Subsistence

Correspondence

- file 1 -

Alaska State Legislature

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Senate
Committee on Resources

M E M O R A N D U M May 5, 1985

TO: Senator Don Bennett,
President of the Senate

FROM: Senator Arliss Sturgulewski,
Chairman, Resources Committee

As you are aware, on Saturday the House, by a one vote margin, passed an amended version of CS for HB 288 (Judiciary), the governor's subsistence bill. Unfortunately, the governor has chosen to present a bill that he must realize has no chance of passage by the full legislature. While warning of the dire consequences if a subsistence bill is not passed, he has steadfastly opposed any amendments which might increase the possibility of developing an acceptable bill.

We are all aware of the possible ramifications of no legislation. Among these may be: the closing of some our major sport and commercial fisheries, federal intrusion into the management of our fish and wildlife resources, unprosecuted violations of fish and game laws, and potential damage to our resources. I realize that there are many in our state who discount these dangers, but the combined risks are grave enough to be of serious concern.

SB 231, the Senate version of the governor's subsistence bill, is still in State Affairs, its committee of first referral. Because of this, the Resources Committee has not held any public hearings on this issue. However, as chairman of the Senate Resources Committee, I have been actively working on the subsistence problem since the Supreme Court decided the Madison case.

I realize the available time for public hearings will be limited if a bill reaches my committee, and that it is vital the interests of groups on all sides of this issue be considered in trying to find a solution. Because of this, I have attempted to include representatives of as many of those interests as possible in discussions of this problem.

This office has worked with other Senators and Representatives; with officials from the departments of Fish and Game and Law; with representatives of the Outdoor Council and other outdoor groups; with representatives of the Alaska Federation of Natives and other Native organizations; with the United Fishermen of Alaska and other commercial fishing interests; with professional big game guides; and with any one

else who has called or come into my office with concern about this issue.

The result of this work has been an evolutionary series of draft bills and letters of intent. The latest of these drafts and its letter of intent are attached to this memo. By no means do I intend to imply that everyone with whom we have worked is in agreement with this draft or that this effort is a perfect solution. If that were so, we would not be faced with a problem. The draft, however, is an honest attempt to craft a subsistence bill that will pass the legislature, will comply with ANILCA, and will balance the competing interests for our resources.

I wanted to be sure that you had this information before making referrals on HB 288. If the house subsistence bill comes to the Resources committee this session, I anticipate acting swiftly to pass out a committee substitute similar to the attached draft. I stand ready to meet with you and explain the draft bill and my grave concerns about the consequences of inaction.

cc: members,
Senate Resources Committee
Senator Mitch Abood,
Chairman State Affairs Committee

DRAFT LETTER OF INTENT 5/4/85

SENATE CS for HB 288

It is the intent of the legislature in enacting this legislation, to comply with the spirit and intent of The Alaska National Interest Lands Conservation Act, P.L. 96-487 while avoiding possible violations of the equal protection guarantees of Article 1, Section 1 and Article VIII, Section 15 of the Alaska Constitution.

This legislation maintains subsistence use as a priority use of Alaska's wild, renewable resources in accordance with ANILCA, and establishes a system of preferences of beneficial uses of these resources. All uses are subject at all times to limitations based on the sustained yield principle and to reasonable regulations as to seasons, catch or bag limits, and methods and means without requiring that uses of lower priority be eliminated first.

If the harvestable surplus of a fish stock or game population is not large enough to provide a reasonable opportunity for all subsistence uses, individual local residents who have a direct and customary dependence upon fish or game populations as a mainstay of their livelihood and who lack available alternative resources have the highest priority of use.

Subsistence uses in rural Alaska by Alaska residents who, in a cost effective manner, use, including consume, their take in the same rural area it was taken, have the next highest priority of use. It is intended that the boards shall have the authority to determine cost effectiveness, considering methods and means of harvest characterized by efficiency and economy of effort and cost, and conditioned by local circumstances.

