery in the southern district. On March 8, 1982, the Court issued a decision and a permanent injunction requiring the defendants not to interfere with the fishery.[38]

The defendants timely filed a Notice of Appeal.[39]

C. Consolidation

On January 21, 1983, the Alaska Supreme Court ordered the consolidation of all appeals pending in the two above-described cases. On April 1, 1983, the Court granted AFN's motion to participate as amicus curiae in Alaska Department of Fish and Game v. Gjosund.

37/ ... File No. 2, pp. 1-9.

38/ Id. 221-245.

39/ Id. 262.

III.

ISSUES PRESENTED FOR REVIEW

A. Madison v. Alaska Department of Fish and Game

1. What is the proper standard of judicial review of the validity of 5 A.A.C. 01.597?

2. Are the criteria in 5 A.A.C. 01.597 for the identification of "subsistence uses" of Cook Inlet salmon stocks consistent with the intent of A.S. 16.05.251(b) and A.S. 16.05.940(26)?

3. Did the Board's adoption of 5 A.A.C. 01.597 moot the plaintiffs' second claim for relief?

4. Were the plaintiffs denied their rights to equal protection and due process of law when the Board determined that the personal use set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute is not a "subsistence use" fishery as defined by A.S. 16.05.940(26)?

5. Does A.S. 16.05.251(a) authorize the Board to adopt a regulation establishing a "personal use fishing" category for regulatory purposes?

6. Were the plaintiffs denied their right to due process of law when the Board decided to authorize a personal use fishery in the central district which targets on sockeye salmon rather than coho salmon?

B. Alaska Department of Fish and Game v. Gjosund

1. With respect to a personal use set gill net fishery which prior to the enactment of the subsistence statute fell within the

purview of the statutory definition of "subsistence fishing", is the Board precluded from determining whether the fishery is or is not a "subsistence use" fishery until such time as it is compelled to do so in order to protect fish stocks which are the target of the fishery from overharvest?

IV.

ARGUMENT

A. Introduction

For residents of rural Alaska, the subsistence statute is possibly the most important legislation enacted by the legislature since statehood. The statute recognizes that the economy of several hundred rural communities continues to be based in large measure on the harvest of fish stocks and game populations for personal and family consumption. Prohibiting hunting and fishing by residents of Anchorage or Juneau would engender considerable inconvenience and occasional personal hardship, but would hardly threaten the economy of either community or the health, safety, or general welfare of their residents. However, prohibiting hunting and fishing by residents of Selawik or Anaktuvuk Pass or English Bay would have devastating social and economic consequences. The legislature enacted the subsistence statute to prevent the latter result.

The foundation of the regulatory system established by the subsistence statute is the identification of "subsistence uses" of fish stocks and game populations around the state. Unfortun-

ately, as this litigation well illustrates, the development of criteria to identify "subsistence uses" has become intertwined with the politics of the Cook Inlet salmon fishery and the Board's institutional collapse in the face of escalating demands by competing fishing groups. A review of the transcripts which are a part of the Record on Appeal will indicate that the plaintiffs' contention that some members of the Board may have used the subsistence statute as a pretext to restrict the fishery in which the plaintiffs participated to placate more numerous and politically powerful sport and commercial fishermen is not without some basis in fact.

But that regrettable reality is unrelated to the validity of the criteria developed by the Board to identify "subsistence uses" or to the Board's authority to establish a "personal use fishing" category to provide Alaskans whose fishing activities are not "subsistence uses" with an opportunity to obtain salmon with set gill nets for personal use.

Consequently, while AFN strongly supports the plaintiffs' efforts to obtain a reasonable opportunity to harvest Cook Inlet salmon stocks, AFN has just as strongly disagreed with the plaintiffs as to why they should be afforded an opportunity to fish.

For the reasons set forth below, AFN believes that the plaintiffs should be afforded a reasonable opportunity to harvest Cock Intlet salmon stocks in the central district with set gill nets, that 5 A.A.C. 01.597 is consistent with the intent of the legislature when it enacted the subsistence statute, that the plain-

tiffs should be afforded an opportunity to present evidence to the Board that the communities in which they reside satisfy the criteria for the identification of "subsistence uses" set forth in 5 A.A.C. 01.597, that A.S. 16.05.251(a) authorizes the Board to establish a "personal use fishing" category, and that if the Board determines that the plaintiffs' fishing activities are not "subsistence uses" and that they are no longer "subsistence fishing", then fundamental fairness requires the Board to adopt "personal use fishing" regulations to provide the plaintiffs a reasonable opportunity to harvest Cook Inlet salmon stocks.

With respect to the Gjosund appeal, AFN believes that no group of Alaskans, including the plaintiffs, have a "right" to harvest any fish stock or game population. The legislature and the Board may alter, restrict, or even eliminate, previously authorized harvest opportunities, so long as they do so in a manner consistent with recognized constitutional principles.

B. The Criteria Adopted By The Board Of Fisheries To Identify "Subsistence Uses" Of Cook Inlet Salmon Stocks Are Consistent With The Intent Of A.S. 16.05.251(b) And A.S. 16.05.940(26).

1. Introduction

5 A.A.C. 01.597 sets forth criteria for identifying "subsistence uses" of Cook Inlet salmon stocks. 5 A.A.C. 99.010 sets forth similar criteria for identifying "subsistence uses" of all fish stocks and game populations in the state.

Application of the criteria has the effect of restricting

the identification of "subsistence uses" of Cook Inlet salmon stocks to fishing with set gill nets for personal use by residents of rural communities around Cook Inlet which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community.[40]

One of the most important issues presented in this appeal is whether that is the result the legislature intended to achieve when it enacted A.S. 16.05.251(b) and A.S. 16.05.940(26)? The Madison and Gjosund Courts, the defendants, and AFN are of the opinion that it was.

2. In Determining Whether 5 A.A.C. 01.597 Is Consistent With The Legislature's Intent When It Enacted A.S. 16.05.251(b) And A.S. 16.05.940(26), This Court May Substitute Its Own Judgment For That Of The Board Of Fisheries.

During the proceedings before the Madison Court, there was considerable confusion among the parties as to the proper standard of judicial review of the criteria developed by the Board to identify "subsistence uses" of Cook Inlet salmon stocks. Although the Board first adopted the criteria as a policy,[41] it later adopted the policy as a regulation. 5 A.A.C. 01.597.

40/ See the Findings of Fact entered by both the Madison and Gjosund Courts. MA File No. 1, pp. 54-57 (Paragraph No. 10). GJ File No. 2, p. 258 (Paragraph No. 18). Significantly, neither the Madison nor the Gjosund plaintiffs challenge the validity of those important findings.

41/ MA File No. 3 (Exhibits "H" and "I").

The standard for determining the validity of a regulation is the test enunciated by this Court in Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971). See also A.S. 44.62.030. To be valid, a regulation must be consistent with the statute pursuant to which it was adopted and it must be reasonably necessary to carry out the purpose of the statute.

Whether adoption of a regulation which establishes criteria for the identification of "subsistence uses" is reasonably necessary to carry out the purpose of A.S. 16.05.251(b) involves questions of fact about the regulation of the Cook Inlet salmon fishery which the Board, rather than the Court, is probably best able to judge. And the Madison Court correctly deferred to the judgment of the Board on that question.

However, the Board has no particular expertise to determine the intent of the Legislature when it enacted A.S. 16.05.251(b) and A.S. 16.05.940(26). The final construction of a statute enacted by the Alaska legislature rests with this Court, not the Board. Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982). Consequently, the Madison Court incorrectly refused to substitute its judgment on the question of whether the criteria adopted by the Board are consistent with A.S. 16.05.251(b) and A.S. 16.05.940(26).

3. Although The Court May Substitute Its Judgment For The Judgment Of The Board, The Board's Interpretation Of A.S. 16.05.940(26) Is A Valuable Aid Which Should Be Afforded Considerable Deference.

A.S. 16.05.940(26) states that "subsistence uses" are "cus-

tomary and traditional" uses of fish stocks and game populations for personal and family consumption and other specified purposes. The statute does not define the phrase "customary and traditional". The criteria set forth in 5 A.A.C. 01.597 reflect the Board's interpretation of the phrase.

Although the Court may substitute its judgment for the judgment of the Board that the criteria are consistent with the legislature's intent when it enacted A.S. 16.05.251(b) and A.S. 16.05.940(26), the Board's interpretation of the latter statute is a valuable aid which the Court should afford considerable deference. See Wien Air Alaska, Inc. v. Department of Revenue, supra. See also Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). The Board's interpretation supports the opinion of the Madison Court that the criteria are consistent with the statute pursuant to which they were adopted.

4. The Legislative History Of The Subsistence Statute And Of Earlier Statutes Which Are In Pari Materia With The Subsistence Statute Indicates That 5 A.A.C. 01.597 Is Consistent With The Intent Of A.S. 16.05.251(b) And A.S. 16.05.940(26).

In determining legislative intent, the Court should investigate a statute's legislative history. North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978). The legislative history of the subsistence statute supports the Madison Court's opinion that 5 A.A.C. 01.597 is consistent with A.S. 16.05.251(b) and A.S. 16.05.940(26).

The subsistence statute was reported to the Alaska House of

Representatives by the Special Committee on Subsistence as HB 960.[42] The Special Committee was chaired by Representative Nels Anderson[43] who was also the manager of HB 960 during the floor debate.

During the debate Representative Sam Cotton offered an amendment to A.S. 16.05.940(26) to strike the phrase "customary and traditional" from the definition of "subsistence uses". He did so because like both the Madison and Gjosund plaintiffs, he was of the opinion that any person who hunts and fishes for personal or family consumption should be considered to be engaging in "subsistence uses" regardless of whether they live in Selawik, Anchorage, or Kenai:

> "Mr. Speaker, I think the reason I introduced this amendment was to raise a point of confusion on my part. I don't know what 'customary and traditional' means? I think that when we talk about subsistence use, we are talking about uses of wild resources for direct personal or family consumption." 44

The Cotton amendment was defeated. In speaking against the amendment, Representative Anderson explained that the intent of the Special Committee when it drafted the definition of "subsistence

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42/ The legislative history of HB 960 is set forth in Alaska House of Representatives, Bill History and Journal Index, Tenth Legislature 1977-78, p. 336.

43/ Id. xii.

44/ MA File No. 3 (Exhibit "U", p. 8).

uses" was to delegate the Board and the Board of Game authority to protect traditional uses of fish stocks and game populations from being overrun by new hunters and fishermen who are a by-product of Alaska's rapid urban population growth:

> "The two words are used in this context to put some guidelines around the uses of Alaska's freedom of resources. What we were afraid of, it was brought to our attention by people who were concerned that this would leave the field of the definition wide open. That newcomers just coming to the State of Alaska would automatically be able to establish not only residency in thirty days, but be able to go out and state they have a customary and traditional use of Alaska's fish and game resources. The use of 'customary and traditional' use also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with aboriginal uses, but also those that have come in, those who come in later. They have...the non-native people in the State of Alaska have established customary and traditional uses of Alaska's fish and game resources for subsistence purposes. And in order to give the Board of Fish and Game (sic) more clarification in the area, we have come up with the (inaudible) of 'customary and traditional' rather than leaving the section wide open. The design is not to be restrictive but to provide guidelines and that is basically what I feel and many...many members felt it was necessary in retaining those two words 'customary and traditional'." 45 (Emphasis added).

The debate on the Cotton amendment is clear evidence that the legislature did not intend mere hunting and fishing for personal uses

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45/ Id. 9-10. It also is important to note that 5 A.A.C. 01.597 does not identify "subsistence uses" on a racial basis (all residents of a community which meets the criteria can participate in "subsistence uses") or establish any type of durational residency requirement (all residents of a community which meets the criteria can participate in "subsistence uses" regardless of the length of their residency. But if they move to an urban area they may no longer participate regardless of the length of their residency in the state).

to be "subsistence uses".

But what uses of fish stocks and game populations was the legislature trying to protect? The legislative history of two earlier statutes which are in pari materia with the subsistence statute indicates that the intent of the legislature was to keep the rural Alaska hunting and fishing economy from being overwhelmed by tens of thousands of urban sport hunters and fishermen.[46]

The first statute was ch. 199 SLA 1975 sponsored by Representative Jimmy Huntington, a rural legislator from the Interior.[47] The statute authorized, but did not require, the Board of Game to adopt regulations inter alia establishing "subsistence hunting areas". See A.S. 16.05.257. The next year ch. 269 SLA 1976 was enacted to provide greater local participation in decisions by the Board of Game relating to the implementation of the 1975 statute. Section 1, ch. 269 SLA 1976 is a legislative finding which explains the goal both statutes were enacted to achieve:

> The legislature finds that traditional dependence on fish and game resources is a continuing and necessary way of life in many areas of the state and that protection of subsistence usage of these resources is essential to the health, safety, and general welfare of the citizens of the state in those areas. (Emphasis added).

Although the location of the "many areas of the state" where dependence on fish stocks and game populations is "a continuing

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46/ State v. Buncrant, 546 P.2d 530, 545 (Alaska 1976)("(T)he general rule is that a statute in pari materia with a subsequent, but approximately contemporaneous, measure is a proper source of evidence of legislative intent in the second measure.").

47/ 1975 House Journal, 9th Leg., 1st Sess. 625.

and necessary way of life" is not identified, it is reasonable to assume that the legislature's concern was directed toward rural Alaska where the local economy is grounded on hunting and fishing, rather than urban Alaska where hunting and fishing is a de minimus part of the local economy.[48]

Chapter 269 SLA 1976 was introduced as HB 804[49] by Representative Philip Guy, a rural legislator from Kwethluk.[50] During the debate on HB 804, Representative Keith Specking opposed the bill on the theory that all hunting in Alaska is subsistence hunting. Speaking in opposition to Representative Specking, Representative Mike Miller, himself an urban legislator from Juneau, indicated that the purpose of the bill was to protect "subsistence hunting" by residents of rural Alaska from being overwhelmed by competition from urban hunters:

> "I think when we say that all hunting in Alaska is subsistence hunting because of the provision that the meat be used, I think that's kind of stretching it a little bit. Mr. Speaker, I enjoy hunting a little bit and I fly up to Yakutat and certainly I used every ounce of meat, but to say that I depend on that meat on a subsistence basis to feed my family and clothe my family, to - you know, it's a little bit - well it's a joke.

48/ In Alvarado v. State, 486 P.2d 891, 894 (Alaska 1971), this Court recognized that the economy of most rural communities is organized around hunting and fishing. Similarly, in Hicklin v. Orbeck, 565 P.2d 159, 164 (Alaska 1977), the Court recognized that the cash economy provides few employment opportunities in rural communities.

49/ 1976 House Journal, 9th Leg., 2d Sess. 340.

50/ Id. iii.

> I don't have to go up there and hunt. I enjoy doing it and as long as the game is available and it's not depriving people who depend on that meat for subsistence, you know, for their real food and bread for the table, so to speak, I don't see anything wrong with me going up there and hunting. But on the other hand, if there's an area where people literally are going to be denied the food they need to live because of pressure from outside sportsmen like myself, then, Mr. Speaker, I just question very seriously whether I should be in that area at all." 51 (Emphasis added).

The debate on HB 804 was concluded by Representative Huntington, the sponsor of the 1975 statute, who made the implicit point that the legislature's intent was to protect the hunting economy of rural communities:

> "And this bill here I went along with because I think it's a good bill and it adds to the possibility of people having some say in the area where they live. And let's just take a little coincidence. Now the Nowitna River on the Yukon River above Ruby, thirty miles above Ruby, has been hunted for many years. It was one of the finest hunting rivers in the area, and it was destroyed by hunting, there's no doubt about that. The people were flown in from airplanes and they cut the moose down to practically zero in two years time. The people of Ruby, the people of Tanana hollered their head off trying to get them (i.e. the Board of Game) to set that aside as a subsistence area, just for the purpose of letting the herd build up again. That was the only purpose behind it and we couldn't do it. Now maybe under this bill an advisory board could advise Fish and Game and that part could be carried out." 52 (Emphasis added).

51/ Recording of Proceedings, 9th Leg., 2d Sess., Tape 130 H, Meter Nos. 527-1208 (1976)(On file at Anchorage State Law Library). The tape index is inadequate to cite to meter numbers more specific than those defining the parameter of the debate. See also Timperley v. Jeffries, Alaska Supreme Court No. 2765, p. 12 (December 16, 1983)(Tapes of legislative proceedings are evidence of legislative intent).

52/ Id.

In 1977 the authority of the Board of Game to adopt regulations pursuant to the 1975 statute to limit hunting of the western arctic caribou herd to residents of rural northwest Alaska communities was challenged by Fairbanks sportsmen in litigation which culminated in State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978). The uncetainty which that litigation created as to the scope of authority which had been delegated to the Board of Game was a significant factor in the legislature's decision to enact the subsistence statute.[53]

The purpose of the subsistence statute was inter alia to delegate the Board and the Board of Game adequate regulatory authority to enable each to better achieve the governmental objective set forth in sec. 1, ch. 269 SLA 1976. And that is precisely the same objective the Madison and Gjosund Courts determined is the factual result of applying the criteria in 5 A.A.C. 01.597 to fishing for Cook Inlet salmon stocks.[54]

53/ See Report of the Special Committee on Subsistence, Alaska House of Representatives, 12th Leg., 1st Sess. 14 (1981).

54/ It should again be emphasized that the consistency of the criteria in 5 A.A.C. 01.597 with the intent of the legislature when it enacted the subsistence statute is unrelated to the question of whether the fishery in which the plaintiffs participated prior to the enactment of the statute satisfies the criteria. The former is a question of law of considerable importance to all Alaskans who reside in rural communities around the state whose local economies are dependent on hunting and fishing. The latter is a somewhat more parochial question of fact.

5. The History Of The Times During Which The Legislature Enacted The Subsistence Statute Indicates That 5 A.A.C. 01.597 Is Consistent With The Intent Of A.S. 16.05.251(b) And A.S. 16.05.940(26).

The history of the times during which the legislature enacted a statute is relevant evidence of its intent in doing so. Northern Commercial Co. v. United States, 4 Alaska Fed. 245 (9th Cir. 1914). And the history of the times during which the legislature enacted the subsistence statute indicates that 5 A.A.C. 01.597 is consistent with the intent of A.S. 16.05.251(b) and A.S. 16.05.940(26).

At the same time that Fairbanks sportsmen were challenging the authority delegated to the Board of Game pursuant to A.S. 16.05.257, the United States Congress began consideration of legislation which three years later became the Alaska National Interest Lands Conservation Act (hereinafter "ANILCA").[55] Title VIII of ANILCA[56] establishes federal guidelines which control the Board's and the Board of Game's regulation of fishing and hunting on the public lands and in the navigable waters of Alaska.

A number of sections of the subsistence statute embody concepts and language drawn by the legislature from the version of title VIII of ANILCA passed by the United States House of Representatives in the spring of 1978. In particular, as Representative Cotton pointed out during the debate on the subsistence

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55/ Pub. L. No. 96-487 (1980).

56/ 16 U.S.C. 3111-3126.

statute,[57] the definition of "subsistence uses" in A.S. 16.05 940(26) is nearly identical to the definition of the same term in the then current version of ANILCA.[58]

When a statute is borrowed from another jurisdiction, the legislature is presumed to have intended to adopt the construction of the statute adopted by the original jurisdiction's highest court. Carver v. Gilbert, 387 P.2d 928 (Alaska 1963), Sekinoff v. United States, 283 F. 38 (Alaska 1922). AFN would urge this Court to consider extending that rule of statutory construction to the legislative history in the original jurisdiction as well.

With respect to ANILCA, the legislative history indicates clearly that the Congress intended its definition of "subsistence uses" to identify uses of fish stocks and game populations by residents of rural communities in which hunting and fishing is a significant characteristic of the economic and social life of the community.

For example, section 702 of the bill reported by the House

57/ MA File No. 3 (Exhibit "U", p. 8)("I want to point out that the legislation that recently passed Congress (sic), H.R. 39, does define "subsistence" (sic) in almost exactly the same way as HB 960 does. They do, in fact, use the words 'customary and traditional'. HR 39 goes quite a bit further in defining what subsistence means and they agree specifically in Title VII on subsistence.").

58/ Compare A.S. 16.05.940(26) with sec. 703, H.R. 39, 95th Cong., 2d Sess. (1978), reprinted in House Rept. No. 95-1045, Part I, 95th Cong., 2d Sess. 1978 (hereinafter "House Report"). This version of H.R. 39 was reported by the House Comm. on Interior and Insular Affairs on April 7, 1978. See also MA File No. 3 (Exhibit "V", sec. 703) and 16 U.S.C. 3113.

Committee on Interior and Insular Affairs during the spring of 1978 states that:

> It is hereby declared to be the policy of the Congress that -
>
> (1) management policies on the public lands in Alaska are to cause the least adverse impact possible on rural people who traditionally and consistently depend upon subsistence uses of the resources of such lands... 59 (Emphasis added).

In pertinent part, the report filed by the Committee to explain its version of H.R. 39 states that:

> After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of Federal, State, academic and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. 60
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> ...
>
> There are more than 200 rural communities throughout Alaska. In many, fresh meat, fish, and produce are unavailable except through the subsistence harvest. 61
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> ...
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> The rapid population growth of Alaska's urban centers has been a major factor threatening subsistence uses, along with inadequate State and Federal actions, declines in certain wildlife populations, and increasing accessibility of remote areas. Between 1965 and 1975, Alaska's population increased from 265,000 to 405,000 people and the number of resident hunting licenses almost doubled - from 93 000 to 170,350. Anchorage

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59/ House Report 27. See also 16 U.S.C. 3111-3112.

60/ Id. 181.

61/ Id. 182.

> presently is the third fastest growing city in the United States... As a result of such developments, pressure on many traditional subsistence resources has been unacceptably increased as urban hunters have intruded into more remote, subsistence-dependent areas of the State. 62 (Emphasis added).

Lastly, although his views were not available to the legislature at the time it drafted and debated the subsistence statute, the comments of Representative Morris K. Udall, the chief sponsor of H.R. 39 and the chairman of the Committee on Interior and Insular Affairs, are the definitive explanation of what the Congress intended to accomplish by including title VIII in ANILCA. His explanation of the operation of the federal and state subsistence management system is important in its entirety, but is too lengthy to reprint here.[63] However, his explanation of the manner in which "subsistence uses" of fish stocks and game populations are to be identified is particularly pertinent:

> "The subsistence preference applies to individual wildlife populations and fish (sic), and State regulation of each population and stock must be consistent with section 804. The State must first identify the customary and traditional uses of each population and stock by rural residents.
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> ...
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> It also should be noted that customary and traditional subsistence uses must be evaluated on a community or area basis rather than an individual basis." 64 (Emphasis added).

62/ Id. 184.

63/ 126 Cong. Rec. H10545 - H10547 (daily ed. November 12, 1980) (remarks of Representative Udall).

64/ Id. H10546.

6. Conclusion

In summary, the interpretation of the intent of A.S. 16.05.251(b), A.S. 16.05.255(b), and A.S. 16.05.940(26) adopted by the Board and the Board of Game, the legislative history of the subsustence statute, and the legislative history of the federal statute upon which the subsistence statute is based all support the decision of both the Madison and Gjosund Courts that when the legislature enacted the subsistence statute, it intended to protect hunting and fishing by persons who reside in rural communities which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community.

The criteria set forth in 5 A.A.C. 01.597 are consistent with that intent.

C. The Alaska Federation Of Natives Has Not Taken A Position On The Validity Of The Policy Adopted By The Board Of Fisheries At Its December 1980 And March 1981 Meetings.

The Madison plaintiffs second claim for relief alleges that the policy adopted by the Board at its December 1980 and March 1981 meetings to identify "subsistence uses" of Cook Inlet salmon stocks[65] is invalid because it was not adopted pursuant to the procedures set forth in the Administrative Procedure Act.

At its December 1981 meeting the Board adopted the policy as a regulation. 5 A.A.C. 01.597. The plaintiffs have not alleged that the regulation was adopted by the Board in an unlawful manner.

65/ MA File No. 3 (Exhibits "H" and "I").

Subsequent to the Board's adoption of 5 A.A.C. 01.597, the defendants moved to dismiss the second claim on the ground that it is moot and the plaintiffs resisted the motion. On March 5, 1982, the Madison Court granted the motion and dismissed the second claim.

During the Court's consideration of the merits of the motion, AFN took no position on the viability of the second claim subsequent to the Board's adoption of 5 A.A.C. 01.597.

D. Equal Protection

1. The Board's Determination That The Set Gill Net Fishery In Which The Plaintiffs Participated Prior To The Enactment Of The Subsistence Statute Is Not A "Subsistence Use" Fishery Did Not Violate The Plaintiffs' Right To Equal Protection.

The plaintiffs do not allege that the legislature's division of fishermen into two classes, i.e. those who engage in "subsistence uses" of fish stocks and those who do not, and then providing each class of fishermen disparate fishing opportunities violates their right to equal protection. Rather, they take issue with the Board's factual determination that they are members of the latter rather than the former class.

Consequently, although their brief mobilizes well-worn "equal protection" rhetoric and case law in support of the result they are prosecuting this appeal in an attempt to achieve,[66] the gravamen of their argument is actually the allegation that the Board's

66/ See Brief of Appellant/Cross Appellee, pp. 30-41.

factual determination that the plaintiffs do not engage in "subsistence uses" of Cook Inlet salmon stocks was arbitrary, capricious, and hence, a violation of the plaintiffs' right to due process.[67]

E. Due Process

1. The Superior Court Properly Remanded The Factual Question Of Whether The Set Gill Net Fishery In Which The Plaintiffs Participated Prior To The Enactment Of The Subsistence Statute Is A "Subsistence Use" Fishery.

The courts will consider a due process claim only in situations in which a plaintiff alleges a deprivation of liberty or property sufficient to warrent constitutional protection. Horowitz v. Alaska Bar Ass'n, 609 P.2d 39 (Alaska 1980). Although the Madison plaintiffs have no "right' to harvest Cook Inlet salmon stocks, their opportunity to do so is certainly a property interest of sufficient importance to warrent constitutional protection. See Herscher v. State, 568 P.2d 996 (Alaska 1977).

Whether the Board's factual determination that the set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute is not a "subsistence use"

67/ Assuming arguendo that 5 A.A.C. 01.597 correctly describes the class of fishermen who engage in "subsistence uses", then whether the class is a violation of equal protection is dependent upon whether providing disparate fishing opportunities to residents of rural communities in which hunting and fishing is a significant characteristic of the social and economic life of the community bears a fair and substantial relation to a legitimate governmental objective. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). The governmental objective in this case is protection of the health, safety, and general welfare of citizens who reside in rural Alaska. sec. 1, ch. 269 SLA 1976. The presumption is that the classification does. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978). And the plaintiffs have presented no evidence to the contrary.

fishery violates the plaintiffs' right to due process of law depends on whether the determination violates fundamental principles of liberty and justice or is an arbitrary administrative action shocking to the universal sense of justice. See Green v. State, 462 P.2d 994 (Alaska 1969).

Although the question is a close one, the Board's determination probably does not violate due process. The criteria to identify "subsistence uses" of Cook Inlet salmon stocks were adopted by the Board in December 1980.[68] Although the Board did not provide an opportunity for the public to present oral testimony at its March 1981 meeting, it did provide the public, including the plaintiffs, an opportunity to submit written testimony on "subsistence uses" of Cook Inlet salmon stocks.

A considerable volume of oral and written testimony on "subsistence uses" of Cook Inlet salmon stocks was generated during the December and March meetings,[69] but the record is near devoid of information about the relationship of hunting and fishing to the economy of the area around the City of Kenai in which the plaintiffs reside.

Whether the economy of the Kenai Peninsula is more like the economy of Selawik than the economy of Anchorage is a question of fact. Based on a review of the record before the Board, it is difficult to conclude that on its face the Board's determination was

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68/ MA File No. 3 (Exhibit "H").

69/ See generally MA File No. 2.

so arbitrary as to violate the plaintiffs' right to due process of law.

However, because of the confusion surrounding the criteria pursuant to which the Board made its determination, the Madison Court correctly remanded the plaintiffs' fourth claim for relief to the Board to determine anew whether the set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute satisfies the requirements of 5 A.A.C. 01.597 and A.S. 16.05.940(26).

2. The Plaintiffs' Claim That The Board Of Fisheries Is Not An Impartial Tribunal Should Be Remanded To The Superior Court.

An impartial administrative decisionmaker is basic to a democratic society and representative government. Green v. State, supra. And every Alaskan, including the plaintiffs, who wishes to participate in the harvest of fish stocks is entitled to have his or her opportunity to do so considered by all seven members of the Board in a fair and impartial manner.

Although they have not aggressively pursued the allegation in their brief, the plaintiffs claim that the Board itself is a violation of due process of law in that it is not an impartial tribunal.[70]

The plaintiffs' allegation in this regard raises a constitu-

70/ See Brief of Appellant/Cross Appellee, p. 47 ("Due process violations can ensue from cummulative patterns of behavior resulting in basic and intuitivly (sic) recognizable unfair actions. Madison alleges at the least that this is what has happened.").

tional question of both first impression and fundamental importance. However, the Record on Appeal is not adequate to decide the question in this appeal.

But because of the serious constitutional and public policy implications of the plaintiffs' claim, they should be afforded an opportunity to present evidence in the Superior Court in support of the argument that the composition of the Board violates the plaintiffs' right to due process of law. An argument which appears to have considerable merit.

The 1959 statute which established the Board of Fish and Game was not the first attempt to create an administrative agency to regulate hunting and fishing in Alaska. In 1957 the Territorial Legislature enacted a statute which established a seven member Fish and Game Commission. ch. 63 SLA 1957. By law the commission was required to be composed of three commercial fishermen representing specific geographical areas, one hunter, one trapper, and one sport fisherman. In other words, the legislature purposely delegated its authority over hunting and fishing to a group premeditatively composed of individuals with substantial vested interests in, and prejudgments about, the regulations they were empowered to adopt.

During its consideration of the Alaska Statehood Act,[71] the Congress determined that the Fish and Game Commission was unacceptable because it purposely delegated control of Alaska's fish stocks to the commercial fishing industry and because it excluded

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71/ Pub. L. No. 85-508 (1958).

Alaska Natives from participation in the regulatory process.[72] As a result, the Congress took the extraordinary step of including section 6(e) in the Statehood Act. In pertinent part, section 6(e) states:

> ... (T)he administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest.

On March 2, 1959, Secretary of the Interior Fred A. Seaton wrote Hugh J. Wade, Acting Governor of Alaska, and detailed the requirements imposed on the new state by section 6(e).[73] With respect to the composition of a new board of fish and game, the Secretary stated that:

> "...(T)he policy-making officials should be selected for their ability and their dedicated interest in the resource, and no identification should be made between a policy-making official and any particular segment of the population; likewise, no official should be bound to represent the interests of a specific geographical region."

On April 17, 1959, the legislature enacted ch. 94 SLA 1959.

72/ 104 Cong. Rec. 9747-9750 (May 28, 1958).

73/ Letter from Fred A. Seaton to Hugh J. Wade (March 2, 1959) reprinted in Hearings on H.R. 39 et al. Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Part XI 411-412 (1978) (hereinafter "House Hearings").

Section 6 of the 1959 statute established a Board of Fish and Game "composed of eight members having a general knowledge of the fish and game resources of the State and selected without regard to political affiliation or special interest".

On April 27, 1959, Secretary Seaton certified to the Congress that the State of Alaska was in compliance with section 6(e) of the Statehood Act,[74] and on January 5, 1960, President Eisenhower transferred the administration and management of fish and game from the federal government to the State.[75]

In 1975 the legislature split the Board of Fish and Game into a seven member Board of Fisheries and a seven member Board of Game. ch. 206 SLA 1975. The members of both boards are required to be appointed by the Governor and confirmed by the legislature "without regard to political affiliation or geographical location of residence". See sec. 3, ch. 206 SLA 1975.

However, what the Congress and the legislature prohibited by statute has been honored primarily in the breach. This Court may take judicial notice[76] of the fact that for almost a quarter of a century five Alaska governors have appointed persons to the Board because of their identification with particular fishing

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74/ Letter from Fred A. Seaton to Sam Rayburn (April 27, 1959) reprinted in House Hearings, Part XI 413.

75/ Executive Order No. 10857 (January 5, 1960).

76/ The Court may judicially notice a fact that is generally known within the state. Alaska Rule of Evidence 201(b).

groups, the geographical area of the state in which they reside, and their vested interest in particular fisheries. For example, during the 1983 session the legislature refused to confirm Governor Sheffield's appointments to the Board[77] because a majority of the members of the legislature were of the opinion that the Governor had not appointed an adequate number of persons to the Board who represented sport fishing groups. In response, the Governor has publicly promised to appoint a sport fisherman from Fairbanks to the Board.

In such a politicized environment for administrative rulemaking, it is small wonder that the plaintiffs argue that the Board was not impartial when it determined that the set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute does not satisfy the criteria set forth in 5 A.A.C. 01.597.

And the plaintiffs are correct that a delegation of regulatory authority to persons who individually or as members of a group have a direct interest in, or prejudgment about, the regulations they are empowered to adopt is a violation of due process of law. Particularly, when the legislature has not delegated such authority pursuant to clear standards to govern its exercise.[78]

For example in State Bd. of Dry Cleaners v. Thrift-D-Lux

77/ See 1983 Senate Journal, 13th Leg., 1st Sess. 1238, 1243-44.

78 Assuming that the fishery in which the plaintiffs desire to participate is not a "subsistence use" fishery regulated pursuant to A.S. 16.05.251(b), then the Board may adopt or not adopt whatever regulations "it considers advisable" authorizing or not authorizing the plaintiffs to harvest Cook Inlet salmon stocks. See A.S. 16.05.251(a).

Cleaners, 254 P.2d 29 (Calif. 1953), the California Supreme Court struck down a scheme for regulating the dry cleaning industry in California which was similar in many respects to the scheme employed by the Governor and the legislature to regulate fishing in Alaska.

Six of the seven members of the Board of Dry Cleaners were required to be members of the dry cleaning industry. The statute which established the board also included no standards to govern the board's exercise of regulatory authority. One of the grounds cited by the Court in support of its decision invalidating the board's authority to fix dry cleaning prices was that the regulatory scheme established by the legislature violated due process:

> "While the delegation of government authority to an administrative body is proper in some instances, the delegation of absolute legislative discretion is not. To avoid such a result it is necessary that a delegating statute establish an ascertainable standard to guide the administrative body. Here the statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule and its penal provisions with no guide for the exercise of the delegated authority." 254 P.2d at 36.

In support of that conclusion, the Court cited Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). Carter invalidated a section of the Bituminous Coal Conservation Act which delegated large coal producers authority to regulate wages paid by small producers and the number of hours small producers could require their employees to work. In doing so, the United States Supreme Court held:

> "The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is

> necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." 56 S.Ct. at 873 (Emphasis added).

Lastly, in Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), the United States Supreme Court upheld a lower court decision which held that the Alabama Board of Optometry was so biased by prejudgment and pecuniary interest that its members could not constitutionally conduct hearings on whether to revoke the licenses of a group of optometrists employed by a private company. Although the case turned on its own peculiar facts, the lower court opinion is instructive with respect to the plaintiffs' claim in the instant appeal in that it recognizes that due process is violated even in situations in which it is difficult to prove demonstrable bias with respect to a particular decision:

> "The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil, but the appearance thereof." Berryhill v. Gibson, 331 F. Supp. 122, 125 (D.C. Ala. 1971).

The plaintiffs' claim in the instant appeal is obviously dif-

ferent from Thrift-D-Lux Cleaners and Carter in that A.S. 16.05. 221(a) does not mandate the appointment of individuals to the Board who have a vested interest in the regulations they adopt. However, for almost a quarter of a century, tradition has produced the same result.

If the Governor were to appoint the counsel of the Chugach Electric Association to the attorney seat on the Alaska Public Utilities Commission, the public uproar would be deafening. But until the filing of this lawsuit, there has been little public outcry about the Board as five governors have appointed fish processors, commercial fishermen, sport fishing guides with a vested economic interest in the regulation of the Cook Inlet fishery, persons designated to represent the interests of fishermen in a particular geographic area of the state, or, most recently, an official of a southcentral Alaska sport fishing organization who shortly after his appointment to the Board appeared before the Kenai River Sport Fishing Association and, according to the Anchorage press, told a room full of sport fishermen:

> "Those 10,000 kings are worth more, to more people, than all those sockeyes. This group is headed to making the Kenai king the number one priority and to hell with the 4.4 million sockeyes.
>
> ...
>
> Let's get some more members in this Kenai River Sport Fishing Association and knock hell out of them (commercial fishermen). That's the only way it can be done. We've got to organize the 170,000 sports fishing

> people that live in Anchorage and on the Kenai Peninsula." 79

A regulatory scheme which purposely produces such prejudgment and bias is constitutionally flawed.

It also should be noted that in a related situation the legislature has recognized the problem and taken steps to eliminate it. The legislature has delegated the Board authority to regulate all aspects of fishing in Alaska with one exception: the regulation of entry into most commercial salmon fisheries. That responsibility has been delegated to the Alaska Commercial Fisheries Entry Commission. In recognition of possible bias, prejudgment, and conflict of interest, A.S. 16.43.050 establishes the following requirements for appointment to the Commission:

> The commission shall consist of three members with a broad range of professional experience, none of whom has a vested economic interest in an interim-use permit, entry permit, commercial fishing vessel or gear, or in any fishery resource processing or marketing business. (Emphasis added).

Why the legislature has purposely eliminated bias and conflict of interest in the regulation of who may participate in the commercial fishery while at the same time actively participating in the appointment of individuals to the Board because of their bias and conflict of interest is best explained by history and political tradition. But history and tradition are not adequate justification for denial of the plaintiffs' right to due

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79/ Chappell, Battle Over Kenai King Salmon Brews, Anchorage Daily News, July 29, 1983, at C1. The above-cited quotation is not a part of the Record on Appeal. It is, however, indicative of the type of record the plaintiffs may be able to develop if their due process claim is remanded to the Superior Court.

process of law.

The plaintiffs have raised a serious constitutional question of first impression which, because it involves a number of questions of fact, cannot be answered based on the record in this appeal. But fundamental fairness requires that the plaintiffs be afforded an opportunity to present evidence in support of their claim.

Consequently, the Court should consider articulating the constitutional standard pursuant to which the Governor is required to appoint persons to the Board, and then remand the plaintiffs' due process claim to the Superior Court for trial.

F. A.S. 16.05.251(a) Authorizes The Board Of Fisheries To Adopt A Regulation Establishing A "Personal Use Fishing" Category For Regulatory Purposes.

Pursuant to A.S. 16.05.251(a), at its March 1982 meeting the Board adopted a regulation which establishes a "personal use fishing" category for regulatory purposes. 5 A.A.C. 77.001.

The plaintiffs now argue that A.S. 16.05.251(a) does not delegate the Board authority to adopt 5 A.A.C. 77.001.[80] However, the plaintiffs are simply incorrect. This Court has already held that A.S. 16.05.251(a) is a broad delegation of authority to "make decisions affecting the utilization of fishery resources" which should be liberally construed to achieve its intended purpose. Kenai Peninsula Fisherman's Cooperative Ass'n v. State, supra at 903. As long as a particular method of regulation is based on

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80/ See Brief of Appellant/Cross Appellee, p. 47-51.

the need to conserve and develop a particular fishery, the Board is empowered by A.S. 16.05.251(a) to adopt it. Id. Consequently, it is difficult to identify even a scintilla of merit in the plaintiffs' argument to the contrary.

To the extent they offer one, it appears to be that the plaintiffs do not believe that the establishment of a "personal use fishing" category is "essential" for regulatory purposes. See A.S. 16.05.251(a)(6). However, the Board, and not the plaintiffs, is the best judge of what is or is not "essential" to the discharge of its statutory responsibilities. A question of fact within the Board's regulatory expertise.

And the plaintiffs' argument is meritless on an even more obvious ground. What could be more "essential" than establishing a regulatory category to enable the Board to adopt regulations authorizing the plaintiffs to continue to harvest Cook Inlet salmon stocks?

The subsistence statute narrowed the statutory definition of "subsistence fishing" to exclude fishing with a set gill net for personal use by residents of communities in which hunting and fishing is not a significant characteristic of the social and economic life of the community.[81] Consequently, absent the "personal use fishing" category, the Board is without a methodology pursuant to which to continue to authorize fishing with set gill nets by residents of such communities. Assuming arguendo

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81/ See MA File No. 1, pp. 54-57 (Findings of Fact and Conclusions of Law relating to the plaintiffs' first claim).

that the plaintiffs' fishing activities are no longer "subsistence fishing", the "personal use fishing" category is "essential" to provide the plaintiffs an opportunity to continue to harvest Cook Inlet salmon stocks.

G. The Board of Fisheries' Decision To Authorize A "Personal Use" Fishery In The Central District Of Cook Inlet Which Targets On Sockeye Salmon Rather Than Coho Salmon Did Not Violate The Plaintiffs' Right To Due Process Of Law.

The legislature has near plenary authority to regulate the utilization of Cook Inlet salmon stocks. Alaska Const. art. VIII, sec. 2. Prior to the enactment of the subsistence statute, the legislature delegated the Board its entire regulatory authority subject only to the requirement that the Board exercise that authority in a manner consistent with recognized due process standards. See Herscher v. State, supra. Assuming arguendo that the plaintiffs' fishing activities are "personal use fishing" rather than "subsistence fishing", they continue to be regulated by the Board pursuant to A.S. 16.05.251(a) and due process limitations.

In 1979 the Board adopted regulations which moved fishing in the central district with set gill nets for personal use from August 1 - September 21 to June 23 - August 15.[82] The purpose of the change was to move the fishery off coho salmon stocks and onto sockeye salmon stocks. Regulations adopted by the Board which authorize "personal use fishing" in the central district during the middle, rather than the end, of the summer[83] are con-

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82/ GJ File No. 4, pp. 26-27.

83/ 5 A.A.C. 77.547.

sistent with the 1979 regulations. The Board's decision to adopt such regulations was not so totally arbitrary as to violate due process standards[84] and the plaintiffs do not challenge that decision in this appeal.

H. With Respect To The Personal Use Set Gill Net Fishery Which The Board Of Fisheries Authorized In The Southern District Of Cook Inlet Prior To The Enactment Of The Subsistence Statute, The Board Is Authorized To Determine Whether The Fishery Is Or Is Not A "Subsistence Use" Fishery, Regardless Of Whether The Biological Status Of The Salmon Stocks Which Are The Target Of The Fishery Does Or Does Not Require It To Do So.