The boards must establish a mandatory allocation that ensures all Alaskans a reasonable opportunity for sport or personal use fishing or hunting, unless such regulations would jeopardize or interfere with the maintenance of a fish stock or game population or with the continuance of subsistence. In making allocation decisions, the Boards of Fish and Game shall continue to strive to ensure the health and prosperity of commercial, sport, personal use and subsistence uses, while guaranteeing Alaskans a reasonable opportunity to take and use fish stocks and game populations for the full range of beneficial uses.

Original sponsor: Rules/Governor

IN THE HOUSE

SENATE CS FOR CS FOR 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) nonresidents visiting Alaska take fish stocks and game populations primarily for commercial, trophy, and recreational purposes; Alaska residents, who take fish stocks and game populations for noncommercial purposes, use the stocks and populations primarily for food for personal or family consumption;

(2) the taking of fish stocks and game populations by residents for personal or family consumption is important to the health, safety, and general well-being of all Alaska residents;

(3) the customary and traditional use of local fish stocks and game populations in rural areas of the state is a significant characteristic of the economy of many Alaskan communities and areas because it is cost effective and important to the health, safety, and general well-being of Alaskans;

(4) the taking of fish stocks and game populations for commercial, recreational, and other uses by both residents and nonresidents is important to the economy of the state and particularly to the economies of communities dependent upon commercial fishing; and

(5) commercial fishermen often use a portion of their catch for personal use.

* 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, subsistence 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) regulating selected stocks in nonrural areas for catch-and-release sport fishing and regulating selected stocks in rural areas for catch-and-release sport fishing and subsistence;

(13) regulating commercial, sport, personal use, and subsistence fishing.

* Sec. 3. AS 16.05.251(b) is repealed and reenacted to read:

(b) The Board of Fisheries shall establish a mandatory allocation that ensures all residents a reasonable opportunity for sport or personal use fishing, and shall adopt regulations authorizing these types of takings in accordance with the Administrative Procedure Act (AS 44.62), unless the regulations will jeopardize or interfere with the maintenance of a fish stock on a sustained-yield basis or with the continuance of subsistence. Takings authorized under this subsection are subject to reasonable regulation of seasons, catch limits, and methods and means.

* Sec. 4. AS 16.05.251 is amended by adding new subsections to read:

(d) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish stocks for subsistence uses unless the board determines that adoption of the regulations will jeopardize or interfere with the maintenance of a fish stock on a sustained-yield basis. Whenever it is necessary to restrict the taking of a fish stock to assure the maintenance of the stock on a sustained-yield basis, or to assure the continuation of subsistence uses of the stock, subsistence shall be

the priority use. Takings authorized under this subsection are subject to reasonable regulation of seasons, bag limits, and methods and means.

(e) If the harvestable surplus of a fish stock is not large enough to provide a reasonable opportunity for the taking of fish from the stock for subsistence uses, the board shall adopt regulations that establish restrictions and limitations on the taking of fish from the stock for subsistence uses on the basis of the following criteria: (1) customary and direct dependence upon the fish stock as the mainstay of one's livelihood; (2) local residency; and (3) availability of alternative resources. Subsistence fishing authorized under this subsection is subject to reasonable regulation of seasons, bag limits, and methods and means.

* Sec. 5. AS 16.05.255(a) is amended to read:

(a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart game reserve areas, refuges and sanctuaries in the water or on the land 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 game;

(3) establishing the means and methods employed in the pursuit, capture and transport of game;

(4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;

(6) methods, means, and harvest levels necessary to control

predation and competition among game in the state;

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

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(9) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed;

(10) regulating sport and subsistence hunts.

* Sec. 6. AS 16.05.255(b) is repealed and reenacted to read:

(b) The Board of Game shall establish a mandatory allocation that ensures all residents a reasonable opportunity for the taking of game for personal or family consumption, and shall adopt regulations authorizing the taking in accordance with the Administrative Procedure Act (AS 44.62), unless the regulations will jeopardize or interfere with the maintenance of a game population on a sustained-yield basis or with the continuance of subsistence. Takings authorized under this subsection are subject to reasonable regulation of seasons, bag limits, and methods and means.