The Gjosund Court upheld the validity of the criteria adopted by the Board to identify "subsistence uses" of Cook Inlet salmon stocks, but then inexplicably held that the Board is prohibited from applying the criteria to the personal use set gill net fishery which it authorized prior to the enactment of the subsistence statute until such time as it is required to do so to prevent overfishing of the salmon stocks which are the target of the fishery. However, such a result misconstrues the nature of the Gjosund plaintiffs' interest in Cook Inlet salmon stocks and sets a dangerous precedent for the regulation of hunting and fishing in Alaska.

The Court's decision implicitly assumes that "conservation" is the sole purpose of the Board's regulation of the harvest of Alaska's fishery resources. The Court ignores the Board's co-equal

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84/ In reaching this result, it is important to differentiate between unfairness and "fundamental" unfairness. Only the latter is a constitutional violation. Because many questions of fact relating to fishery management are so close and so complex, it is particularly important that the Board be composed of seven truly impartial persons. It is extremely difficult for this or any other Court to substitute its judgment for that of the Board with respect to most decisions involving questions of fact.

responsibilities to facilitate the "utilization" and "development" of fish stocks. A.S. 16.05.221(a). See also Kenai Peninsula Fisherman's Cooperative Ass'n v. State, supra.

The allocation of the harvestable surplus of fish stocks among competing groups of fishermen can have a profound social and economic effect. As population growth, new settlement, and economic change occurs, whether a particular allocation of the harvestable surplus of a particular fish stock does or does not provide the "maximum benefit"[85] to all the people of Alaska may also change. And for better or for worse, the legislature has delegated responsibility for making such important decisions to the Board.

But the Court's decision assumes that once the Board has allocated the harvestable surplus of a particular fish stock to a particular group of fishermen, those fishermen acquire some type of vested interest in the harvest of the stock which can be reduced or eliminated only if "conservation" considerations so require. Such a result ignores two important decisions by this Court. And if affirmed in this appeal, will wreck havoc on the legislature's and the Board's responsibility to advance the "utilization" and "development" of Alaska's fishery resources.[86]

85/ Alaska Const. art. VIII, sec. 2 (The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State...for the maximum benefit of its people.).

86/ The legislature's and the Board of Game's responsibility to advance the "utilization" and "development" of Alaska's game populations would also be similarly compromised. Compare A.S. 16.05.221(a) and .251(a) with A.S. 16.05.221(b) and .255(a).

The decision of the Gjosund Court is squarely opposed to the opinion of this Court in Herscher v. State, supra, that the only limitation on the legislature's authority to regulate (or eliminate) the harvest of a fish stock or game population is that imposed by due process:

> "It is true that the state has the right to direct the use of its natural resources, including fish and game. We recognize that there is a difference between the state's plenary control over the natural resources and the taking away of a formerly granted state license. The state's power over natural resources is such that it could entirely eliminate the role of hunting guides, and no problem of due process would arise. However, when the state decides to permit the harvesting of its fish and game, and in so doing so permits the issuance of hunting guide licenses, then problems of due process do arise when the individual, rather than the group as a whole, is affected. At that point the consideration is whether the state's procedures in taking the property right in the individual's guide license comported with due process requirements." 568 P.2d at 1003. (Emphasis added).

Similarly, in Kenai Peninsula Fisherman's Cooperative, Ass'n v. State, supra, this Court upheld the Board's authority to reallocate certain Cook Inlet salmon stocks from commercial to sport fishermen. The decision of the Gjosund Court precludes that result absent a showing of necessity related solely to "conservation".

The Gjosund holding is bad law, worse public policy, and, consequently, the Superior Court's decision should be reversed.

V.

CONCLUSION

The Madison and Gjosund plaintiffs initiated this litigation because they want to harvest the same Cook Inlet salmon stocks in the same manner and in the same places along the shoreline of the central and southern districts of the Kenai Peninsula as they did prior to the enactment of the subsistence statute. Although AFN is sympathetic to the plaintiffs' goal, AFN intervened in Madison because of its concern about the public policy implications of the issues raised in the plaintiffs' pleadings and requested this Court for an opportunity to participate as amicus curiae in the Gjosund appeal because of its concern about the public policy implications of the portion of the Superior Court's decision now under review. Tens of thousands of Alaskans who live in the bush will be effected by the Court's decision in this case.

Because the issues raised in this consolidated appeal are so important, this Court should be careful to differentiate between the governmental objective the legislature intended to achieve when it enacted the subsistence statute, and the Board's implementation of the statute. Although the criteria developed by the Board to identify "subsistence uses" of Cook Inlet salmon stocks are consistent with A.S. 16.05.251(b) and A.S. 16.05.940 (26), the Board's application of the criteria to the fishery in which the Madison plaintiffs participated prior to the enactment of the subsistence statute may or may not have been made in a

manner consistent with due process requirements. If it was not, the reason may not be the fundamental unfairness of any particular Board decision as much as the lack of impartiality by the members of the Board as a whole which the legislature and five Alaska governors have purposely encouraged.

For all the reasons set forth above, the Alaska Federation of Natives respectfully requests that the holdings of the Madison Court be affirmed, that the holding of the Gjosund Court which is the subject of this appeal be reversed, and that the Madison plaintiffs' claim that the composition of the Board of Fisheries violates their right to due process of law be remanded to the Superior Court for trial.

DATED: December 27, 1983

Donald C. Mitchell
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Amicus Curiae

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN McGAHAN, SR., ANDY JOHNSON, MARGIE KIVI, J.W. WARE, DICK FRANCIS, DON GROLESKE, KEN JORDON and SHIRLEY DEVAULT, Appellant, vs ALASKA DEPARTMENT OF FISH AND GAME and ALASKA BOARD OF FISHERIES, Appellees, and THE ALASKA FEDERATION OF NATIVES, Intervenors.	Supreme Court Nos. 6824/7181 Superior Court No. 3 KN 81-542 Civil
ALASKA DEPARTMENT OF FISH AND GAME, RONALD SKOOG, ALASKA BOARD OF FISHERIES Appellants, vs LOUIS GJOSUND, DORA MULCH, and KACHEMAK BAY SUBSISTENCE GROUP, INC., Cross-Appellees.	Supreme Court No. 7410 Superior Court Nos. 3HO-80-92 Civil 3HO-77-11014 Homer

MERIT APPEAL FROM THE SUPERIOR COURT, STATE OF ALASKA
THIRD JUDICIAL DISTRICT
JUDGE VICTOR CARLSON

BRIEF OF APPELLANT/CROSS APPELLEE

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Clerk of Court

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorites.....ii

Constitutional Provisions, Statutes, and Regulations.....v

Statement of Jurisdiction.....xviii

Statement of issues.....1

Statement of facts.....3

Introduction of Facts.....8

Argument:

I Did the Board Exceed its legislative Authority in Adopting and Applying the 10 criteria
- A. Applicable Law.....12
- B. Administrative Review.....15

II Did the Board violate, AS 44.62.310, 312, the Public Meetings Provisions of the APA and was Judge Carlson's Ruling that this issue was moot In Error.....26

III Did the Superior Court Err in Failing to Find that the Action of the Board of Fisheries violated the Plaintiffs' Rights to Equal Protection of Law Under the Federal and State Constitution.....30

IV Has the Board of Fisheries Violated Plaintiffs' Right Due Process of Law.....41
- A. Due Process- Arbitrary Exclusion/Biased Hearing....41
- B. Due Process - Closed Hearings.....43
- C. Due Process- Administrative Actions by the Board are Improper.....44
- D. Due Process - Generally.....46

V In the Creation of a New Fishery, Namely a Personal Use Fishery, Beyond the Authority Delegated to the Board of Fisheries.....47

Conclusion.....51

TABLE OF AUTHORITIES

Cases

Aguchak v Montgomery Ward Co. Inc., 520 P2d 1352, 1357, (Alaska 1974).....42

Bachner v Pierson, 479 P2d 319 (Alaska 1970).....46

Castner v City of Homer, 598 P2d 95 (Alaska 1979).....14

Chin Hilbers v Municipality of Anchorage, 611 P2d 31, (Alaska 1980).....42

Commercial Fisheries Entry Commission v Apokedak, 606 P2d 1255, (Alaska 1980).....30

Green v State, 462 P2d 994, (Alaska 1969).....42,46

Herscher v State, 568 P2d 996 (Alaska 1977).....41

Hood v State, 574 P2d 811, 813.....13

Isakson v Rickey, 550 P2d 359 (Alaska 1976).....30, 31

Kelly v Zamarello, 486 P2d 906, (Alaska 1971).....12

Kenai Peninsula Fisherman's Cooperative Assn, Inc. v State of Alaska, 628 P2d 897, (Alaska 1981)....44, 49

Kenai River Sports Fisherman v State, _____ _____(Sept 1983).....6, 51

Rogers Construction Co. v Hill, 384 P2d 219, 222, (Oregon 1963).....12

State of Alaska v Bowers Office Products, Inc., 621 P2d 11, (Alaska 1980).....14

State v Erickson, 574 P2d 1 (Alaska 1978).....30, 31

State v Tanana Valley Sportsman's Association, 583 P2d 354, (Alaska 1978).....4

Stevenson v Burgess, 570 P2d 728 (Alaska 1977).....13

Tyonek v Alaska Board of Fisheries, 3AN 80 3073.....4

Vick v Board of Electrical Examiners, 626 P2d 90, (Alaska 1981).....42

Constitutions

Alaska Constitution, Article 1, Section 7.....41

Alaska Constitution, Article 1, Section 1.....30

U. S. Constitution, 14th Amendment, Section 1.....30, 41

Statutes

AS 16.05.050(9).....44

AS 16.05.090 - 094.....2, 5

AS 16.05.221(a).....49

AS 16.05.241.....10, 44

AS 16.05.251(a)(6).....6,48,49

AS 16.05.251(b).....16,19, 6,4,2 1,9,31

AS 16.05.251(b)(1)(2) & (3).....4

AS 16.05.940(17).....1,6,17, 18,9,49

AS 16.05.940(26).....1,6,17, 9,40,49

AS 16.20.010.....49

AS 16.20.020.....49

AS 44.62.020.....12

AS 44.62.030.....13

AS 44.62.180-290.....28

AS 44.62.310.....2,5, 28,29

AS 42.62.310(c)(1).....26

AS 44.62.312.....2,5, 26,29

Regulations

5 AAC 01.597.....18,9

5 AAC 01.597(a)(b) & (c).....5,16,40

5 AAC .01.597(b).....44

5 AAC 77.001.....6,48
50

5 AAC 77.001(a)(4) & (b).....51

5 AAC 77.548.....7

80-79FB, 'G', Appendix A.....6,8,
18,44

Amended 80-79 FB, 'G', Appendix A-1.....5,6,8
16,18,
44

Texts

American Heritage Dictionary (1973).....50

Ballentine's Law Dictionary, 3rd edition.....45

Black's Law Dictionary, Revised 4th Edition.....50,45

Funk & Wagnalles, Standard College Dictionary (1963).....50

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS RELIED UPON

Constitutional Provisions

U.S. Constitution, Fourteenth Amendment, Section 1, provides:

> "...nor shall any state deprive any person of life, liberty, or property without due pr cess of law..."

Alaska Constitution, Article 1, Section 1, provides:

> Uniform application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law and regulations.

Alaska Constitution, Article 1, Section 7, provides:

> "No person shall be deprived of life, liberty, or property without due process of law."

Statutes

Alaska Statute 16.05.050 (9) reads:

> "Powers and duties of the commissioner: The Commissioner has, but not by way of limitation, the following powers and duties:
>
> (9) Administrative, budgeting, and fiscal powers;

AS 16.05.090 states:

> (a) The commissioner may, with the approval of the governor, establish a departmental division of commercial fishe ies, a departmental division of sport fisheries, a departmental division of game, and other departmental divisions as are necessary.
>
> (b) The commissioner shall establish a departmental division of fisheries rehabilitation, enhanc ment and development
>
> (c) There is established in the Department of Fish and Game a section of subsistence hunting and fishing.

AS 16.05.094 states:

AS 16.05.094 states:

> Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall
>
> (1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;
>
> (2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;
>
> (3) make information gathered available to the public, appropriate agencies, and other organized bodies;
>
> (4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;
>
> (5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;
>
> (6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;
>
> (7) participate with other divisions in the preparation of statewide and regional management plans so that those plans reorganize and incorporate the needs of subsistence users of fish and game.

AS 16.05.221 states:

> Boards of Fisheries and Game.
>
> (a) For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven member appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location or residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

AS 16.05.241 states:

"Powers excluded. The boards have regulation making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers.'

Alaska Statute 16.05.251, which states:

"(a) The Board of Fisheries may make regulations it considers advisable in accordance with the Administrative Procedures Act for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishment of opena dn closed seasons and areas for the taking of fish;

(3) setting quotas and bag limits on the taking of fish;

(4) establishment of the means and methods employed in the pursuit, capture and trasport of fish;

(5) establishment of marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;

(7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish research, amangement, education and information and to train men for fish management;

(10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(11) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(12) establishment of the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.010 - 16.43.380.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62.010 - AS 62.650) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorites for the consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources.

AS 16.05.940 (17) states:

(17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence use with gill net,seine, fish wheel, long line, or other means defined by the Board of Fisheries;

AS 16.05.940.(26) states:

(26) "subsistence uses" means <u>the customary and traditional uses</u> in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons

related by blood, marriage, or adoption, and any person living within the household on a permanent basis.

AS 16.20.010 states:

> The legislature recognized that
>
> (1) the state has jurisdiction over all fish and game in the state except in those areas where it has assented to federal control;
>
> (2) the state ahs not assented to federal control of fish and game in those areas which were set apart as National Bird and Wildlife Refuges while the state was a United States territory;
>
> (3) special recognition of the value to the state and the nation of areas of unspoiled habitat and the game characteristic to it will be demonstrated by designating as state game refuges those federal lands whcih were National Bird and Wildlife Refuges or Ranges at the time that Alaska achieved statehood.

AS 16.20.020 states:

> Purpose. The purpose of this chapter is to protect and preserve the natural habitat and game population in certain designated areas of the state.

AS 62.020 states:

> Authority to adopt, administer, or enforce regulations. Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - AS 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

AS 44.62.030 states:

> Consistency between regulation and sta u e. If, by express or implied terms of of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.310 states:

Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrtive body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, or the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assembl es, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state of local governmwnt supported in whol_ or in part by public money or authorized to spend public mon y, are op_n to the public exc_pt as otherwise provided by this section. Except when voice votes ar' authorized, the vote shall be conducted in such a manner that the public may know the vote of each persons entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

(b) If excepted subjects are to discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except tho_e mentioned in the motion calling for the executive session unless auxiliary to the main question. No acion may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to
(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; of

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Resonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

AS 44.62.312 states:
State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) It is the intent of the law that actions of these units be taken openly and that the deliberations be conducted openly;

(3) The people of this state do not yield their soveriegnity to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) The people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

Regulations

5 AAC 01.597 states:
CHARACTERISTICS OF SUBSISTENCE FISHERIES. (a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identificatior of subsistence fisheries:

(1) a long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g. regulatory action or fluctuations

in resource abundance;

(2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;

(3) a use pattern associated with specific stocks and seasons;

(4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;

(5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;

(6) a use pattern occurring in locations with easiest and most direct access to the resources;

(7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;

(8) a use pattern which includes the intergenerational transmission of activities and skills;

(9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and

(10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residence.

(b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the

characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.

(c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests.

5 AAC 77.001 states:

INTENT AND APPLICATION OF THIS CHAPTER.

(a) The Board of Fisheries finds that

(1) before the enactment of the state's subsistence priority law in ch. 151, SLA 1978, an individual could fulfull his personal use needs for fish under subsistence fishing regulations;

(2) the state's subsistence priority law changed the definition of subsistence in a manner that now precludes some individuals from participating in customary and traditional subsistence fisheries and efficiently harvesting fish for their personal use;

(3) there presently are areas of the state with harvestable surpluses of fish in excess of both spawning escapement needs and present levels of subsistence, commercial and sport uses; and

(4) it is necessary to establish a new fishery classified as "personal use" because

(A) since the sale of fish is not appropriate or permissible, this fishery cannot be classified as commercial;

(B) since the use is not a rural customary and traditional use this fishery cannot be classified as subsistence; and

(C) since the gear for this fishery is often different from that historically associated with sport fishing, this fishery should not be classified as a sport fishery, to prevent confusion among the public.

(b) It is the intent of the board that the taking of fish under a 5 AAC 77 will be allowed when that taking

does not jeopardize the sustained yield of a resource and either does not negatively impact an existing resource use or is in the broad public interest.

(c) Regulations in 5 AAC 77 apply to the taking of finfish, shellfish and aquatic plants fof personal use. The regulations in 5 AAC 77.001 - 5 AAC 77.049 apply to the taking of finfish, shellfish and aquatic plants in all waters of Alaska.

(d) The regulations in 5 AAC 77 do not prohibit the personal use of finfish, shellfish or aquatic plants legally taken under the subsistence, commercial and sport fishing regulations in 5 AAC 01 - 5 AAC 75.

(e) The definitions of legal gear in 5 AAC 35.105(d). escape mechanisms for pots in 5 AAC 39.145, unlawful possession of fish in 5 AAC 39.197, definitions in 5 AAC 39.975, and abbreviations and symbols in 5 AAC 39.997 apply to the regulations in 5 AAC 77.

(f) In this chapter, "personal use fishing" means the taking, attempting to take, or possession of finfish, shellfish or aquatic platns by an individual for consumption as food or use as bait by that individual or his immediate family.

FINDINGS AND POLICY REGARDING SUBSISTENCE USE OF COOK INLET SALMON #80-79-FB states:

The Board of Fisheries finds that the past and current permitting system and regulations governing Subsistence fishing in Cook Inlet do not necessarily reflect and protect the customary and traditional use of salmon resources in the area. Evidence presented to the Board at its fall 1980 meeting described certain customary and traditional practices and procedures of utilizing fish in Cook Inlet. This evidence described and established a basis for allowing those persons who engage in the uses to be given a reasonable opportunity to harvest fish in the historically established places, manners, times and quantities.

The evidence suggests that Customary and Traditional uses continue to be nutritionally, economically, and socially important, particularly in the non-road-connected villages of Cook Inlet. These uses may be recognized by the following characteristics:

(1) A long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g. regulatory action, or fluctuations in resource abundance.

(2) A use pattern established by an identified community,

subcommunity, or group having preponderant concentrations of persons showing past use.

(3) A use pattern associated with specific stocks and seasons.

(4) A use pattern based on the most efficient and productive gear and economical use of time, energy, and money.

(5) A use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual.

(6) A use pattern occurring in locations with easiest and most direct access to the resources.

(7) A use pattern which includes a history of traditional modes of handling, preparing, and storing the product (without precluding recent technological advances).

(8) A use pattern which includes the intergenerational transmission of activities and skills.

(9) A use pattern in which the effort and products are distributed on a communal and family basis (including trade, bartering, sharing, and gift-giving).

(10) A use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.

Evidence indicates that these use patterns may occur in road-connected communities as well as in the non-road connected areas. The Board intends that these use patterns be identified and acknowledged in regulations. The Board will adopt a set of criteria drawn from the characteristics noted above and apply these criteria to communities, subcommunities, groups, and individuals who wish to continue to participate in an established customary and traditional fishing effort in Cook Inlet. Those who fail to meet the criteria may request the Commissioner of the Department of Fish and Game to review evidence establishing their claim in an expeditious amnner.

ADOPTED: Anchorage, Alaska
December 21, 1980

VOTE: 7-0

/S/ Nick Szabo, Chairman

AMENDED FINDINGS AND POLICY REGARDING SUBSISTENCE USE OF COOK INLET SALMON #80-79-FB

The Board of Fisheries finds that the past and current permitting system and regulations governing subsistence fishing in Cook Inlet do not necessarily reflect and protect the customary and traditional use of salmon resources in the area. Evidence presented to the Board at its fall 1980 meeting described certain customary and traditional practices and procedures of utilizing fish in Cook Inlet. This evidence described and established a basis for allowing those persons who engage in the uses to be given a reasonable opportunity to harvest fish in the historically established places, manners, times, and quantities.

The evidence suggests that customary and traditional uses continue to be nutritionally, economically, and socially important, particularly in the non-road-connected villages of Cook Inlet. These uses shall be identified by applying all of the following characteristics:

(1) A long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g., regulatory action or fluctuations in resource abundance.

(2) A use pattern established by an identified community, subcommunity, or group having preponderant concentrations of persons howing past use.

(3) A use pattern associated with specific stocks and seasons.

(4) A use pattern based on the most efficient and productive gear and economical use of time, energy, and money.

(5) A use pattern occurring in reasonable geographic proximity to the primary residence of the community, group, or individual

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(10) A use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.

Evidence indicates that these use patterns may occur in road-connected communities as well as in the non-road-connected areas. The Board intends that these use patterns be identified and acknowledged in regulations. The Board will apply all of the above-described characteristics to communites, subcommunities, groups, and individuals in order to determine which uses are customary and traditional and therefore are eligible for the subsistence priority.

ADOPTED: Anchorage, Alaska
April 6, 1981

VOTE: 7-0

/S/ Nick Szabl, Chairman.

STATEMENT OF JURISDICTION

This is an appeal from the judgments and findings of Superior Court Judge Victor Carlson, State of Alaska, Third Judicial District in the case of Gene Madison et al, vs The Alaska Department of Fish and Game and Alaska Board of Fisheries , #3KN 81-532 Civil, entered on March 5, 1982, August 30, 1982, November 9, 1982, and January 26, 1983. This is a consolidated appeal with Gjosund et. al., 3HO-80-92 Civil and 3HO-77-11014 Homer. This court has jurisdiction to consider this appeal pursuant to Appellate Rule 202 and Alaska Statute 22.05.010

STATEMENT OF THE ISSUES *

1. Was the Board of Fisheries, (hereinafter Board), acting within their legislative and statutory authority granted by Alaska Statute 16.05.251(b) and 940(17) & (26), in adopting the 10 characteristics ultimately codified at 5AAC 01.597? ('M' file #1, pages 58, 59)

2. Did the trial court err in applying the 'judicial deference' standard to the Board's actions and upholding the regulatory scheme adopted under AS 16.051(b) and 940(17) and (26)? ('M' File #1, pages 58,59)

3. Did the trial court err in determining that questions of violation of the Administrative Procedures Act, AS

*This case is a consolidated appeal. Most of the issues in both cases are identical and rely on the same record. Citations to the record in Appellant's opening brief will refer to the record in both Madison and Gjosund to avoid unnecessary duplication and repetition in Appellant Cross-/ Appellee's brief in Madison and his Appellees brief in Gjosund . Also the appendices and exhibits are substantially the same in both cases. References to the record in Madison will be preceeded by the letter 'M' and to the record in Gjosund by a 'G'.

.310, 312 were moot? ('M' File #4, page 296)

4. Did the trial court err in finding that the actions of ard eliminating and excluding Plaintiffs as subsistence of the fish stocks moving through Cook Inlet did not te Plaintiff's rights to equal protection of the law? ('M' #4, page 295)

5. Were the characteristics of 5 AAC.01.597 overly ctive and exclusive on their face and do they result in g and discrimating against Plaintiff's class without a d substantial connection to the purposes of the tence Bill, (AS 16.05.251(b))? ('M' File #4, page 295)

6. Have the Defendant's violated the Due Process rights ntiffs by:

a. excluding them from the fishery in an arbitrary, and capricious manner;

b. improper administrative proceeding;

c. failing to provide an impartial hearing;

d. failing to comply with the directions and purposes .05.094;

e. failing to hold public meetings when formulating ssing basic policy affecting Plaintiffs in violation 62.312? ('M' File #1 & #4, pages 1-36, 92, 94)

Is creation of a 'personal use fishery', 5 AAC 77.001 yond the statutory authority of the Board? ('M' File 2)

STATEMENT OF FACTS

This appeal in its most general perspective is about fish. More particularly about those fish which move in and through the waters of Cook Inlet. The Plaintiffs in both cases under review have harvested and used those fish for their family and personal consumption for up to 50 years. ('G' File #2; App M p.13-221; 'M' File #1, Affidavits to Complaint pages 1-36) This fishery has been identified and regulated as a subsistence fishery since 1959 by the state and prior to that time by the federal government. ('G' File #2, p 13 et seq; Appendix R. Braund Subsistence Report). The Plaintiffs have participated in this subsistence fishery subject to those regulations which regulations have been generally consistent over the years.

The Plaintiffs' long term and continued participation in the subsistence fishery as well as their dependency upon the salmon moving through Cook Inlet has been documented and established. The recognition of the importance of subsistence uses and the consumption of fish and game for personal and family use was formally set out by the State of Alaska in 1973. (ADF&G Game Management Policy , 'G' File #2, pages 13 - 221, Appendix. S, page 4)

In 1978, The Alaska legislature enacted CH. 151 SLA 1978. These statutes mandated that the taking of fish for subsistence uses was no longer a matter of discretion of the Board of

Fisheries. The legislation also established a priority of use for subsistence whenever it was necessary to restrict the taking of fish because of sustained yield shortages, (AS 16.05.251(b)),and set up criteria for priorities for the 'consumptive uses' if further shortages existed.(AS 16.05.261(b)(1), (2) & (3)).

The subsistence bill was passed in part to codify the 1973 policy statement of the commissioner of the Department of Fish and Game and, in part, to correct the Board's failure to protect the subsistence uses especially where there was competition with sports or commercial uses. (Draft- Report of the Special Committee on Subsistence , pages 44-45, 'G' File #2, pages 13-221, Appendix BB).

The Board's action or inaction regarding subsistence, both prior and subsequent to, the enactment of the subsistence bill has generated a great deal of litigation and controversy.[eg's State v Tanana Valley Sportsman's Association 583 P2d 854 (Alaska 1978); Superior Court Orders 1977, 1980, 1981; 'G' File #2, page 13 et seq, Appendix O, P, and Q; Tyonek v Alaska Board of Fisheries, 3 AN 80-3073; and the 1982 Initiative Repeal aimed at the subsistence bill.

The subsistence bill also established a special Section (now a Division) of subsistence hunting and fishing within the Department of Fish and Game. The duties of the Subsistence Hunting and Fishing Section were very particularly spelled out and the Section was created to raise the subsistence fishery to

created b/c no date (?)

the same level as the commercial and sports fisheries. (See AS 16.05.090 & .094).

The Board, in 1980, took action under the subsistence bill. That action precipitated these lawsuits. At the December 1980 Board hearings, the Board adopted Findings And Policy Regarding Subsistence , #80-79-FB. ('G' File #2, page 13-221, Appendix A-1). These Findings and Policy , with some refinements, are the substance of 5 AAC 01.597. The refinements, (5 AAC .01.597(b) & (c)), were developed in part at the Board's hearings concerning Knik subsistence use on December 14, 1981. (Proceedings December 14, 1981, Knik Discussions, page 126, 'M' file #4, Exhibits EE, page 70-292). The Board of Fisheries in April, 1981, adopted 80-79 FB which was an Amended Findings and Policy Regarding Cook Inlet ('G' file #2, page 13 et. seq. Appendix A) which contained the same 10 criteria as 80-79 FB from the December 1980 meeting. They also applied those 10 criteria to Cook Inlet. (Findings of Fact , 81-92 FB, 'G' File #2, pages 13-221, Appendix B).

The December 1980 meetings, out of which the 10 criteria were created and enunciated, violated the public meeting provision of AS 44.62.310,312 (See Amended Findings of Fact and Conclusions of Law , November 12, 1982, Finding of Fact #23, 'G' File #2, page 254,).On June 22, 1982, the Board through their counsel, signed a stipulation admitting a violation of AS 44.62.310, 312 at the December 1980 Board meeting.

The Board of Fishery regulations ('G' Appendices A, A-1, & B supra) in their adoption and application excluded the Plaintiffs from harvesting salmon in the manner, by the means and at the times, they had historically subsistence fished. The Board determined that Plaintiffs' subsistence uses were not intended to be permitted uses pursuant to AS 16.05.251 (b). Their fishing was no longer subsistence fishing nor was their use a subsistence use under AS 16.05.940(17) & (26).

This lawsuit was filed by the Plaintiffs on August 13, 1981, and Judge Carlson granted preliminary relief opening a set gill net fishery in the Central and Northern District of Cook Inlet similar to the fishery that was in effect during and prior to the 1980 subsistence fishing season.

On December 10, Judge Carlson in his Memorandum of Decision granted Defendant's motion for summary judgment on the Plaintiff's first claim for relief. In April 1982, the Board adopted regulations establishing a personal use fishery. 5 AAC 77.001 et. seq. The personal use fishery was adopted pursuant to AS 16.05.251(a)(6) and is generally an excess fishery only permissible after the subsistence, commercial and sports users harvest has been guaranteed or established. 5 AAC 77.001 (a)(3) & (b). The personal use fishery in Cook Inlet has recently been successfully attacked preliminarily in Kenai River Sport's Fishing Association v Alaska Department of Fish and Game, Alaska Board of Fisheries , # _____ , September 15, 1983). Superior Court Judge Cranston issued a

preliminary injunction severely restricting the 1983 Cook Inlet personal use fishery established at 5 AAC 77.548. The Board created the fishery as an excess fishery to satisfy Judge Carlson's Findings of Fact and Conclusion of Law #11, signed on January 26, 1983. Judge Carlson denied Plaintiff's request for summary judgement on counts II, III, and IV and granted Defendant's request for summary judgment on Plaintiff's count I. This appeal proceeded from these actions.

One other factual precondition should be established. The subsistence harvest of salmon in Cook Inlet, since data has been available, has never exceeded one half of one percent of the total harvest taken by sport and commercial users. As an example, on a four year average annual harvest, including the years 1977 through 1980, of an average annual harvest of 3,807,406 fish by commercial users and 255,884 fish by sports fisherman, the subsistence average has been 7,198 fish. There has never been, nor is there anticipated to be, any jeopardy to the sustained yield of the fish stocks running in and through Cook Inlet. In fact, the 1983 commercial season in Cook Inlet has been one of the largest in recorded history.(Braund Report ,page 15, 'G' File #2, page 13-221, Appendix R and 'M' File #3, exhibit T.)

INTRODUCTION TO ARGUMENT

The Plaintiffs have brought this action to affirm their right to harvest fish by the use of set gill nets on the eastern shore of Cook Inlet. The Plaintiffs, consistent with state and federal subsistence fishing regulations, have for many years fished for Cook Inlet salmon as a means of feeding themselves and their families. The season's weekly fishing periods, gear, bag limits, and permits per person have remained generally the same during that period of time. Changes in 1979 and 1980 moved the seasons to June through August, reduced the actual fishing time within that period to one 12 hour period per week and changed the bag limits. The gear length was also reduced in 1979 and 1980, from an original 35 fathom set net to a 10 fathom net. (Braund Report 'G', Appendix R, supra, page 30). The Plaintiffs have subsistence fished in conjunction with their other subsistence activities.e.g. coal/wood gathering, gardening, berry picking, logging, hunting, etc. Subsistence fishing has provided a good part of their dietary and protein needs and has been an integral part of the natural pattern and rhythm of their lives for a considerable length of time. (Affidavits of Plaintiffs,'G' and 'M' supra)

The Board of Fisheries, in December of 1980, (80-79 FB, 'G', Appendix A-1, supra) and in March and April of 1981, (Amended 80-79 FB; 81-92 FB, 'G' Appendix A and Appendix B, supra) adopted regulations which systematically and immutably

eliminated the Plaintiffs from their customary and traditional manner of obtaining salmon for their family and personal consumption. This action was taken by the Board under their interpretation and implementation of the subsistence bill. AS 16.05.251(b)(1), (2) & (3), AS 16.05.940 (17) & (26).

5 AAC 01.597(b)(c) is the latest regulation incorporating all of the 10 criteria plus the additional community criteria refinements.

The Board interpreted the purposes of the subsistence statutes to be restrictive and exclusive, and developed the 10 criteria as a tool of elimination for all individuals, families, or groups residing on the Eastern shores of Cook Inlet and the Northern shores of Kachemak Bay. When the Board was finished the only individuals qualifying as subsistence users were residents of the villages of English Bay, Port Graham, and through judicial intervention, Tyonek. The action to permit the three named villages was taken reluctantly and only after the Tyonek decision. Statements of the Board indicate that even these three communities were "dangerously on the borderline" of not being considered as subsistence users. ('M' File #2, Volumes 27, 28, page 37).

Plaintiffs' ask judicial assistance to restore what they believe are their rights to participate in a subsistence fishery in the general manner and for the particular purposes they have in the past. The Board's enactment of an exclusive and restrictive policy was an incorrect interpretation of the

intent and purposes of the statutes.

The Board also misintrepretated the subsistence statute as authorizing them to administer their policy and regulations, a power which they are precluded by AS 16.05.241 from doing. Plaintiffs' position is that this court should independently review the regulatory scheme, including the formulated policy for its application. They should substitute their judgement and independently examine the meaning of the statute because the impetus for the Board's action required interpretation of the intent of the subsistence legislation.

Contrarily, even under a more inhibited review of agency actions the regulation is not consistent with, nor reasonably necessary to carry out the purposes of, the statute and is ultimately unreasonable and arbitrary.

Plaintiffs also contend that the matrix for the ten characteristics i.e. the regulation and application thereof, was adopted in violation of an APA regulation requiring public meetings. The Board may have readopted the 10 characteristics in April, 1981, that originated in the December 1980 Board meeting, but they did not recreate or reenact their closed meeting activity that resulted in selecting and developing those criteria.

Plaintiffs also contend that they were denied equal protection of law under the State and Federal Constitution. The Board of Fisheries has created two clasess. One is an idealized model pictured as a 'pure native rural village

community' whose members have particular ethnic and racial characteristics. The members of this class are subsistence users. All other individuals or families not satisfying all of these virtues are excluded.

This scheme does not fairly and substantially further the purposes of providing for, and permitting, the taking of fish for subsistence uses for all Alaskan residence and therefore the class is under-inclusive and does not bear a substantial relationship to the purposes of the legislation.

Plaintiffs also seek recognition of their rights to harvest fish for their personal and family consumption under the due process clauses of the State and Federal Constitution. The actions of the Board in certain individual aspects and cumulatively have violated traditional concepts of fair play and substantial justice in the exclusion of Plaintiffs from parity, much less priority, participation with sports and commercial users of Cook Inlet.

Finally, the case law applicable to this appeal is basically uncontested. The threshold analysis on almost all issues should deal with the application of that law to the vast array and morass of reports, papers, documents and exhibits evidencing the intentions and actions of the Board of Fisheries.

ARGUMENT

I

DID THE BOARD EXCEED ITS LEGISLATIVE AUTHORITY IN ADOPTING AND APPLYING THE 10 CHARACTERISTICS .

A. APPLICABLE LAW

An analysis of the manner and scope of judicial review of administrative actions circles Kelly v Zamarello , 486 Pd2d 906, (Alaska 1971). Kelly involved a complex fact situation and a circuitous path to conclusion. This Court decided that the highest bids for oil leases, which included a cash plus bonus royality in excess of the fixed 12 1/2% could have been superfluous and rejected for being non-responsive to the sale notice. They were in fact rejected because of higher cash only bids and may not have been the high bid. Policy considerations set out in the regulation dictated that the bids should be final and that drilling should proceed. The Court in Kelly deferred to the administrative interpretation since the expertize of the agency would be of "material assistance to the court". The Court went on to state at page 916:

> "the amount of deference varies depending upon the apparent degree of reasonableness of the administrative decision and the degree to which the problem involves knowledge peculiar to an industry, business, etc." Kelly 916 citing Rogers Construction Company v Hill ,384 P2d 219, 222, (Oregon 1963)).

This analysis, in conjunction with AS 44.62.020 which reads:

> "To be effective, each regulation adopted must be within the scope of authority conferred in accordance with standards prescribed by other provisions of law."

and AS 44.62.030:

> "[NO] regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purposes of the statute".

led the Kelly decision to formulate the most oft quoted review standard for administrative actions.

> "First, we will ascertain whether the regulations are consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary." Kelly , at 911

Kelly also set out the second standard for appellate review of administrative regulations. Where there is a question of statutory interpretation or where the agency was not acting within its ambiance of specialized knowledge, the court has applied a much broader standard of review and in these cases has substituted its own judgment for the agency's. Kelly , at 917; also see Hood v State , 574 P2d 811, 813. Thus the second standard for review, generally considered the 'substituted judgment', was formulated although not applied.

The Kelly decision was bedded on policies necessitating predictability in bidding procedures and carefully delineating public competitive bidding standards.(Also see Stevenson v

Burgess , 570 P2d 728, (Alaska 1977), substitution of judgment in interpretation of taxing statute because no special competency was required. Reversed on other grounds); and State of Alaska v Bowers Office Products Inc. , 621 P2d 11, (Alaska 1980).

Therefore, attempting to hone the focus of the applicable standards to the case at hand, the threshold question is whether the subsistence statutes authorized the Board to formulate fundamental policy for subsistence use and users, (as Plaintiffs claim the Board interpreted the statutes to do) or whether the statute is clear on its face and does not authorize the regulatory scheme and its application adopted and administered by the Board. This is the decision which should decide the standard to apply in this case.

Counsel's instincts sense a conclusion oriented test in this area. Even though certain of the factual situations in the cases considered aren't clearly drawn, there are many where the determinatation of which standard applies, results in reversal in 'substituted judgment cases', and affirmation in 'deference cases'. *

*The same conclusion oriented analysis was recognized as a problem in equal protection analysis i.e. strict scrutiny versus the rational basis test. See generally, Gunther G, Harvard Law Review , (November 1972), page 1. This theory was a bit diluted in the case of Castner v City of Homer , 598 P2d 95, (Alaska 1979) where a strict scrutiny of fundamental rights analysis was used and yet the local ordinance was upheld under the compelling interest standard.

Plaintiffs assert that under either standard a rigorous and critical analysis should result in reversal of the Superior Court's affirmation of the Board's actions.

B. ARGUMENT

ADMINISTRATIVE REVIEW

Plaintiffs aver that the regulations promulgated under the ostensible authority of the subsistence statute together with the Board's explicit policy evident in the application and effect of these regulations represents a formulation of fundamental policy in conflict with, and outside the scope of, the regulatory authority set out in the subsistence statutes. In other-words, the Board is interpreting the statutory scheme. Under this analysis the court can subsitute its judgment for that of the Board's. The above analysis depends in part on whether authority exists in the statute for the Board to formulate fundamental policy. Obviously if this court determines that the intent and authority is inherent in the statute then the inquiry moves to the regulations and policy i.e. whether the regulation and policy is reasonable and not arbitrary in light of the purposes and intent.

If there is a question of statutory interpretation, then the courts are uniquely qualified to examine and interpert the statutes independent of the Board.

The regulations under consideration here are #80-79 FB

('G', Appendix A-1 supra) and its ultimate successor, 5 AAC 01.597 (a)(b) and (c).

The significant changes to the 10 criteria since the December 1980 Board meetings are (b) and (c):

> (b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.
>
> (c) For purposes of this section a community is generally considered to be several households of full time residents who all reside in a specific geographic are because of common interests.

The legislative source of authority to adopt regulations is in AS 16.05.251(b) and the Legislative Intent preamble:

> LEGISLATIVE INTENT. The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that those resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents . The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated with as much input as possible from the affected users, so that the viability of fish and game recources is not threatened and so that resources are conserved in a manner consistent with the sustained yield principle.(emphasis added).

AS 16.05.251(b):

> REGULATIONS OF THE BOARD OF FISHERIES. (b) The Board

of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources. (emphasis added)

The legislature defined subsistence uses in AS 16.05.940.(26):

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption , and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis. (emphasis added).

and subsistence fishing is defined in AS 16.05.940 (17):

17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence use with gill net,seine, fish wheel, long line, or other means defined by the Board of Fisheries;

The intention of the Subsistence Bill was to codify the state's 1973 policy statement of the Commissioner and Board of Fish and Game ('G', File #2, Appendix S, page 4, supra) and to overcome the failure of the Board to protect subsistence use in light of competiting uses. The Report of the Special Legislative Committee on Subsistence states:

> "the subsistence law was passed to enable the Board to provide for subsistence use during times of resource shortage and intense competition, and to make certain that the Boards took care of subsistence use prior to allowing other uses of these important economic resources.
>
> "...Be that as it may, what the subsistence law did was to codify this policy (the 1973 Commissioner's Policy) in order that its intent be enforceable rather than subject to the whims of the resource managers." ('G' File #2, pages 13-221, Appendix LL, page 44)

The intent was to be protective of, and provide for subsistence uses, most particularly during times of resource shortage and competition. The pre-1978 statute, AS 16.05.940(17) defined subsistence fishing as:

> "[S]ubsistence fishing" means the taking, fishing for, or possession of fish, shellfish or other fishery resources for personal use and not for sale or barter with gill net, seine, fish wheel, long line, or other means defined by the Board of Fishery.

The 1978 Amendment substituted "subsistence uses" for "personal uses not for sale or barter."

Relying on the amended definition of subsistence fishing and the added definition of subsistence uses as customary and traditional uses, the Board adopted regulations 80-79 FB and Amended 80-79 FB (supra) and ultimately 5 AAC 01.597.

The Board interpreted the statutes as almost being absolutely exclusive and adopted regulations consistent with

this interpretation.

Plaintiffs and every other person and family in the area of Cook Inlet other than those persons residing in the villages of Port Graham, English Bay, and Tyonek have been segregated from subsistence participation. This interpretation ignores the permissive nature of the statute and elevates 'customary and traditional' to such complexity and mystery that it requires ph.d.'s in metaphyics to unravel the meaning.

The definition of customary and traditional is secondary to the primary purpose of the subsistence bill which is to:

> "clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs, and traditions of Alaskan residents"; and to "permit the taking of fish unless....[it] will jeopardize or interfere with the maintenance of fish stocks on a sustained yield basis,"; AS 16.05.251(b) and Legislative Intent and preamble
>
> and to "set forth a priority of users if restrictions are needed because of unavailability of resources...to insure that those with the most dependence upon the fish and game resources are the last to be restricted." House Journal, May 13, 1978, page 1155, ('G' File #2, pages 13-22, Appendix N)

The Board's interpretation of the legislature's meaning of customary and traditional overlooks the manifest ambition of the legislation to provide for and permit, and to protect, when there is a resource shortage.