* Sec. 7. AS 16.05.255 is amended by adding new subsections to read:

(d) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game populations for subsistence uses unless the board determines that adoption of the regulations will jeopardize or interfere with the maintenance of a game population on a sustained-yield basis. Whenever it is necessary to restrict the taking of a game population to assure the maintenance of the population on a sustained-yield basis, or to

assure the continuation of subsistence uses of the population, subsistence shall be the priority use. Takings authorized under this subsection are subject to reasonable regulation of seasons, bag limits, and methods and means.

(e) If the harvestable surplus of a game population is not large enough to provide a reasonable opportunity for the taking of game from the population for subsistence uses, the board shall adopt regulations that establish restrictions and limitations on the taking of game from the population for subsistence uses on the basis of the following criteria: (1) customary and direct dependence upon the population as the mainstay of one's livelihood; (2) local residency; and (3) availability of alternative resources. Subsistence hunting authorized under this subsection is subject to reasonable regulation of seasons, bag limits, and methods and means.

* Sec. 8. AS 16.05.940(21) is amended to read:

(21) "sport fishing" means the taking of or attempting to take for personal use <u>or for personal or family consumption</u>, 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 <u>that</u> [WHICH] is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

* Sec. 9. AS 16.05.940(23) is repealed and reenacted to read:

(23) "subsistence uses" means the customary, traditional and cost-effective taking and use by Alaska residents in rural areas 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 noncommercial customary trade, barter, or sharing

for personal or family consumption. Wild and renewable resources taken for subsistence uses must be used in the same area in which they are taken. In this paragraph,

(A) "family" means persons related by blood, marriage, or adoption, and persons living in the household on a permanent basis;

(B) "rural area" means a historic hunting or fishing area associated with a community or area in which the taking of fish stocks and game populations for personal and family consumption is a significant characteristic of the economy of the community or area;

* Sec. 10. AS 16.05.940 is amended by adding a new paragraph to read:

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

* Sec. 11. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Alaska State Legislature

POUCH V
JUNEAU, ALASKA, 99811
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Senate
Committee on Resources

February 27, 1986

Honorable William P. Horn
Assistant Secretary
Fish and Wildlife and Parks
Department of the Interior

Dear Secretary Horn:

Enclosed is Senate Resources CS for CS for House Bill No. 288 (Resources) and a sectional analysis of this bill. This committee substitute has been formally adopted by the Resources Committee as the working document before the committee.

I am looking forward to your visit and hope that you can address this bill in your testimony. It has been our intent, in drafting this bill, to comply with federal law.

If you have the opportunity to call me after you have had a chance to look at the bill and before you come to Juneau, I feel this would be beneficial. I appreciate your continued help and concern on this issue.

Sincerely yours,

Senator Arliss Sturgulewski
Chairman, Resources Committee

3986

R O N S O M E R V I L L E

FOR

GOVERNOR OF ALASKA

8800 Glacier Hwy., Suite 250
JUNEAU, AK. 99801

March 5, 1986

Senate Resources Committee
State of Alaska
Senator Arliss Sturgulewski, Chairman
Pouch V
Juneau, AK. 99811

Dear Senators:

It is my understanding that your review of Senate CS for HB 288 (subsistence) is coming to an end and there may not be any further public testimony on this piece of legislation in your committee. Unfortunately, I was unaware of your one teleconference on the bill and thus was not able to testify. I do believe, however, that there are a few points that have not been stressed adequately and since it appears that I will not be able to present them personally, I am putting them in writing.

First, I want to stress that all AlasKans are praying that a fair and workable law will be forthcoming which will lay the subsistence controversy to rest, once and for all. We are also appreciative of the complexity of the problem and the seriousness of the issue as, in one way or the other, it affects the daily lives of most AlasKans.

I would like to compliment the State Affairs and Resource Committees attempts to improve on the simplistic legislation introduced by the Governor and narrowly passed by the House during the last session. There are definite improvements in the legislation.