Customary and traditional are not words of art or mystery. Representative Gruening, in the House debate on an amendment to eliminate the words customary and traditional states in part:

> "I think that the meaning of customary and traditional applying to use is...not that confusing. After all,

> this bill is to establish a framework in which these can be developed. And I don't think we need a definition of words that have a common dictionary meaning . But just so the members don't confuse, there are two questions here, one is traditional methods of taking and one is traditional and customary uses. And that is what we are talking about. Uses here in this amendment. I oppose it. It don't think it is necessary to take these words out. I think that really gives a better handle for the Board to work for in defining the range of subsistence." (House Debate on House Bill 960, Tenth Legislature, Second Session, March 26, 1978. ('M' file #3, Exhibit U) (emphasis added)

Customary and traditional should be used in the general dictionary sense having a similar context as 'historical' or 'of having some past'. Subsistence uses and users have been defined at least since 1959 by the legislature. One doesn't read the regulations to learn how to fish or what to do with the fish. One obviously learns from neighbors, friends, or family h ow to fish. What one does with the fish other than immediately eat it is also a skill acquired from others and refined by resources available. e.g. electricity for freezing, wood for smoking, salt for salting. etc.

The statutes indicate subsistence fishing has two components. One is a means or method of harvest, the other is the use to which the resource is put. Since 1959, the legislature has defined the means and methods of harvest. In Cook Inlet, those means of taking subsistence fish has been primarily with set gill net. Plaintiffs have been using gill

nets as a means to harvest their subsistence salmon for food for many years.

From 1959 to 1978, the legislature defined subsistence uses as "personal use, not for sale or barter." Personal use as defined and allowed by statute was for the direct personal or family consumpion of fish as food. Plaintiffs have historically consumed their gill net caught salmon on a direct personal and family basis for food.

To adopt a regulatory policy and scheme that excludes the Plaintiff's 1978 personal use of Cook Inlet Salmon as food from inclusion as a subsistence use because it is not a customary and traditional use raises the art of linguistic analysis to a high science. The fact of consistent use prior to 1978 is precisely why the legislature defined it as a customary and traditional use. The use does not require a complexly conceived, idealized, rural, native village as a model community to recognize customary and traditional uses of salmon in Cook Inlet. This is in fact what the Board has done. They have failed to provide any means or method whereby an Alaskan resident or family, or a small group of families can take fish for subsistence uses. The community requirements of the regulatory scheme are absolute prohibitions consistent with the Board's historical attitudes. They have now attributed those attitudes to the legislature.

The transcript of the Knik Board hearing of December 14, 1981, ('M' File #4, pages 70-272, Appendix EE) and the hearings

of March and April 1981 resulting in the adoption of 81-92 FB, ('G' File #2, pages 13-221, appendix B) indicates the Board's policy inherent in the 10 criteria and the interpretation and administration the Board has endowed on the subsistence bill. The Knik discussion neglects referrence to 'permitting subsistence uses' or 'maintainence of fish stock on a sustained yield basis' or 'protection of or continuation of subsistence uses'. These are the impetus for and the stated intent of the legislature in adopting and enacting the subsistence bill. The transcript shows why the Board developed the community criteria as a pre-condition. It was to exclude Knik. Since Knik had already satisfied the 10 criteria, the Board raised the 'community criteria' to an insurmountable prerequisite.

At the Knik hearing, the Board was presented with a subsistence report by James Fall of the South Central Region, Division of Subsistence, essentially establishing that Knik residents were subsistence users ('G' File #2, page 13- 221, Appendix GG). The community criteria became a means of enforcing the Board's exclusionary policy. They interpreted the statutes as authorizing them to not only define community in such a specially and narrow sense but also to administer and apply their regulations and policy.

On page 126 of the Knik proceedings ('M' File #4, Appendix EE):

Szabo (Board chairman):...We decide, is that an actual community or not? And if we do look at it, then we look at little groups like neighborhoods and little

enclaves, we look at individuals and so forth and see if, you know, 70% of the individuals are doing this, two or three of the groups are doing that and so forth and if they exhibit all these qualities then we say, o.k. this community meets the ten criteria. But first you have to have a community there . I think that what we did here, we said, well, obviously this whole area doesn't meet the ten criteria and then we start looking at well, just these two acres that one household was on. And we said, well, maybe those two acres and one household. If you viewed them as a community would meet those ten criteria, we don't think they should be viewed as a community ."

Chris Goll, (Board member), page 126, 127, supra:"Yeah. Just one comment, Mr. Chairman, and that is I think, perhaps, some people are under the false impression that the ten criteria is the only thing , the only latitude that the Board has, and that's not in fact. the case . Not the way that I understand it. It's part, we can go beyond that too, it's only ten points. There are many other things that we may wish to consider also. Am I not correct in that? (emphasis added)

Szabo, page 127: "Well,I think there's other things. But I think that the key to this thing is that before you know you have to determine if something is actually a community before you apply the 10 criteria to it. And I think that was a decision that we made last year, was we were gonna identify communities and then apply the ten criteria. " (emphasis added)

The Board's prepossessed responses to subsistence uses in Cook Inlet jaded their interpretation of the subsistence statutes. Their proclivities for exclusion and elimination of subsistence uses in Cook Inlet as well as their inability to control themselves is well documented. It has kept the

State's attorneys busy representing and trying to civilize the Board. The Tyonek case and the two southern district cases (77-22014, Homer and 3HO-80-92)* occurred prior to the Board's formal consideration of the subsistence statute although after its 1978 enactment.

The Board begrudgingly 'allowed' subsistence uses in Port Graham, English Bay and Tyonek, and only after judicial intervention in Tyonek. The Board doles out, almost as a matter of charity, subsistence use largess, and even this is done reluctantly. In the April 1, 1981 meeting ('G' File #1, volume 27 page 37).

> Beaton, (a Board member): " I've really felt that even Tyonek in my own mind and English Bay and Port Graham are dangerously on the borderline , but I certainly think that Kenaitze---everything I heard up until now led me to believe that just maybe they'd want, you know, into that new world there or whatever they're really overwhelmed by..."(emphasis added)

*3HO-80-92 Civil was filed in the Superior Court and heard without a jury on June 16, 1980 and the Superior Court entered a permanent injunction against the Defendants. In May of 1981, Plaintiffs, under the same case heading and number, filed a Petition for Imposition of Sanctions for Contempt, Request of Preliminary Permanent and Declaratory Relief , which was again ruled on favorably to the Plaintiffs and which is under appeal by the state in Supreme Court No. 7410. Also see Frances et. al. v Alaska Department of Fish and Game, 3KN 80-546.

It is somewhat ironic that of all Cook Inlet subsistence users, the users in the three native villages participated the least in the permitted subsistence fishery while most other Cook Inlet users excluded after 1979 complied with the regulations.

> "In all communities [Cook Inlet] there are families who have participated in the subsistence salmon fishery for a long time (generally without permits) and have received social, economic and nutritional benefits from the harvest of this resource. Although this pattern of use is often most visible in the relatively isolated communities (English Bay , Port Graham , Tyonek , and Seldovia) it is not restricted to these places. Rural food connected communities...and more urban centers...all have residents who have trationally subsistence fished for Cook Inlet Salmon." (Braund Report-next to last page , (unnumbered) ('G' File #2, Appendix R. supra).

Plaintiff's offer that under either administrative review standard, the regulations and policy adopted are inconsistent with and outside the authority of the legislative enactment. The statute is clear in terms of its intent. It is meant to include individuals as Alaskan residents,as families, and as community members. It tells the Board to adopt regulations permitting subsistence uses and that these uses shall be a priority when certain preconditions exist. It also sets out the criteria for imposing restrictions and limitations among subsistence users.

The Board did not have any authority to formulate fundamental policy. For purposes of argument, even if it did, that authorization did not designate the Board to administer

that policy. Under any conditions the regulations and policy adopted and used in this case are not reasonably related to nor consistent with the purposes of the subsistence statutes and are capricious acts beyond the scope and intent of these statutes.

II

DID THE BOARD VIOLATE AS 44.62.310, 312; THE PUBLIC MEETINGS PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT AND WAS JUDGE CARLSON'S RULING THAT THIS ISSUE WAS MOOT IN ERROR

Judge Carlson held that Plaintiff's Count II was moot. Count II alleged violations of the Administrative Procedures Act, particularly the notice and public meetings provisions of Title 44. Plaintiffs, in this brief, will deal with the public meetings provision.

AS 44.62.312 states:

State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) It is the intent of the law that actions of these units be taken openly and that the deliberations be conducted openly;

(3) The people of this state do not yield their soveriegnity to the agencies which serve them;

(4) The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) The people's right to remain informed shall be protected so that they may maintain control of the instruments they have created.

(b) AS 42.62.310(c)(1) shall be contrued narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

Plaintiffs claim that in December, 1980, the Board held closed meetings in violation of Alaska Statute 44.62.310 and 312. During these closed meetings it appears that the Board discussed, analyzed, and developed strategic findings which affected the public and its use of Cook Inlet salmon resources. These meetings designedly formulated and led to the adoption of the 10 criteria which are the nucleus for all subsistence action taken by the Board since that meeting. As a result of those secret meetings, the Board adopted 80-79 FB ('G', Appendix A-1, supra) (See Affidavit of Larry Smith , "G" file #2, page 13-221, Appendix L., paragraphs 4, 5, 7, 8, 9; also Affidavit of Arthur S. Robinson , 'G' file #2, page 13-221, Appendix MM, paragraphs 3, 4, 5, 6, & 8; and transcript of Board meetings December 15, 1980. 'G' file #1, volume 3, pages 122, 124, 126 and volumne 8, pages 101, 115, 117).

When the subsistence bill was enacted, the legislature independently emphasized the importance of public meetings on all actions affecting subsistence issues.

> "...it is the intent of this committee that the decisions and determinations of the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act. May 12, House Journal, page 1155, Session 697, ('G' Appendix N, supra). (emphasis added)

Defendants have acknowledged that during the 1980 Board meetings they violated AS 44.66.310 and 312. On June 22, 1982, Defendants stipulated to Entry of Judgment against them on Count II of Plaintiffs' complaint in Gjosund et al v Alaska Department of Fish and Game et al , 3HO 80-92 Civil and 77-11014, Homer. Count II in Gjosund is identical to Count II in Madison. It alleges that the Board violated AS 44.66.310. The parties stipulated that:

> "It is the agreement and the stipulation of the parties to this action that, the defendants having examined the evidence available to them in light of the public meetings law, entry of judgment can be had against the defendants on the second part of plaintiffs count two alleging violations of the public meeting provisions of AS 44.62.310, and 312 and therefore judgment can be entered against the defendant on all parts of count two of plaintiffs complaint."

Stipulation Relating To Counts Two, Three and Five of Plaintiffs' Complaint was filed and the Order signed November 12, 1982, by Judge Paul Jones (also see Findings of Fact and Conclusions of Law in Support of Declaratory Judgment and Permanent Injunctive Relief dated November 12, 1982, signed by Judge Paul Jones in Gjosund . Findings of Fact #23 'G' file #2 at 254 et seq) and the Order of Judge Jones of Declaratory Judgment and Permanent Injunctive Relief , Order #3, signed November 12, 1982, Judge Paul Jones.

Judge Carlson ruled that Plaintiffs' count II was moot, however, he apparently only considered AS 44.62.180-290 which deals principally with the procedural aspects of the Administrative Procedures Act. Although Judge Carlson's ruling

claims to decide all the issues raised in Count II, i.e. public notice and public meetings, and moots Count II on this ground, neither the record nor his Findings and Conclusions support his Judgment of January 26, 1983. (See Findings of Fact and Conclusion of Law on Counts II and III , Judge Victor Carlson, January 26, 1983.

Plaintiffs' position is that the closed meeting issue has been incorrectly resolved and is not moot. All of the subsistence use criteria were apparently discussed, analyzed, compromised and effectively agreed to in the closed meetings of December 1980 in violation of the public meeting provisions of the Administrative Procedures Act. Immediately after the closed meetings, the Board adopted regulation #80-79 FB.

AS 44.62.310 and 312 combined with the legislature's particular proscription against anything less than 'complete public scrutiny' compels a substantive right to public meetings. Therefore since the ten criteria creation process took place in violation of the Plaintiffs' right to observe and be informed of the conduct of business relating to them; and since the subsequent public notices and hearings only attempted to correct what had previously been done in public without proper notice; then the ten criteria and all subsequent regulations and measures incorporating those criteria are void.

The open meeting and public scrutiny policy statement of AS 44.62.312 are so forceful that even a questionable deviation must nullify the resultant actions. In this case the

violations are considerably deviant.

III

DID THE SUPERIOR COURT ERR IN FAILING TO FIND THAT THE ACTIONS OF THE BOARD OF FISHERIES VIOLATED THE PLAINTIFFS RIGHTS TO EQUAL PROTECTION OF LAW UNDER THE FEDERAL AND STATE CONSTITUTION

Equal protection rights are set out in the U. S. Constitution, Amendment 14, Section 1 and in the Alaska Consitution at Article 1, Section 1.

Article 8 Section 17 of the Alaska Constitution states:

> Uniform application . Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law and regulations."

No cases have really distinguished the natural resources constitutional equal protection provision from Article 1, Section 1. Plaintiffs offer that the equal protection restatment for natural resources requires an even more diligent and sensitive approach to equal protection analysis than areas not doubly protected.

The standards to be applied in equal protection challenges under the Alaska constitution have been developed and enunciated in Isakson v Rickey ., 550 P2d 359 (Alaska 1976); State v Erickson , 574 P2d 1, (Alaska 1978) and Commercial Fisheries Entry Commission v Apokedak , 606 P2d 1255, (Alaska 1980). The test to be applied can be stated as follows:

Initially, we must look to the purpose of the statute,

> viewing the legislation as a whole on the circumstances surrounding it. It must be determined that its purposes are legitimate, that it falls under the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced, therefore, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved." Erickson , supra, page 12

The equal protection test has also been stated in Isakson , supra, at 362,

> "In order for a classification to survive judicial scrutiny, the classification must be reasonable, not arbitrary and must rest on some grounded difference having a substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Plaintiffs allege that the Board of Fisheries through regulation, policy and application established a screening model for subsistence use inclusion which is unrelated to the intent of AS 16.05.251(b) and which discriminates against and amongst subsistence users unreasonably.

As a preamble to the equal protection analysis, we offer that the Board has done two things. Firstly, they have created a set of 10 criteria using as a paradigm an ethnically pure rural native village community to screen all applications for subsistence users. In conjunction with this they have adopted a policy and precedent requiring conformance to this model prior to evaluating whether or not an applicant satisfies all of the 10 criteria.

The Board has then gone one step further, apparently assuming that 16.05.251(b), granted them administrative powers enabling the Board to apply the regulations they enacted.

What has in effect occurred is that the Board has interpreted the legislation, enacted regulations, and then applied those regulations to restrict the taking of fish for subsistence uses from all Alaskan residents unless they reside in an established geographic community precisely mirroring an idealized rural native village community. This is not a legitimate purpose of the statute.(*)

It also unfairly discriminates against all excluded Alaskan residents who are and have been subsistence users without any rational connection to the statute's legitimate purposes.

Examples describing how the Board deliberates, decides, creates, and applies their regulations is critical to understanding Plaintiffs' arguments in this brief. Since 1977, the Board has actively attempted, due to their personal philosophies and bias, to exclude all subsistence uses in Cook Inlet.

At the December, 1976 meetings, the Board eliminated subsistence fishing in the Southern District of Cook Inlet. The record of proceedings illustrated that there were no legitimate or supportable biological concerns. It was a 'shoot from the lip' decision that subsistence use no longer existed in the Southern

*To avoid repetition, Plaintiffs incorporate in this equal protection argument their analysis of legislative intent from Argument I, A & B Administrative Review.

District of Cook Inlet. Judge Lewis in June of 1977, entered a preliminary injunction reinstating the regulations that had existed prior to 1977. (See 'G' File #2, Appendices Q, M, supra).

Over the next three years the Board reduced the area, catch per permit, and size of gear for subsistence fishing to where the fishery was effectively eliminated. On June 16, 1980, the Superior Court was called upon again, and entered a permanent injunction reinstating the subsistence fishery as it had been in effect prior to 1978. ('G', file #2, Appendix O, supra).

Part of the record in Gjosund upon which Judge Jones made his decision was the Board's discussion of gear length reduction for subsistence fishing from 35 to 20 fathoms.

> Beaton, (Board member): Mr. Chairman, I'd like to amend it to read "Southern District set gill Nets 20 fathoms". I don't see any reason they need 35... I think 20 would be plenty. I think there is a problem of wastage.* Got to be something reasonable. I'd like to get down to 5 to 10 but I know you couldn't catch anything then . (Big laugh)...
>
> Szabo: Is there a second to that motion,...(Motion and Amendment seconded and passed)
>
> Beaton : They might have beat us but we got our little licks at them ...(laugh) (emphasis added)

The Board has now discovered that the subsistence bill provides them with a more sophisticated tool to fulfil their purposes. Neither the body of the subsistence legislation nor the statments of intent offer indications, implications, or

*No evidence was ever presented to the Board showing that wastage existed or was a noteable problem.

hints of racial or ethnic considerations. However, the Board has consistently referred to race and ethnicity in their discussions and have fashioned a community prerequisite to subsistence inclusion based upon an ethnically pure rural native village community.

The effect of this has been two fold. It has made it impossible for any individual, family or small community Native or non-Native, to be considered a Cook Inlet subsistence user and has also excluded all Natives living on Cook Inlet (except those in Port Graham, English Bay, and Tyonek) due to their lact of 'ethnic purity'.

Following are excepts from the Board's hearings of April 1, 1981, discussing the qualities and characteristics of subsistence in Cook Inlet in regard to the Kenaitze Indians. ('G' file #1, volume 27, 28).

Beaton, (Board member):---that the Kenaitzes fall somewhere in between, <u>obviously the blood/cultural thing is there,</u> but it is not there to the degree that it was in the three villages. (line 23, page 19, 20) (<u>emphasis added</u>)

Beaton: Well what I'm saying there, I guess, essentially is that the three villages, ---- there have been some inroads made by some outsiders, you know, intermarriage, a few school teachers, things in that nature, but small--- in comparison to the over-all population is. But in the Kenaitze, it really gets down to where it is really a lot harder to identify them as an entity, and that is probably the best proof it that is in these land claims and I think that under ---- these land claims <u>they couldn't clearly identify them as a village</u> ; (line 15, page 21, 22) (<u>emphasis added</u>)

Beaton: ...But, in other places,---alluding to there such as Anchorage and everything, it literally over whelmed that culture. I mean, you know, for whatever reason, either they didn't have enough (indiscernible) of the culture, and you know, the people weren't purist enough , or whatever, but they really just kind of got steamrolled over that their culture really did change.(line 16, page 36) (emphasis added)

...And that gets dangerously close to that if not that in the case of the Kenaitze. You know, that's what I'm concerned about. It may not be the case, but it certainly is on that really borderline area there. I really felt that even Tyonek in my own mind, English Bay and Port Graham are dangerouly on the borderline, but I certainly think that the Kenaitze...everything I've heard until now led me to believe that just maybe they'd want, you know, into that new world there whatever they are really overwhelmed by... (line 6, page 37) (emphasis added)

Beaton: But, nevertheless I can see why they did check out the Kenaitze because that is where all the pressure is coming from. They claim they are a native village , they claim all of these things.(line 6, page 43) (emphasis added)

But at best they are not meeting all of the same criteria such I think it is to the discretion of the Board whether the Kenaitze have been maybe classified as a village or, you know, as one that was subsistence type rights and...of the three. (line 22, page 43, 44) (emphasis added)

Quintin: Mr. Chairman, I'll just get back to the same subsistence thing here again that without a real definite interpretation of subsistence I would submit that 99 percent of the people are not subsistence users. Now, the reason that I say that is simply the fact that a 100 years ago now, the ethnic people --- the native people or whoever lived here were truely subsistence users. (line 13, page 50) (emphasis added)

Beaton: ... why the Kenaitzes seem to be almost singled out is, I guess that they made a real allegation that they are one in the same as those three villages, and I

don't think anyone else on that list, or anybody else, has really come forward with positions papers and the rest of it that they are asserting that they are one and the same as those three villages. (line 15, page 42) (emphasis added)

The following excerpts are from the Board's consideration of the Homer area for subsistence use. ('G' file #2, April 1, 1981, volume 28)

Huntington: Homer is a fishing community.

Szabo: Well, yeah but... I don't even think it has its roots as far as being a native village or anything. I mean...I don't even know what the history of Homer was. Maybe...maybe Grif knows better what existed in Homer back 70 years ago when you...(line 20, page 10)

Quinton: It was never a native community. Never was. (line 10, page 10)

Beaton: Seldovia was at one time a native village .....Then later became a logging area which it is now. Logging and fishing area. But it was originally a native village. However, there are an awful lot of people in Seldovia today...I've lived there three years myself, Johnnie---- and there are of mixed blood there ... and particularlly all of the natives that were, you know, ---really oriented to the native lifestyle pretty well moved back into Port Graham and English Bay. T ones that essentially don't like all of this change, so to speak. And, now you have a lot of progressive Natives like Pete Alsaut (Ph) is part native ---and, you know, he is a real time - big time, big crabber, big fisherman, and the rest of it....But they, the rest of them kind of moved back over into the Port Graham and English Bay part ....part of the native community. (line 25, page 11, 12)

Beaton: ...for a lack of a better term, (the term used was 'pseudo subsistence users') I mean in otherwords,...you know they really did just run in there and kind of (indiscernible) it up in anyway. They decided that they are going to emmulate the three villages but they are really not true subsistence users. (line 16, page 18)

Szabo: I think if they had come here, you---say, several hundred years ago and started this same thing that he is doing now...you could certainly make the same case for them as you are making for these other villages. But, the fact that this group, you know, arrives new on the scene with no---you know cultural ties, no family ties or anything else. And that they all just appear and then they set up, you know, something that mimics what subsistence means then...

Beaton: It's almost like (indiscernible) blue blood, (ph) or something. I mean you just...just money alone doesn't really get you into this thing anyway. (line 7, page 19)

Szabo: But, you know, as far as any---they still don't have---all of them aren't fourth --- fourth generation people, you know. whereas like Tyonek you can trace their existence back for many generations, the same with English Bay and Port Graham. (line 22, page 20) (emphasis added)

An example of the Board discussing Ninilchik:

Beaton: I think the key component...you would have a hard time dealing with Ninilchik---like you said Mr. Glosslein, (ph) who was causing the problem and super siener there, Jerry (indiscernible) in Ninilchik. I mean, it is just a tremendous variation of guys from Ninilchik that are up on there. ---you know--- and there's some Native involvment there, and there is all these others. And certainly Gloslein is about as different from a Native as anybody (indiscernible voice drops)--- you know, I mean as far as his background and stuff. (line 12, page 22) (emphasis added)

The Board also shows particular prejudice and cynicism towards subsistence reports which contradict their desires and beliefs. At the March 20, 1981, hearings ('G' file #1 volumes 19-22) the chairman of the Board inquires about a subsistence report from the Subsistence Division and continually infers,

without any substantiation, that the people who filled out the questionaire were liars. On page 88 Mr. Szabo says in response to certain charts presented to him.

Szabo: ...or else, how many liars you had...

Szabo: Yeah, but that's assuming that the people didn't lie about their family size...also didn't lie about anything else. (page 92)

Mr. Szabo's cynicism towards the information provided by the subsistence section comesout again when he questions their information:

Szabo: The information coming out is only as good as the information going in." (page 93)

Szabo: I mean we found two hundred and thirty liars yesterday...now we don't know how many other liars we have... (page 270)

At the March 23, 1981, meetings Mr. Kelso of the Subsistence Section and Mr. Szabo have a dialogue. Mr. Szabo attempts to pressure Mr. Kelso to write supportive findings for the Board's conclusions when the Subsistence Section's data regarding subsistence users leads to a contrary conclusion. Mr. Kelso advises Mr. Szabo of this information and advises him that the Subsistence Section is not in the business of "creative writing" ('G' File #1, volumes 24, 24, 26, pages 58-68, see page 63)

In the December, 1981 proceedings the Board first receives a report from James Fall of the Subsistence Division. ('G' File #2, Appendix GG, Traditional Resource Uses in the Knik

Arm Area by James Fall, December 1981). The report and testimony establish that Knik satisfies the 10 criteria. As the Board realizes this they adjourn and upon returning they developed the new idealized community definition which must be satisfied before the Board will apply the 10 criteria. They then also formulate the policy requiring conformity with all 10 criteria after satisfying the community requirement.

The Board then reevaluates Knik with the community definition and finds that Knik is not a community and therefore the 10 criteria are now inapplicable. Conclusion: No one in Knik is a subsistence user.

Referring to Knik: ('M' File #4, Exhibit EE supra)

Szabo: ...And we said well, maybe that two acres and that one household. If you viewed them as a community would meet those ten criteria, but we don't think they could be viewed as a community. (page 126)

Goll: Yeah. Just one comment, Mr. Chairman...some people are under the false impression that the ten criteria is the only think, the only latitude the Board has, and that's not, in fact, the case...It's part of it, but we can go beyond that too...Am I correct in that?

Szabo: Well, I think there's other things... (page 126, 127)

The Board also shows a patronizing and often cynical view of Native activities. For example see pages 5, 6, 12, and 13.

To clarify Plaintiffs' position in light of the above referred to record with one final example: The Board

effectively set up two classes. One results from 5 AAC 01.597(b and (c) requiring that one belong to "the community" (See proceedings, Knik, 'M' , Appendix EE, supra) before requiring satisfaction of all ten criteria. The community includes the class that lives in an established geographic community, which may be participating in a subsistence system, with at least several households of full time residents who reside in a specific geographical area because of common interests and who look like a pure native village and then satisfy all ten of the criteria.(5 AAC 01.597(b)(c). The excluded class is made up of all other Alaskan residents either as individuals, families, groups or communties who have a history of use of set gill nets and use of salmon for their family and personal consumption consistent with all subsistence regulations in effect prior to 1979 and who otherwise may satify some or all of the ten criteria but are not considered subsistence users because they are not members of the idealized community.

Although the class descriptions are a bit wordy they do describe what the Board has done. It is incredible that this scheme and all of the hearings and litigation spring from the Board's belief that the legislature in 16.05.940(26) intended the term customary and traditional to proscribe all Alaskans but those in the 'perfect idealized native community' category. Plaintiffs submit that this scheme does not further the purposes of "permitting the taking of fish for subsistence uses", "of recognizing the needs, customs and traditions of

all Alaskans" and of maintaining fish stock on a sustained yield basis." Further that the class system set up discriminates against Plaintiffs and persons similarly situated without any rational basis.

IV

HAS THE BOARD OF FISHERIES VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS OF LAW?

Plaintiffs claim that they have a right to fish, minimally, on a parity basis with all other user groups. This claim is based upon their prior continued and long term use of the salmon moving through Cook Inlet. The method used has primarily been with set gill nets in particular areas on the east shores of Cook Inlet. The salmon have been used for their personal and family consumption. The Fourteenth Amendment to the U.S. Constitution, Section 1, provides as follows:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law..."

The Consitution of the State of Alaska, Article 1, Section 7, provides:

> "No person shall be deprived of life, liberty, or property without due process of law."

The allegations in this section include cummulative violations, some of which alone are sufficient to support due process violation.

(A) Due process - Arbitrary Exclusion/Biased Hearing

The Board terminated Plaintiffs access to equally participate in the harvest of Cook Inlet salmon with the other user groups i.e. sports and commercial users. The history of Plaintiffs' use is set out earlier in this brief by reference to the record and affidavits. We assert that the deprivation of access to harvest and supply food for oneself and one's family is of comparable importance to warrant protection under the due process clauses the interests in Kerscher v State , 568 P2d 996 (Alaska 1977) and Chin Hilbers v Municipality of Anchorage , 611 P2d 31 (Alaska 1980) Actions of an agency or government, although discretionary must still conform to principles of fundamental due process. See Vick v Board of Electrical Examiners , 626 P2d 90 (Alaska 1981). Due process requires notice, which is "reasonably calculated ....to....afford an opportunity...to be heard at a meaningful time and a meaningful manner' Aguchak v Montgomery Ward Co. Inc , 520 P2d 1352, 1357 (Alaska 1974) Plaintiffs submit that a due process hearing in a 'meaningful manner' includes an impartial hearing i.e. impartial jury or Board. Green v State, 462 P2d 994, 997, (Alaska 1969).

The exclusion of Plaintiffs was devoid of considerations of resource shortages or biological need to limit the harvest or protect the sustained yield of salmon moving in and through Cook Inlet. The record also fails to establish that the Subsistence Section was requested to, and did, provide the Board with comprehensive research data on the Plaintiffs or

persons in their area regarding subsistence use qualification under AS 16.05.094.

Contrarily the Braund Report , ('G' Appendix R,pages 26-35, supra) concludes that there are numbers of subsistence users participating in subsistence uses on the east shore of Cook Inlet. The record of this Board's action imp s concluding that the Board can not, where these Plain fs particularly and subsistence use in Cook Inlet generallyis concerned, conduct fair and impartial hearings.(Plaintiff directs the Court to the facts set out in this brief at the Statement of Facts and in the Equal Protection argument including references to quotations from the record.) The record also confirms that Plaintiffs' exclusion was a capricious act by a biased hearing board without any substantial base. The result deprived Plaintiffs of the right to fish as they have historically and traditionally done and to feed themselves and their families. As such the Plaintiffs have been denied due process of law.

(B) Due Process - Closed Hearings

Madison also alleges that the closed meeting violations by the Board (argued and discussed in argument II i.e. Public meetings issue) which resulted in the formulation, synthesis and ultimately the adoption of the 10 criteria violates the principles of procedural and substantive due process. There is a substantive aspect of the Administrative Procedures Act which

appears in AS 44.62.310, 312. The public meetings policy act does not involve procedural matter such as contained in AS 44.62.040-290. Therefore Plaintiffs submit that the Board's failure to comply with AS 44.62.310, 312 is both procedural due process violation under Aguchak v Montgomery Ward Co., Inc , 520 P2d 1352 (Alaska 1974), and a substantive due process under an analysis of the Administrative Procedures Act.

C. Due Process - Administrative Actions By The Board Are Improper

Madison alleges that the Board is administrating their own regulations. (See 5 AAC .01.597(b). Also 80-79 FB, Amended 80-79 FB; 81-92 FB and Knik hearings, pages 126, 127; 'G', Appendix A-1, A and B respectively and 'M' Exhibit EE supra)

The application of the subsistence regulations is an administrative act which the Board is statutorily precluded from doing. There are no formal procedural administrative rules within which the Board can competently and fairly administer the regulations. AS 16.05.241 states:

> "Powers excluded. The boards have regulation making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers.'

Alaska Statute 16.05.050 (9) reads:

> "Powers and duties of the commissioner: The Commissioner has, but not by way of limitation, the following powers and duties:
>
> (9) Administrative, budgeting, and fiscal powers; Also see Kenai Peninsula Fisherman's Cooperative Association, Inc. v State of Alaska, 628 P2d 397,

(Alaska 1981)

The Board has assumed the powers of applying the policy and regulation adopted by it. Black's Law Dictionary , 4th edition, defines administrative acts as:

> "those acts which are necessary to be done to carry out legislative policies and purposes already declared by legislative body..."

Ballentine's Law Dictionary , 3rd edition, defines administer as:

> "...to apply or enforce the law..."

and defines administrative power as:

> "...the power of carrying laws into effect, giving them practical application to carry on affairs by way of management, oversight, investigation, regulation, and control, in accordance with and in execution with the principles precribed by the law maker...,"

The necessity for separating administrative powers from regulatory powers is reflected by the actions of this Board in the present controversy. They tend to blend the regulation making with the application of those regulations and the result is a general and vague process pretending precision. Their actions in process fail to objectively and fairly represent to the public a system of recognizable standards and mechanisms for applying those standards so that the public can be treated with and reasonably expect some degree of predictability. (Knik Transcripts, 126, 127, 'M' Appendix EE supra).

The basic point is that the Board may adopt criteria, policy, and regulations but the mechanical process of uniform application can and should only be done by technical and

managerial staff in the affected areas and under the Commissioner of Department of Fish and Game. The mechanics of applying for subsistence status to the Board invites irregular and haphazard results when, especially in this case, the policy making body attempts to weigh individual applications while at the still formulating and defining the regulation and policy which they have created. (Knik Transcripts, supra).

D. Due Process - Generally

In combination or alone, [1] the Board's personal predilictions; [2] the absence of any biological need to restrict use of Cook Inlet salmon; [3] violations of the Administrative Procedures Act; [4] absolute exclusion of Plaintiffs as equal participants with other user groups; and the [5] illegal administration of the regulations, exemplify violations of Plaintiffs' due process rights.

This Supreme Court has described due process in Bachner v Pierson , 479 P2d 319 (Alaska 1970) and Green v State , 462 P2d 994, (Alaska 1969). Both cases dealt with allegations of improper jury selection, and defined due process as:

> "The term due process of law is not susceptible to a precise definition or reduction to a mathematical formula" But, in the course of judicial decision has come to express a basic concept of justice under the law, such as "our traditional conception of fair play and substantial justice", of "protection of the individual from arbitrary actions"; "fundamental principles of liberty and justice", whether there have been a denial of fundamental fairness, shocking to the universal sense of justice, "that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct." and

" respect for those personal immunities which...are so rooted in the traditions and consciencness of our people as to be ranked as fundamental....or implict in the concept of liberty." Green v State , at 996, 997, Citations omitted).

Due process violations can ensue from cummulative patterns of behavior resulting in basic and intuitivly recognizable unfair actions. Madison alleges at the least that this is what has happened.

V

IS THE CREATION OF A NEW FISHERY, NAMELY A PERSONAL USE FISHERY, BEYOND THE AUTHORITY DELEGATED TO THE BOARD OF FISHERIES?

The Board of Fisheries, in 1981, birthed a new fishery, originally labeled a family use fishery. However the abbreviated form of family use (using the first letter of 'family' and the first letter of 'use,' i.e. FU) caused the Board to doubt the wisdom of that selection. Finally they selected 'personal use' as the label for the new fishery, (The abbreviated form of which was not considerably better than their prior selection). This personal use fishery was assumedly conceived as a token for the former subsistence users now disenfranchised by the Board. Both occurred at the Spring 1981 Board meetings.

Personal use is an excess stock fishery and, as a food source, is dependent on whether or not the other users' catch i.e. sports, commercial, and subsistence, is assured.

The rationale for creating the personal use fishery and

its limitations are set out in 5 AAC 77.001 entitled Intent and Application of this Chapter .

(a) The Board of Fisheries finds that

(1) before the enactment of the state's subsistence priority law in ch. 151, SLA 1978, an individual could fulfull his personal use needs for fish under subsistence fishing regulations;

(2) the state's subsistence priority law changed the definition of subsistence in a manner that now precludes some individuals from participating in customary and traditional subsistence fisheries and efficiently harvesting fish for their personal use;

(3) there presently are areas of the state with harvestable surpluses of fish in excess of both spawning escapement needs and present levels of subsistence, commercial and sport uses ; and

(4) it is necessary to establish a new fishery classified as "personal use" because

(A) since the sale of fish is not appropriate or permissible, this fishery cannot be classified as commercial;

(B) since the use is not a rural customary and traditional use this fishery cannot be classified as subsistence; and

(C) since the gear for this fishery is often different from that historically associated with sport fishing, this fishery should not be classified as a sport fishery, to prevent confusion among the public.

(b) It is the intent of the board that the taking of fish under a 5 AAC 77 will be allowed when that taking does not jeopardize the sustained yield of a resource and either does not negatively impact an existing resource use or is in the broad public interest. (emphasis added)

As authority for adopting and creating this fishery, Defendants relied on Alaska Statute 16.05.251(a)(6), which

states:

> "(a) The Board of Fisheries may make regulations it considers adviseable in accordance with the Administrative Procedures Act for
>
> (6) classifying fish as commercial fish, sports fish or predators or other categories essential for regulatory purposes". (emphasis added)

Significantly this section only refers to classifying 'fish' not creating new fishery categories and this classification must be essential for regulatory purposes i.e. conservation and development, AS 16.05.221(a).

Plaintiffs propose that the language of 16.05.251(a)(6) contains two limitations. First the 'fish' to be classified must be within statutorily designated categories. The legislature particularly set out some of these categories in the statute, i.e. predatory fish, commercial fish, and sports fish. Any other category must be authorized by the legislature such as subsistence, AS 16.05.940(17)(26); endangered AS 16.20.010, 020; experimental, educational, and scientific, AS 16.15.020; or any other categories set out in Title 16. The legislature did not authorize the Board to create a new category of fish, i.e. the personal use fish.

Secondly, the category must be essential for regulatory purposes. Essential for the conservation, development and utilization of fishing resources, (Kenai Peninsula Fisherman's Association v State , 628 p2d 897 (Alaska 1981).

Essential is defined as 'extremely important; 'of the

greatest importance; indispensable'. American Heritage Dictionary , (1973) Funk and Wagnalls, Standard College Dictionary , (1963). Black's Law Dictionary Revised Fourth Edition. Essential is not the equivalent of 'want' or 'convenience'.

The intent outlined in 5 AAC 77.001 does not satisfy 'essential'. Therefore for both of the above reasons, Plaintiffs believe the Board has exceeded its legislative authority by creating a new category of fish, i.e. personal use. Additionally, even if the Board could create the new category, they would have to show that it was 'indispensible' to the conservation, development and utilization of the fisheries.

Plaintiff's position on the personal use fishery independent of the above arguments is that this fishery is closer to a charity fishery than a parity fishery. Plaintiffs feel that they are minimally entitled to equality of use even independent of the subsistence bill. This right was recognized by the Superior Court in Gjosund 77-22104, Homer and 3HO-80-92 Civil, and to a degree by Judge Carlson in Madison . (See Findings of Fact and Conclusions of Law on Counts II and III, January 26, 1983, Conclusions of Law, 9, 10)

The personal use fishery is an excess stock fishery and it does not provide certain essential attributes, i.e. it does not provide a predictable and reliable means in terms of time, gear, location and species, of providing food for Plaintiffs and their families as they have in the past.

The true character of this fishery is set out in 5 AAC

77.001(a)(4) and (b). The Board's attempt to use this as a solution to the problems they have created, has merely created additional problems. For example see Kenai River Sports Fisherman v State , _____(September, 1983).

CONCLUSION

The Plaintiffs ask the Supreme Court to recognize that they have a right to participate in the harvest of Cook Inlet Salmon at least on a parity with other users. Their political and financial influence with the Board is considerably less than that of the sports and commercial users, however, their traditional, historical and customary life pattern including fishing with set gill nets to feed themselves and their families is of considerable importance. The documents, exhibits, papers, time and energy spent on these cases demonstrates conflicting interests, but certainly the legislature did not mean to align the interests of Mr. Madison, Lucy Casey and their neighbors, relatives and friends against the Board of Fisheries' interests. Certainly their uses are subsistence uses under any reasonable definition or conceptualization ofsubsistence ues. The arguments and law here are meant to demonstrate and pursuade this Court to recognize the Plaintiffs' right to continue to set their nets, gather their fish, and feed themselves and their families consistent

with Plaintiffs' life patterns and with the legislature's directive to the Board of Fisheries to " permit the taking of fish for subsistence uses".

DATED at Homer, Alaska this 1 day of Oct, 1983.

Respectfully submitted,

MARTIN FRIEDMAN

ARTHUR ROBINSON

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, et al. Appellant, ALASKA DEPARTMENT OF FISH AND GAME and ALASKA BOARD OF FISHERIES, Appellees, vs THE ALASKA FEDERATION OF NATIVES, Intervenor.	Supreme Court Nos. 6824/7181 Superior Court No. 3KN-81-542 Civil
ALASKA DEPARTMENT OF FISH AND GAME, et al., Appellants, vs LOUIS GJOSUND, et al., Cross-Appellees.	Supreme Court No. 7410 Superior Court Nos. 3HO-80-92 Civil 3HO-77-11014 Homer

MERIT APPEAL FROM THE SUPERIOR COURT, STATE OF ALASKA
THIRD JUDICIAL DISTRICT
JUDGE VICTOR CARLSON

REPLY BRIEF OF APPELLANT/CROSS-APPELLEES

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May 1984.
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~~ROBERT B. BACON~~ David A. Hampers
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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATUTES RELIED ON..... iv

REGULATIONS RELIED ON..... iv

STATEMENT OF ISSUES..... 1

ARGUMENT

LEGISLATIVE INTENT..... 2

ADMINISTRATIVE REVIEW..... 10

RURALNESS ISSUE..... 13

THE PUBLIC MEETINGS ISSUE..... 16

EQUAL PROTECTION..... 17

DUE PROCESS..... 19

IMPARTIALITY..... 22

PERSONAL USE FISHERY..... 23

THE GJOSUND DECISION..... 23

CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES:

Alaska Transportation Commission v Grandia, 602 P2d 402 (Alaska 1979)..... 17

Aleknagik Native's Limited v Andrus, 648 P2d 496..... 22

Doe v State, 487 P2d 47 (Alaska 1971)..... 17

Green v State, 462 P2d 994 (Alaska 1969)..... 20

Ketchikan Gateway Borough, Alaska v Breed, 639 P2d 995 (Alaska 1981)..... 15

Lynch v McCann, 478 P2d 835 (1970)..... 6

Marks v City of Anchorage, 500)2d 644 (Alaska 1972)..... 15

Towne v Eisner, 245 US 418, 425 (1918)..... 2

Tyonek v Alaska Board of Fisheries, 3AN 80-3073..... 5

Woodards v State, 604 P2d 250 (Alaska 1979)..... 15

STATUTES:

AS 01.10.040..... 6

AS 16.05.094..... 21

AS 16.05.251(b)..... 2,12

AS 16.05.251(b)(1), (2) & (3)..... 24

AS 16.05.940(17)..... 1,2,3,12,21

AS 16.05.940(17) pre-1978..... 3

AS 16.05.940(26)..... 1,2,3,12

AS 44.62.310..... 16

AS 44.62.312..... 16

AS 44.62.330(9)(40)..... 22

AS 44.62.630..... 22

REGULATIONS:

5 AAC 01.597(a)(1-10)(b)(c).....4,5, 7, 8, 12,16

5 AAC 99.020..... 14

STATUTES RELIED ON

AS 01.10.040

> Words and phrases. Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.

AS 16.05.094:

> Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall
>
> (1) compile existing data and conduct studies to gather information including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;
>
> (2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;
>
> (3) make information gathered available to the public, appropriate agencies, and other organized bodies;
>
> (4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;
>
> (5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;
>
> (6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;

(7) participate with other divisions in the preparation of statewide and regional management plans so that these plans reorganize and incorporate the needs of subsistence users of fish and game.

AS 16.05.251

Regulations of the Board of Fisheries.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
(2) local residency; and
(3) availability of alternative resources.

AS 16.05.940

Definitions. In this chapter

(17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence use with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as resources for direct personal or family

consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption: for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis.

AS 16.05.940 - pre-1978

"Subsistence fishing": the taking, fishing for or possession of fish, shellfish, or other fishery resources for personal use and not for sale or barter, with gill net, seine, fish wheel, long line, or other means as defined by the Board.

AS 44.62.310

Agency Meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivision, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to orgainze the afore-mentioned bodies.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the

motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

AS 44.62.312:

State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the

people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) AS 44.62.310(c)(1)1 shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executve sessions.

AS 44.62.330:

(a) The procedure of the state boards, commissions, and officers listed in this subsectin or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 - AS 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatment or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 - 44.62.630 is limited to named functions of the agency

(40) Board of Fisheries

AS 44.62.630:

Impartiality. The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties.

REGULATIONS RELIED ON

5 AAC 01.597

CHARACTERISTICS OF SUBSISTENCE FISHERIES.(a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

(1) a long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g., regulatory action or fluctuations in resource abundance;

(2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;

(3) a use pattern associated with specific stocks and seasons;

(4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;

(5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;

(6) a use pattern occurring in locations with easiest and most direct access to the resources;

(7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;

(8) a use pattern which includes the intergenerational transmission of activities and skills;

(9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and

(10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.

(b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.

(c) For purposes of this section, a "community" is generally considred to be several households of full-time residents who all reside in a specific geographic area because of common interests. (Eff. 4/14/82, Reg. 82)

5 AAC 99.020 Definitions.

In this chapter, "rural" means outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more, as determined by the Alaska Department of Community and Regional Affairs. (Eff. 5/30/82, Reg 82)

STATEMENT OF ISSUES

The issues under consideration have been set out in the Opening and Responsive Briefs of the parties. This Reply will deal with the points raised in the State and Intervenor's briefs. The argument heading in this Reply refers to the issue discussed under that heading. All arguments in this reply have been dealt with and described in the Statement of Issues in the Opening and Responsive Briefs.

ARGUMENT

"A word is not a crystal, transparent or unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Mr. Justice Holmes in Towne v Eisner, 245 US 418, 425 (1918)

I. LEGISLATIVE INTENT

Gjosund and Madison (hereinafter Plaintiffs) will try to clarify the primary issues in this case and deal with the legal arguments countering and supporting these issues in subsequent parts of this reply.

With time for reflection and a renewed and hopefully clearer examination of the heart of this controversy, it appears that much has been done about nothing. If this Court, independent of the Board's interpretation, examines AS 16.05.251(b) and AS 16.05.940 (17) and (26), this conclusion will result. It will not be because of any reference to newly discovered insights into applicable legal standards, but by macroscopic view of the acknowledged history and bias of the Board of Fisheries in dealing with subsistence fishery issues. (Intervenor's brief, page 3, 18 and 37 through 46 and Plaintiff's opening brief.)

Plaintiffs will attempt to minimize repetition by referencing to earlier briefs.

Plaintiff's position regarding the subsistence legislation is that the intentions of the state legislature were permissive, protective and inclusive. The legislature wanted to maintain and protect the status quo regarding subsistence uses in the state of Alaska. The subsistence bill also reflects a delineation and expansion of uses by including some uses, such as barter and trade, which were not included in the pre-1978 subsistence use definition. To argue that inclusion of the words 'customary and traditional use' instead of 'personal use' was intended to be restrictive, narrowing and exclusive ignores the plain and simple meaning of the words used as well as every legislative and legislator's statement of intent.

An objective view of legislative intention shows an intention to maintain and protect the usual uses by 'all Alaska residents,' 'native and non-native' by setting out in particular what those usual uses are. Subsistence use now means and includes, in particular, uses for food, shelter, clothing, tools or transportation and what had been excluded before, customary trade and barter. (Compare AS 16.05.940(17(26) with the pre-1978 AS 16.05.940(17)).

The new legislative statement is more inclusive than the

former, which contained means and uses in one statute, and excluded sale and barter from personal use. The subsistence law was passed to force the Board, by statutory enactment, to protect subsistence use. The legislature felt that the 1973 policy statement of the Commissioner of Fish and Game was neither adequate nor sufficient legal justification for protecting subsistence uses because the Board had failed to protect subsistence users where competition existed in the fishery with other user groups.

> " There are other individual examples of the failure of the Board to protect subsistence use in light of competing uses. In summary, however, the subsistence law was passed to enable the Board to provide for subsistence use during times of resource shortage and intense competition and to make certain that the Board took care of subsistence use prior to allowing other uses of these important economic resources ... .In the same way reliance upon the 1973 policy statement of the Commissioner and Board was not deemed adequate. First, this policy did not provide the legal justification for protecting subsistence uses and, in the generally held view in rural Alaska, was only a policy statement which the Board could point to without implementing it with any substantive measures. Be that as it may, all the subsistence law did was to codify this policy in order that its intent be enforceable rather than subject to the whims of the resource managers ....While this is only one example of the Board of Fisheries proclivities when 'left with its own devises' it is a clear indication of what fate is in store for subsistence users in highly intensive competitive fisheries and hunting situations, where there is no protection guaranteed by statute". (page 44, 45 - Draft Report of Special Committee on Subsistence. G file #2, page 13-221, Appendix BB) (emphasis

added)

The cases involving the Board of Fisheries (except the first Gjosund case (1977)) arose subsequent to the passage of the subsistence bill in 1978. These cases evidence the Board's approach to the Cook Inlet subsistence fishery.

The legislature must have been aware of the Cook Inlet Management Plan adopted by the Board in 1977, which omitted any consideration of subsistence. That plan was the subject of KPFCA v State, 628 P2d 897 (Alaska 1981) and was another impetus to upgrading the 1973 policy into legislation.

Tyonek v Alaska Board of Fisheries, 3An 80-3073, occurred after 1978 when the Board was fully aware of the particular wording and directon of the subsistence bill. However, they completely ignored the village of Tyonek which, for the past 15 years, had not been able to fish legally for King Salmon. After the stock recovered, the sports and commercial users were allowed to fish. Obviously Tyonek would be considered a subsistence user without any discussion. However, court action was still necessary. Through a Superior Court Order the Board enfranchised the village of Tyonek, its residents, and all timber and logging workers and state and school distict employees working in the area. In otherwords anyone who moved to or near Tyonek was now, at least after the Court order, a subsistence user.

The record before the Board and before this court shows a long time continual, usual, common, historical use by plaintiffs of the salmon in Cook Inlet.

The entire foundation for the Board's actions, and the position of Intervenors and the State, is that the division of subsistence uses from subsistence methods into two separate statutes, together with the language 'customary and traditional uses', justifies every action the Board has taken in excluding the plaintiffs in these cases. That change supposedly authorized the Board to adopt 5 ACC 01.597 i.e. Characteristics for Subsistence Fisheries. These criteria confuse what is a very simple legislative statement.

Customary and traditional should be interpreted according to their common and approved usage. They have not acquired any pecular meaning and no further statutory definition, judicial interpretation, or construction of these words has been set out. Taken in their very simple form or dictionary definition, they are adjectives meaning 'usual' and/or 'conventional'. Alaska Statute 01.10.040 states as follows:

> "Words and phrases: Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a pecular and appropriate meaning, whether by legislative definition or otherwise shall be construed according to the pecular and appropriate meaning." (For interpretation see Lynch v McCann, 478 P2d 835, (1970))

Customary and traditional should be accorded their common and approved usage.i.e. dictionary definition and general understanding of those words. These words are not terms of art from which the legislature intended 5 AAC 01.597(a)(1-10)(b)(c) to emerge.

Intervenor's brief (page 24) and the State's brief (page 21), both refer to a quote of Representative Anderson discussing the subsistence bill in the Alaska State Legislature as support for their understanding of the legislative intent. The language is much more consistent with plaintiffs' position. Since it has already been quoted twice, one additional time can't be too harmful.

> "The two words are used in this context to put some guidelines around the uses of Alaska's freedom of resources. What we were afraid of, it was brought to our attention by people who were concerned that this would leave the field of the definition wide open. That newcomers just coming to the State of Alaska would automatically be able to establish not only residency in thirty days, but be able to go out and state they have a customary and traditional use of Alaska's fish and game resources. The use of customary and traditional' use also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with aboriginal uses, but also those that have come in, those who come in later. They have... the non-native people in the State of Alaska have established customary and traditional uses of Alaska's fish and game resources for subsistence purposes. And in order to give the Board of Fish and Game (sic) more clarification in the area, we have come up with the (inaudible) of 'customary and

> traditional' rather than leaving the section wide open. The design is not to be restrictive but to provide guidelines and that is basically what I feel and many...many members felt it was necessary in retaining those two words 'customary and traditional'." (emlphasis added).

Representative Anderson's points indicate that the statute wanted to 'put some guidelines around the use of Alaska's freedom of resources' and that the 'design was not to be restrictive.' 'Customary and traditional use' is recognition of historical use 'of those (Alaskan residents) that come in later'...'the non-native people.' 'Customary and traditional' are used to give the Board more clarification. The State and Intervenor are now arguing that plaintiffs pre-1978 use of salmon is no longer subsistence use because the Board has developed 10-criteria (plus two community criteria) which do not include the plaintiffs. In fact they were adopted to exclude them. (See discussion of Knik hearings in plaintiff's brief at page 21-23).

5 AAC 01.597(b)& (c) are examples of over-extension of the Board's authority and are exactly why the legislature felt a need to adopt a subsistence bill. Subsistence users had to be protected from the Board. However, the Board has again pursued its own course and found a means to subvert the intentions of the subsistence bill. 5 AAC 01.597(b) states.

> "The Board will identify established geographic communities which may be participating in a subsistence system. The Board will then apply

> all the characteristics in (a) of this section to the communities and to subcommunites, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority."

The Board has developed an exclusion mechanism for any individuals, families, or groups of families from consideration as subsistence users unless they live in an 'identified established geographic community which may be particiating in a subsistence system.' Where does the subsistence bill authorize or offer a hint as to what this regulation means? The Board then goes on in subparagraph (c) to state:

> "for purposes of this section, a "community" is generally considered to be several households of full time residents who all reside in a specific geographic area because of common interest."

The intention of this regulation is clear. It is to exclude anyone in Cook Inlet who does not live in a model native rural village and completely controvenes the legislative intent.

Intervenor (page 26 and 27) and the State (page 20) use two quotes attributed to Representatives Miller and Huntington describing hunters flying in to rural areas to hunt and take meat from the subsistence users. These quotes emphasize, (and its a point we do not disagree with), that the people in the place of the subsistence resources should have a say about the use of resources in the area they live in. Assumedly

Intervenor and State accept these quotes as supporting their case. It is our position, illustrated by the record, that plaintiffs in Madison and Gjosund live where the fish are, and the Board has in fact excluded them from subsistence fishing, instead of protecting and permitting their subsistence fishery, because of threats to the resource by people from other areas. I assume Representatives Miller and Huntington wanted the area users protected from, and not excluded by, the fly-in hunters or fishermen.

II ADMINISTRATIVE REVIEW

One point connected to the discussion and argument above relates to the continual flux of positions, arguments and rationales that this case seems to birth. As an example, the Intervenor and State briefs are apparently now disagreeing with both Judge Carlson's and Judge Jones' standard of review of administrative action. The Superior Courts, in both cases, deferred to the Board's interpretations and resultant promulgations of subsistence criteria and refused to substitute their judgment for that of the Board. Intervenor and the State argued 'judicial deference' at the Superior Court level. It appears that they are now arguing that the Superior Court and this Court should substitute their judgment in the first stage of analysis for the Board's interpretation of the intentions of the subsistence bill (Intervenors brief, page 21; State's

brief, page 19) and defer to the Board regarding the enactment of the criteria regulations.

Plaintiff's position is that Judge Jones in Gjosund would have found that the criteria were not an accurate reflection of the intention of the statute and voided those criteria if he had substituted his judgment for that of the Board. The same could be argued for Judge Carlson. If the State and Intervenor are stipulating that the Superior Court erred in arriving at their conclusion regarding the administrative review issue all parties are now in agreement.

Plaintiffs have consistently argued that the courts should substitute their judgment for the Board's. The Board has predictably misinterpreted the intention of the subsistence statute and has over-extended and distorted the words 'customary and traditional' to the point where the criteria are incomprehensible to the public and tailored to fulfill the Board's pre-set intentions to close Cook Inlet to subsistence.

This Supreme Court must view the events and arguments in this case in a continuum. Individual elements of the issues may hold a certain attractiveness or reasonableness, however, when viewed in process from 1973 through 1983, the picture becomes much clearer.

The fact that subsistence use and gear prior to 1978 was set out in one statute and subsistence use and gear subsequent

to 1978 is set out in two statutes is nothing more than an intention to keep the same gear criteria to identify methods of harvest, and to amplify and exemplify subsistence uses separately. The uses set out in AS 16.05.940(26) are the particular and usual subsistence uses. The statute both expands on, and particularizes personal use to the existing users by including barter and specifying other uses that had heretofore been general. Substituting the words 'usual' in paragraph (26) for the words customary and traditional would make much more sense than substituting all of the characteristics contained in 5 AAC 01.597(a)(b) & (c) for customary and tradi ional.

In Gjosund, Judge Jones deferred to the Board of Fisheries' adoption of the criteria, however, he found that the criteria were only effective when determining priorities between and amongst subsistence users under subparagraphs (1), (2), & (3) of 16.25.251(b). Judge Jones determined that the Board's interpretation, insofar as excluding the plaintiffs in Gjosund, was unsound at the pre-priority level. He found that the plaintiffs in Gjosund were subsistence users of Cook Inlet Salmon stocks in accordance with AS 16.05.251(b) & AS 16.05.940(17)(26) and that they could not be restricted unless there was a factual showing that the salmon stocks were jeopardized.

"RURALNESS" ISSUE

Although this issue was not brought up in plaintifs' opening brief, it has been assumedly and subtly included in Intervenor's and State's briefs. It appears as a new criteria, undefined and absolute, called 'ruralness'. How and under what conditions it has been injected into the Cook Inlet drama is unclear. However, it seems that both Intervenor and State have accepted, and are now arguing, that the subsistence legislation includes the term 'rural' as a prerequisite to subsistence use. They also must then argue that the legislative intent was to define rural so the public and the Board could identify and know that it was a pre-condition to subsistence use. The State and Intervenor argue that rural is as integral to the subsistence legislaton as customary and traditional. However, if that is so, why did not the legislature set out rural, as it did customary and traditional.

Plaintiffs were never presented with the question of whether they were rural or not. In fact rural is now a conclusion without a defined origin. If the legislature was going to use a rural versus non-rural subsistence use discrimination, then one must assume that because of the history and source from which the subsistence bill arguably originated, (i.e. ANILCA, according to the Intervenor and the State; page 32, & 30 of their briefs respectively), then the

state legislature would have said what they were in fact doing. They would have defined rural and described its application to the issue. However, the state subsistence legislation does not include a rural versus non-rural standard.

One federal standard for rural in Alaska designates Fairbanks, Ketchikan, Anchorage, and Juneau as urban and all else rural. (see Federal Register January, 1981, Statement of Secretary of Interior) The State Board of Fish and Game became aware of the problem and tried to resolve it by adopting a definition of rural in 1982. (5 AAC 99.020, Attachment E) stated:

> "In this chapter 'rural' means outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more as determined by the Alaska Department of Community and Regional Affairs."

The Board apparently realized that defining 'rural' exposed their errors more than it hid them and repealed this regulation in 1983.

No opportunity to respond to the rural criteria in proceedings before the Board was ever noticed nor was this standard anticipated in the state subsistence bill or the Board's action. A rural standard without notice and definition poses serious consitutional questions. What and where are the rural/non-rural borderlines and what is the delineation of, and factors identifing 'ruralness'? Are these Borough or City

boundaries, population or census district boundaries, or life style characteristic delineations? (See Ketchikan Gateway Borough, Alaska v Breed, 639 P2d 995 (Alaska 1981)), (persons similarly situated must be treated alike.) Obviously persons residing on opposite sides of a border boundary must be distinguished by something other than an arbitrary line. Questions arise of vagueness and due process, in light of the fact that no regulatory definition of rural existed at the time the Board excluded plaintiffs, (See Woodards v State, 604 P2d 250, (Alaska 1979), and Marks v City of Anchorage, 500 P2d 644 (Alaska 1972)).

Also raised are procedural and substantive due process questions regarding notice and hearing in conjunction with plaintiffs' due process agrument in their brief.

Rural or area categorizations are not unconditionally repugnant. Plaintiffs feel that their situation is the same as that referred to by Representatives Miller and Huntington. They live where the subsistence resources and uses are located and they live where the customary and traditional i.e. historical, conventional, usual, uses have and do exist. Plaintiffs have never had an opportunity to respond or relate to the rural criteria since it appears to have developed in the conclusions of the Board and briefs of Intervenor and State and not in the subsistence legislation or regulations.

THE PUBLIC MEETINGS ISSUE

Intervenor takes no position on the question of violations of the public meetings provisions except to imply that this issue only relates to actions prior to the adoption of 5 AAC 01.597.

The State responds by saying that the issue is moot. However, plaintiffs refer this Court to our brief (page 26 through 30) and point out that the policies and regulations adopted in the December 1980, Board meeting were in violation of AS 44.62.310 & 312. That illegality, by acknowledgment of the State, has not been, nor could it be, remedied by the subsequent public notices and meetings on subsistence issues, especially when the policy was formulated at an illegal closed meeting and all subsequent policies, with certain minor deviations, mirror the policy originating from the closed meeting. Until such time as there is a replay and representation of what in fact took place at those closed meetings, so the public will have an opportunity to confront and participate in the presentations and deliberations, claims of mootness and renotices do not vitiate the original and acknowledged stains.

Without relinquishing our claim that the issue is not moot, plantiffs offer that an exception to the mootness doctrine exists in public interest situations. The Board's

violation of the public meetings laws can be reviewed by this court, especially if it is a matter of public concern and capable of evading review. (See Doe v State, 487 P2d 47 (Alaska 1971); Alaska Transportation Commission v Grandia, 602 P2d 402 (Alaska 1979))

It is rare that issues of violations of notice or public meetings can be pursued both through trial and appellate stages within the period of time between public meetings. In this case the record of the Board's proceedings mandates an independent review by this court of the actions of the Board at the illegal public meeting to determine how much of the Board's subsequent policy and regulations on Cook Inlet subsistence uses were tainted.

EQUAL PROTECTION

The State's description of Gjosund's equal protection questions lumps equal protection with due process by confusing the constitutional distinctions between the two. They also, (State's brief page 40), refer consistently to the fact that the Board has identified subsistence fishing only in 'rural' communities. As earlier indicated, 'rural' has never been clearly identified, defined, or applied.

The Board has apparently used some notion of 'ruralness' to set up a class of residents of the idealized rural native village community model as subsistence users as opposed to the

class of people which plaintiffs belong (who cannot tell whether they live in a rural or non-rural area because no definition exists), and who have otherwise historically fished by subsistence means and used salmon for their family and personal consumption and nevertheless have been excluded from subsistence fishing.

The Intervenor misstates our case. It matters little whether state or agency legislation sets up classifications. If the classifications are arbitrary and unrelated to the object of the legislation and do not treat all persons similarly circumstanced alike it is an equal protection issue. Plaintiffs' claim is that the regulatory scheme, i.e. the ten plus criteria, has set up two classifications of Alaskan residents and that these classifications are not substantially related to the purposes of the statute and discriminate against plaintiffs without any reason.

There is no legitimate purpose or distinction to setting up a class of subsistence users in Port Graham, English Bay and Tyonek, which class includes all residents of that area whether they be natives, non-natives, school district employees, transient cannery workers, or timber employees, and setting up an excluded class of all other persons residing on Kachemak Bay in or near Homer or Kenai or any place on the entire shoreline of Kachemak Bay or Cook Inlet i.e. Halibut Cove, Bear Cove,

Fritz Creek, Clam Gulch, Aurora Lagoon, Ninilchik, etc.

The class exclusion does not suit the purposes of the legislation nor does it further the purposes of permitting the taking of fish for subsistence uses and "of recognizing the needs, customs, traditions, of all Alaskans" and "maintaining fish stock on a sustained yield basis."

As indicated earlier, the plaintiffs have all been fishing for lengths of time up to 50 years by the use of set gill nets. They are residents of the general Kenai Peninsula Borough area, have fished in the localities closest to where they live, have used the fish for family and personal consumption and have participated in other subsistence activities (i.e. coaling, gardening, gathering, clamming, etc.) To argue that this is not an equal protection issue overlooks the obvious.

DUE PROCESS ISSUES

The plaintiffs' due process claims are on pages 41-47 of their brief and will only be discussed here to counter specific arguments raised by Intervenor and State. Intervenor claims that Judge Carlson's remand of plaintiffs' Count IV, (Intervenor's brief, pages 35-37), somehow postpones what Intervenor acknowledges is a close substantive due process question. i.e. whether plaintiffs' right to due process of law was violated by exclusion of their use as a subsistence user.

This issue will be addressed in the reply brief to amplify

our claim that the Board acted arbitrarily in an aspect other than those set out in plaintiffs' opening brief. The inclusion of rural as a prerequsite to subsistence use inclusion is one more cumulative step in our claim. As indicated earlier in the reply brief, no definition, discussion, or elements of 'ruralness' were set out by the Board for plaintiffs' to confront or respond to. This is a cumulative element in the Board's behavior patterns which plaintiffs' claim have resulted in violations of fundamental principals of liberty and justice and is another arbitrary administrative action 'shocking to the universal sense of justice.' See Green v State, 462 P2d 994, (Alaska 1969).

The remand order on Count IV is lacking integrity when compared with the simultaneous order of Judge Carlson denying plaintiffs' Motion for Summary Judgment on Counts III and IV on 30 August 1982. By denying plaintiffs' motions, he was finding that no violations of due process or equal protection existed, therefore a remand is inappropriate.

Judge Carlson's remand suggested that proposals be resubmitted to the Board. Plaintiffs did in fact submit another round of proposals. The result and record before the Board were the same.

The Board had the same record before it as this Court does, i.e. testimony on behalf of Kenai area plaintiffs and the

Kenai Kenaitze reports, testimony and reports of Kachemak Bay susbsistence group and Larry Smith; affidavits presented to the court in Madison and Gjosund; and proposals requesting establishment of subsistence use fisheries. The Board responded as it had done in the past.

At the time those proceediings took place this appeal was moving through the court system and to date nothing has in fact changed. The remand to the Board was an empty remand. No standards were set nor were instructions or directions given to the Board. The Superior Court merely said "proceed as you had in the past" and the Board followed that instruction and did not acknowledge any subsistence uses in Cook Inlet or Kachemak Bay other than Port Graham, English Bay, and Tyonek.

The obligation to research and provide information on plaintiffs subsistence use (in addition to plaintiffs' contributions to the record) is with the Division of Subsistence (see AS 16.05.094) and this data should be before the Board prior to any action. The Braund report (G File #2 Appendix M, revised November 1982) concludes that there are numbers of subsistence users both on the east shore of Cook Inlet and along the borders of Kachemak Bay. Assumedly the Board had, or should have had, this information and the Board still retained its stubborn stance.

Plaintiffs claim that the record in this case demonstrates

that confronting the Board again would be a futile gesture and that judicial action is plaintiffs' only hope for a remedy (see Aleknagik Native's Limited v Andrus, 648 F2d 496).

IMPARTIALITY

Plaintiffs aver, contrary to Intervenor's position, that ample record exists co determine that the Board has acted arbitrarily, discriminiatorily, and with prejudgment. Alaska Statute 44.62.630 states as follows:

> Impartiality: The functions of hearing officers and those officer participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of exparte matters authorized by law, shall not engage in interviews with, or recieve evidence or arguments from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communcations with these officers shall be served upon all parties."

This section applies to the Board of Fishery. (See AS 44.62.330(a)(40)). It further supports plaintiffs' claim that the public meeting law deviation is a serious breach which cannot be rectified without a full and complete statement and avowal of the events that occurred during that closed meeting.

This section also relates to plaintiff's due process claims. Remand to the Superior Court and/or the Board for

trial/hearing would be superfluous. Very little could be added to the record that is not there already. Additionally the tenuous state of the Board's composition and existence, in light of the conflict between the governor and the legislature regarding confirmation of appointments of Board members, together with recently proposed legislation aimed at reorganizing Board member representation, changes the complexion of plaintiffs' position again.

PERSONAL USE FISHERY

Questions of the personal use fishery must be decided on the basis of statutory interpretation and due process standards. Judge Carlson's decision specifically did not consider any record of the Board's personal use hearings and those records were not a part of the record on appeal. It is deceitful to suggest or imply that the personal use fishery involved only a name change and minor shift in location on the 'use scale.' The personal use fishery moved the pre 1980 subsistence users from first consideration to last consideration.

THE GJOSUND DECISION

In reviewing and trying to discredit the Gjosund decision, Intervenor raises the spectre of catastrophe 'to tens of thousands of Alaskans who live in the bush.' This is not the case and Intervenor misinterprets what Judge Jones did.

Judge Jones deferred to the Board's adoption of the criteria but determined that the criteria 'kick in' when a priority selection was necessary. The court firstly found that the plaintiffs were subsistence users of the Southern District salmon based upon the legislative definition and history of use of the Gjosund plaintiffs. He further found that the criteria would come into effect when and to the extent that jeopardy to the sustained yield of fish stocks took place and that the criteria were applicable to the need for further restrictions, based upon AS 16.05.251(b)(1), (2), & (3), to distinguish between different types of subsistence users.

It is offered that if Judge Jones had determined that he could substitute the court's judgment for that of the Board in interpreting the statutes, (as the Intervenor and State now concede is the law) then Judge Jones would most likely have voided the criteria if they were to be used to exclude plaintiffs as subsistence users. Judge Jones found that the statute was clear and no further criteria was needed to find that plaintiffs were subsistence users.

CONCLUSION

Plaintiff again asks this Supreme Court to review the subsistence statutory scheme and the state legislative record and independently determine if, in fact, that scheme was meant to be restrictive, narrowing and as complex as the Board,

Intervenor, and State suggest. We also ask this court to examine how, when and where 'ruralness' enters into any of the legislative enactments or Board deliberations to the point where plaintiffs were put on notice of a rural prerequisite for subsistence inclusion.

Plaintiffs offer that they, in their community and together with their families, reside near, and have been subsistence fishing in and around Cook Inlet for periods of time up to 50 years. They live in the area and are the persons intended to be included under subsistence use by the legislature. We also claim that the convolutions undertaken to exclude plaintiffs fatally taints the Board's actions regarding the Cook Inlet subsistence fishery.

Plaintiffs submit that the Board has violated the equal protection and due process rights of the plaintiffs.

We request this court to make such findings and to order that the plaintiffs' use of the salmon moving in and through Kachemak Bay and Cook Inlet is a subsistence use as intended by the State legislature.

SIGNED AND DATED this 29 day of May, 1984.

Martin Friedman

Arthur Robinson

STATUTES AND REGULATIONS

PERTAINING TO

SUBSISTENCE

Sec. 16.05.251. Regulations of the Board of Fisheries.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62.010 — 44.62.650) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980)

Sec. 16.05.255. Regulations of the Board of Game.

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62.010 — 44.62.650) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

ATTACHMENT A

Sec. 16.05.940. Definitions. In AS 16.05.010 — 16.05.950 /

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

ATTACHMENT B

the state files a civil complaint on the next working day following the seizure, and the owners are promptly notified, the owners are afforded procedural due process. State v. Baranof, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), P.2d (1984).

Section not preempted by federal law. — The Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., does not preempt state regulation of king crab harvesting in the extraterritorial fishery conservation zone by vessels registered in Alaska. State v. F/V Baranof, Sup. Ct. Op. No. 2787 (File Nos. 7287, 7324), 677 P.2d 1245 (1984).

The federal Fishery Management and Conservation Act does not preempt Alaskan king crab regulation of vessels registered in Alaska. State v. Baranof, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), P.2d (1984).

Concurrent state jurisdiction of in rem admiralty forfeiture actions. — In rem admiralty forfeiture actions brought by the state to enforce violations of law may be brought in state courts under concurrent state jurisdiction. State v. Baranof, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), P.2d (1984).

Article 2. Boards of Fisheries and Game.

Section

251. Regulations of the Board of Fisheries
255. Regulations of the Board of Game

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources.

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explantion for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 1[illegible] SLA 1978; am §§ 1, 2 ch 110 SLA 1980; am §§ 8, 9 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment, effective July 3, 1984, in subsection (a), substituted "bag limits, harvest levels, and sex and size limitations" for "and bag limits" in paragraph (3), deleted "engaging in biological research" from the beginning of paragraph (7), substituted "and management, conservation, protection, use, disposal, propagation and stocking of fish" for "fish management, protection, propagation and stocking" in paragraph (7), repealed paragraph (9), and renumbered former paragraphs (10)-(12) as present paragraphs (9)-(11). The amendment also added subsection (c).

NOTES TO DECISIONS

Cited in Langesater v. State, Ct. App. Op. No. 279 (File No. 7357), 668 P.2d 1359 (1983).

Sec. 16.05.255. Regulations of the Board of Game. (a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

Effective dates. — Section 30, ch. 132, SLA 1984, makes this section effective July 3, 1984, in accordance with AS 01.10.010(c).

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the Department of Fish and Game examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes. (§ 28 art I ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment, effective July 3, 1984, in subsection (c), made a word correction in the first sentence and added the second sentence.

Sec. 16.05.940. Definitions. In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(10) "fish derby" means a contest in which prizes are awarded for catching fish;

(11) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(12) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means

having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

(13) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(14) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40,

(15) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(16) "nonresident" means a person who is not a resident of the state;

(17) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(18) "operator" means the individual by law made responsible for the operation of the vessel;

(19) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(20) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(21) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(22) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence

uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(23) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

(24) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(25) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(26) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(27) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft. (§ 2 art I ch 95 SLA 1959; am §§ 1 — 4 ch 131 SLA 1960; am § 1 ch 21 SLA 1961; am §§ 1, 2 ch 102 SLA 1961; § 9 art III ch 94 SLA 1959; am § 23 ch 131 SLA 1960; am § 1 ch 160 SLA 1962; am §§ 13, 14 ch 31 SLA 1963; am § 2 ch 32 SLA 1968; am § 3 ch 73 SLA 1970; am § 1 ch 91 SLA 1970; am § 4 ch 110 SLA 1970; am § 1 ch 90 SLA 1972; am § 5 ch 82 SLA 1974; am §§ 26, 82 ch 127 SLA 1974; am §§ 18 — 20 ch 206 SLA 1975; am § 12 ch 105 SLA 1977; am §§ 14, 15 ch 151 SLA 1978; am § 1 ch 78 SLA 1979; am § 1 ch 24 SLA 1980; § 4 ch 74 SLA 1982; am § 24 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment, effective July 3, 1984, substituted "AS 16.05 — AS 16.40" for "this chapter" in the introductory language and paragraphs (14), (15) and (20); in paragraph (9), substituted "invertebrate, or amphibian" for "invertebrates and amphibians" and "its" for "their" preceding "life cycle" and added the language beginning "and includes any part of such aquatic finfish"; reworded the contents of paragraph (13); inserted "reptile" near the beginning of paragraph (14); substituted "those chapters" for "it" in paragraph (15); substituted "this paragraph" for "this chapter" in three places in paragraph (19); inserted "of" following "taking" in paragraph (22); deleted "for the purposes of this chapter" preceding "does not include aircraft" in paragraph (27); and repealed paragraph (28), defining "visitor."

June Register 89, April 1984

PART 8.
SUBSISTENCE HUNTING, FISHING, AND TRAPPING

Chapter
99. Subsistence Uses

CHAPTER 99.
SUBSISTENCE USES

Section
10. Joint Boards of Fisheries and Game subsistence procedures
20. (Repealed)

5 AAC 99.010. JOINT BOARDS OF FISHERIES AND GAME SUBSISTENCE PROCEDURES. (a) In applying a subsistence priority, the Board of Fisheries and the Board of Game will provide for conservation and development of Alaska's fish and game resources according to the following procedures:

(1) each board will assess the biological status of fish or game resources and determine whether a surplus may be harvested during a regulatory year consistent with the conservation and development of the resources on the sustained yield principle and compatible with the public interest;

(2) each board will identify subsistence uses of fish or game resources, recognizing that subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing.

(b) Customary and traditional subsistence uses by rural Alaska residents will be identified by use of the following criteria:

(1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in specific seasons of each year;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community of persons, including customary trade, barter, sharing, and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection; and

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and which provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

(c) After identifying subsistence uses based upon the criteria set out in (b) of this section, each board will determine the approximate amount of fish or game necessary to provide fully for reasonable opportunities to engage in these customary and traditional uses.

(d) Each board will adopt regulations that provide an opportunity for the subsistence taking of fish or game resources in amounts sufficient to provide for the customary and traditional uses identified in (b) of this section, and consistent with sound conservation and management practices. In no instance may the subsistence taking jeopardize or interfere with the maintenance of a specific fish stock or game population on a sustained-yield basis.

(e) Each board will, in its discretion, adopt

regulations that provide an opportunity for non-subsistence uses of the resource, to the extent that the non-subsistence uses do not jeopardize or interfere with the conservation and development of fish or game resources on a sustained-yield basis, or with the opportunity for taking these resources for customary and traditional subsistence uses as provided in (d) of this section.

(f) When circumstances such as increased numbers of users, weather, predation, or loss of habitat may jeopardize the sustained yield of a fish stock or game population, each board will exercise all practical options for restricting non-subsistence harvest before subsistence uses are restricted. If all available restrictions for non-subsistence uses have been implemented and further restrictions are needed, each board will reduce the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who

(1) live closest to the resource;

(2) have the fewest available alternative resources; and

(3) have the greatest customary and direct dependence upon the resource.

(g) In no event, however, will a board allow uses which will jeopardize or interfere with the conservation and management of fish stocks or game populations on a sustained-yield basis. (Eff. 5/30/82, Reg. 82)

Authority: AS 16.05.251(b)
AS 16.05.255(b)

5 AAC 99.020. DEFINITIONS. Repealed 10/9/83.

(2) subsistence salmon fishing permits for the Port Graham subdistrict will be issued only to those persons domiciled in the villages of Port Graham and English Bay.

(b) Smelt may only be taken under the authority of a subsistence fishing permit, except that a permit is not required for smelt fishing in the Kenai River.

(c) Freshwater species other than trout, grayling, char and burbot may only be taken in freshwater under the authority of a subsistence fishing permit.

Authority: AS 16.05.251(a)(2),(7),(10) and (b)

5 AAC 01.590. MARKING OF SUBSISTENCE-TAKEN SALMON. (a) No person may possess salmon taken under the authority of a subsistence fishing permit unless both lobes of the caudal fin (tail) have been immediately removed from the salmon.

(b) It is unlawful to purchase or sell salmon from which both lobes of the caudal fin (tail) have been removed.

Authority: AS 16.05.251(a)(2),(4),(5), (7) and (b)

5 AAC 01.595. SUBSISTENCE BAG AND POSSESSION LIMITS. (a) The total annual possession limit for each subsistence salmon fishing permit is as follows:

(1) there is no total annual possession limit for holders of Port Graham subdistrict subsistence salmon fishing permits; subsistence salmon catches must be recorded on forms provided by the department;

(2) 25 salmon for the head of a household and 10 salmon for each dependent of the permit holder;

(3) in addition to the limits in (2) of this subsection, the holder of a Tyonek subdistrict subsistence salmon fishing permit may take 70 king salmon; no more than 4,200 king salmon may be taken in the Tyonek subdistrict from May 15 through June 30.

(b) The daily bag and possession limit for halibut is two. No person may possess sport-taken and subsistence-taken halibut on the same day. (In effect before 1981; am 4/15/81, Reg. 78; am 5/17/81, Reg. 78)

Authority: AS 16.05.060
AS 16.05.251(a)(3),(7),(10) and (b)

5 AAC 01.597. CHARACTERISTICS OF SUBSISTENCE FISHERIES. (a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

(1) a long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g., regulatory action or fluctuations in resource abundance;

(2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;

(3) a use pattern associated with specific stocks and seasons;

(4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;

(5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;

(6) a use pattern occurring in locations with easiest and most direct access to the resources;

(7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;

(8) a use pattern which includes the intergenerational transmission of activities and skills;

(9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and

(10) a use pattern which includes reliance on

subsistence taking of a range of wild resources in proximity to the community or primary residency.

(b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.

(c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests. (Eff. 4/14/82, Reg. 82)

Authority: AS 16.05.251(b)

ARTICLE 12.
PRINCE WILLIAM SOUND AREA

Section
600. Description of Prince William Sound area
605. Description of districts and subdistricts
610. Fishing seasons
620. Lawful gear and gear specifications
625. Waters closed to subsistence fishing
630. Subsistence fishing permits
640. Marking of subsistence-taken salmon
645. Subsistence bag and possession limits
647. Copper River subsistence salmon management plan

5 AAC 01.600. DESCRIPTION OF PRINCE WILLIAM SOUND AREA. The Prince William Sound area includes all waters of Alaska between the longitude of Cape Fairfield and the longitude of Cape Suckling.

Authority: AS 16.05.251(a)(2) and (b)

5 AAC 01.605. DESCRIPTION OF DISTRICTS AND SUBDISTRICTS. The Upper Copper River district consists of all waters of the main Copper River from the confluence of the Slana River downstream to an east-west line crossing the Copper River at the confluence of the unnamed stream located approximately one and one-fourth mile below the U.S.G.S. gauging cable across the Copper River, as designated by Alaska Department of Fish and Game regulatory markers

(1) the Chitina subdistrict consists of all waters of the main Copper River from the downstream edge of the Chitina-McCarthy Road Bridge downstream to an east-west line crossing the Copper River at the confluence of the unnamed stream located approximately one and one-fourth mile below the U.S.G.S. gauging cable across the Copper River, as designated by the Alaska Department of Fish and Game regulatory markers;

(2) the Glennallen subdistrict consists of all waters of the main Copper River from the confluence of the Slana River downstream to the downstream edge of the Chitina-McCarthy Road Bridge.

Authority: AS 16.05.251(a)(2) and (b)

5 AAC 01.610. FISHING SEASONS. (a) Unless restricted in this section and 5 AAC 01.625, or unless restricted under the terms of subsistence fishing permit, fish may be taken at any time in the Prince William Sound area.

(b) Salmon may be taken in the Upper Copper River District only as follows:

(1) in the Glennallen Subdistrict, from June 1 through September 30;

(2) in the Chitina Subdistrict, only when that subdistrict is open to personal use salmon fishing;

(3) when the Copper River subsistence fishery is closed or restricted because of an inadequate escapement of sockeye or chinook salmon, the fishery may be reopened September 1 for the taking of coho salmon, which constitute the majority of the salmon at that time.

(c) Repealed 6/30/83.

(d) Herring spawn on kelp may be taken only during the open commercial herring spawn on kelp season. (In effect before 1983; am 6/30/83, Reg. 86; am 4/28/84, Reg. 90)

Authority: AS 16.05.060
AS 16.05.251

5 AAC 01.620. LAWFUL GEAR AND GEAR SPECIFICATIONS. (a) Fish may be taken by gear listed in 5 AAC 01.010(a) unless restricted

angler needs. When this situation occurs, the department will attempt to achieve a minimum escapement of 30,000 sockeye salmon into the Russian River system.

(d) Early and late Russian River system sockeye salmon are discrete stocks with established escapement goals. Because of this they will be managed by the department as a separate entity without regard to Kenai River system sockeye salmon run size. The Russian River sockeye salmon harvest, therefore, will not be included in the Kenai River system recreational harvest quota outlined in 5 AAC 21.360(c).

(e) When the department determines that late Russian River system sockeye salmon stocks are comprising the majority of the Kenai River sockeye salmon run, appropriate restrictions will be placed on the various fisheries to protect the remaining Kenai River system sockeye salmon escapement.

Authority: AS 16.05.060
AS 16.05.251(a)(2),(3),(4),
(6) and (7)

5 AAC 21.362. EARLY KENAI RIVER KING SALMON MANAGEMENT PLAN. Repealed 5/3/84.

5 AAC 21.363. UPPER COOK INLET SALMON MANAGEMENT PLAN. (a) The Department of Fish and Game should receive long-term direction in management of upper Cook Inlet salmon stocks rather than being called upon to respond annually to changing management policies. Divisions within the department must receive long-term direction in order to accomplish their missions and plan management, research, administrative, and other programs. Therefore, the board establishes the following priorities for the use of upper Cook Inlet salmon stocks:

(1) consistent with the statutory priority for subsistence, the harvest of upper Cook Inlet salmon for customary and traditional subsistence uses will be allowed for specific species in appropriate areas, seasons, and periods to satisfy subsistence needs; other beneficial uses, to the extent they are consistent with the publ interest and overall benefit of the people Alaska, will be allowed in order to maximize t benefits of these resources;

(2) Susitna king, early Kenai king, and ear Russian River sockeye salmon stocks, whic normally move in upper Cook Inlet to spawnin areas before June 30 will be managed primaril for recreational uses in order to promote th public interest and provide maximum benefit to the people of Alaska and to the extent tha management is consistent with the statutor subsistence priority; and

(3) insofar as the following managemer steps are consistent with the statutory subsis tence priority:

(A) from July 1 through August 15 salmon stocks which normally move in upp Cook Inlet will be managed primarily commercial uses;

(B) after August 15, salmon stock moving to spawning areas in Kenai Peninsul drainages will be managed primarily for rec reational uses; and

(C) salmon stocks other than those spawning in Kenai Peninsula drainages will be managed primarily for commercial uses.

(b) The department shall

(1) manage the upper Cook Inlet commercial salmon fisheries to minimize the incidental take of Susitna coho, late Kenai king and early Kenai coho salmon stocks;

(2) assist the board in setting optimal salmon harvest rates for all uses by monitoring upper Cook Inlet salmon fisheries to determine the interception of Susitna coho, late Kenai king, and early Kenai coho salmon stocks;

(3) maintain the sustained yield of more abundant pink, chum, and sockeye salmon stocks; and

(4) insure that subsistence use priorities are met.

(c) In this section "upper Cook Inlet salmon

stocks" means those salmon that move through the Northern and Central districts as defined in 5 AAC 21.200(a) and (b) and spawn in waters draining into those districts. (Eff. 5/17/81, Reg. 78)

Authority: AS 16.05.251(a)(2),(6),(7) and (b)

5 AAC 21.380. UNLAWFUL POSSESSION OF SUBSISTENCE-TAKEN SALMON. It is unlawful to purchase or sell salmon from which both lobes of the caudal fin (tail) have been removed as required by 5 AAC 01.590.

Authority: AS 16.05.251(a)(2),(4),(7) and (b)

ARTICLE 4.
BOTTOMFISH FISHERY

Section
410. Fishing season
430. Gear

5 AAC 21.410. FISHING SEASON. There is no closed season on bottomfish.

Authority: AS 16.05.250(2)

5 AAC 21.430. GEAR. (a) Bottomfish may be taken only by trawls, longlines, pots, and mechanical jigging machines, except as provided in (c) of this section.

(c) Bottomfish may be taken in the Outer and Eastern districts by sunken gill nets under the authority of a permit issued by the commissioner. The permit may specify open areas, fishing periods, gear specifications and operating specifications, and may require completion by the vessel operator of log books supplied by the department.

Authority: AS 16.05.251(a)(4)

ARTICLE 5.
SMELT FISHERY

Section
510. Fishing seasons
531. Gill net specifications and operation
534. Identification of gear
535. Minimum distance between units of gear
550. Closed waters

5 AAC 21.510. FISHING SEASONS. (a) Smelt may be taken in the Northern and Central districts from October 1 to June 1.

(b) Smelt may be taken in the Eastern, Outer, Southern and Kamishak Bay districts from January 1 to December 31.

(c) Smelt may not be taken in freshwater.

Authority: AS 16.05.251(2) and (10)

5 AAC 21.531. GILL NET SPECIFICATIONS AND OPERATION. (a) The mesh size of a gill net used for taking smelt may not be more than two and one-half inches.

(b) No set gill net may exceed 35 fathoms in length. Each fisherman is allowed to operate 105 fathoms of set gill net in the aggregate.

PERTINENT SECTIONS OF

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans; and

(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

43 USC 1601 note.

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

POLICY

16 USC 3112.

SEC. 802. It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized

scientific principles and the p
designated, or expanded by or
this Act, the purpose of this tit
rural residents engaged in a

(2) nonwasteful subsistence
renewable resources shall be t
such resources on the public la
to restrict taking in order to a
fish or wildlife population or th
of such population, the taking
subsistence uses shall be give
over other consumptive uses; a

(3) except as otherwise provi
laws, Federal land managing a
activities on the public lands
viability of all wild renewable
ate with adjacent landowners
Native Corporations, appropri
and other nations.

DEFINI

SEC. 803. As used in this Act, th
the customary and traditional uses
renewable resources for direct pe
food, shelter, fuel, clothing, tools,
and selling of handicraft articles o
and wildlife resources taken for pe
barter, or sharing for personal
customary trade. For the purposes o

(1) "family" means all perso
adoption, or any person living
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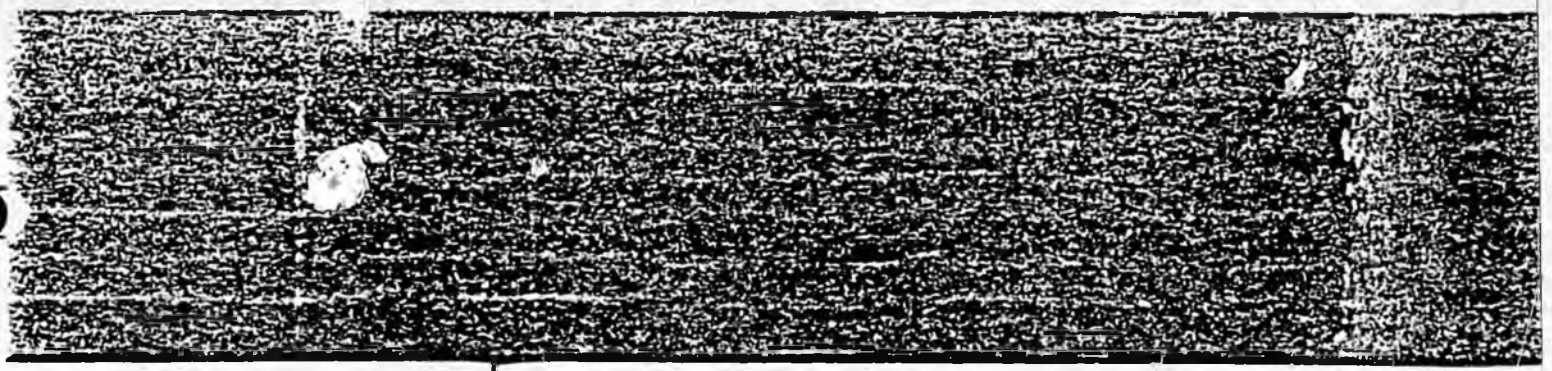
PREFERENCE FOR S

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:NC" MANAGEMENT AND USE

FINDINGS

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POLICY

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lands in Alaska is to cause the least
n rural residents who depend upon
sources of such lands; consistent with
wildlife in accordance with recognized

scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so; *Ante*, p. 2377.

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

DEFINITIONS

SEC. 803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term— 16 USC 3113.

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses—

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

PREFERENCE FOR SUBSISTENCE USES

SEC. 804. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria: 16 USC 3114. Priority criteria.

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

SEC. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

Annual report to Secretary.

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates reco: wildlife conservation, or would be detr subsistence needs. If a recommendatior tary, he shall set forth the factual b decision.

(d) The Secretary shall not implemen this section if within one year from the the State enacts and implements laws c are consistent with, and which provide and participation specified in, sections unless and until repealed, shall super such sections govern State responsibilit taking of fish and wildlife on the publ Laws establishing a system of local advi advisory councils consistent with sectic State rulemaking authority shall consic dations of the regional councils conce wildlife populations on public lands wi for subsistence uses. The regional counc tions, and the evidence upon which such to the State rulemaking authority duri trative proceedings of such authori authority may choose not to follow ar determines is not supported by substant the course of its administrative proc principles of fish and wildlife conservati the satisfaction of rural subsistence nee adopted by the State rulemaking autho forth the factual basis and the reasons fc

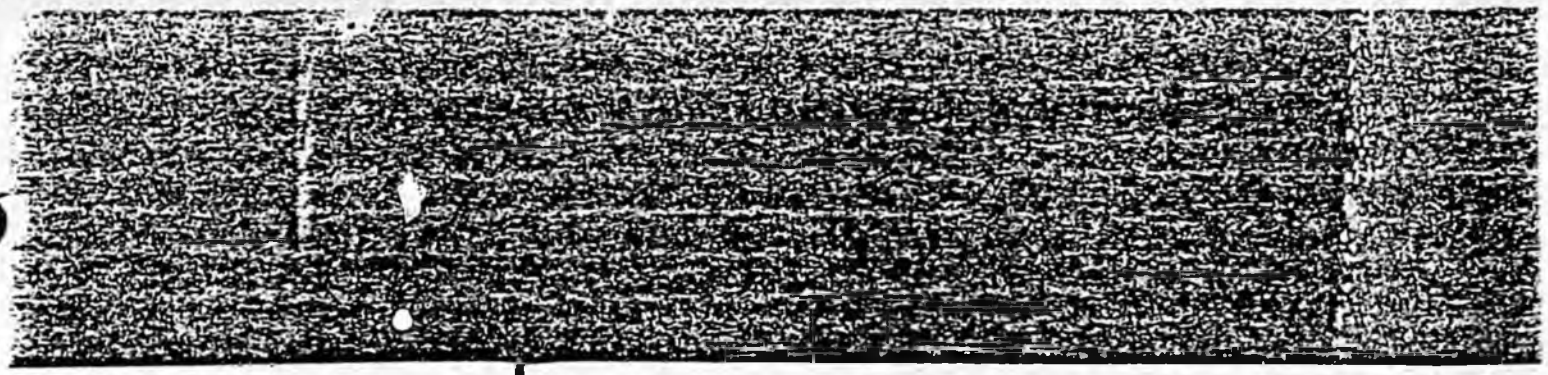
(e)(1) The Secretary shall reimburse th ated to the Department of the Interior f able costs relating to the establishment advisory councils established by the Sta tion (d) and the operation of the St committees so long as such committee Secretary pursuant to paragraph (2) o bursement may not exceed 50 per centu year. Such costs shall be verified in a st determines to be adequate and accur subsection shall be in addition to any gra to which the State is entitled from appr of the Interior.

(2) Total payments to the State ur exceed the sum of $5,000,000 in any or shall advise the Congress at least onc whether or not the maximum payment are adequate to ensure the effectiveness by the State to provide the preference fo wildlife set forth in section 804.

FEDERAL MONITO

SEC. 806. The Secretary shall monitor the subsistence preference set forth in the State and the Committee on Interio Merchant Marine and Fisheries of the H the Committees on Energy and Natural and Public Works of the Senate annuall





D REGIONAL PARTICIPATION

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by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision. Implementation.

(e)(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior. Reimbursement to States.

(2) Total payments to the State under this subsection shall not exceed the sum of $5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804. Report to Congress.

FEDERAL MONITORING

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as Report to congressional committees. 16 USC 3116.

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions. 16 USC 3117.

SEC. 807. (a) Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Hearing.

(b) A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

(c) This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or investigations conducted jointly or se administrative personnel of the State Interior, information submitted by, ar appropriate local advisory committee cils, and any testimony received in a p by the commission prior to preparatio location or locations in the vicinity of Each year thereafter, the commissior appropriate local committees and reg relevant data and holding one or mo vicinity of the park or park monument, to the Secretary and the Governor for its implementation which the commissi

Subsistence hunting program.

(b) The Secretary shall promptly recommendations submitted to him b finds in writing that such program recognized principles of wildlife conse vation of healthy populations of wildli ment, is contrary to the purposes monument is established, or would be of subsistence needs of local residen Governor, the Secretary shall take n commission for sixty days during whic proposed changes in the program or re the commission which the Governor pr

(c) Pending the implementation of a of this section, the Secretary shall pe residents in accordance with the pro applicable Federal and State law.

COOPERATIVE AGR

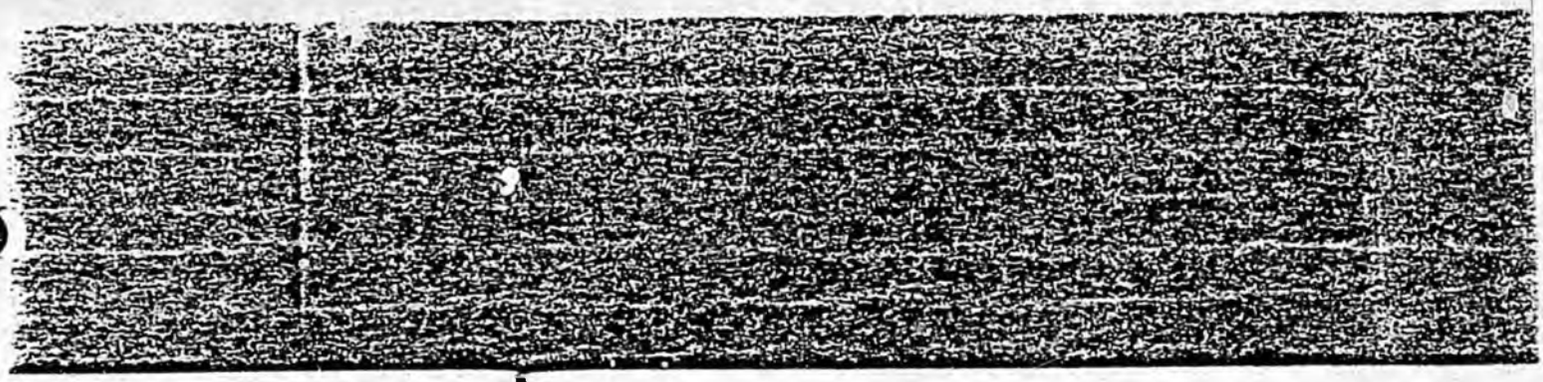
SEC. 809. The Secretary may enter i otherwise cooperate with other Feder Corporations, other appropriate pers acting through the Secretary of State, purpcses and policies of this title.

SUBSISTENCE AND LAND

SEC. 810. (a) In determining whether otherwise permit the use, occupancy, under any provision of law authorizin Federal agency having primary juris designee shall evaluate the effect of su tion on subsistence uses and needs, the the purposes sought to be achieved, would reduce or eliminate the use, occu lands needed for subsistence purposes. tion, lease, permit, or other use, occu lands which would significantly restr effected until the head of such Federal

(1) gives notice to the appro appropriate local committees and pursuant to section 805;

(2) gives notice of, and holds, area involved; and



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ICIAL ENFORCEMENT

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issued until after an opportunity for
filed against the State, the court shall
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order, and such order shall be valid only
normally provided by State law for the
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NT SUBSISTENCE RESOURCE COMMISSIONS

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ctment of this Act, each commission shall
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investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

Program and recommendation implementation.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

COOPERATIVE AGREEMENTS

SEC. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title. 16 USC 3119.

SUBSISTENCE AND LAND USE DECISIONS

SEC. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency— 16 USC 3120.

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and Hearing.

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Notice and hearings.
42 USC 4332.

(c) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

48 USC note prec. 21.
43 USC 1601 note.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

16 USC 3121.

SEC. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

16 USC 3122.

SEC. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

Submittal to Speaker of House and President of Senate.
16 USC 3123.

SEC. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in rural Alaska;

(5) comments on the Secretary's r advisory councils and regional advi the Secretary or the State pursua appropriate persons and organizatio

(6) a description of those actions be taken in the future, to permit ation of activities relating to subsist and

(7) such other recommendations ti ate.

A notice of the report shall be published the report shall be made available to the

REGULATION

SEC. 814. The Secretary shall prescr necessary and appropriate to carry out title.

LIMITATIONS, SAVING

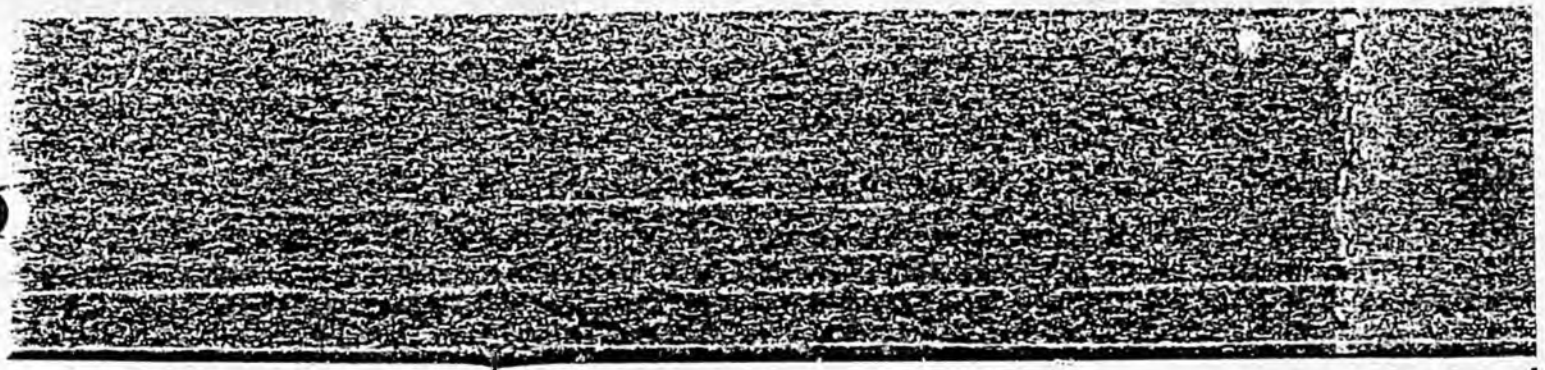
SEC. 815. Nothing in this title shall be c

(1) granting any property right in resource of the public lands or as pe ence uses of fish and wildlife within be inconsistent with the conservatio within a national park or monumer conservation of natural and healt wildlife. No privilege which may be individual with respect to subsiste any other individual;

(2) permitting any subsistence us portion of the public lands (whether tion system unit) which was perma January 1, 1978, or enlarging or authority to manipulate habitat o lands;

(3) authorizing a restriction on th for nonsubsistence uses on the publ parks and park monuments) unless tion of healthy populations of fish an forth in section 816, to continue sub tions, or pursuant to other applicabl

(4) modifying or repealing the pr governing the conservation or pro including the National Wildlife Re Act of 1966 (80 Stat. 927; 16 U.S.C. Service Organic Act (39 Stat. 535, 16 Act of 1966 (80 Stat. 1091; 16 U. Species Act of 1973 (87 Stat. 884; 16 U Mammal Protection Act of 1972 1361-1407), the Act entitled "An A Bald Eagle", approved June 8, 19 742a-754), the Migratory Bird Treat 703-711), the Federal Aid in Wildl 917; 16 U.S.C. 669-669i), the Fisher ment Act of 1976 (90 Stat. 331; 16 U



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ACCESS

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RESEARCH

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RIODIC REPORTS

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wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public. Publication in Federal Register.

REGULATIONS

SEC. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title. 16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

SEC. 815. Nothing in this title shall be construed as— 16 USC 3125.

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1157), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), o
any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

16 USC 3126.

SEC. 816. (a) All national parks and park monuments in Alask
shall be closed to the taking of wildlife except for subsistence uses t
the extent specifically permitted by this Act. Subsistence uses an
sport fishing shall be authorized in such areas by the Secretary an
carried out in accordance with the requirements of this title an
other applicable laws of the United States and the State of Alaska

(b) Except as specifically provided otherwise by this section, noth
ing in this title is intended to enlarge or diminish the authority of th
Secretary to designate areas where, and establish periods when, t
taking of fish and wildlife shall be permitted on the public lands fo
reasons of public safety, administration, or to assure the continue
viability of a particular fish or wildlife population. Notwithstandin
any other provision of this Act or other law, the Secretary, afte
consultation with the State and adequate notice and public hearing
may temporarily close any public lands (including those within an
conservation system unit), or any portion thereof, to subsistence use
of a particular fish or wildlife population only if necessary for reason
of public safety, administration, or to assure the continued viabilit
of such population. If the Secretary determines that an emergenc
situation exists and that extraordinary measures must be taken fo
public safety or to assure the continued viability of a particular fis
or wildlife population, the Secretary may immediately close th
public lands, or any portion thereof, to the subsistence uses of suc
population and shall publish the reasons justifying the closure in th
Federal Register. Such emergency closure shall be effective whe
made, shall not extend for a period exceeding sixty days, and may no
subsequently be extended unless the Secretary affirmatively estab
lishes, after notice and public hearing, that such closure should b
extended.

Publication in Federal Register.

TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

SUBMERGED LANDS STATUTE OF LIMITATION

43 USC 1631.

43 USC 1601 note.

SEC. 901. (a) Notwithstanding any other provision of law, th
ownership by a Native Corporation or Native Group of a parcel o
submerged land conveyed to such Corporation or Group pursuant t
the Alaska Native Claims Settlement Act or this Act, or a decision b
the Secretary of the Interior that the water covering such parcel i
not navigable, shall not be subject to judicial determination unless a
civil action is filed in the United States District Court within fiv
years after the date of execution of the interim conveyance if th
interim conveyance was executed after the date of enactment of thi
Act, or within seven years after the date of enactment of this Act i
the interim conveyance was executed on or before the date o
enactment of this Act. If a parcel of submerged land was conveyed b
a patent rather than an interim conveyance, the civil actio
described in the preceding sentence shall be filed within five year
after the date of execution of the patent if the patent was executed
after the date of enactment of this Act, or within seven years after th
date of enactment of this Act if the patent was executed on or befor
the date of enactment of this Act. The civil action described in thi
subsection shall be a de novo determinati
parcel which is the subject of the action.

(b) No agency or board of the Departmen
the Bureau of Land Managemen shall ha
the navigability of water covering a parcel
by a Native Corporation or Native Grou
Native Claims Settlement Act unless a de
of Land Management that the water cove
land is not navigable was validly appeale
prior to the date of enactment of this Act. T
conveyance or patent (whichever is execu
Land Management conveying a parcel of s
Corporation or Native Group shall be th
respect to a decision by the Secretary of t
covering such parcel is not navigable,
validly appealed prior to the date of en
agency or board of the Department of th
Bureau of Land Management.

(c) If the court determines that a parcel
the subject of a civil action described in sub
Native Corporation or Native Group t
pursuant to the Alaska Native Claims S
each defendant Native Corporation an
awarded a money judgment against the pl
to its costs and attorney's fees, including
incurred on appeal.

(d) No Native Corporation or Native Gr
have been conveyed its acreage entitlemen
Claims Settlement Act until—

(1) the statutes of limitation set fo
expired with respect to every parcel of
to such Corporation or Group; and

(2) a final judgment or order not sub
obtained in every civil action filed p

(e)(1) Whenever a parcel of submerged
Native Corporation or Native Group is loca
of a conservation system unit such Corp
State of Alaska may mutually agree that s
by and conveyed to the State under the p
the Alaska Statehood Act.

(2) In any instance in which the State co
of submerged land pursuant to an agreeme
Native Corporation or Native Group pur
such parcel had not previously been conve
Group, such Corporation or Group is au
parcel to the Secretary, and the Secretar
veyance. If the surface estate and subsurfa
owned by different Native Corporations
Corporation and Group with an interest in
its entire interest in such parcel to the Secr

(3) In any agreement made between a Na
Group and the State of Alaska pursuant to
reconveyance executed by a Native Corp
pursuant to paragraph (2), each affected C
disclaim its interest in the parcel whi
agreement or reconveyance. If such parcel
surface area of fifty acres or greater or a
three chains or greater, the Secretary sh

LETTERS IN SUPPORT OF

HOUSE BILL 288

HB #288

Attention Alaska Legislature

I am writing to urge you to pass [redacted] and give the Board of Fisheries the flexibility to manage the resource for the user groups. Thank You.

Kate Schmidt
Box 1251
Cordova 99574

HB #288

I am writing to urge you to pass [redacted] and give the Board of Fisheries the flexibility to manage the resource for the user groups. Thank You.

Jack + Heidi Babic
Box 1208 Cordova 99574

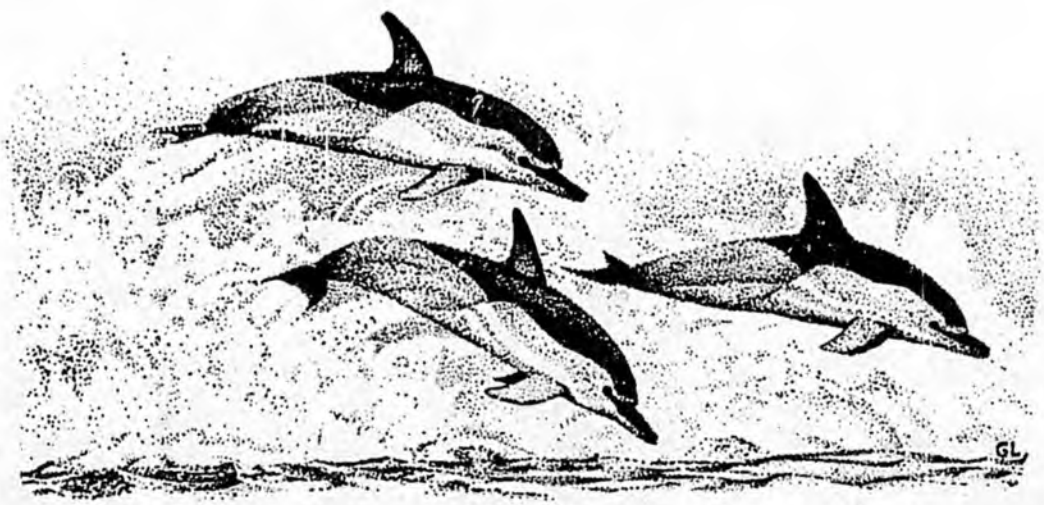
4-1-85

Dear Representative Herrmann,

I urge you to [redacted] and Senate Bill 231. We are Cordova fishermen and our livelihood depends on our ability to commercially fish the Copper River Flats.

Sincerely,

Mr. + Mrs. E. L. Cheshier
Box 116
Cordova, Alaska
99574



4-1-85

Dear Representative Hermann,

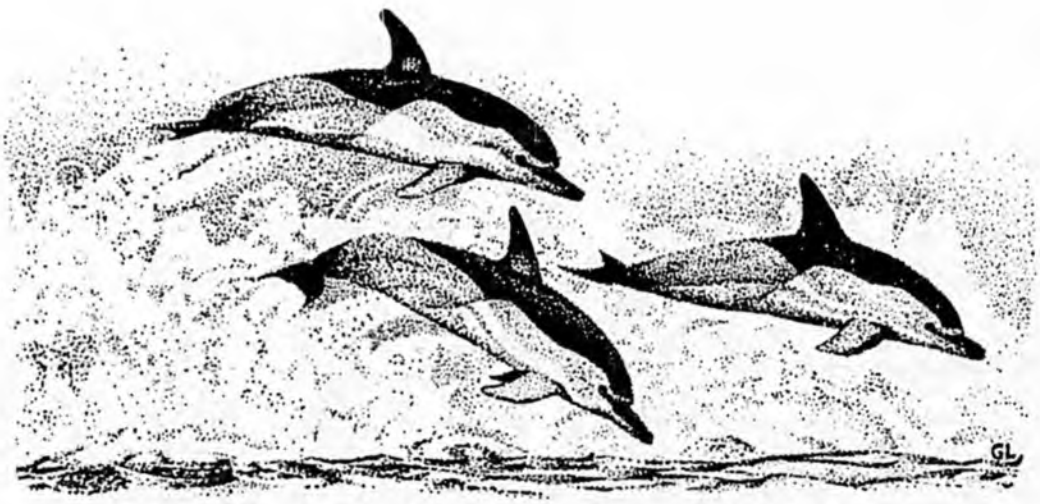
I urge you to [redacted] and Senate Bill 231. We are Cordova fishermen and our livelihood depends on our ability to Commercially fish the Copper River Flats.

Sincerely,

Mike + Clara Phillips

Box 391

Cordova AK 99574



4/1/85

Rep. Hermandson,

I urge you to read my enclosure which expresses my feelings better than I can.

I also urge you to support Senate Bill #231 [redacted].

Commercial fishing is my living and I want to go on living. Please help me and the rest of the Copper River commercial fishermen.

C. M. DeVille
Box 652 - Cordova

Main Trails & Bypaths

We recently passed the opinion that sportsman anglers should not be allowed to fish salmon after the fish have entered their fresh-water spawning streams . . . and we were bitterly taken to task by at least one Anchorage resident whose opinion was that we were "far out of touch with Alaskans and especially South-Central and Western Alaska sport-fishing enthusiasts."

Well, Mr. Anchoragite . . . "we" (that's polite for editorial use to keep from using the big personal pronoun) have fished an awful lot of Alaskan rivers for more than half a century, and we've seen the changes in both regulations and the type of fisherman in Alaska. In years past, nobody except a few Natives took salmon out of spawning streams. It just wasn't done. There were markers at the mouths of streams beyond which commercial fishermen were not allowed, and, maybe because there were not too many of us sports fishermen, it was natural that since we didn't have to fish spawning salmon runs, we didn't.

The problem, reduced to simple terms, is largely with numbers and attitude. Now, we'll agree that it is great for folks to be able to go catch, with rod and reel, bright sockeye and bright silvers . . .even bright kings . . .for their annual stuffing of the freezer or the Sears canning equipment . . .but for folks to think pink-sided or black-jowled kings or silvers are "trophy" is kind of hard to swallow for a guy who grew up with bright sea fish. And for anybody to think a turned humpback or dog salmon is good fodder . . .that just shows they "don't know no better."

People ask this old-timer once in awhile as to "What changes do we notice in Alaska, over the years?" Well, we'll have to be honest and say that the "new breed" of sports fisherman who've arrived in Alaska in recent years, and the biologists and the fish management programs that have resulted, are among the greatest . . . and most serious changes . . . we've noticed.



The question put to us by our outraged Anchorage reader deserves some discussion. Times have changed. A lot of people have changed. And it may be a good time to begin bringing out a lot of untouchable subjects and begin fashioning a little more thoughtful ethic among all fishermen . . . Native as well as White . . . and their administrators.

Our Anchorage complainer accused us of leaning to the Native subsistence fishermen and "against" non-Native fishermen . . . sportsmen. The answer to that criticism is yes and no . . . "yes," because we believe time-honored (and against the total fish run numbers, extremely small) traditional takings of spawning fish were . . . and note we said "were" . . . legitimate, and "no" because what is being lost in the shuffle of this whole "subsistence" fishing management problem is that there are probably more whites than there used to be Natives, qualified for "subsistence" fishing on spawning streams, plus the fact that for a variety of legal and economic reasons, there are now many more Natives than there were before . . . you don't have to be "half," you can be "quarter" . . . the collective Native health and living conditions have greatly improved . . . in many instances, it is more profitable to be Native . . . and, not insignificantly, there is no longer stigma in being non-white.

The old Native, in his fewer numbers, did not take much. The new Native, and his white neighbors privileged to have subsistence, are not only legally allowed salmon from spawning streams, but where in years past fishing in streams for salmon was discouraged for Natives in any great numbers and totally disallowed in any commercial sense, and prohibited altogether for whites, now a new generation of biologists and fish and game administrators has abandoned all old stream-watching protection systems and has jumped headlong into political administration of fish stocks . . . for votes . . . trying to answer pressure from all gear groups and certainly answering to pressure from Native groups . . . and we hasten to emphasize here, a "new" kind of Native group . . . not the old-time folks who truly lived off the land, but the modern-day political corporations spawned by whites themselves.

In actual administration practices for fish and game protection, no longer are stream watchmen put out for a few weeks or a few months at the mouths of important salmon streams to inhibit or prevent poaching of salmon above the markers. Any number of important fish runs are being gradually whittled down to dangerous stock levels by legal subsistence fishing. Many runs could be wiped out in a season, for all time, if a handy market should appear.

White rights? What rights does a pair of white school teachers pulling $50 to $100 thousand a year in wages have for "subsistence" sockeye they can take from a spawning stream with a drag net or with other gear?

Sooner or later we are going to have to come to grips with the fact that the blood lines between Natives and whites have become blurred . . . even the political rights of inheritance for Native rights and for fish permits have become blurred.

Political fights, gear fights, and racial fights . . . plus the importation of new "sportsman" fishing ethics . . . have collided in places like the crowded Kenai River and the Russian. Probably only improved policing and sharing rules will smooth things out on the Kenai, but there are other rivers where rules and regulations might be better adjusted before the fact. We need more ethic, more concern for preserving what we can of what used to be.

Let us understand that there are too many new whites, too many only partly native Natives, too many politicians and too many fish and game administrators controlled by politicians. It is a time for soul searching.

Kreaky, our bald-headed eagle at Angoon, was sure nice and white in the head and tail feathers in November, when this was being written. Probably fresh winter feathers, and he wasn't getting them so stained with spawning salmon. Incidentally, with the herring into winter holes, salmon runs over, and bottom fish moved out to deeper water, Kreaky was



making a meal the other day of a big starfish. He'll be after the unwary duck or sea gull soon.

Asked about subsistence fishing, Kreaky says, "At the best it's lousy, this subsistence fishing. Some years there are hardly any fish in the streams at all. Maybe one day there won't be any salmon. Hope there will still be herring . . .but if all the eggs get shipped to Japan . . . can we have herring without eggs?"

Robert A. Henning

Publisher

Dear Legislator 3-31-85

I am [redacted] of Governor Sheffield's [redacted]

I was raised in Anchorage since 1956 and my family relied heavily on sport caught moose, caribou and salmon. We never considered ourselves subsistence users. This food was incidental to our hunting and fishing. It was the sport and not the food which sent us to Alaska's wilds.

In 1972 my wife and I moved to the Aleutian Chain for four years. Here we witnessed people living a true subsistence lifestyle. Their wealth is their knowledge of the land and resultant ability to provide the majority of their needs from it. To these people the need for food, not sport, was the compelling factor.

In 1976 my family moved to Valdeana in the Copper River Basin. The majority of these people live in a more cash orientated economy. Subsistence is important to supplement their lifestyle.

The subsistence lifestyle is a part of Alaska's past and present which should be protected. I would not favor a system of subsistence which "Doles" out fish and game like welfare on a needs basis. The subsistence lifestyle deserves to be encouraged and lived with pride. Under Governor Sheffield's bill, subsistence would be regulated as in the past based on rural residency. I feel this is a good solution as it is less need orientated. One of our subsistence groups our Alaska natives have traditionally shared

On the Copper River personal use was created to protect both the true subsistence users and commercial fisherman by giving a lower priority to recreational dipnetting. I have nothing against recreational dipnetting so long as it is called such and managed as such.

Today we are back at square 1 with Anchorage and Fairbanks recreational dipnetters having a priority over commercial fishermen and threatening the priority of the true subsistence users to this resource.

What is the future of the Copper River commercial fisherman and true subsistence user as our state population grows?

What is the future of our sport fishing, commercial fishing, sport hunting and subsistence users in other areas of the State of Alaska?

Will recreational gillnetting close the world famous Kenai sport fishery?

Please address this problem rationally, responsibly and quickly by passing governor Sheffield's subsistence bill.

Fred Dison
STAR RT. BOX 6700-L
WASILLA, ALASKA
99687

PHONE 1-907-424-7318

GILBERT L. URATA, D.M.D.
GENERAL DENTISTRY
BOX 518
CORDOVA, ALASKA 99574

March 26, 1985

Alaska State Legislature
Pouch 5
Juneau, Ak. 99811

Dear Legislator:

Am asking for your immediate support of Senate Bill 231 and House Bill 288 for the following reasons.

1) Subsistence merely means existence or an aid to existence. Not all people of Alaska need to catch fish in order to exist. Those that do, ought to have the opportunity to do so, those that don't should be restricted. The ADFG and Board of Fisheries have, and need to be allowed to continue to regulate such. Many residents of the state can't use 200 fish. The fish are not in prime condition as they are at the mouth of a river. Others waste or sell their subsistence fish, or are actually sport fishing, driving hundreds of miles for an outing while others indeed need the resource.

2) The state legislature is not qualified, able, and definitly lacks the time to regulate a fisheries. Therefore, give the proper agency the ADFG, the authority to do so. Shelving both of these bills will eventually undermine commercial fishing in all fishing districts in Alaska. Besides the Copper River and Cook Inlet regions, others will be invaded as access improves. The dipnetters and true subsisters have been getting their fair share of fish. They don't require expensive boats, gear, andpermits. Look at Oregon and Washington. They allowed a judge to kill their fisheries, especially during difficult times with their other industries. How about the Stikine River? Fishing there is practically wiped out following Canadian fishing at the headwaters. When salmon survive the difficult cylcle back to their spawning grounds, let em.

3) My final reason deals with the community of Cordova and others like it. Who's to pay for the vessels and permits? How are the banks to withstand the defaults? Who wants to foot our welfare checks? Class action litigation against the state, including legislators and the CFEC will undoubtly follow. How can the state deny a resident the right to make a living he or she's had for a lifetime?

Please, urge for quick action on this matter. Passage must be concluded prior to May 1, 1985. The red season peak(highest priced reds in Aklaska) lasts only 2-3 weeks starting in May. Most fisherman make their boat and permit payments from reds and use the silver season to the survive the winter. Keep a historic way of life alive.

Cordially,

Gilbert L. Urata DMD

Tanana Chiefs Conference, Inc.

Doyon Building
201 First Avenue
Fairbanks, Alaska 99701
Phone (907) 452-8251

March 27, 1985

Hon. Richard Schultz
Co Chair, House Committee on
Natural Resources
Alaska State Legislature
Pouch V MS 3100
Juneau, Alaska 99811

RE: ~~H.B. 288~~

Dear Rep. Schultz:

Enclosed please find a copy of Resolution No. 85-77, "Support for SB 231 and HB 288, Governor's Subsistence Bill". This resolution was passed by the full Board of Directors of the Tanana Chiefs Conference, Inc. gathered at their annual convention mid March, and is being forwarded at their request to the House Committee on Natural Resources to please be made an official part of the record of hearings which your committee is currently holding on this proposed legislation.

The resolution emphasizes the need to treat subsistence priority as a rural occurrence on a community basis, that is that communities subsist as communities not as individuals.

We also urge action to be taken in this bill this session.

Thank you in advance for any consideration you and the committee hopefully will make of the information set forth in the resolution.

Sincerely,

TANANA CHIEFS CONFERENCE, INC.

Jim Kowalsky, Director
Wildlife and Parks

684.1

cc: Rep. Adilheid Herrmann
Rep. Kay Wallis
Rep. John Sund
Rep. David Thompson
Rep. Mike Miller, North Pole
Rep. Bette Cato
Rep. Drew Pearce
Rep. Roger Jenkins
Ted Charles, Director, TCC Tok Subregion

enclosure

JK/kk

TANANA CHIEFS CONFERENCE, INC.

Support for SB 231 and HB 288,
Governor's Subsistence Bill

Resolution No. 85-77

WHEREAS: the Alaska Supreme Court has recently ruled, in Madison v. Alaska Department of Fish and Game, that the State Board of Fisheries could not distinguish between rural and urban subsistence users until all other uses such as commercial and sport fishing have been eliminated first; and

WHEREAS: this ruling means that potentially large numbers of urban fishers and hunters will share scarce subsistence resources equally with rural fishers and hunters up to the time that those resources reach a critical level; and

WHEREAS: this ruling also means that only when such local resources reach a critcally low level, and only when all sport and commercial uses thusly are eliminated, can local rural communities be given priority subsistence use of that resource over all other including urban uses; and

WHEREAS: this ruling fails to fully recognize that Alaska's urban and rural economics, lifestyles, institutions, opportunities for employment, culture, customs and traditions of communitywide sharing greatly differ; and

WHEREAS: characteristically, rural communities acting together as whole communities have few or no alternatives to the subsistence harvest of locally available resources; and

WHEREAS: urban communities, as whole communities, have diversified economic opportunities and support systems as alternatives to the subsistence harvest; and

TANANA CHIEFS CONFERENCE, INC.

WHEREAS: local populations of game and fish cannot support harvests of large numbers of urban subsistence users fishing and hunting alongside, and in competition with, rural subsistence hunters and fishers; and

WHEREAS: federal law (the Alaska National Interest Lands Conservation Act of 1981) does define subsistence as "rural" in contrast to State law which does not; and

WHEREAS: Governor Sheffield proposed legislation SB 231 and HB 288 to specifiy that subsistence users are customary and traditional uses of fish and game made only by rural Alaska residents; and

WHEREAS: such legislation, if enacted, would essentially resolve the problems created by Alaska's Supreme Court ruling;

BE IT HEREBY RESOLVED that the Board of Directors of the Tanana Chiefs Conference, Inc. supports the proposed legislation SB 231 and HB 288 which would specifiy that subsistence users are rural users of fisn and game resources.

CERTIFICATION

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 14, 1985 at Fairbanks, Alaska.

Tanana Chiefs Conference, Inc.
Dorothy Shockley
Secretary/Treasurer

F/V Belen-C
Joe and Belen Cook, Jr.
P. O. Box 215
Cordova, Alaska 99574
Phone (907) 424-3507

Board of Fisheries

I am writing this letter because of my concern of what has happened in the last month during the [redacted]. I would not like to start by telling you a little about myself and family. Both my husband and I were born and raised here in Cordova. Starting May 15 to last each year, salmon seining on the Copper River Flats. I decide on becoming a part of the business, I commercial fished in the Prince William Sound area, and am familiar with the problems that have arisen in the past.

I was on the Prince William Sound Advisory committee, when it was first decided to bring action to Board of Fish among user groups subsistence personal use, and Commercial. I was very happy to see it pass, since I believe this to be an excellent way to manage the



F/V Belen-C
Joe and Beler Cook, Jr.
P. O. Box 215
Cordova, Alaska 99574
Phone (907) 424-3507

(2)

resource.

I do not want to give you the impression that I am only involved in fishing intrests, because this is not the case! I am also on the Cordova Hospital Auxiliary, and The Women's Resource Center, which I am a board of directors of.

My husband has been a Commercial Fisherman since he was 13 years old and he is now 34 years old. Our livelyhood depends on fishing, we depend on the Copper River Flats for 85 percent of our living and 15 percent on the Prince William Sound.

Besides fishermen, the Community of Cordova also depends on fishing, thus I believe HB288 must pass and pass in this session.

You see its quite simple if we fishermen cannot meet our obligations to our creditors, they in turn cannot meet theirs, which can cause great problems in the near future as far as economic hardship.

I am positive Cordova will be the only community



F/V Belen-C
Joe and Belen Cook, Jr.
P. O. Box 215
Cordova, Alaska 99574
Phone (907) 424-3507

affected in the marine Alaska
to ask you again to support HB 282

Sincerely,

Belen Cook





RAINBIRD FISHERIES, Inc.
P.O. Box 1065
Cordova, AK. 99574

March 31, 1985

Adelheid Herrmann, Co-Chairman
Richard Shultz, Co-Chairman
House of Representatives Resources
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Sirs:

We [redacted] and SB #231) to give back the power to the Alaska Board of Fisheries and Game to manage our resources. We urgently request your supportas, if this legislation is not passed, this will have a serious impact on the Town of Cordova.

It is most important that this issue be resolved during this Session.

Thank you very much for your efforts.

Very truly yours,

R. J. Shaw

Box 993
Cordova, Alaska, 99574
March 27, 1985

Dear Representative,

Please take immediate action, Concerning Senate Bill #231 or [redacted] 288.

Unless Fish & Game open the Copper River fishery by the beginning of May our family and the city of Cordova will have no income to sustain them. Cordova's only industry is fishing.

My husband, age 42, has been fishing in Cordova all of his life and the early red run may be as much as 90% of his yearly income.

It is hard to understand how it could be allowed for people who have regular jobs and or excess of income to take fish they don't need and put others out of work.

I am hoping that the Judiciary and Finance Committees will waive Senate Bill #231 so this can be resolved in time.

Thank you,
Rebecca Garland

Box 993
Cordova, Al.
99574
March 26, 1985

Dear Representative;

I'm writing to you on behalf of the ~~[illegible]~~ fishing ordeal. I think that the Legislature should find some way to solve the fishing problem Alaskans are faced with. My father is a commercial fisherman, and without the money he makes during the fishing season, we may starve this winter.

I'm seriously hoping that you'll give the matter at hand some thought and fast action.

Sincerly,
Ai'em Garland
age 14

Box 254
Cordova, Alaska
March 28, 1985

Representative Adelheid Herrmann, Co-Chairman
House of Representatives Resources
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Herrmann;

I am writing to request your support on [redacted] or any similar legislation that would give the Alaska Board of Fish and Game the power back to regulate and manage our fish and game resources. If not passed this could virtually destroy Cordova. Cordova's main industry is fishing and the only industry that is keeping Cordova alive today. We cannot depend on tourism.

Many Cordova fishermen would loose their boats and their only means of making a living if they are not allowed to fish (gill-net). Does the state want to see this happen? Nearly all of the Cordova fleet is financed thru the state. What will this do to the state?

My husband has been in the fisheries since 1969. We make our home here in Cordova and have been residents for over 25 years. This is our only means of employment. We are not young and certainly do not want to loose our boat. We also prefer to be employed and not on Welfare.

I urge you, along with all of Cordova, to please give this bill your support.

Sincerely,

Kathy Crow

Kathy Crow

HIGH TIDE SEAFOODS
P. O. Box 1556
VALDEZ, AK 99686

March 29, 1985

Representative Adelheid Herrmann
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative:

The commercial salmon industry is a major resource of revenue and employment in the State of Alaska. We urge you to support SB #231.

Thank you.

Sincerely,

James L. Shefler
Partner

JLS/jcs

ALASKA POWER SERVICES

P.O. BOX 622 • CORDOVA, ALASKA 99574
(907) 424-3300

March 25, 1985

[illegible], Co-Chairman
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

[illegible]:

I am writing this letter as a private business owner in the city of Cordova in support of HB#288 Alaska Power Services is solely dependent upon the commercial fisheries in Cordova, providing mechanical services and parts to the gillnet fleet of Cordova. If HB#288 is not acted upon by May 1, the survival of my business and many others in Cordova are doubtful this year. There are many resident's livelihoods at stake pending the decision of this bill. We urge that you make every effort to pass this bill as quickly as possible.

Business has dropped off sharply due to the confusion and uncertainty created by the Madison decision, whether or not the gillnet fleet will fish May 15 or not.

We, the owners and employees of Alaska Power Services urge you to act immediately on HB# 288 to ensure a stable economic base for Cordova and it work force.

Your cooperation in this important matter in Cordova is greatly appreciated.

Sincerely,

Charles E. Maxwell

March 28, 1985

Dear Representative Heinmann,

I am a commercial fisherman's wife who is very concerned about the courts interpretation of priority in allocating fish. Giving ~~subsistence~~ more priority over commercial fishermen means financial disaster to us personally and to the future of the Copper River salmon. For the past three years we have worked hard in Prince William Sound and now find ourselves with an investment in a doomed industry.

I am asking for immediate action this session to protect our livelihood. Commercial fishing was under strict regulation by the State board of fish and game. I feel qualifying as a subsistence user should also be strictly limited. Salmon is a fragile resource - mismanagement one year may have lasting effects.

Sincerely,

Jean C Phillips
3308 Lois Dr
Anchorage AK
99503

Dear Sir

3-21-85

I am writting to urge you to Pass House Bill # 788 and give back to the Board of Fisheries the flexibility to manage the Resource for the user groups.

Thank you

John Johnson

Alaska Resources Comm.

Taelheid HERRMANN

Sir.

I ask your support on H.B. 222 or any other Legislation that would put the Board of fish and game BACK in Power to Regulate the Resources as they have in the Past.

The Economy of Cordova and Every other Fishing Community in the State may well hinge on this Bill.

Thank you

Jack Kittel
Box 1189
Cordova, AK.

=>

Dear ~~Sir~~ Respresentative

As a commercial fisherman who is very dependent upon the Copper River gillnet fishery for my livelyhood, I am very concerned about the current threat by [redacted] usage and possible loss of this fishery to commercial fishermen

I think the problem lies with the definition of subsistance. As far as fisherman we really are completly dependent upon these fish. Our homes, vehicles, and vessels are centered around this fishery. We are the ultimate subsistance users. We are not casual users as seems to be the case with many urban up-river people who travel hundreds of miles to fish under the guise of subsistance.

I urge you to support SB 231 and HB. 228 and manage the Copper River fishery as had been done successfully under the Board of Fishes pre-Madison decision plan. This plan was agreed upon by the various factions involved: true rural subsistance users, sports

fishermen and commercial fishermen. Your support of this bill will help keep our fishing industry which is very important to the State of Alaska. alive and healthy.

Sincerely
W. F. Fleming
Box 363
Cordova, Alaska
99574

Cordova Chamber of Commerce

P.O. Box 99
Cordova, Alaska 99574
(907) 424-7260



March 19, 1985

R E S O L U T I O N

WHEREAS commerical fishing is the backbone of the economy of Cordova and other Prince William Sound Communities, and

WHEREAS the Madison Decision severely impairs the opportunity for commerical gillnetting on the Copper River Flats, and

WHEREAS a speedy resolution is necessary in order to allow the 1985 commercial gillnet fishing to start as scheduled, now therefore

BE IT RESOLVED that the Cordova Chamber of Commerce supports the passage of HB 288 and SB 231 and urges members of both the House and Senate to put their support behind these bills.

CORDOVA CHAMBER OF COMMERCE

Margy K. Johnson

Margy K. Johnson
President

P.O. Box 1142
Cordova, Alaska 99574
March 24, 1985

House of Representatives
Resources Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Sirs,

As a resident of Cordova, Alaska, and a Prince William Sound Drift Gillnet permit holder I am urging your support of HB #288 and any similar legislation restoring the Alaska Board of Fisheries and Game to their previous management position of fish and game. The impact of the Madison Decision on my community and myself is catastrophic. Please reinstate the Board of Fisheries and Game as the managing body for our fisheries.

Sincerely,

Karol R. Marx

2-21-20

I am writing to urge you to vote
from bill 280 and give back to the
local libraries the flexibility to
manage its resources for the use general.

Thank you
Gail Dunn

March 25

Dear Mr. Schultz,

I'm writting to urge you to please pass House Bill 288 and give to the Board of Fisheries the flexibility to manage the resource for the user groups.

Thank you,
Mike McKenzie

CORDOVA, AK 99574

REP. SHULTZ

THIS LETTER IS IN SUPPORT OF SENATE BILL #231 AND HOUSE BILL #288 WHICH WILL SAVE THE COPPER RIVER FISHERY.

I MOVED TO CORDOVA TOO LATE TO BE ELIGIBLE FOR A LIMITED ENTRY PERMIT ON THE POINT SYSTEM. FOR THE PAST 10 YEARS I HAVE FISHED FULL-TIME AS A DECKHAND ON CRAB & SALMON BOATS WHILE ALSO RUNNING MY SMALL BOAT ON OTHER HARVESTS.

AS OF LAST YEAR MY HOUSE WAS NEARLY PAID FOR AND I COULD INVEST IN A P.W.S GILLNET PERMIT (VIA A STATE LOAN). IF I AM NOT ALLOWED TO FISH THE COPPER RIVER RED SALMON TEN YEARS OF EFFORT, IN ACCORDANCE WITH LEGISLATIVE POLICY, WILL HAVE BEEN WASTED.

CRAB & OTHER FISHERIES AT THIS POINT ARE NOT LUCRATIVE ENOUGH TO MAKE PAYMENTS. WITHOUT THE GILLNET FISHERY I WOULD BE FORCED TO LEAVE CORDOVA.

AFTER WORKING FOR 10 YEARS, IN COMPLIANCE WITH LEGISLATIVE POLICY, TO HAVE ALL I'VE WORKED FOR THROWN OUT BY LEGISLATIVE ACTION WOULD ~~[illegible]~~ LEAVE ME WITH A DEEP RESENTMENT & LOSS OF RESPECT FOR THOSE LAWS I HAVE TRIED TO OBEY AND RESPECT.

SINCERELY

LYNN POTTER - COMM. FISHERMAN

CORDOVA.

Richard Shultz, Co-Chairman
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Shultz,

I was born and raised on the Copper River, and I have been a commercial fisherman for 19 years. Over the past few years the fishing time on the Copper River has been restricted time and time again due to escapement reasons and increasing pressures on the upper Copper River. Over 50% of my annual income is generated from gillnetting on the Copper River. I am also a partner in a small fishing co-op. We started this five years ago with 12 fishermen, and our operation has been selling fresh reds and kings to various restaurant markets throughout the country. The entire success of the operation is based on the early fishing we have had and soley relies on the Copper River.

I live in Cordova 12 months a year and 90% of what I buy is bought in Cordova. In my opinion the gillnet fleet cannot survive without utilizing the Copper River fisheries. Therefore I'm asking you to support House Bill #288. I feel that this would be devastating to the economy of Cordova, and I feel that the community itself would have a hard time surviving it if this bill is not passed.

Thank You

Jean Jackson

Richard Shultz, Co-Chairman
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Shultz,

I live in Cordove and I run a small fish business, along with Tom Johnson also of Cordova. The whole of our business runs strictly off the Copper River red and king salmon run.

I'm writing to you now in the hopes that you will support House Bill #288. If this bill is not passed, I'm afraid the future of the people of Cordova and our children will be limited to handouts from the state welfare. I know this sounds drastic but everything in this small fishing town is centered around the commercial fishing fleet. Personally the affects on myself if this bill is not passed will be devastating as I have no other means from which I depend. I feel stuck between a rock and a hard spot as we who depend on commercial fishing are a minority. I only hope you will take our livelihoods into serious concideration.

Thank You for your time and effort.

Sincerly
Betty J. York

Betty J. York

I am writing to urge you to pass House Bill #288 and give the Board of Fisheries the flexibility to manage the resource for the user groups. Thank You.

Kim L Johnson
BOX 1179
CORDOVA, AK. 99574

Dear Rep. Young

I am writing to support speedy passage of Senate Bill #231 and House Bill #288 to save the Copper River Salmon fishery.

As a resident and employee in the city of Cordova I do become very aware of the large contribution the P.W.S. gillnetter make to the economic base here. I don't believe Cordova can survive without healthy fisheries.

I believe that the State Fish and Game Board have done a pretty good job, if preservation and growing numbers of Salmon are any indication, and a return to the system that has worked well is the best solution.

As an Alaskan I favor ~~[illegible]~~ subsistence for those who need it. Has anyone considered an income ceiling for subsistence permit holders?

We are all anxiously awaiting the outcome of these bills as the future of so many hang in the balance.

Sincerely
Carol Emmett
Bartender
Cordova

Richard Shultz, Co-Chairman

Addressing House of Representatives Resoures

Dear Representative, as a Copper River Commercial Salmon Gillnet Fisherman and a ten year resident of Alaska, I urge you to support House Bill #288 or similar legislation to save the Copper River Salmon Fishery, my profession, and the town of Cordova. Failure to stop un-limited subsistance usage by the Urban masses of the state will end the Traditional 70 year old Commercial Fishery on the Copper River, as well as take 75% of my yearly earned income away. As a Gillnet Fisherman for Salmon, the Copper River Fishery provides the bulk of my yearly catch, and supports my livelihood. Cutting off the Copper River Commercial fishing season would put a serious threat to the town of Cordova's very existance. Cordova's local economy depends on the revenue generated thru the Copper River Fishery. All local business would face the possibility of closing their doors in the event of NO Commercial Fishing on the Copper River. Without this Fishery my profession as a Gillnetter would be seriously jeopardized. I rely totally on the income from Salmon Fishing. If the fishery is taken away from me, I have no way to make a living and have limited training in other Fields of work. How would you as a legislator like it if a law was passed that basically eliminated politicans as a bread earning profession, thus forcing you to find another way to earn a living?

You would probably react the same way Iam and make an effort to protect your way of life and career. My Career as a Drift Gillnetter is likely to be finished without the Copper River Fishery. I strongly urge you To support legislation that would return the power back to the Alaska Board of Fisheries and Game to regulate the resource. They have studied the Copper River Fish Stock's and have a set management plan. We must protect the resource above all else. Unlimited Subsistance harvests would soon eventually wipe out the Copper River Salmon runs. I feel Subsistance should be based on the individuals needs and traditional use basis. Those individuals who need the Salmon to help survive should be able to take what they can personally consume. For one individual to take 200 Salmon or a Family 500 Salmon when they cannot in all probability consume that many Fish is absurd. That makes an under-the-table Fish Sale situation likely for illegally dealing with the surplus Fish. It turns every Subsistance fisherman into a Commercial Fisherman on the 200 fish quota system. How many Families actually eat that many fish? There are only a few choices with that many fish, Sell them, Smoke them, or blantantly waste them! I myself eat a lot of Salmon annually. Including Canning, Smoking, and gifts to relatives,

I have personal use of 30 to 50 Salmon at the most, and I am a professional Fisherman! There should be a personal use fishery for all resident Alaskans, but it should regulated by need. Those residents who need the fish To subsist on would get them under House Bill #288. This Bill would also allow Traditional use groups, such as Commercial Fisherman, and Copper River Valley resident to be able to continue our set-way of existance and help assure management of future stocks of Salmon. I have my whole life's investment tied up in the industry at age 32. I have State backing on a resident loan from the Alaska Commercial Fishing and Agriculture Bank. All in all I have over $100,000 tied up in my fishing business. I live a modest existance and work hard and take many risks against the ocean just to get by on most years I have participate in this Fishery. So its not as easy or lucrative as many might seen to think about the life of an Alaskan Commercial Fisherman. It should be my constitutional right to be allowed to continue this traditional way to make a living. Why is my profession any different than anyones **elses**? Give me a chance to earn a living! With Alaska's concern over falling oil Revenues, the State should be concerned about enhancing its Commercial Fishing Industry, not pinching it out of existance and those who earn their livings from it.

Fishing Vessel — Sincerely, John C. Gregory — Copper River Salmon Drift Gillnetter
" " "

Box 1210 602 Railroad Avenue
Cordova, Alaska 99574
Phone: (907) 424-3237
or 424-3238

"The Friendly City"

March 20, 1985

Leonard V. Pingatore
Mayor

Richard J. Leland
City Manager

Donna M. Sherby
City Clerk

Council Members
Joe Gunderson
Phyllis Day
Oliver Osborn
Lew L. Cochran
R. L. Van Brocklin
John Wheeler

Representative Bette Cato
Pouch V
Juneau, AK 99811

Dear Representative Cato:

On March 13, 1985, Governor Sheffield introduced Senate Bill 231 and House Bill 288 relating to the taking of fish and game for subsistence and personal use. As you know, this was necessitated by the Supreme Court's findings in the matter of Madison et al versus the Alaska Department of Fish and Game and the Alaska Board of Fisheries. The intent of the proposed legislation is to provide definition and clarification to the Board of Fisheries' authority to manage Alaska's most valuable renewable resource.

We, in Cordova, have reviewed the proposed legislation with representatives of the commercial and sport fishing industry as well as those who participate in the personal use fisheries. While it is clear that additional work will be necessary to define the various fisheries and the role of the Board of Fisheries over the long term, we feel it is imperative that the Legislature enact the proposed legislation immediately to assure a fishing season in 1985.

On behalf of my colleagues and the City Council and all Cordovan's who depend on a well-managed fishery, I strongly urge your immediate passage of Senate Bill 231 and House Bill 288.

Sincerely,

Leonard V Pingatore

LEONARD V. PINGATORE
Mayor

Enclosure: Resolution 85-9

CITY OF CORDOVA, ALASKA

RESOLUTION 85-9

A RESOLUTION OF THE CITY OF CORDOVA, ALASKA URGING IMMEDIATE PASSAGE OF SENATE BILL 231 AND HOUSE BILL 288, RELATING TO SUBSISTENCE FISHERIES, BY THE ALASKA STATE LEGISLATURE

WHEREAS, the Supreme Court of the State of Alaska recently found the Alaska Board of Fisheries Regulation, 5 AAC 01.597 inconsistent with the Legislative intent to provide guidelines for the protection of subsistence fishing, and

WHEREAS, the court found the regulation exceeds the authority delegated to the Board because it operates too restrictively in non-subsistence uses, and

WHEREAS, Governor Sheffield has proposed legislation in the form of Senate Bill 231 and House Bill 288 which provides the necessary definition and clarification of the subsistence and non-subsistence fishery issues, and

WHEREAS, the economy of the City of Cordova is critically dependant on the Copper River Fishery, as is the State of Alaska dependant on the revenue and employment resulting from the commercial and sport fisheries, and

WHEREAS, the proposed Senate Bill 231 and House Bill 288 when enacted will serve to the benefit of subsistence, personal use, commercial and sport fisheries, and the Board's management of Alaska's most valuable renewable resource.

NOW THEREFORE BE IT RESOLVED that the Mayor and City Council of Cordova, Alaska, recommend and urge the immediate consideration and enactment of Senate Bill 231 and House Bill 288 as proposed by Governor Sheffield.

PASSED AND APPROVED THIS 20 DAY OF March 1985.

Leonard J. Pingatore
Mayor

Theresa M. Shelby
City Clerk

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Margy K Johnson	Box 150 ~ Cordova, AK	424 3272
Harold Brown	Box 873	424-7434
Roger E Brown	Box 404	424-7645
Frank L. Plant	Box 641 "	424-5230
Ezra Young	Box 933	424-3508
Elmer Lange	Box 393	424-3419
Charles T. Peters	Box 150	424-3272
Denise Amen	Box 150	424-3272
Chris Carlson	Box 323	424-3603
Michael J Rayack	Box 1601 "	424-3272
Cynthia A Kenny	Box 61	424-7388
Gail Allen	Box 610 Cordova AK	424-7153
Donna L. Burnett	2843 Redwood Rd (ANCHORAGE AK)	279-7745
William N. Schofield	Box 1305 CORDOVA	
Peter E McCallen	Box 362 Cordova AK	424-5324
Lisa Lynn	Box 847 Cordova AK	4245460
Glen Simmons	Box 72 Cordova	424-7428
Lee Ann Fairall	Box 72 Cordova	424-7428
Tonia L. Yarbrough	Box 804 Cordova	424-3689
Harold E Yarbrough	14620 Sunset Hwy Anch.	345-3661
Tim Hanson	9.7C TUDOR ANCH AK	562-2672
Bryan Brady	Box 1043 Cordova	424-7377
Robert E Maxwell	Box 344 Cordova	
Paul Nordine	Box 1129 CORDOVA	-7351
Larry Allen	Box 1103 Cordova	

NAME	ADDRESS	PHONE NO.
Evan Butler	P.O. Box 102.1 / CDV, AK	424-5359
William J Allender	P.O. Box 1136 Cord. AK	424-7555
Beverly R Steffe	Box 1221 CDV AK	424 5628
Anna Ballem	Box 98 Cordova, AK	424-3663
Kathy Halverson	Box 1210 " "	424-5644
Rick Halverson	Box 1292 " "	424-5644
Amy Beedle	Box 39 " "	424-3507
Peter Oralrud	Box 126	5317
Leonard Anderson	Box 126	424-5317
Curtis J Carlson	Box 121	424-5541
Gary W Taylor	Box 545	424-3123

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill Bill #231.

****

NAME	ADDRESS	PHONE NO.
Jeannine Butler	P.O. Box 1051	424-7536
Jerry McCune	PO Box 372	424-7480
Robin Wilson	P.O. Box 1133	424-7358
Irene Weiler	P.O. Box 876	424-3500
Matthew McCarty	P.O. Box 2368	424-7485
Judy M Reynolds	PO Box 903	424-3608
Phil Lair	P.O Box 106	424-7528
Debbie Lair	P.O. Box 106 — 99574	424-7528
Jerrain's Home	Box 83 99574	———
Gene Koechlin	Box 533	424-5108
Jeff Pidgeon	Box 473	424-5765
Cathy A Kitchen	Box 1255	424-3649
Kim Hoyer	Box 2271	424-3094
Chris (Chip) Chesnut	BOX 116	424-7240
Kathleen A Brown	Box 161 - 99574	424-3657
Jon E Thomson	Box 106 7 [illegible]	424-7596
Rico Andersen Jr.	Box 1149	424-7707
Margie Travis	Box 93	424-7480
Jim Finnegan	Box 1139	424-3305
Tom McGahan	Box 2262	424-5657
Herbert + Jenny	Box 294	424-3584
Wallace & Kenneth	Box 1014	424-7326
Mark A Rumfelt	Box 572	424-7291
Jeanne A Godden	Box 989	424-7327
Joe Cook	Box 215	424-3507

NAME	ADDRESS	PHONE NO.
K Zia Simon	Box 1564	424-5556
Collette Petit	Box 745	424-7608
Douglas Petit	"	" "
Glen P Hopkins	Box 343	424-7632
Helen Cobb	Box 215	424-3507
Frank V Collins	Box 2361	424-5689
Robert J Kopchak	Box 1126	424-7178
Jack Kuitel	Box 489	424-3110
Arthur Cunningham	1275	" 7371
Sharon Patchett	Box 701	—
Neil M. Enfield	G.D.	—
John A. Lisak	Box 376	424-7442

NAME	ADDRESS	PHONE NO.
Mildred Olson	P.O. Box 1052	424-7758
Verla Childs	P.O. Box 179	424-3206
Chris Kompkoff	Box 1	424-7216
Martha Nichols	Box 235	424-7559
Joann Thomas	Box 284	424-7497
Dawn Patton	Box 2065	424-7366
Robin Brandley	Box 1174 Otis	424-7197
Velda D. Travis	Box 1059, City	424-7486
Amy Campbell	Box 147 "	" 3293
Mitch Mitchell	Box 1611	" 7354
Mimi Hertel	Box 489	3110
Caleb Kompkoff	Box 455	" " 5625
Donald E. Edwards	Box 405	
Diana Johannsen	Box 474	424-7310
Lacy McHorse	Box 579	424 5288
Ruth Tiedeman	Box 902	424-3619
Kathy Wamser	Box 256	424-7378
Howard Johnson	Box 146	424 3564
Mabel Kompkoff	Box 435	424-3521
Cheryl Greenwald	Box 1531	424-5208
Chas Ehrs	Box 305	424-3471
Mary A. Mordoff	2356 W. 46th Lincoln.	248-0101
Cecilia L. Wiseley	Box 47	424-3467
Mary Gene Dawson	Box 78	424-3666
Julia J. Mordoff	Box 608	424-3615
Jack Austin	Box 980	424-3528
Dick Sheldon	Box 820	424-3543
John D Johnson	Box 1179	424-7243
Bobbie Jo Sherman	Box 225	424-7626
Nikki L Sherman	Box 116	424-7240

NAME		
Keri Crawley	Box 1483	424-5371
Judith Cunningham	Box 1139	424-3305
Karen Blake	Box 2666	424-3322
Grace Jansen	Box 2334	" " 3418
Pam Strickland	Box 1517	424-5277
Brenda Mazzanti	Box 102	424-7489
Wm Adam Bauer III	Box 1604	424-7422
Kim L. Hunter	Box 1179	424-7243
Christine T. Wellons	Box 191	424-3541
Erina Parker	Box 542	
Cissa McBride	686	7462
Mary Cunningham	1275	7371
Betty M. Turner	Box 260	424-7676
Diana M. Clary	1573	424-33-25
Lyllecia Gillen	Box 358	424-3674
Ron Mullins	Box 436	424-3664
Tammy Ann Harris	PO #1015	424-7503
Steve W. Starek	PO # 1289	424-3586
Rene Lankford	1289	424-3586
Rifle Nesters	Box 697	424-7224
Charles R Nesters	Box 697	424-7224
Karl Heisel	Box 2377	NONE
Peggy Ann Warner	Box 266	424-3322
Karen Hendrix	Box 343	424-7632
Lloyd Kostoff	Box 1	424-7216

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Lanny Gillespie	Po box 2512	424 5561
(?)Sandra Ann White	Box 988	424-7763
Cathy Allender	Box 1136	424-7335
Alice Reilly	Box 1125	424-7210
Nena S Totemoff	Box 1232	
Tessa Kohler	Box 1194	424-3589
Joseph W. Henderson	Box 1294	424-7425
Gilbert Olsen	Box 665	424-3441
Clifford Olsen	Box 665	424-3441
Terry C. Holliday	Box 352	424-3346
Lenita L. Lankford	Box 976	424-7470
Ralph R. Moorhouse	Box 976	424-7470
Darrin L Phillips	Box 2315	424-5144
Wesley D. Kimber	Box 1226	5507
Ed Stupman	Box 1108	424-7271
Teresa Hardie	Box 931	424-5166
Linda Cooper	Box 1296	424-7346
Ken Bell	Box 1043	4247193
Barbara Webber	Box 934 Cordova AK	424 7343
James Kallander	Box 2272	424 7693
Judy Allen	Box 1117	424-3684
[illegible] LeBlanc	Box 1026	424-7102
[illegible]	P.O Box 681	424-3695
[illegible] Kopchak	Box 1126	424-7178
[illegible] Muller	P.O. Box 1297	424-5411

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

NAME	ADDRESS	PHONE NO.
David A Botto	P.O. Box 2086 Sitka AK	747-8730
Gary Haines	Box 255 Cordova	424-7449
Dan Demott		
Laura J Bacon	Box 807	424-3144
Arnold Bolm	Box 1157	
Andrew Kallaco	Box 1503	424-5623
Jerry L Pitts	Box 482	424-3451
J Reid	Box 1005	3541
Richard D Cole	Box 478	7363
Andi Taggart	Box 1208	3357
John C Reese	Box 258	424-7563
Susan Butler	Box 1021	424-5359
Kenneth E Halbeck	Box 998	424-3106
[illegible]	Box 835	424-7293
Donald C Slaughter	Box 259	424-7321
Eric J Johnston	Box 1457	424 3171
William Reid Jr	PO 1234	424 7448
Ron W Sr	Box 1069	424-3128
Evelyn Hidalgo	Box 1635	424-5602
Allison Bannis	Box 255	424-4449
Richard Collins	Box 337	424-5272
C. Hare	Box 711	4[illegible]-7494
Karen Mullins	Box 1554	———
Chris Longley	1228	5320
Mike Ba[illegible]	Box 783	424 5676
Jon Lutt	Box 1473	———
Jon Lund		
Brenda Johnson	Box 460	424-3353
Terry Haines	Box 255	424 7449

NAME	ADDRESS	PHONE NO.
Natalia Mary Parsons	Box 573	424-7404
Bill Parsons	Box 151	424-3541
Bill Stucki	Box 1115	"
R.t Nigard	1245	3196
Cheryl A Nygard	1245	"
Patrick M Harris	Box 1524	424-3511
Jim Shipman	Box 1108	424-7694
Chris L Fulton	Box 1068	424-5120
(Elizabeth Brooks)	Box 415	424-3157
Mark A Castillo	Box 757	424-7766
Cindy L Eaki	Box 96	424-5441
Becki Flaschen	Box 455	424-5625
John M. Coulter	Box 777	424-7597
Bill Milam	PoBox 1228	424-5520
Ivan Jones	Box 1597	
Tom Keeton	Gen del	424-5643
Mark W Williams	P.O. Box 1293	424-5659
James M Green	Box 3	" 3179
Ronnie Lee	Box 1062	" - 7318
Debbie Bessie	Box 1626	424-3160
Dana Matsuba	Box 452	424-7390
Pat Nicola	Box 259	424-7319
Wm. A. Nicola	POB 259	424-7319
Mario Pellicer	Box 1461	424-7311
Lee Weingroff	Box 1	424-7216
Lacey Hayes	Box 253	424-5706
Tina Vicki Kaneta	Box 66	424-3179
Steve McButler	Box 141	424-3699
David Dorla	Box 752	
L. McClellan J.	Box 55	" 3392
P.M. Herman	Box 2347	5584
Russell L Olsen	P.O. Box	424-3569

1-b

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME.	ADDRESS	PHONE NO.
Sandra Mature Cf	Box 1574	424-5477
Mike Mature Cf	Box "	" "
Ron Horton	Box 216	3638
Leslie C. Justice	Box 991	424-7303
Rene L. Allen	Box 111	424-7505
Lewis Allen	Box 111	424 7505
Sue Muna	Box 987	424-5134
Dave Muna	Box 987	424-5134
Tony McCathern	Po. Box 1222	424-7671
Linda Burch	Box 132	424-3422
Donald Burch	" "	" "
Betty King	" 354	424-3670
Kelly L Givens	776	424-7248 Cell #
Merle A Hanson	Box 345	424-3662
David F. Grimes	Box 1636	424-5253
Carmen L. Smallwood	Box 453	424-7618
A Smallwood	Box 453	424-7618
John Hardridge	PO Box 134	424-7493
Roy Scb	P.O. Box	424-3128
Dede Scb	P.O. Box	424-3128
C Hansen	PO Box 442	42473 73
Bud Lane	P.O # 1314	7797
Rick Steele	Box 392	424-3409
Pauline Allen	Box 1281	424-5443
Tom R Clement	Box 989	424-7327

NAME	ADDRESS	PHONE NO.
Jim 2nd Spur		
Betty Ott	Box 457	424-7382
Paul Goodlet	Box 1135	424-5718
Dawn Hambert	" "	" "
Pam Pedersen	Box 864	424-5218
Gordon Lyptomb	Box 1311	4247145
Elaine Jones	Box 56	424-3192
Lila Johnson	Box 574	424-3368
Corrine Erickson	Box 472	424-3581
Nelson J Hunt	Box 1616	424-5605
Deanne L Hemenston	Box 2246	2124-3410
John K Reeves	Box 756	424-7565
Dawn M Penn	Box 756	424-7563
Kim Evans	Box 776	424-7248
John F Burch	Box 1012	424-7658
Carol L Burch	Box 1012	424-7658
Pamela M Jones	Box 1177	424-3518
Eleanor Lary	Box 393	424-3419
Patricia L Jones	Box 574	424-3652
Janet Bellew	Box 412	424-7586
Mary R Hogard	Box 579	424-5298
Linda Norman	Box 1161	424-5164
Richard McCracken	Box 940	424-5400
Elizabeth E Adams	Box 772	424-7852
Victor R Rode	Box 1524	
Tom Anderson	Box 107	428-7387
Carol A Maxwell	Box 717	424-3361
Fred A Brady	Box 1693	424-7377
Sandra King	Box 965	424-3373
Rose Weathers	Box 1167	424-7492
Kevin Weathers	Box 1167	424-7492

NAME	ADDRESS	PHONE NO.
Diane Johnson	Box 202	424-7235
Shane Edwards	Box 978 97	424-7138
Larry D. Fulton	Box 2355	424-5560
Rebecca Haland	Box 993	424-7579
Carol Emmett	Box 1472	424 5226
Neal Wood	Box 1166	
Harry J. Woods	Box 954	[redacted]
Terri E Woods	Box 954	Hospital
Jerry Lee Weathers	Box 837	UHF Ch 6
Lon W. Ezbey	Box 2263	Cordova AK 424-317
Dave Ezbey	Box 2263	Cordova, AK 424-3196
Clyde Nolan	Box 266	Cordova, AK
Dana L. Moore	Box 1119	Cordova
Arlene Crump	P.O. Box 1123	Cordova, Ak
Jean C Swenson	Box 225	Cordova Ak
Bob Shirmer	Box 225	Cordova Ak
Anne L Hershleb	Box 1252	Cordova, Ak
Mike Flynn	Box 847	Cordova AK 424 5460
Jim Jackson	Box 365	Cordova AK 99574 424/116
Karen Chappell	Box 92	Cordova, AK 99574
Kathleen C Fleming	P.O Box 157	CORDOVA AK. 99574
J MERIDETH	PO Box 1453	CORDOVA, AK 99574

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Jennie Blake	Box 1122	424-3804
Ingrid Makarka	Box 534	424-5523
Rita Petrinovich	Box 636	424-3618
Mary Phillips	Box 396	424-5355
Tony Buchanan	Box 771	424-3395
Carla Church	Box 406	424-3389
Christine Lyon	Box 723	424-3425
Don Biddlecomb	Box 723	424 3475
Debbie Panick	Box 1266	7273
Jerry Pitcher	Box 468	—
Charlie Botta	Box 548	424-7171 3529
Kenneth W Pratt	Box 1033	424 5445
Alec Hayes	Box 1112	424-5331
R.J. Roberts	Box 507	424-3357
R Sandusky	Box 481	5504
Ed Ulasaik	Box 367	424-7421
Charlotte Carli	Box 281	424-3432
Michael S. Scott	Box 833	424-3584
Frances Scott	Box 833	424-3584
Nancy Brady	Box 531	424-5441
Robin Hamr	Box 1105	424-7256-7104
Joan Wenstrom	Box 1243	424-7564
Patricia MacMartin	Box 343	424 7439
Benita Parsons	Box 573	424-7404
Susan L. Rando	Box 277	424-7354
Dawn Williams	Box 2211	[illegible]

NAME	ADDRESS	PHONE NO.
[illegible]	Box 2346	424-5209
[illegible]	Box 1571	424-5308
[illegible]	Box 731	424 3524
[illegible]	Box 21	424-3545
[illegible]	Box 150	424-3272
[illegible]	Box 532	424-3586
[illegible]	Box 771	424-3395
[illegible]	Box 542	———
[illegible]	Box 863	7597
[illegible]	Box 997	424-3103
[illegible]	" 1161	3331
[illegible]	" 804	424-3689
[illegible]	Box 141	424-7170
[illegible]	Box 1302	424-3678
[illegible]	Box 772	424-5688
[illegible]	Box 1155	424-7456
[illegible]	Box 1208	424-7244
[illegible]	Box 80	424 3364
[illegible]	Box 286	424-7328
[illegible]	Box 286	424-7378
[illegible]	Box 282	424-7263
[illegible]	Box 1187	424-7426
[illegible]	Box 731	424-3524
[illegible]	" 782	424-5384
[illegible]	" 937	" -5593
[illegible]	Box 109	424-3152
[illegible]	Box 52	424-7684
[illegible]	Box 178	424-3431
[illegible]	Box 178	424-3431
[illegible]	Box 254	424-3636
[illegible]	Box 1611 Cordova	424-7361

DO NOT SIGN

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Michael Galambush	Box 1223 Cordova	424-7355
R C Schroeder	Box 1251 Cordova	424-5305
Tom Baughman	Box 296 Cordova	424-3316
Jim Pahl	Box 1128 Cordova	———
Tiffany B. Fisher	Box 321 Cordova	424-7505
Thomas K Welte	Box 982 Cordova	424-7509
Donald D. Enlow	Box 341 Cordova	424-7229
Charles A McCracken	Box 940 Cordova	424-3919
Ray Atkinson	Box 2251 Cordova	424-34
Kyle Carroll	Box 1594 Cordova	424-751
Virgil L. Capell	Box 281 CORDOVA	424-34
Dennis O. Long	Box 393 Cordova	424-3419

NAME	ADDRESS		PHONE NO.
D. L. Kurtz	Gen Del	Cordova, AK	4243835
Carl Saarela	Box 451	Cordova AK	424-7339
Andy Gallion	Box 2356	Cordova AK	424-318
Mike Medley	3321 VERKA	Anchorage, AK	561-5694
Wm. G. Lankard Jr.	Box 37	Cordova AK	424-7470
Keith B. Fenicle	BOX 1537	Westport Wash	
Fred A. Faso	BOX 1515	Cordova AK	424-5268
Jerry L. Bluhm	Box 605	Cordova AK	424 [illegible]064

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Frank Foole	P.O Box 2356 CDV-AK	424-3584
Charlotte Maxwell	Box 622 CDV-AK	424-7580
Paul L. Lee	Box 341 Cordova AK	424 5687
Bill Smith	PoBox 1221 Cordova	424-5628
Charles Maxwell	PO Box 622 Cordova AK	424-3306
Luke Wisnicki	P.O. Box 354 Cordova Ak.	424-7309
Jon Bo[illegible]	Box 832 Cordova AK	424-3401
Bill M[illegible]	Box 43 CORDOVA AK	274-1922
Chris Clark	C-o Delivery Cordova AK	424-3802
Andrew D. Rip[illegible]	Gen Del. Cordova AK 99574	
Rita M. Henderson	Box 261 Cordova ak 99574	424-3624
William A. Merritt	Box 1108 Cordova AK. 99574	424-7271
A Nelson	464 Cordova Ak. 99574	424-7243
David M. Phillips	Box 396 Cordova AK	424-5388
Rick D. Phillips	Box 989 Valdez AK	835-4506
Don Bailey	Box 472 Cordova	424-7586
Eli Shipman	Box 1108 CORDOVA	424-7271
John T. Reynolds	Box 907 Cordova AK.	424-7606
[illegible]	Box 174 [illegible]	424 7590
[illegible]	Box 124 Cordova	424 3484
[illegible]	Box 1611 Cordova	424 7361
[illegible]	Box 58 Cordova	424.5318
[illegible]	Box 52 Cordova	424-7684
[illegible]	Box 576 Cordova	424-3418
[illegible]	Box 261 CORDOVA	424-5624

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS		PHONE NO.
Carl Allison	Box 427	Cordova ak	424-3302
Ron Wagner	Box 1534	Cordova AK	424-7671
Bill Hanson	Box 43	Cordova	AK 274-1922
Dan Nichols	Box 235	Cordova	AK 424-7559
Fred Weiss	Box 1102	Cordova	AK 424-7670
Max H Bennett	Box 1006	Cordova	AK 424-3695
E.J. Chesley	Box 2264	CORDOVA	AK 424 7106
Don Mastrini	Box 102	Cordova	AK 424-7489
Neil Nelson	Box 1522	Cordova	AK 424-5570
Dan Jory	Box 1597	Cordova	AK 424-5370
Steve Stanford	Box 112	Cordova	AK 424-5578
Mike & Collins	Box 501	Cordova	AK 424-3606
Stephen J Herfel	Box 174	Cordova	AK 424 7550
Mike Webber	Box 257	Cordova	AK 424-7471
G.E. Thomas	Box 842	Cordova,	AK 424-3309
Edward Kunz	Box 34	Cordova	ak. 424-3192
Ronald Lahn	Box 246	Cordova	Alaska 424 7582
Michael K Brown	Box 953	CORDOVA	424-7616
William J. Wilhelm	Box 1146	Cordova	424-7208
W.H. Hagmiller	Box 2325	CORDOVA	424-7420
Jack B. Shaw	Box 891	CORDOVA	424-335
Ross Hunter	Box 252	Cordova	424-3315
A.D. Moore	Box 1192	Cordova	424-7348
R.G. Tate	Box 1035	Cordova	AK 424-7118
Byron L Jones	Box 544	Cordova,	Ak. 424-3652
Richard A Hunter	Box 1294	Cordova	AK 424 7287

NAME	ADDRESS	PHONE NO.
Kenneth Johnson	Box 414	Cordova Alaska
Richard Zimmerman	Box 1274	Cordova Alaska
Deborah A Zimmerman	Box 1274	Cordova Ak
Lars A. Olsen	Box 637	Cordova AK
Dorreen Kay Hite	Box 901	Cordova Alaska 5432
Martin Parsons	Box 573	Cordova Alaska 9957
Martin M. Parsons	Box 573	Cordova Alaska
Wayne Patchett	Box 701	Cordova, Ak.
Robert L. Crawford	Box 25	Cordova, AK.

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Bonnie Hourde	Box 124	424-3484
Sharon Ernest	Box 741	424-3697
Ken Kitchen	Box 1255	424-3649
Patti Steen	Box 621	424-3650
Bill Jensen	Box 1150	424-7285
Phyllis J. Klein	Box 82	
Martin Parsons	Box 573	424-7404
Diana Maddux	Box 1131	424-7328.
D.W. Gilbertson	Box 1216	424-3334
Pip Ellingham	Box 1057	424-5387
Barbara Jensen	Box 294	
Jo Anne Bents	Box 13	424-7264
Sean McDaniel	Box 1118	424-7736
Bob Smith	Box 251	424-3520
Chad Clark	Box 75	424-5189
Frank Steen	Box 610	424-7153
Brian Shaw	Box 891	424-3359
Wanda Rosenbalm	Box 893	424-5256
Elaine Tabbutt	Box 975	424-3117
Scott E. Eik	Box 44	424-3414
Pete Oehs	Box 441	424-3191
Ronald P. Compton Sr	Box 357	424-3577
Dave Riddell	1635	424-5602
Linda O'Brien	2206	7640
Gary Weinrich	1011	424-7440

NAME	ADDRESS	PHONE NO.
Daniel C. Chappell	Box 2242	424-3105
Robert Ott		424 5171
Brian A Halverson	Box 975	424-3117
John C. Gregory	Box 342 Cordova	424 5292

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS		PHONE NO.
DONALD R. NARRANCE	P.O. Box 320	Cordova	424-3284
Shannon J. Willis	P.O.B. 1521	Cordova	424-5617
Judy Arsenault	P.O. Box 11	Cordova	424-3288
John C. Hanson	P.O. Box 342	Cordova	424-5292
Andrew Light	P.O. Box 139	Cordova	424-7354
Delaree Hanson	General Delivery	Cordova	424-5497
[illegible]		Cordova	424737[illegible]

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Bob Halverson	Box 975	424-3117
James A Rankin	Box 1309 Cordova, Ak.	424-3282
Robert D Roberts	Box 801 Cdv. AK	424-3108
Lynna Merritt	Box 1108 Cdv Ak	424-7271
Mary Beth Albert	Box 32 Cdv Ak	424-3550
Marie Leary	Box 431 Cordova ak	424-5411
Steve Pavlik	Box 1453 Cordova, AK	424-5677
[illegible]	Box 401 Cordova, Ak	424-3680
Robert D Trasi	Box 1059 Cordova, AK	424-3486
George F. Morris	Box 407 Cordova AK	424-3625
Patty Hayes	Box 1453 Cordova AK	424-5477
Tom Copeland	" 1286 Cordova, AK	424-7349
Wm Gunderson	" 1282 " "	424-726[illegible]
Doris J Anderson	Box 2 Cordova	424-3664
Debby L Plueker	Box 80 Cordova	424-5341
Richard B Plueker	Box 80 Cordova Ak.	424-5341
Jerry Welker	Box 1934 Cordova Ak.	424-7345
Daniel Z Knudsen	Box 685 CORDOVA, AK	424-5109

PETITION

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****

NAME	ADDRESS	PHONE NO.
Thurston Franklin	Chevron USA, Box 910 Cdv.	424-3264
Frank Foode	P.O. Box 2356 CDV-AK	424-3544
Rick Johnson	P.O. Box 1207 Cdv. AK.	424-7738
Stan Leighton	P.O. Box 30 Cdv. AK	424-3202
Paul Pole	PO Box 180 CORDOVA AK.	424-3240
Cindy Scott	Box 505 Cordova AK	424-7597
Mary Boyer	Box 413 Cordova ak	424-3188
Charles F Wicka	Box 932 CORDOVA	424-3135
Bob Hermanson	Box 244 Cordova	424-7881
Tim Joyner	Box 2208 Cordova	424-5437
Teresa Allen	Box 67 Cordova	424-3130
Dan R. Burch	Box 132 Cordova AK	424-3422
Sue Laird	Box 1240 Cordova AK	424-5597
Ed Thomas	Box 1108	CORDOVA AK. 424-7271
Nick Mirick	Box 1108	CORDOVA AK 424-7271
Allen Olson	Box 665	Cordova AK 424-3444
Sara Carlson	Box 1623	CDV, AK 99574 424-3624
Gerald Edmonson	Box 245	CDV AK 424-5457
John R. Snyder	Box 1464	CDV AK " -7448
Mary M Wentworth	Box 895	Cordova 424-3151
Bruce Strait	Box 354	Cordova 424-7654
Ben Ellingsen	Box 656	Cordova 424-3638
Tony Shields	Box 831	Cordova AK 424-3801

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Donald Pelto	Box 662	424-7608
Robert R. Gruba	Box 2375 308 S. Whiting View	
John K Romer	Box 756	424-7563
Lesley Hidalgo	Box 1635	424-5602

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Mrs. Carol J. Cummins	P.O. Box 727	424-3679
Mrs. Emily Campbell	Box 44	424-3411
[illegible]	Box 727	[illegible]
Deandi C	P.O. D 1572	424-3533
Suzanne K. Knebel	Box 685	424-5109
Debbie Denton	Box 490	424-3491

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Norman R. Roberts	Box 38 Cordova	424-3450
Chris Tenin	Box 2354 Cordova	424-5406
Robert G. Manwell	Box 717 - Cordova	424-3361
Chris P. Kinder	Box 353 Cordova	424-3411
Marvin J. VanDenBroek	Box 921 Cordova	424-3486
Robert F. Weiss	Box 477	Cordova AK. 424-727
[illegible] Pott	Box 1472	Cordova AK 424-52[illegible]
Dean L. Kinder	Box 353	CORDOVA AK 424-3411
[illegible]	[illegible]	Cordova ak 11 5 725
Debbie Allen	Box 358	Cordova Ala 424-3474 99574
Linda M Olsen	Box 432	Cordova, Alaska 424-3539 995[illegible]
David L Olsen	Box 432	Cordova, AK 424-3539 99574
Victor E. Jones	Box 1177	Cordova, AK 99574 424-35[illegible]
Sandra C. Van Dyke	Box 473	CORDOVA 5165
Bob Wentworth	Box 1243	" "
Dixie Lambert	Box 17	CORDOVA AK 5146
BE Murray	Box 1111	Cordova, AK 424-7324
Brent Songer	Box 1019	CORDOVA AK 424 3152
Sharon Enslow	Box 341	Cordova, AK 424-727[illegible]
Nancy L Rich	Box 925	Cordova, AK 424-363[illegible]
Carl G Brown	Box 173	Cordova Ak 424-756[illegible]
D. Reay Kay Carroll	Box 1594	Cordova Ak 424-7517
Richard H Carroll	Box 1594	Cordova, AK 424-7517
Ken Adams	Box 1617	Cordova " 424-347[illegible]
William O'Brien	Box 2206	Cordova AK

NAME	ADDRESS		PHONE NO.
Mary B. Osborn	Box 1193	Cordova, AK 99574	424-3492
William A Bailey	Box 1302	Cordova AK 99574	424-567
Mary Thompson	Box 1625	Cordova ak 99574	42452
Jeffrey A Moore	Box 1119	Cordova Ak 99574	424-758
Jack Baker	Box 1208	Cordova AK 99574	42422
Ruth Tiedeman	Bx 902	Cordova 99574	424-56
[illegible]	Box 1312	Cordova AK 99574	424-5
[illegible]	Box 503	Cordova AK 99574	424-57
Erich Kitchen	Box 935	Cordova AK 99574	424-746
Steve Copeland	Box 53	Cordova AK 99574	424-3181
Randy D Blume	Box 1304	Cordova, AK 99574	

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Thea Thomas	Box 1566	424-5402
Stanley Langlin	Box 934	424-7714
Barry A. Fitton	Box 2265	424-2366
Russell Bales	Box 1157	
E. Iverson	Box 1285	
John K Reeves	Box 756	424-7563
Dawn Reeves	Box 756	424-7563
Marie E. Fox	Box 323	424-3288
Carol A. Baur	Box 1622	424-5563
Dolly Sherman	Box 185	424-3288
Clay Ryman	Box 92	424-3165
Lisa Thiel	Box 1138	424-3442
Richard Lewis	Box 986	424-5536
Alberta J. Beyer	Box 166	424-3511
Victor R. Guerrero	Box 972	424-5402
Nick Borodkin	Gen. Del. Cordova, Ak	-3674
Debra L. James	Box 2342 Cordova, Ak	424-7472
L. A. Clemente	Box 186 Cordova	424-3540
Larry K. Hayes	Cordova, Ak	424-5153
Mary J. Tomkosy	Box 725 Cordova, Ak	424-7284
Pete Konyukoff	Box 725 Cordova	" "
Julie E. Schmitt	Box 217 Cordova	
Dan Schmitt	Box 217 Cordova	
Bert A. Cottingill	Box 636	Cordova
Wm. L. Arnold	Box 57	Cordova Ak

NAME	ADDRESS	PHONE NO.
Steve Rodrigues	P.O. Box 323	424-56
Correct Complete	Box 435, Cordova Ak.	424-35
Newell K. Anderson	Box 1038 CORDOVA, AK	99574
Mark Roberts	ge del Cordova	
Willie Hamilton	Box 2235	Mess. 424-5171
Charlotte L. Smith	Box 1613	Cordova, Ak 9957
Victoria Nickell	Box 1158	Cordova, AK 9957
Daniel D. Hogarth	Box 359	Cordova
Daniel L Pettit + Wingham	Box 662	CORDOVA
Jake Goldy	Box 565	NONE Cordova A
Lyle Kitten	Box 935 424-7464	Cordova AK
Donald Shaw	Box 753	CORDOVA
Carl Burton	" 881	"
John L Rust @	Box 1026	Cordova, AK 9957
Dale C Hunt	Box 291	Cordova AK 9957
Mary Monia	424-3635 Box 167	Chv. AK
Cannery worker, 3 years		
Judith L. Briggs	Box 1158	Cordova AK 995
Faye Fabey	Box 752	" " "
Kenneth L. Ford	Box 1254	Cordova AK 99574
Brian Hutchinson	Box 700	Cordova, AK 99574
August Lindeman	Box 65	Cordova, AK.
Neal Simon	P.O. Box 200	Cordova Alaska
Paul Pappas	Box 365	Cordova AK

PETITION

Because the economy of Cordova is entirely based on commercial fishing on the Copper River and Prince William Sound, we the undersigned citizens of Cordova would like to respectfully request the Alaska Legislators to act immediately on House Bill #288 and Senate Bill #231.

****

NAME	ADDRESS	PHONE NO.
Steve Rooney	Box 2349 Cordova	424-3324
x [signature]	Box 31 Cordova	424-5393

Carol Emmett
P.O. Box 1472
Cordova AK 99574

Dear Rep. Hermann
I am writing to support speedy passage of Senate Bill # 231 and House Bill # 283 to save the Copper River Salmon fishery.

As a resident and employer in the city of Cordova I have become very aware of the large contribution the P.W.S. gillnetters make to the economic base here. I don't believe Cordova can survive without healthy fisheries.

I believe that the State Fish and Game Board have done a pretty good job, if preservation and growing numbers of Salmon are any indications, and I believe to the system what have worked well in the last reduction.

Favor.

As an Alaskan I [redacted] subsidence for those who need it. Has anyone considered an income ceiling

We are all anxiously watching the
outcome of this battle as the future
of so many things in the balance.

Sincerely
Carl Smith
Portland
Indiana

My name is Ray Estes. I was born and raised in Cordova.

I believe that our renewable resources can be used equally, by all of the people of Alaska. This can only be done if the Board of Fish & Game are allowed to do the job they were hired for.

As a lifelong fisherman, I can see no feasible way to allow any sensible management under present conditions.

Allowing unlimited harvesting means the end of our fisheries - and eventually, our salmon. This is our reality, as things stand now.

Please pass SB 231 and House bill 388. Without it, Cordova will just about cease to exist.

Thank you
Ray Estes
Box 1307
Cordova, Alaska

MAR 25 1985

March 21, 1985

The Honorable Adeheid Herrmann, Co-Chairman
Alaska State Legislature
Pouch V
Juneau, Alaska 99811
Dear Respresentative Herrmann,

We urge your support of HB #288 which will help save our Copper River fishery.

This request is not from a casual concern, but we are dependent on the salmon fisheries for our livelihood.

Sincerely yours,
Chris D. Billings
Chris D. Billings
P.O. Box 219
Cordova Ak. 99574

"In Support of Legislation to Maintain Orderly Harvest of Fish and Game Resources."

WHEREAS, the orderly harvest of fish and game resources is essential to the general welfare of rural Alaskans who depend on these resources for a large part of their livelihood; and

WHEREAS, the Alaska Supreme Court, in Madison, et al. vs. the Alaska Department of Fish and Game, struck down state regulations designed to determine eligibility for subsistence as being inconsistent with state law and legislative intent; and

WHEREAS, the decision would have the effect of allowing massive increases in the number of subsistence permits which may be issued; and

WHEREAS, this ruling also has the effect of preventing orderly harvest of subsistence fish and game resources because it diminishes the authority delegated to the Alaska State Board of Fisheries to establish criteria for the eligibility of users; and

WHEREAS, the ruling broadens the eligibility for subsistence permits to include all residents of the state, because it focuses on the place where customary and traditional uses have occurred, rather than the people who conduct them; and

WHEREAS, relaxing the eligibility requirements may necessitate emergency closure of commercial and sport harvests due to the influx of "court-created" subsistence users; and

WHEREAS, the court recognized that the legislature intended to protect subsistence rights in the 1978 statute; and

WHEREAS, the court, by broadening subsistence access so dramatically, jeopardizes the preference for those who depend most directly on the resource: rural residents of Alaska; and

WHEREAS, Governor Sheffield has introduced legislation that would restore order to the harvest of fish and game by more strictly defining the personal use and subsistence use of fish and game; and

WHEREAS, the subsistence use definitions must include the use of the words "rural" and "residents" in order to protect limited resources from virtually unlimited access by urban residents who have never depended upon fish and game resources for maintaining their way of life.

NOW THEREFORE BE IT RESOLVED,

that the Board of Directors of the Rural Alaska Community Action Program, Inc., endorses Senate Bill No. 231, "An Act Relating to the Taking of Fish and Game for Subsistence and Personal Use," and

BE IT FURTHER RESOLVED,

that the Alaska State Legislature is urged to act immediately ~~expeditiously~~ on this legislation, in order to maintain harmonious relations among Alaska fish and game user groups.

ETC.

MAR 27 1985

3-21-85

I am writing to ask you to put some silt [illegible] and silt road in the area of Lassen. I would like to have Mr. Jones look this over.

Thank you
Carl Lane
Box 175
Lassen 95371

LYNN W. POTTER
P.O. BOX 1472
CORDOVA, AK 99574

REPRESENTATIVE HERRMANN

THIS LETTER IS IN SUPPORT OF SENATE BILL #231 AND HOUSE BILL #283 WHICH WILL SAVE THE COPPER RIVER FISHERY.

I MOVED TO CORDOVA TOO LATE TO BE ELIGIBLE FOR A LIMITED ENTRY PERMIT ON THE POINT SYSTEM. FOR THE PAST 10 YEARS I HAVE FISHED FULL-TIME AS A DECKHAND ON CRAB & SALMON BOATS WHILE ALSO RUNNING MY SMALL BOAT ON OTHER HARVESTS.

AS OF LAST YEAR MY HOUSE WAS NEARLY PAID FOR AND I COULD INVEST IN A P.W.S GILLNET PERMIT (VIA A STATE LOAN). IF I AM NOT ALLOWED TO FISH THE COPPER RIVER RED SALMON TEN YEARS OF EFFORT, IN ACCORDANCE WITH LEGISLATIVE POLICY, WILL HAVE BEEN WASTED.

CRAB & OTHER FISHERIES AT THIS POINT ARE NOT LUCRATIVE ENOUGH TO MAKE PAYMENTS. WITHOUT THE GILLNET FISHERY I WOULD BE FORCED TO LEAVE CORDOVA.

AFTER WORKING FOR 10 YEARS, IN COMPLIANCE

WORKED FOR THROWN OUT BY LEGISLATIVE ACTION WOULD [redacted] LEAVE ME WITH A DEEP RESENTMENT A LOSS OF RESPECT FOR THOSE LAWS I HAVE TRIED TO OBEY AND RESPECT.

SINCERELY

LYNN POTTER - COMM. FISHERMAN

CORDOVA.

MAR 28 1985

Dear Sir 3-21-85

I am writing to urge you to Pass House Bill #288 and give the Board of Fisheries the flexability to manage the resource for the user groups.

Mark Gall

John Gall

Box 1179

Cordova, AK 99574

MAR 2 [illegible] 1988

CORDOVA DISTRICT FISHERMEN UNITED

P.O. Box 939

Cordova, Alaska 99574

(907) 424-3477

Represenative Adelheid Herrmann,
Co Chairman, Resources Committee
Alaska State Legislature
Pouch V
Juneau, Alaska

Represenative Herrmann,

I am writing to urge you to pass House Bill #288 as quickly as possible. It is most urgent that the flexibility to manage the resources is returned to the Board of Fisheries this year. The Copper River will be hard to manage if the Madison decision stands the way it is now.

A lot of hard work has been accomplished by Fish and Game, PWSAC and the Advisory Board to come up with a management plan for the Copper River. This plan did work and did provide for all the user groups on the Copper River in the form of personal use and Subsistence. That balance to manage and maintain a small sockeye fishing time will further burden the financial stability of Cordova as a whole.

Thank you for your cooperation on this important matter.

Sincerly,

Jerry McCune

Jerry McCune
Vice President
CDFU

JM/ru

cc Richard Shultz
F. Day Wallis
Bette Cato
Roger Jenkens
Mike W. Miller
Drue Pearce
John Sund
Dave Thompson

Box 1210 602 Railroad Avenue
Cordova, Alaska 99574
Phone: (907) 424-3237
or 424-3238

"The Friendly City"

March 22, 1985

Leonard V. Pingatore
Mayor

Richard J. Leland
City Manager

Donna M. Sherby
City Clerk

Council Members
Joe Gunderson
Phyllis Day
Oliver Osborn
Lew L. Cochran
R. L. Van Brocklin
John Wheeler

Chairman, House Resources Committee
State of Alaska

On March 13, 1985, Governor Sheffield introduced Senate Bill 231 and House Bill 288 relating to the taking of fish and game for subsistence and personal use. As you know, this was necessitated by the Supreme Court's findings in the matter of Madison et al versus the Alaska Department of Fish and Game and the Alaska Board of Fisheries. The intent of the proposed legislation is to provide definition and clarification to the Board of Fisheries' authority to manage Alaska's most valuable renewable resource.

We, in Cordova, have reviewed the proposed legislation with representatives of the commercial and sport fishing industry as well as those who participate in the personal use fisheries. While it is clear that additional work will be necessary to define the various fisheries and the role of the Board of Fisheries over the long term, we feel it is imperative that the Legislature enact the proposed legislation immediately to assure a fishing season in 1985.

On behalf of colleagues and the City Council and all Cordovans who depend on a well-managed fishery, I strongly urge your immediate passage of Senate Bill 231 and House Bill 288.

Sincerely,

LEONARD V. PINGATORE
Mayor

CITY OF CORDOVA, ALASKA

RESOLUTION 85-9

A RESOLUTION OF THE CITY OF CORDOVA, ALASKA URGING IMMEDIATE PASSAGE OF SENATE BILL 231 AND HOUSE BILL 288, RELATING TO SUBSISTENCE FISHERIES, BY THE ALASKA STATE LEGISLATURE.

WHEREAS, the Supreme Court of the State of Alaska recently found the Alaska Board of Fisheries Regulation, 5 AAC 01.597 inconsistent with the Legislative intent to provide guidelines for the protection of subsistence fishing, and

WHEREAS, the court found the regulation exceeds the authority delegated to the Board because it operates too restrictively in non-subsistence uses, and

WHEREAS, Governor Sheffield has proposed legislation in the form of Senate Bill 231 and House Bill 288 which provides the necessary definition and clarification of the subsistence and non-subsistence fishery issues, and

WHEREAS, the economy of the City of Cordova is critically dependent on the Copper River fishery, as is the State of Alaska dependent on the revenue and employment resulting from the commercial and sport fisheries, and

WHEREAS, the proposed Senate Bill 231 and House Bill 288 when enacted will serve to the benefit of subsistence, personal use, commercial and sport fisheries, and the Board's management of Alaska's most valuable renewable resource,

NOW THEREFORE BE IT RESOLVED, that the Mayor and City Council of Cordova, Alaska, recommend and urge the immediate consideration and enactment of Senate Bill 231 and House Bill 288 as proposed by Governor Sheffield.

PASSED AND APPROVED THIS 20th DAY OF March, 1985.

Leonard J. Pinkerton
Mayor

City Clerk

MAR 27 198

March 25

Dear Mr. Herrmann,

I'm writting to urge you to please pass House Bill 288 and give to the Board of Fisheries the flexibility to manage the resource for the user groups.

Thank You.

Mike McKenzie

Dear Sir 3-21-85

I am writting, urge you to Pass House Bill # 288 and give back to the Board of Fisheries the flexability to manage the resource for the user groups.

Thank you

John Johnson

LETTERS IN OPPOSITION TO

HOUSE BILL 288

THE CHITINA DIPNETTERS ASSN.
1002 PIONEER ROAD
FAIRBANKS, ALASKA 99701



March 9, 1985

Rep. Richard Shultz
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Rep. Shultz:

In a teleconference Tuesday night 3-5-85 I along with Stan Bloom, Dick Burley and Marry Bishop all testified on the Alaska Supreme Court Opinion on subsistence.

The Chitina Dipnetter's Assn. agree with this opinion and want the law to stay as it is and we do not want to be disfranchise again.

I received a phone call from Juneau the next day (3-6-85) in which it was stated that there was some confusion after the teleconference as why we wanted the law to be changed. We do not want the law to be changed we support the Supreme Court Opinion. If there is a bill from the Governer or other legislatures to change this Opinion the Chitina Dipnetter's Assn. would like for you to do whatever you can to defeat there efforts.

If the interior delegation is positive the other side may have a chance to get a bill passed then you should work for a compromise to make sure that RURAL, LOCAL RESIDENCY OR COMMUNITY are not included and to try an identify "CUSTOMARY AND TRADITIONAL" in order to cut down on users.

If any changes are going to be made there will need to be public hearings on all changes. The main thing is that you go slow and get all of the input you can and make a good and constitutional law.

In the Daily News-Miner this morning Rep. Peter Goll stated that "Alaskans voted overwhelmingly in 1982 to keep the subsistence priority for rural Alaskans". This is incorrect the vote was to repeal the State of Alaska Subsistence Law and the word RURAL is not in the State Law.

Again I say if there has to be a change go very slowly.

Sincerely

Byron W. Haley

March 23/85

Tina M. Simmons
Box 80303
College, Ak 99708

Representative Shultz
Porch V
Juneau, Alaska 99811

Dear Representative Shultz,

I am opposed to Governor Sheffield's subsistence law

Sincerely

Tina Simmons

Tina Simmons

3/23/85

Representative Shultz
Pouch V
Juneau Ak 99811

Dear Representative Shultz

I am in shock that the Subsistance law could be passed as is. Please remit the issue to more public hearings. The future of my children's Alaska is at stake. Thanks

Michael L Ross
292 Narrow View lane
Fairbanks, Alaska 99701

P.S. Don't let it pass.

To: House Resources Committee

From: Mary Bishop
1555 Gus's Grind
Fairbanks, AK 99701 Phone: 455-6151

Date: March 26, 1985

Re: HB 288, Subsistence priority

Yesterday, in Anchorage, I attended the Joint Boards of Fisheries and Game hearing on the Madison case. During the hearing the winning lawyers on the Madison case offered their advise--free of charge--to the boards. I fear the boards may not accept the offer.

These two lawyers, Martin Freidman and Chuck Robinson, have a very different interpretation of the subsisence priority law than does the AG office. Using that interpretation Freidman and Robinson have not only won the Madison case before the state's supreme court. Evidently they have also won other cases against the state regarding this issue. Yet, for some reason, the administration continues to listen only to the AG office and not to the "winners".

I urge your committee to receive substantial input from Mr. Friedman and Mr. Robinson before taking any action on HB 288. It would be nice if they could make a 10 minute presentation at the April 8 teleconference so that all of us who are interested in the issue might benefit from their input.

After speaking personally to Mr. Freidman, I am convinced that the impact upon Cordova commercial fishing interests has been misrepresented by the AG office. The boards may, right now, regulate and restrict total subsistence harvest of a resource to the customary and traditional level of that subsistence use. For example, if the traditional level of subsistence harvest at Chitina is 60,000 sockeye, then any fish available for harvest above that 60,000 quota can be allocated to recreation, sport or commercial users in any manner the board desires.

This is not the same as saying all Chitina subsistence users get the traditional "bag limit" of 300 fish. Rather, the traditional total harvest level (60,000) must be maintained. As the court opinion makes clear on both pages 17 and 19, the priority goes for the customary and traditional use, not for the user.

The priority language as written in AS 16.05.251(b) and .255(b) needs to be rewritten and the intent of the legislature made clear. The original bill was passed in haste back in 1978. The language is vague and confusing; I am concerned about parts of the legislative history. We don't need to do this right now.

The Boards of Fisheries and Game are dealing with an incredibly difficult situation--not made easier by the fact that virtually all of them are newly appointed, with the notable exception of Sydney Huntington.

A problem exists--not necessarily the one described by the AG office. Passing the Governor's bill is no solution. It would merely create more tension among state residents.

Mary Bishop

REP. JOHN G. (JACK) FULLER

DISTRICT 23
ALAKANUK
BREVIG MISSION
CHEVAK
DIOMEDE
ELIM
EMMONAK
GAMBELL
GOLOVIN
HOOPER BAY
KOTLIK
KOYUK
NOME
SAVOONGA
SCAMMON BAY
SHAKTOOLIK
SHELDON'S POINT
SHISHMAREF
STEBBINS
ST. MICHAEL
TELLER
UNALAKLEET
WALES
WHITE MOUNTAIN

CHAIRMAN
BUSH CAUCUS
LEGISLATIVE COUNCIL
ADMINISTRATIVE REGULATION
REVIEW COMMITTEE

MEMBER
POLICY COMMITTEE
SPECIAL COMMITTEE ON LOANS
RULES COMMITTEE
COMMITTEE ON COMMITTEES

Alaska House of Representatives

MEMORANDUM

DATE: March 25, 1985

TO: Bush Caucus Members

FROM: Rep. Jack Fuller
Chairman

SUBJECT: Kenaitze Tribe Resolution - Subsistence

Cora Sacaloff of Kenai asked that I distribute the attached resolution to all Bush Caucus members.

HOME
P.O. BOX 689
NOME, ALASKA 99762

WHILE IN JUNEAU
POUCH V

KENAITZE INDIAN TRIBE
Resolution 85-6

RESOLUTION IN OPPOSITION TO HOUSE BILL 288 AND SENATE BILL 231

WHEREAS, the Kenaitze Indian Tribe is a federally recognized Indian Tribe which was reorganized in August of 1971 under the statutes of the Indian Reorganization Act of 1934 as amended for Alaska in 1936; and,

WHEREAS, the Kenaitze Indian Tribe represents and promotes the security, social welfare as well as the interests and common bond of association of its 500 Tribal members; and,

WHEREAS, it is the conviction of the Kenaitze Indian Tribe that the preservation and fostering of a customary and traditional subsistence lifestyle for its members is the primary means of promoting the interests of its members; and,

WHEREAS, the State of Alaska's Subsistence Law (Chapter 151 SLA 1978) recognizes that the fish and game resources of the state "... are not inexaustible and that preferences must be established among beneficial users of the resources..."; likewise that: "... it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources, and to recognize the needs, customs, and traditions of Alaska residents" (Sec. 1, Chapter 151); and,

WHEREAS, it is the Supreme Court of Alaska's opinion that the Board of Fisheries interpretation of "customary and traditional" uses (§ 703 HR 39) in the 1978 Subsistence Law is inconsistent with the legislative intent to provide guidelines for the protection of subsistence fishing (5 AAC 01.597); and,

WHEREAS, 5 AAC 01.597 was designed to protect subsistence uses; and,

WHEREAS, the Board of Fisheries has devised a regulation to disenfranchise many subsistence users whose interests the statute was designed to protect; and,

WHEREAS, House Bill 288 and Senate Bill 231 - an Act entitled: "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date" - was introduced at the request of Governor Sheffield; and,

WHEREAS, House Bill 288 and Senate Bill 231 intends to amend Section 3 AS 16.05.940(23) to read: (23) " 'subsistence uses' means the customary and traditional uses by rural [IN] Alaska residents of wild, renewable resources for direct personal or family consumption..."; and,

WHEREAS, Section 4 AS 16.05.940 is amended by adding a new paragraph to read: " (28) 'personal use fishing' means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter..."; and,

WHEREAS, amending Section 3 (AS 16.05.940(23) to regulate "subsistence uses" to rural Alaska residents only and creating "personal use" fishery for urban residents is viewed as an attempt to divide Aalskans and to legalize something that has been illegal in the past;

NOW THEREFORE BE IT RESOLVED BY THE EXECUTIVE COMMITTEE/TRIBAL COUNCIL OF THE KENAITZE INDIAN TRIBE at a meeting held on March 18, 1985 that the Tribe goes on record as being opposed to House Bill 288 and Senate Bill 231 introduced at the request of the Governor;

BE IT FURTHER RESOLVED that the Tribe urges all Senators and Representatives to carefully review the legality of House Bill 288 and Senate Bill 231 before making this important decision;

BE IT FINALLY RESOLVED that the Tribe will request federal intervention if further attempts to circumvent Supreme Court rulings are taken.

CERTIFICATION

This Resolution 85-6 was duly adopted by the Executive Committee/Tribal Council of the Kenaitze Indian Tribe at a meeting held on March 18, 1985 by a vote of 6 for and 0 against with 1 absent and 0 abstaining.

Ms. Clara Swan
Chairperson, Kenaitze Indian Tribe

Secretary, Kenaitze Indian Tribe

OTHER LETTERS AND COMMENTS

other

3/23/85

Representative Shultz
Pouch V
Juneau Ak 99811

Dear Representative Shultz

I am in shock that the Subsistance law could be passed as is. Please remit the issue to more public hearings. The future of my children's Alaska is at stake. Thanks

Michael L Ross
292 Narrow View Lane
Fairbanks, Alaska 99701

P.S. Don't let it pass.

S.E. Reid
Myrt Manor
Koliganek, Alaska 99576

Representative Adelheid Herrmann
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

March 29, 1985

Dear Adelheid;

The recent Madison decision concerning [redacted] concerns me very much, as I am sure it does you and Fred Thorsoff. Governor Sheffield's initive to reinstate subsistence is very encouraging.

The purpose of this letter is to obtain information from you and your staff. Would you please supply me with a copy of the Madison decision, or direct me to a source for such a copy? Would you please identify just who are the individuals in the Senate Republican leadership, that are opposed to the Governor's initive to reinstate subsistence, as I wish to correspond with those who are opposed.

The basic argument in favor of subsistence rights that I expect to be hearing from proponents of subsistence, will be based on "traditional use". While that argument will be valid, and I do support the "tradition l use" concept, I feel that a more pragmatic argument to those who are moderate in their viewpoints or maybe even downright opposed to subsistence, will be based on my own particular economic situation, that I am sure is shared by other bush residents. My argument in favor of subsistence rights is based on the fact that we live in a semi-cash/subsistance economy. Further that th utilization of subsistance resources to offset the limited cash income is a major factor in keeping me off of many social programs such as, food stamps, free school lunch, energy assistance, and welfare. Why would any tax paying citizen want to support me with their tax dollars, when I can support myself between limited cash income and subsistence?

On the subject of the Alaska National Guard, everyone who supported the effort is to be commended. Members of the Guard have done a lot toward local establishment of a unit. At this site we have at least nineteen interested applicants, there are more at other Nushagak River sites. On February fourteenth, officials of the

Alaska National Guard arrived here in Noligonek and conducted an assessment meeting and presentation, with members of both the Village Council and Noligonek Natives Ltd. At that meeting the Guard officials instructed village officials in a few very basic and straightforward steps that are required for local establishment of an Alaska National Guard unit. Since that February fourteenth meeting the initive for the establishment of a local Guard unit, has been with the Village Council and Noligonek Natives, Ltd. Your support in the National Guard project, has been very appreciated, thank you.

Sincerely,

C.T. Seidl

C.T. Seidl

Alaska Sportfishing Association

3605 Arctic Blvd., Suite 800 • Anchorage, Alaska 99503

March 21, 1985

Representative Richard Shultz
Pouch V
Juneau, Ak 99811

Dear Dick,
The recent Alaska Supreme Court decision (Madison Case) has resulted in a potentially chaotic and explosive situation. It leaves nearly all of Alaska's people as "priority subsistence users" under the subsistence law and it precludes restricting these subsistence users until sport and commercial fishing is closed down. Although on the outside this may appear to be fair, it creates an unmanageable mess of the Dept of Fish and Game and renders the Board of Fisheries nearly useless. This could be disasterous to the sportfishing, commercial and hunting industries. Additionally, some rivers cannot stand an efficient harvesting method without a threat to the fish resource. The current legislation proposed by the Administration will not resolve these issues and, as a permanent bill, will harm sport and commercial fisheries.

The citizens of Alaska did not vote or participate in the designation of "rural" Alaska as the only ones qualified for priority subsistence, nor is the definition of "rural" or "subsistence priority" clearly understood. These are issues that need full public discussion prior to considering a permenent change to the subsistence law. Therefore, as an interim measure, the Alaska Sportfishing Association calls for immediate action to:

1. Enact legislation this session with a termination or sunset clause expiration date of December 31, 1985, that will enable the Dept of Fish and Game and particularly the Boards of Fish and Game to limit subsistence fishing in the same manner as they were before the Madison decision.

2, Immediately take action that will insure that prior to the 1986 legislative session the priority subsistence issue is fully aired at public hearings with this input assembled and given to the 1986 legislature.

3. During the 1986 legislative session, thoroughly debate the subsistence priority statute and bring about a long term, fair solution for resource users in all areas of the state.

One possible means of identifying the Boards authority in a temporary law for this year would be to include the eight points utilized by the Board.

We believe that a true subsistence priority need does exist for a very few long time residents in very remote areas. Putting any individual in a position where he has priority of a resource, if even legal, over all other people in Alaska, and the world for that matter, is a law and priority that must be severely restricted.

Bob Hunter
Robert L. Hunter
Alaska Sportfishing Association

SUBSISTENCE

With the recent Supreme Court decision, the State now has the direction and opportunity to assure to All Alaskans the equal consideration to take fish and game for their own personal consumptive use. This decision supports the Constitution's provision that "Wherever occuring in their natural state fish, wildlife and waters are reserved to the people for common use." The court stressed that common 'use' and not priority 'users was the main intent and should be the effect of the subsistence regulations. They found that all consumptive users, and not just rural residents, are eligible priority subsistence users.

Government and its laws should apply even handedly to All Alaskans and make sure that whatever criteria is used is not unjustly discrimintory in intent or effect. The Constitution does not on a whole and should not have severe restrictive provisions. This same need should be observed by any legislation and should be used to make sure that its clear intent is to protect and insure the equal and just consideration of All Alaskans.

But the same politics that supported the illegal discrimintory subsistence regulations are at work to speedily fix their court failure. Their main weapon, now as in the past, is their threats aimed at the majority of Alaskans. One such threat is that the over 200,000 sportfishermen will be severly impacted by the Supreme Court decision. The court, in fact, said that all personal consumptive user were to be given equal consideration. As most so-called sport fishermen eat the fish that they catch, any priority subsistence use must include them. And those 'pure sport fishermen' who catch and release are not harvesters of the resource, therefore have a negligible impact. With an annual harvest of well over 100,000,000 salmon, All Alaskan should be entitled to the equal opportunity to take fish for their own dinner table.

Another political threat used is that the federal government will deny our State the right to manage our fish and game unless the subsistence priority is based on rural residency. When the Feds mandate that the resource must be managed as they say, the State has in fact already lost the right of management authority. This restriction resulted from State politics that requested and supports such residency discrimination. When Ron Sommerville, Alaska's representative during early d-2 / ANILCA, opposed this federal mandated discrimination he was removed from his Washinton D.C. post. Governor Hammond admitted in a public meeting of the Boards of Fish and Game that Sommerville was removed because of Native pressure. His replacement, John Katz, has compromised the Alaskan public's constitutional rights on this and many other issues. For the State not to politically and judicialy oppose this discrimintory action, which specifically denies equality to all residents of Anchorage, Fairbanks, Juneau and Ketchikan, shows a planed sell out of our rights. This plan includes the continued lobbying action of Larry Spengler, Attorney General office, supporting a priority subsistence use of Alaska's fish and game to be as discrimintory and restrictive as has been politcally motivated. Alaska would be better served if our Attorney General would be motivated by a responsibility to assure that all residents are not discrimintorly restricted in their rights.

The history of Governor Sheffield's stern actions has been a well known threat to any state employee who would question these unconstitutional subsistence regulations. He fired Fish and Game Commissioner Ron Skoog and Game Division Chief Ron Sommerville because of their private personal stands against these regulations. And he then requested the resignations of all Board of Fish and Game members when they began questioning the balatant directions ordered by Larry Spengler. It is time that All Alaskans are again "equal" under the law, no matter where they reside, and that such equality is promoted by our State and is not necessitated by continued court challenges by its residents.

Dale Bondurant

Dale Bondurant
SR 1 Box 2516
Chugiak, Alaska 99567

ALASKA OUTDOOR COUNCIL, INC.
3780 McGINNIS DR. JUNEAU, AK 99801
(907) 789-3450

March 5, 1985

PRESIDENT
Rupert Andrews
9416 Long Run Drive
Juneau, AK 99801
(907) 789-7422

REGIONAL VICE-PRESIDENT
Lyle Carlson
Box 2741
Fairbanks, AK 99707
(907) 452-3498

REGIONAL VICE-PRESIDENT
Robert Rausch
P.O. Box 2662
Juneau, AK 99803
(907) 789-3764

REGIONAL VICE-PRESIDENT
Ron Swanson
417 Katllan
Eagle River, AK 99577
(907) 694-9564

TREASURER
Ed Grasser
Box 1350
Palmer, AK 99645
(907) 745-3772

SECRETARY
Sam Harbo
P.O. Box 80522
Fairbanks, AK 99708
(907) 452-7815

DIRECTOR-AT-LARGE
Warren Hoflich
6901 Tall Spruce Dr.
Anchorage, AK 99502
(907) 243 4790

Representative Richard Shultz
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re: Possible Amendment to 1978 Subsistence Law

Dear Representative Shultz:

This letter is written because our Executive Director was recently advised that there may be an effort to amend the 1978 subsistence law and that effort may be tailored to accomplish those amendments with little or no public hearings.

We understand that if an effort to amend the law is offered this year, it will be to permit the Alaska Boards of Fish and Game to discriminate against individuals who reside in a community defined as "urban".

The purpose of this letter is to make it as clear as possible that we believe the 1978 subsistence law should not be amended in the absence of committee hearings which are open to the public, including hearings which involve teleconferences. In other words, public participation should be permitted.

Sincerely,

LYLE R. CARLSON
Vice-President Interior Region

ok

Kenai Peninsula Fishermen's Cooperative Assn.

Political and Legal Action Committee

Box 546, Soldotna, Alaska 99669

Phone: 262-2492



March 18, 1985

Representative Richard Shultz
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Shultz:

We are writing to you to ask your support on Senate Bill 37 and its corresponding House Bill 235. It is an act relating to management plans and regulations adopted by the Board of Fisheries. We have enclosed a Request for Support for this piece and legislation and hope that you will take time to read it.

We are especially concerned that we make it clear to you that we do not support United Fishermen Of Alaska in their position on the Governor's piece of subsistence legislation. In a March 8 letter to past UFA members, support was sought for the this legislation. It was stated that "efforts will require a rigorous and expensive lobbying effort, and even then the outcome will be uncertain because of the powerful seats held in the Legislature by the Fairbanks delegation." These are NOT our sentiments as commercial fishermen who fish the waters of Cook Inlet. In years past, we played a very active role as members of UFA with Cook Inlet commercial fishermen comprising a large number of their membership. When we called upon UFA to assist us with problems that we faced in Cook Inlet, they did not want to become involved. When we needed their help, they were not there to help. As a result of these types of things, we withdrew our support from the organization, but, unfortunately, UFA stills thinks that they have the authority to speak for every commercial fisherman in our state. There have been many issues that UFA has supported in recent years that we cannot support. Please do not think that they speak our minds when they speak on commercial fishing issues.

Our legislation is not a special interest bill. It is designed to benefit all user groups of our very valuable resource of fish. We believe that it would allow the Alaska Board of Fisheries to operate apart from the political pressures and whims of specie' interest groups that they are at present so susceptible to. It is designed to have our resource managed on a biological basis which will insure its future for generations to come. It is not an "exclusive right" bill and we are not endeavouring to remove anyone from their opportunity to have a part in the harvest of this resource.

We appreciate your time and consideration and hope that you will support us on our bill.

Sincerely,

Cheryl Sutton(Mrs.)
Committee Coordinator
Political and Legal Action Committee

CS:cp

Enclosures

Alaska Fish and Wildlife Federation and Outdoor Council

and

Alaska Fish and Wildlife Conservation Fund
3780 McGinnis Dr.
Juneau, Ak. 99801

SPECIAL NOTICE

Alaska Supreme Court Subsistence Ruling

The Alaska Supreme Court Friday February 22, 1985 struck down a Board of Fisheries regulation designed to identify eligibility for subsistence fishing in the Cook Inlet region. Under the regulation, certain residents of the Kenai coastline and an area near Homer were forbidden to fish for subsistence purposes.

The Supreme Court, in a 5-0 ruling, held that the board erred in denying subsistence permits to certain residents who had fished with set nets for personal and family use for many years. The Supreme Court found that the board's regulation on subsistence uses was inconsistent with Alaska law because the regulation was too restrictive.

The opinion stated: "Under a statute designed to protect subsistence uses, the board has devised a regulation to disenfranchise many subsistence users whose interests the statute was designed to protect."

The ruling by the Supreme Court was not a Constitutional decision but rather a statutory ruling. The Court decision went far beyond just eliminating the particular regulation, however.

The Court opinion emphasized the following points:

1. The State subsistence law does not allow the Boards of Fisheries and Game to distinguish between rural and urban subsistence fish and game users.

2. The State law does not allow the Boards to restrict initial subsistence users to a specific community.

3. The Court ruled that the ten point criteria used by the Board of Fisheries was too restrictive and was thrown out.

4. The State law requires the Boards to adopt regulations permitting "subsistence uses".

5. A major point of departure from the State's previous position was the ruling by the Court that <u>all</u> sport and

7. The Alaska Outdoor Council annual meeting is scheduled for Juneau from April 11-14, 1985 where subsistence and other critical issues are scheduled for deliberation. We request that no immediate action be taken until after the Council's annual meeting.

8. We agree that some resource management problems could exist this year if the administration chooses to direct the Fisheries and Game Boards to adopt sweeping regulatory changes. It is our opinion that this type of action isn't necessary nor equitable to the general public.

9. If however, it is determined, after full deliberations by the legislature, that immediate temporary corrective measures are essential, we propose that the legislature consider passing a law creating a one year moratorium or "freeze" on the subsistence law which will give them, the public and the Subsistence Task Force one full year to appropriately tackle the entire issue.

3-23-85

Dear Rep. Richard Shultz

Please hold public hearings in Fbks on the subsistance law before acting on it!

Thank you

Tobi Petersen

1153 Donna dr
Fbks, Ak 99701

THEODORE J. ALMASY
Pioneer "Alaskan Woodsman" Guide-Outfitter
McGrath, Alaska 99627
The Tikchik Lakes – The Kuskokwim – The Alaska Range
Trophy Fishing • Trophy Hunting • Recreation & Exploration
Dec. 15, 1984

State of Alaska
Boards of Fisheries & Game
Box 3-2000
Juneau, Alaska 99801

Subject: Regulation Proposal Item 4. (extra sheets as required)

DEFINITION: Subsistance in Alaska today is simply all or that portion of an individual or family unit's living or livelihood that is derived and obtained from land and sea by self-employment through use, utilization and development of available natural resources by Alaska's permanent inhabitants (without reguard to race or ancestrial heiredity); and, including, but not limited to: agriculture, mining and forest products along with personal harvest of fur, fish and game.

IN SHORT: Self-support by direct acquisition and personal processing and use of Alaska's land and sea natural resources to provide all or most of one's living or livelihood, and with cash flow not involving wages and salaries from this self-employment.

* * * * * * * * *

LEGAL BASIS: "GRANDFATHER RIGHTS" established by present day Alaskan inhabitants by and through historic personal use. These rights are not limited to any particular race, but rather belong to an ethnic group in a mixed and integrated society. The U.S. Government, after all, invited foreign immigration, permanent settlement, and encouraged and fostered economic development by these pioneers through use, utilization and development of Alaska's natural resources for more that 100 years; and, while she may have changed the rules and policies with reference to recent and current immigrants - she (and her Colonial Arm - the so-called State of Alaska) are legally duty and honor bound to keep promises and committments made in the past. Thus, after some 250 years (beginning with the Russian occupation) of foreign immigration, permanent settlement, and racial integration and assimilation both an ethnic group has developed and a way of life evolved in which individual rights cannot be decided nor judged based upon racial nor ancestrial heiredity; but must be treated on the basis of members of an ethnic society. We are now aware of many flaws in thw Alaska Native Claims Settlement Act, and a major flaw yet to be contested in the courts is based on the Civil Rights of those Alaska Nationals forcefully segregated and disenfranchised because of our race, and thus denied our "equal rights".

IN SHORT: "GRANDFATHER RIGHTS".

* * * * * * * * * *

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DETERMINATION of WHO and WHOM QUALIFIES

* * * * * * * * * * *

WHO IS QUALIFIED? : All Legal Residents of Alaska whose home and permanent residence is outside of the limits of first and second class cities tied into the integrated highway system and Marine Highway Systems, and who as individuals or family units qualify as subsistance users under the "DEFINITION" and "LEGAL BASIS" as stated.

WHO IS EXCLUDED ? : All persons whose home and permanent residence is located within the city limits of any First or Second Class City tied into the integrated highway or Marine Highway systems; residents of government (federal or state) owned housing located upon government owned or reserved lands; and, all U.S. Citizen immigrants who may hold Alaska Resident Status under Law, but whom are themselves in Alaska under "labor" or "tour of duty" contracts or agreements on full time wages and/or salaries; and, who are granted and accorded special benefits, privileges, and tax exemptions including "cost of living allowances" by their employer and governments "as an condition of employment" that are not equally granted nor accorded nor available to local permanent inhabitants of Alaska. Such "Residents" cannot claim Subsistance Rights in Alaska.

****

IMPLIMENTATION

****

1. (a) For the purpose of implimenting this Section: Each full Game Unit (as they currently exist including all divisions and sub-units) shall henceforth be declared to be also a Subsistance Unit and Unit of Permanent Residence for all legal (one year) Alaska Residents who maintain their home and permanent Post Office address within such Unit's boundaries.

(b) Both Subsistance Rights and Resident Hunting and Fishing Rights (without payment of trophy fees) for all Resident Alaskans shall be limited to (1) Unit only - the Unit of Permanent Residency; and, in order to maintain these rights a party must reside year around in Alaska and not less than six (6) months per year within the boundaries of the Unit for which he claims these rights.

2. All Subsistance Users and legal Residents hunting and fishing outside of their Unit of Permanent Residence shall be deemed to be Trophy Hunting and Sports Fishing and subject to the prevailing trophy fees, but exempt (as Residents) from the Registered Guide Requirement.

3. Trapping is hereby designated as a subsistance right, and trapping is closed except to Subsistance Users.

4. Any Alaskan holding a "Permanent Hunting, Fishing & Trapping License is automatically declared to be a subsistance user and hold Subsistance Rights.

5. That where the taking of certain game animals is restricted by permit that subsistance users within said Game Unit shall have first preference rights to these permits with the general public taking the excess.

Implimentation Continued:

6. Nothing in this or these regulations is intended nor shall prevent immigrant settlers from acquiring Subsistance Rights as an Earned Right so long as they meet the requirements.

* * * * * * * * * * * *

END

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by Theodore J. Almasy

Theodore J. Almasy

ALASKAN ALPINE CLUB
3641 SANDVIK
FAIRBANKS
ALASKA
99701



LEADERS IN PROTECTING THE HERITAGE OF AMERICAN MOUNTAINEERING FREEDOM

23 March 1985

Representative Richard Shultz
Pouch V
Juneau, Alaska 99811

Subject: Subsistence

Dear Representative Shultz,

Reference subsistence: The Alaskan Alpine Club is appalled by the nature and degree of fallacious information presented to legislators by Governor Sheffield's appointees.

These are the same tactics used by the Native Corporations/ Sierra Club to gain the blackmail Federal subsistence law. It is important that Alaska legislators not tolerate such tactics.

Futhermore, the recommendation of Governor Sheffield's now fully politicized Boards of Game and Fisheries demonstrate a classic case of dishonest politics undermining the achievements of scientific wildlife management in this nation.

Every credible wildlife management agency and organization in the nation is on record as acknowledging that subsistence priorities greatly harm sound biological management of wildlife resources.

If the Alaska State Legislature holds any vestage of honesty, it is inconceivable that Legislators would acquiesce to the same entity which illegally managed the subsistence law amid years of public complaints against that abusive and illegal management.

The self-serving intents of Sheffield administrators are too obvious to later claim any position other than intentional dishonesty, and acquiescence to such.

The subsistence issue CANNOT avoid blowing up in the face of Alaska, not only for Alaskans, but for the witness of the nation.

Its ramifications involve all outdoor users.

Alaska's legislators may not then wish to be identified with the actions that caused such irreparable harm.

Now is the time to demonstrate the honesty and integrity so notably lacking in the imposition of the subsistence scam.

We urge you to address this profound issue with the care and full public participation that it demands.

I must ask: Where are the recommendations of Governor Sheffield's Subsistence Task Force?

Like many other Alaskans, who sincerely accepted the merits of that promised Task Force, the Alaskan Alpine Club was waiting to testify before that entity!!!!

Governor Sheffield catagorically lied to the public when he used the promise of that Task Force to get elected and gloss over this critical issue. That sham Task Force has branded Sheffield and Butrovitch as contemptable examples of Alaskan government officials.

Are the Interior Alaska State Legislators of the same nature, and too cowardous to demand credible results from that Task Force? Are they incapable or unwilling to study the results of this law and hear the people, as Alaskans were led to believe would be done?

I respectfully request answers to these questions from yourself and other interior legislators.

Thank you for considering these views.

And have a pleasant day.

Sincerely,

Doug Buchanan
Executive Director

cc: interior delegation
Governor Sheffield
Mr. Butrovitch
Board of Game and Fisheries
news media

GREGORY FRANK COOK

ATTORNEY AT LAW
P.O. Box 618, Douglas, Alaska 99824
Residence (907) 586-9719
Admitted to Practice in Alaska and Oregon

Representative Dick Shultz
Chairman, House Resources Committee
Pouch V
Juneau, Alaska 99811

March 26, 1985

Dear Representative Shultz,

This is in response to your request for a written memorandum of the oral testimony I presented before the House Resources Committee on March 25, 1985 regarding subsistence legislation.

In dealing with the subsistence issue, the Legislature should bear in mind two key provisions of the Alaska Constitution.

> "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use." (Article VIII, Sec. 3.)
>
> "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." (Article VIII, Sec. 17.)

Recently introduced legislation (HB 288; SB 231) should be carefully assessed in the light of these Constitutional provisions.

Before adopting any subsistence legislation, the Legislature would be wise to carefully formulate the specific goals it seeks to achieve. Also, it would be prudent to specify the tasks to be delegated to the Board of Fisheries and Board of Game.

Once its goals are made clear, the Legislature's purposes should be put into draft legislation. A broad variety of public comment, together with a range of legal opinions, should be studied until a political resolution is reached that does not violate our state Constitution.

Thank you.

Sincerely,

Gregory F. Cook

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
CHAIRMAN, HEALTH, EDUCATION AND
SOCIAL SERVICES COMMITTEE
1117 LAKEVIEW TERRACE
FAIRBANKS, ALASKA 99701
907-456-2899

WHILE IN JUNEAU
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Senate

March 26, 1985

Representative Richard Shultz
Chairman, House Resources Committee
Pouch V
Juneau, AK 99811

Dear Dick:

Because of the ramifications of the recent Supreme Court decision in Madison vs. the State of Alaska, the Governor has introduced legislation to establish a personal use fishery in law and further broaden the definition of "subsistence user" to mean customary and traditional uses by rural Alaska residents.

HB 288 currently before the House Resources Committee affects many of our constituents. Last year many of our Interior Delegation teleconferences were dominated by those interested in this issue. Now, once again our constituents are requesting hearings before the Legislature takes any final action on the Governor's proposal. We respectfully request that you hold hearings on this bill in those communities most affected, including Fairbanks.

Thanking you in advance for your consideration.

Senator Bettye Fahrenkamp

Representative John Ringstad

Senator Don Bennett

Representative Mike Davis

Senator Jack Coghill

Representative Mike Miller

Representative Hillo Koponen

Representative Steve Frank

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3700

To: Resources
Room 118 CAPITOL

Ms. Hermann, Mr. Shultz +
Committee members,

I am a Cordova, Alaska resident. At present, I have all my personal funds tied up and hanging in the Balance of further decisions, follow the initial decision on Subsistance which has brought such chaos to our community. The Last industry of Cordova being chocked off at the whim of one supreme court decision.

I am at the mercy, financially at a critical moment, having

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH P - STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

invested properly & SAFELY in a viable Limited entry fishery, which Another ARM OF STATE Goverment — the Dept. OF Fish & Game has worked hard & well TO MANAGE AND the results are beginning TO Show Suddenly — this is all in Jeopardy AND the FUTURE OF AN ALASKAN Town with the Fishermen whove worked & Died on these COASTS For So MANY YEARS will suffer A dismal & degrading end.

I beg that your comittee will find SOLUTIONS ACCEPTABLE TO all ALASKANS IN this MATTER. Give the working person — the Fisherman — the respect he has earned over the Long history of fishing in ALASKA

DENNIS McGUIRE



KENAI RIVER SPORTFISHING ASSOCIATION

3301 "C" Street Suite 202
Anchorage, Alaska 99503
Phone (907) 276-1451



To: Alaska State Legislators

On March 19, 1985 the Steering Committee of the Kenai River Sportfishing Association unanimously approved the following motion:

"We favor interim legislation this session having a sunset clause of December 31, 1985 that accomplishes:

(1) Return of the regulatory jurisdiction of fish and game back to the boards of fish and game as it existed prior to the Madison decision of February 22, 1985 by the Alaska Supremen Court.

(2) That the legislature then cause to have public hearings held state wide prior to the 1986 legislative session that would frame legislation that would accomplish a permanent solution. to the relationship between subsistence, sport, commercial and personal use fisheries as well as all aspects of recreational and subsistence hunting."

Chaos must be remove from the management of our fish and game resource until a permanent solution be gained from public input from all citizens of the State of Alaska on the permanent use and allocation of fish and game. We cannot allow any situation to continue that has the potential of causing severe damage to the fishery resource. Resource regulation must be preserved.

TESTIMONY OF CHUCK ROBINSON
BEFORE THE HOUSE RESOURCES
COMMITTEE ON APRIL 2, 1985

SUBSISTENCE AFTER MADISON

In the recent case of Madison v. Alaska Dept. of Fish and Game, the Alaska Supreme Court ruled that a set of regulations adopted by the Alaska Board of Fisheries concerning eligibility into the Cook Inlet Subsistence Fishery were unlawful and inconsistent with the intent of the current subsistence law. The regulations invalidated by the court excluded the majority of subsistence users, mostly Kenai Peninsula residents from participation in the Cook Inlet Subsistence Fishery. This, the court declared, was contrary to the intent and spirit of the state's subsistence laws.

To fully understand the ruling of the court, it is necessary to review the language of the law, the circumstances which surrounded the passage of the law, and the facts and circumstances concerning the application and interpretation of the law by the Board of Fisheries which led to the court's ruling. Further, any enlightened discussion of subsistence fishing cannot occur without including the relationship of this fishery with other uses of fish, such as sports and commercial fishing. The Cook Inlet salmon fisheries provide the best example of salmon fishing user conflicts in terms of the means and ways that the Board has used to resolve or heighten and intensify those conflicts. Only by reviewing the law, the facts and the application and interpretation of the law by the Board can an accurate picture of the Madison decision be depicted.

The current subsistence law, adopted by the Alaska Legislature in 1978, is a fairly simple law. It was enacted by the Legislature in the spirit of cooperation with federal law and is founded upon sound social policy. The law was passed in light of a need on the part of Alaskan people to protect subsistence uses of fish resources in face of changing social and economic development bound to occur in the state with increase in growth and the need to conserve the fish stocks for sustained yield purposes.

The law provides that the Board of Fisheries must

permit subsistence use of fish unless a factual determination is made that such use is harmful to or jeopardises the fish stocks in question. If fish resources are in short supply, then subsistence use of the resources shall have a priority use over all other beneficial uses. If fish resources are in such short supply that only subsistence uses can be permitted on fish stocks then, those subsistence users who have a customary need and dependence on the stocks, live closest to the resource and have no other alternate available resources for use have a priority of use over all other subsistence users on these resources. Until such time that the fish resource is in such scarcity that only subsistence use is allowed and there is not enough fish to go around among subsistence users any Alaska resident is eligible to obtain a subsistence permit.

The law establishes a two tier or two class category of subsistence users. The first tier is the general class, to which any resident may belong and the second tier, which is the preferred class, which only certain residents may qualify for. Any Alaskan resident is eligible for a subsistence permit at such times when fish stocks are abundant and even when fish stocks may be low, but not necessarily depleted to the point of severe jeopardy. Only certain residents may qualify for preferred subsistence status, based on dependency, local residency, and alternate available resources, When fish resources are so low that only subsistence use is allowed on these resources, sports and commercial use have been prohibited and there are not enough fish stocks to adequately supply subsistence use. Further, if the Board determines that subsistence use may jeopardize the viability of available fish stocks this use may too be eliminated.

The subsistence law defines subsistence fishing as the taking of fish by longline, seine, fishwheel, gill net or other means defined by the Board for subsistence uses. Subsistences uses are defined as those customary and

traditional uses of fish in Alaska for direct personal and family consumption for food, shelter, clothing, fuel, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish resources taken for personal or family consumption, and for customary trade, barter, or sharing of these resources for personal or family consumption. Subsistence use covers a wide range of personal use of fish resources.

The law was adopted in response to a number of factors that had occurred and were occuring in the area of conservation, utilization and development of fish and game resources in Alaska during the 1970's. In 1972 Governor Bill Egan's administration established a state-wide policy within the Department of Fish and Game that made subsistence use by Alaska residents of fish and game resources the highest priority use during resource shortages. This policy was established one year after Congress enacted the Alaska Native Land Claim Settlement Act (ANSCA) and at the infancy of the Alaska oil pipeline boom. During the same year the constitutional amendment allowing limited entry into Alaska's commercial fisheries was ratified and the commercial fishery entry law was passed.

Between 1972 and 1981, Alaska experienced a dramatic increase in population. By 1980 there were approximately 400,000 people living in the state. Also many thousands of people visited the state each year. In 1976 Congress, after the election of President Carter, proposed the Alaska National Interest Land Conservation Act (ANILCA). The proposed legislation, enacted in 1980 was in part the result of the transfer of federal lands to the state and native Alaskans under Section D-2 of ANSCA. The ANILCA legislation creates a subsistence use priority on fish and game resources on federal lands and water within Alaska. In 1978 the Alaska legislature in an attempt to protect subsistence uses and to conserve on state fish and game resources enacted the subsistence law. In part the subsistence use priority was etablished to comply with federal law.

Despite the establishment of the 1972 subsistence policy and the passage of the 1978 subsistence law, the Board of Fisheries continued to regulate Alaska fisheries in such a way that completely ignored the mandate of the social policies on subsistence use of fish resources. Even during periods of shortages the Board failed to allow subsistence fishing to be the priority use. The Cook Inlet salmon fishery is a prime example of the Board's reluctance during the late 1970's and early 1980's to accommodate subsistence use of these resources.

In 1977 the Board of Fisheries established the Upper Cook Inlet management plan. This plan was used by the Board to allocate Cook Inlet salmon stocks between sports and commercial fishermen until it was invalidated by the Supreme Court in 1981. The plan essentially allocated Cook Inlet salmon stocks between sport and commercial use based upon seasonal fish movements. The plan did not include any specific allocations for subsistence use. The plan was adopted by the Board in response to political pressures placed upon it by the Anchorage chapter of the Isaac Walton League, an international organization comprised mostly of recreational fishermen and hunters and outdoor enthusiasts. The argument put forth in support of the plan was that Cook Inlet king and silver salmon resources should be allocated to sports use on a priority basis because sports users outnumber commercial users and the sport use demand is growing. Threats were made to the Board that if it did not adopt the plan sportfishermen would urge a referendum vote on the subject or get the Legislature to adopt the policies outlined in the plan.

The plan allocated all salmon found in Upper Cook Inlet prior to June 30 to exclusive sport use and all salmon destined to spawn on the Kenai Peninsula after August 15 to priority sport use. All salmon moving in Upper Cook Inlet between July 1 and August 15 is primarily for commercial fishing use, except certain salmon stocks which must be

minimized in the commercial harvest. No specific priority allocations were made in the plan for subsistence use of Cook Inlet salmon stocks.

The stocks moving in Upper Cook Inlet prior to June 30 are the majority of Cook Inlet king salmon and other runs of red salmon. After August 15 the stocks moving in Upper Cook Inlet are mostly fall silver salmon. Between July 1 and August 15 the Upper Cook Inlet salmon stocks are comprised mostly of red, pink and chum salmon. However, there are stocks of silver and king salmon present. The Kenai River king salmon, for instance, is present during July, though it is a much smaller run of salmon than the early runs present prior to June 30.

The Cook Inlet salmon subsistence fishery until 1977 was opened by regulation to any Alaskan resident. It had been in existence since territorial days and was opened in practically all areas of the inlet. The seasons were from early May until December 31, until the early 1960's when the seasons were shortened along with commercial and sports fishing seasons to protect for conservation purposes the depleted early run of Cook Inlet king salmon. From the mid 1960's until 1978 the season opened in the Northern district of the Inlet from June 30 until September 21 and in the rest of the Inlet from August 15 until December 31. The open periods were the same as the open commercial fishing periods. The method of subsistence harvest was with set gill nets, one per permit holder, ranging in size from 20 to 75 fathoms. The bag limit or quota per permit holder was no more than 50 salmon. The subsistence fishery primarily throughout its history targeted on king and silver salmon, though other species in smaller quantities were also harvested.

The lead plaintiffs in the Madison case, Gene Madison and Louis GJosund are Alaska residents living in North Kenai and Homer respectively. Each has been a subsistence fisherman since the mid 1940's. They and others similar to them, have regularly subsistence fished for salmon for personal and family consumption as food ever since settling

in Alaska nearly 40 years ago. In addition to salmon, they have used other natural resources such as wood, coal, berries and wildlife for subsistence purposes for food and fuel.

In 1977 the Board by regulation eliminated the Homer subsistence fishery. The elimination of the fishery was done in response to sportfishing pressure, mainly from Anchorage sportsfishermen who wanted no competition from subsistence users on their take of fall silver salmon in the Homer area. Louis GJosund and other subsistence fishermen went to Superior Court and requested an injunction against the elimination of the Homer salmon subsistence fishery. The court after finding that the Board's action was unjust, enjoined the enforcement of the regulation closing the fishery.

In 1978, less than two months after the current subsistence law went into effect, the Board adopted regulations eliminating all of the subsistence fisheries along the Eastern shore of Cook Inlet and severely restricted the gear, area, and quota for the Homer subsistence fishery. This action was taken to accommodate and prioritize sport use of fall silver salmon. Again, Louis GJosund went to court to enjoin the regulations and again the Superior Court ruled in favor of GJosund and against the Board.

Pursuant to the 1977 salmon management plan the Board in 1978 adopted regulations permitting the sport use of early Susitna River drainage king salmon. It refused to allow any subsistence or commercial use of these resources. In 1979 a group of Tyonek residents requested of the Board to allow a subsistence fishery on these stocks. The Board denied the request in light of much objection by Anchorage sport fishing interest groups. In 1980 the Tyonek residents, mostly people from a small Indian village located on the northwest shore of Cook Inlet, brought suit against the Board claiming that their customary and traditional subsistence fishery for king salmon should be allowed if the Board was going to allow sport use of these stocks. The Superior Court ruled in favor

of the people of Tyonek and ordered the Board to open a king salmon subsistence fishery in the Tyonek area. As a result of the ruling in the Tyonek case, the Board was forced to address subsistence fishing in all other parts of the Cook Inlet and to provide for subsistence use. In 1980 the Board opened the Tyonek fishery and opened a subsistence fishery along the Eastern shore of Cook Inlet. However, the area opened along Eastern Cook Inlet was in a place that was rock strewn, extremely muddy and terribly inaccessible. Again, the Board was sued in Superior Court. This time the Board reached a compromise and out of court settlement with the litigants and opened the fishery in an area that was more suitable to subsistence fishing. The series of court cases against the Board exemplifies the Board resistance to protecting subsistence use of Cook Inlet salmon resources as mandated by the Egan policy and the subsistence law.

By 1981, the Board was convinced that subsistence use of salmon was to be permitted in Cook Inlet despite the opposition from sport interest groups. However, the Board was still looking for a way to allow the use in its most narrow form, so as not to upset the sports fishing priority set forth in the management plan. The means that it found to accomplish this objective was the interpretation of the words customary and traditional use as found in the current subsistence law. The Board interpreted those words to mean that only rural residents in the Cook Inlet region were eligible to participate in the subsistence fishery and only areas close to rural communities would be open to subsistence fishing. The only rural areas and residents that the Board found to exist in Cook Inlet were Tyonek, Port Graham, and English Bay. These communities are predominantly native in composition and are isolated. The only access to these areas is by water or air travel. The rest of the Kenai Peninsula areas were considered urban and their residents ineligible to participate in subsistence fishing. This included communities such as Clam Gulch, population 100, Ninilchik, population 200, and other Peninsula communities like Homer, Kenai,

Soldotna, Seward, and North Kenai. Also the whole of the Mat-Su valley which borders the Inlet was considered urban along with the Anchorage community. None of the residents of these areas could qualify for subsistence fishing permits and no areas near these communities were open to subsistence fishing. As a result of the Board's 1981 subsistence fishing regulations the majority of the Cook Inlet subsistence users were excluded from the subsistence salmon and other subsistence fisheries including halibut, herring, bottom fish and smelt fisheries.

Prior to 1978 subsistence fishing was defined by law as the taking of fish by longline, gill net, fishwheel, seine or other means as defined by the Board for personal use, not for barter or sale. The 1978 law changed the definition to the taking of fish by such means for subsistence uses, which includes barter trade and selling of nonedible parts of fish as handicrafts. At the insistence of the Attorney General's office, the Board made a distinction between subsistence use and personal use and adopted the narrowest interpretation of the subsistence law in order to exclude the majority of the subsistence users. It found that only the residents of the three villages of Tyonek, Port Graham, and English Bay had a history of subsistence use of Cook Inlet salmon.

In 1981 Madison, GJosund and other Cook Inlet subsistence fishermen brought suit in two Superior Courts to enjoin the enforcement of the Board of Fisheries subsistence regulations. Superior Court Judge Paul Jones presided over a case brought in Homer and Superior Court Judge Victor Carlson presided over another case brought in Kenai. Judge Jones ruled that the subsistence criteria were valid, however, the Board's application of these criteria violated equal protection of the laws and was not based on a factual finding that it was necessary to exclude Homer subsistence fishermen to protect subsistence fishing in Tyonek, Port Graham and English Bay. Judge Carlson ruled that even though the Board's criteria were valid, that the Board's exclusion of

Upper Cook Inlet subsistence fishermen was without due process of law and remanded the case to the Board with a request to provide a personal use fishery for these fishermen. In March of 1982, the Board pursuant to Judge Carlson's ruling, created a personal use fishery on Kasilof red salmon and Upper Cook Inlet fall coho salmon. The personal use fishery was created as an excess "charity" fishery to be accommodated only after subsistence, sports, and commercial fishermen had satisfied their needs. Also, the fishery would not permit trade and barter of the fishery resources. However, the former subsistence fishery remained open and has continued as a subsistence fishery since the Court's ruling.

In 1983 the Kenai River Sportsfishing Association, the sports interest group of which Board member Bix Bonney was an officer, brought suit in Kenai Superior Court to halt the all coho personal use fishery. The court issued a restraining order against the operation of the fishery in favor of Bonney's group.

Then, in 1985, the Supreme Court reversed the two Superior Court rulings in the Madison and G. Josund cases, declaring the Board's subsistence criteria and the regulations adopted pursuant to them invalid and inconsistent with the subsistence law.

It is from this Supreme Court ruling that much debate has followed concerning subsistence use of fish and game and has led the Governor to introduce House Bill 288. Though the Court's ruling is fairly clear and simple, some confusion has been created over the issue. The alleged purpose behind HB 288 is to clear up the confusion, bring state law into compliance with ANILCA, and prevent the elimination of sports and commercial fishing because of runaway subsistence use. None of the objectives of the Governor's bill are well founded. Indeed, the legislation is not essential nor reasonably needed to deal with subsistence fishing in Alaska.

Taking each alleged purpose for the passage of the legislation one at a time and discussing them openly and

rationally should convince members of the Legislature that such legislation is not needed and moreover may be unconstitutional under Alaska law.

It has been alleged by the Governor's administration that unless HB 288 is enacted the state's subsistence law will not be in compliance with ANILCA and this will lead to a takeover of management by the federal government of Alaska fish and game resources and a denial to the state of certain federal revenues intended for management of sea mammals and sports fishing. This allegation is not founded on the truth.

On April 6, 1982, Under Secretary of the Department of the Interior Bill Horn gave a presentation to the joint Boards of Fish and Game at a joint Board meeting in Anchorage Attached to this document are the transcribed comments of Mr. Horn made to the Boards concerning what actions the Board needed to take to be in compliance with ANILCA. In his presentation Mr. Horn made it perfectly clear that regulations adopted by the Boards which encompass either a one tier or two tier subsistence use approach to subsistence users would satisfy the federal requirements of ANILCA. The one tier approach would make only rural residents eligible to be subsistence users. The two tier approach would allow any Alaska resident to qualify until such time that fish resources are so low that only subsistence use can be permitted and the supply of fish stocks available is not enough to reasonably accommodate all subsistence users. Then a priority between subsistence users can be established for subsistence uses, based upon customary dependence on the resource, local residency, and alternative available resources.

The Board opted for the one tier approach to subsistence use. The court in Madison reviewed the one tier approach of the Board and rejected that approach as inconsistent with intent of the current law. The court declared that the current subsistence law intends a two tier approach on the issue of eligibility into the subsistence

fisheries. The two tier approach embodied in the law is consistent with and in compliance with ANILCA. In fact, the court stated that our law is not intended to limit subsistence users to rural residents only, but that all Alaska residents can qualify for a permit. The court also found that the subsistence fishery in which Madison ha' participated in for approximately 40 years was a customary and traditional use of salmon for personal and family consumption and other subsistence uses. The claim that the current law is not in compliance with ANILCA is patently false.

The next misrepresentation of the Madison decision concerns the Governor's administration's claim that subsistence use of fish cannot be limited until such time that sports and commercial fishing has been eliminated. This representation, like the noncompliance with ANILCA representation, is unfounded. The administration has either mistakenly or wilfully confused the issues of use and users. The two are distinctly different. Subsistence use is intended by the current law to be carefully monitored and regulated. This is clearly stated in the preamble to the subsistence law. In the preamble it states:

> It is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents. The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated with as much input as possible from the affected users, so that the viability of fish and game resources is not threatened and so that resources are conserved in a manner consistent with the sustained yield principle.

The legislative intent to regulate subsistence use in order to avoid jeopardy to fish stocks is abundantly clear. Therefore subsistence use of fish resources can be limited by bag limits, quotas, time, area, and other means available to the Board of Fisheries without the elimination of sports or commercial fishing.

In Madison, the court merely stated that before the Board may limit priority use among subsistence users, it

must factually find two things: 1) that it is necessary to restrict the taking of fish for sustained yield purposes and 2) that eliminating sports and commercial users will not assure the maintenance of fish stocks for sustained yield purposes and establishing a priority among subsistence users is also necessary. It is this interpretation of the law by the court that the administration has confused and misrepresented. It is not necessary to eliminate sports and commercial use of fish in order to limit and regulate subsistence use. It is required to find that it is necessary to restrict the taking of fish to avoid damage and harm to the stocks and that eliminating sports and commercial uses will not assure the viability to the stocks before there is any occasion to limit subsistence fishing to second tier preferred or priority subsistence users as distinct from all subsistence users. The concept of use and users must be kept separate in discussing the intent of the law.

The Cook Inlet subsistence fishery has never posed a real and substantial threat to salmon resources or other beneficial uses of the resource. The Cook Inlet salmon subsistence fishery since the 1960's and until the 1980's has never harvested more the one half percent to one percent of the total salmon harvest by all user groups.

Between 1978 and 1980 the number of persons licensed by the state to participate in the Cook Inlet salmon subsistence fishery ranged from 323 to 1,331. This number is compared to 1300 commercial salmon entry permit holders and from 180,000 to 200,000 sportfishing license holders for the same period. In comparing the number of sport license holders with subsistence permit holders it is readily apparent that the Cook Inlet sport fishery rather than the subsistence fishery has experienced the more dramatic increase in the number of participants. The Cook Inlet sportfishery is comprised of approximately 47 percent non-resident participants. The subsistence fishery is a 100 percent resident fishery. The Cook Inlet salmon commercial fisheries are comprised of seine and gill net fisheries. The Cook Inlet salmon seine fishery

is a 100 percent resident fishery. The set gill net fishery is 90 percent resident and the salmon drift gill net fishery is 60 percent resident and 40 percent non-resident.

The intent of the current subsistence law is to establish subsistence use by Alaska residents of fish as the priority use during times of resources shortage. Most of the sport fisheries and many of the commercial fisheries are comprised of resident and non-resident participants. The social policy embodied in the subsistence law is to make available on a priority basis fish stocks for subsistence use by Alaska residents over non-residential use of these stocks for sports and commercial use in times of resource shortages. This is good sound policy designed to protect the needs, customs, and traditions of Alaskan residents.

The Governor's proposed legislation may also run afoul of the state's constitution. Article VIII, Section 15 of the constitution reads:

> Section 15. No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state. This section does not restrict the power of the State to limit entry into any fishery for the purpose of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Article VIII, Section 17 of the constitution reads:

> Section 17. Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulations.

These two constitutional provisions create major stumbling blocks to the attempt by the Governor or the Legislature to limit entry into the subsistence fishery to rural residents only, and the establishment of a personal use fishery as an alternative for urban residents. Article VIII, Section 15 prevents exclusive and special rights or privileges of fisheries in the natural waters of the state except for commercial fishing and aquaculture. The recent Supreme Court case of Ostrosky v. State gives a clear

interpretation of what this constitutional provision means. If HB 288 was enacted limiting entry into subsistence fisheries to rural residents only, this law would create an exclusive or special right or privilege of fishery based solely on residency. This scheme would be contrary to this constitutional provision prohibiting such action. This is so because the law would create a closed class of persons, namely rural residents, which have an exclusive right or special privilege to subsistence fish.

Next, Article VIII, Section 17 would prevent the rural vs. urban classification of subsistence users. If the purpose behind the governor's bill is to protect subsistence use of fish then those uses demonstrated by Gene Madison and others to have customarily and traditionally existed as subsistence uses in Cook Inlet for many years would be entitled to uniform treatment by the law. Those individuals who have demonstrated use of the Cook Inlet salmon resources for personal and family consumption as food, etc., and for trade and barter are similarly situated with other Alaska residents in rural communities like Tyonek, Port Graham and English Bay with respect to the use and disposal of salmon resources. The constitution requires that these individuals be given equal treatment. Therefore, it would be unconstitutional to allow subsistence use by rural residents only and exclude urban residents from such use. Further the creation of a personal use category for urban users is not equal treatment. Under the personal use category trade, barter, and sale of non-edible by products of fish would not be permitted. The prohibition of these activities to urban residents and the permission to rural residents would not be uniform treatment. Both groups of people would be harvesting the resource for personal and family consumption but only rural residents would be able to extend this consumption to trade, barter and sale of non edible by products as handicrafts. This limitation on urban users would not withstand the mandate of Article VIII, Section 17 as it would result in unreasonable differential treatment among persons similarly situated with

respect to the use of fish resources.

In conclusion it must be said that HB 288 is not a well founded piece of proposed legislation. The bill would create more problems than it allegedly attempts to resolve. The current subsistence law achieves the twin objectives of conserving fish stocks and protecting subsistence uses of these resources. The current law when circumstances warrant would protect a rural priority for subsistence use, for instance, when the fish are in such short supply that priorities must be set among subsistence users.

It is urged that the legislature take no action on HB 288. The time has come to allow subsistence fishing to take its course. There are no present circumstances that have been clearly demonstrated which require subsistence use of fish resources to be limited solely to rural residents. Until such time that a clear and present need arises for such action the type of legislation proposed by the Governor should be shelved. The sky over subsistence use of fish and game is not falling.

If a problem does exist over subsistence use perhaps the solution is not in changing the law but rather in a close re-examination of the Board's process and its application of the law.

DATED this 1 day of April, 1985.

Arthur S. Robinson
ARTHUR S. ROBINSON

Martin Friedman
MARTIN FRIEDMAN

JOINT MEETING OF THE ALASKA BOARD OF FISHERIES
AND BOARD OF GAME, APRIL 6, 1982

Testimony of Deputy Undersecretary of the Department of Interior Bill Horne.
BM: stands for Board of Fish/Game member

Horne: Thank you, Mr. Chairman, I appreciate the opportunity to appear before the Joint Boards and discuss the State's compliance and implementation with the Alaska Lands Act, and hope that the cooperation that we've been engaged in with the State since last August can continue and we can bring this matter to a satisfactory conclusion. Let me say at the outset that reiterate the Dept. remains philosophically and policy-wise strongly committed to state management. We believe that the State possesses the requisite expertise to protect the fish and game resources of the State of Alaska. It is expertise that we cannot hope to match and as a consequence, we are most anxious to have this matter resolved in such a fashion that we can continue to defer to your judgement, expertise and not have to comply with any manadatory statutory requirements that would force us into the fray. Let me state that from where we're sitting, the federal law that is at issue imposes some fairly minimal requirements on the state, it is obvious that these minimal requirements can have some fairly major repercussions but in and of themselves, we see the requirements to be very bare bones and they are that the State establish some law of general applicability which includes regulations that would provide for a rural priority for subsitence, of course, rural is not the sole criteria, and it also includes the terms "customary and traditional" and there are continued references in the legislative history to nonwasteful taking. That's basic requirement number one. Requirement number two is that the state establish this regional advisory council system and that the recommendations that come up from the regional advisory councils be dealt with by these boards. That is all that the federal law requires and all that we've asked for in our review so far is demonstration from the state that you have laws or regulations that meet these minimal requirements. One of the courses of action suggested to us last year when this process began, was that the State has historically provided this type of preference to its rural residents and that Dept. of Interior should look to the factual track record of recent years, we can conclude on that basis that yes, indeed, the State was doing an adequate job in providing that rural priority and therefore, we could approve a state program without any form of specific laws or regulations. We choose to reject that approach for two basic reasons, one legal and one policy. From the legal perspective, the statute requires us to determine whether or not the state has loss of general applicability to implement Sections 803-805, and factual track record and policies and such as terms of _____ do not consititute laws of

general applicability, we could not satisfy a federal court of law that we had done an adequate and appropriate job of review if all we brought in was the factual track record. It's one of those crazy circumstances in which you need a regulation rather than the facts. The second reason, from a policy prespective, we found even more persuasive. We did not want to engage in a thorough review of the State's track record on fish and game management and try to determine by looking over your shoulder whether or not you had done a job on a resource by resource basis to satisfy rural priority. Frankly, we are not equipped to do that job, we did not possess the requisite expertise to go through the process and say, "well, in game area X you didn't give enough moose to this particular group or in fishing area Y you divied up the resource incorrectly and not in keeping with federal statute". We did not possess the expertise to engage in that type of review, we didn't think it was appropriate of the federal government to second-guess your track record. More important, when it came, if at some stage of the game, this whole process ends up in court, which we regard as a pretty good prospect, we did not want to be going to some federal judge and having that federal judge look over our shoulder at the nature of the factual review that we conducted the program. Consequently we have limited our review to a legal review, which is why since last August, you've been dealing with our friendly solicitors rather than our folks from the Wildlife Service or other resource experts that we possess. All we are looking for is does the state have laws or regulations that establish the regional council system and provide for a rural priority with customary and traditional criteria. That's all we've looked for, that's as far as our review is going to go. Regarding implementation, and obviously we've tried to keep our review to a bare statutory requirements, we've also received many questions about how if the state has this type of priority, codified in a regulation, what sort of guidelines regarding implementation, what sort of practical on the ground effects will that regulation have. Frankly, we don't know. That is something we have refrained from engaging in because it is pretty clear in our mind that the statutory scheme outlined in Title 8 defers those judgements to the State of Alaska, and the state of course, has chosen to defer those judgements to these boards. It is essentially the state's job and the state's responsibility to define rural. The only guidelines in the legislative history regarding what rural means is one phrase in the Senate committee report that says "Anchorage, Fairbanks, Ketchikan and Juneau aren't and Dillingham, Barrow, Bethel, Kotzbue, Nome are". Now that obviously is one criteria, there is nothing in the legislative history regarding what is customary and tradional is, that's clearly yours, and of course, the statute also refers to nonwasteful levels of taking. That again, is a determination for the state to make. Consequently, all that we need is the assurance in some law or regulation that you will provide the adequate rural priority and then in terms of how that is to

be specifically implemented, the statute clearly confers those decisions on you, and as a matter of policy we would like very much to have those decisions conferred on you because, frankly, we don't possess the requisite expertise.

Regarding the timing, the consequences of approval, disapproval. We made it very clear in all of the meetings that we've been conducting, starting last August, that all we need is these minimal requirements. And the stage where we are now is that either one of the approaches outlined by John Gisberg would satisfy ourselves. I will say that from sort of a selfish perspective, we would prefer what I call, for lack of better term, a "one tier" approach that would simply recognize and provide a priority to rural subsistence without trying to define and establish a second category of other subsistence. That is the cleanest way for us, it is abundently clear that would be in full compliance with Title 8. However, based on the process that we have gone through, we are fully prepared to accept what I call the "two tier" system, which is embodied in the proposed regulation that is in your book, which of course is the minor modifications made to your December policy statement and have that modified policy statement recast as a regulation. As the letter from the Secretary to the Governor on February 25, indicated, if that particular proposal is enacted as a regulation by the boards, upon our formal receipt of notification from either the commissioner, the boards, or the governor, that that is now a binding regulation on the State of Alaska. The Secretary will immediately issue the letter of approval and the resonsibilities for implementing this program will remain firmly in the State. I guess I can't emphasize enough how much we wish to do that, that's our primary desire. The reason the Secretary has asked me to come up for these meetings, to pass that on. Obviously if passage of that proposal or something similar that provides for the rural priority. If that goes, we obviously are in a position to approve. I guess the other side of the coin, what are the consequences of inaction or some action that does not establish a sufficiently clear, sufficiently firm rural priority. You know the Act basically says that the Secretary is supposed to grant the state one year to put a program in place, and if at the end of one year, a program is not in place, that the Dept. was mandated, and I guess I should emphasize that it was nondiscretionary, it was mandated to step in and begin to undertake a subsistence management program on federal lands. We received the state's submission on December 2, exactly one year after enactment of the Alaska Lands Bill. We have been engaged in the review process since and conseqently have held off and have conducted no planning and no activities in terms of preparing for any contingencies such as federal intervention and assumption of management. However, the clock is ticking on us and we feel that sometime very soon we are going to have to take some action and determine whether the state is in compliance or not in compliance. Consequently, if at the conclusion of the

meetings, we have not received from the state some form of regulation or law that establishes the priority in proper fashion that conforms with the federal statute. We will be shortly be forced to issue some kind of preliminary finding of noncompliance, schedule a hearing within a matter of days in which we will take testimony, I think we will probably have to have it here in the state, regarding whether or not the state program does comply with Title 8. Following that hearing, the Secretary will render his decision. Obviously if this decision is that the state is in noncompliance, we will have to being on a very fast basis the tooling up to assume the management authority on federal lands and of course, we will have to establish further provisions of 805, the regional council system that right now is set up under state law. We don't undertake that activity very lightly. We don't undertake it with much relish. It is something that we hope to avoid at all costs. But nonetheless it is very explicit, nondiscretionary requirement of the law and if we fail to act, any party can go to court and get a writ of mandamus forcing the Secretary to do it. Frankly, one of the concerns we have and there have been various points of view expressed that well, that the Dept. could take a rather minimal back of the hand approach. We wouldn't have to do much in terms of assuming this management authority on federal lands. That type of approach frightens us and it frightens, I could sum it up in two words "federal courts". We are concerned that if the necessity for federal assumption came to pass, and we engaged in what I call a "minimalist approach", it ever so barely satisfied the requirements in the Act, that we may well be hauled into federal court. I think the chances of that are fairly high. If we get before some federal judge, I have a sneaking suspicion we might end up before the judges in the District of Columbia, the prospects of a judge finding that the Dept. has failed to comply with its obligations under the provisions of Title 8 and then the judge take it upon himself to say "Dept. you've acted in bad faith, I'm assuming management of the program." We think the prospects and the chances by our inaction of our obligation under Title 8, that this would end up, there is a good prospect of having this whole thing end up under the jurisdiction of a federal judge in the District of Columbia. We would regard that as an unmitigated travesty and would do all in our power to see that that does not come to pass.

Let me just basically conclude and prepared to answer any questions you might have. We are fully committed to state management. You're the people with the expertise, not ourselves. We will have to engage in a real scramble to catch up effort if this responsibility is thrust on us. We think that the federal law establish some basic minimum requirements that we believe the state, from a policy prespective has been doing this for years, and that in essense, what this regulation does is merely codify the actual enacted policy of many years. Consequently, we would think that that would have rather minimal impacts within the

state. We would hope that the state would take appropriate action. That we would approve the program on a very fast track because we are committed to state management, as evidenced by the recent memorandum of understanding that we executed between our Fish & Wildlife Service and the Alaska Dept. of Fish & Game regarding state involvement in refuge management. We are currently negotiating a similar agreement with the Parks Service regarding fish and game management in the National Park areas. It's common knowledge that we are working very hard to attempt to return marine mammal management to the people of the state of Alaska. Again, you are the people who possess the expertise. We would like to assure that our Secretary's policy of trying to get these things back in the hands of the people with the expertise can be continued and the way to best continue that is for us to have the state enact the appropriate laws and regulations that would permit us to certify compliance with Title 8. Thank you much.

BM: Bill, from your reading of the law there, does the state only have one chance to actually comply, the language just says that within one year the state complies then (inaudible) assume this thing under the guidelines, you're saying that you know, that this is where (inaudible) is here now, bu either we have to take some action at this meeting to decide whether we choose to comply or not. But, for example, if we choose not to comply at this time, would there be an opportunity, say a year from now or five years from now for the state to say "OK, we've rethought this whole thing and maybe we will (inaudible).

Horne: The statute is not explicitly clear. It is very clear that it says one year. Our general belief is that there may well be an opportunity that if the state did not comply at this stage, for the state to come into compliance at a future stage and resubmit something to the Secretary. So that I think that there is a possibility of future compliance by the state. My major concern is that I don't think the statute is explicitly clear and someone may well argue that the door has been closed. Obviously from a practical standpoint, we don't engage frankly in the federal management efforts, we don't think that would be good for the resource, we'd much prefer for the state to take appropriate action now.