The provisions which provide the authority to regulate subsistence taking, give the Boards authority to identify subsistence stocks, authorize issuance of subsistence permits, provide that subsistence users be given a reasonable opportunity to harvest and allow no subsistence defense for fish and wildlife harvested outside the regulations are all important and crucial additions to the original bills.

The major stumbling blocks of the subsistence law debates are, however, still left unattended. The committe chose to eliminate

a critical section of an early draft which allowed the Boards to apportion subsistence use among species, stocks and populations that are similar and reasonably available. The committee also chose to insert the word "rural" into the state law without providing a definition which would possibly narrow a subsistence priority down to the "true subsistence users" which most Alaskans would agree deserve some preferential treatment.

The committee has also chosen to ignore the overwhelming testimony of most Alaskans that any preferential allocation of our common property resources for subsistence should be based on need rather than residency. Alaskans have also strongly endorsed a revision of the existing policy to base subsistence on individual or family need rather than on a community basis where "need" is totally ignored.

We all fully realize that you are under pressure from the Federal government and subsistence advocates to adopt a state law precisely in line with their narrow interpretations of the existing Federal law. Unfortunately, most Alaskans are not going to endorse a law which descriminates based on where a person lives in Alaska.

One of the most volatile issues has been concerned with identifying "who" is a subsistence user. In your legislation, by complying with the Federal law and inserting the word rural, the only residents that are really eliminated from the priority use are those that live in Anchorage, Fairbanks, Juneau and Ketchikan. I fully realize that you have provided direction, through the letter of intent, for the Boards of Fisheries and Game to further delineate "subsistence uses" and "rural areas". In my opinion, by passing the buck to the regulatory boards, the legislature is neglecting its responsibilities. It is obvious that if each legislator is forced to define which area is or is not a subsistence area and thus which constituents are subsistence users, that it is going to be extremely difficult to draft legislation which will pass both houses.

I maintain that the boards are even less prepared to deal with the construction of socially descriminatory laws than is the legislature and further more it is not the function of an allocation board. It is clearly the function of the legislature to develop clear guidelines by which the boards would follow in implementing the laws. Most importantly, every Alaskan would be able to judge and comment personally on the legislation. It is critical that everyone be able to determine whether he or she is "in" or "out" directly from the proposed legislation.

I believe it is hypocritical for the legislature to consistently criticize the administrative agencies for developing broad regulatory authority and then pass a piece of legislation as poorly constucted as this legislation with almost unlimited regulatory options. It is clear that because the legislature cannot deal with the politics of this issue, they are pulling the pin and throwing the hand grenade to the Boards in hope that they

will develop the political guts to do what the legislature is apparently unable to do.

I personally feel you should craft a subsistence law which is acceptable to most Alaskans based on some criteria of need and lack of alternative resources and let the courts settle whether or not it is in compliance with the Federal law. I also strongly urge you to face up to your public responsibilities if you decide to descriminate against urban residents by giving a priority to rural residents by precisely defining what is rural. The public deserves that much consideration on this volatile issue.

I would like to point out in closing that despite recent testimony to the contrary, Alaskans voted in 1982 to retain the exisiting State law which clearly does not descriminate against urban users. For some reason, subsistence advocates have twisted the 1982 vote as an endorsement of the privilege for only rural residents.

It is also important to express my concern for your lack of consideration for public input into the constantly changing legislation. One poorly advertised teleconference can hardly be considered public participation.

Thank you for considering my comments.

Sincerely,

Ron Somerville

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

March 10, 1986

Ron Somerville
c/o Somerville for Governor
8800 Glacier Highway, Suite 250
Juneau, Alaska 99801

Dear Ron,

Thank you for your letter which I received Friday. As you are aware, though we have agreed on some aspects of the subsistence issue and disagreed on others, I have always valued your opinions.

I share your opinion that we all deeply desire a fair and workable subsistence law that will lay the subsistence issue to rest once and for all. The Senate State Affairs and Resources Committees have worked long and hard to make such a bill a reality. I appreciated your compliments on the improvements to the bill.

As you mention, the subsistence bill now has a number of important provisions that were lacking last year. Among these are:
- a requirement that the boards identify subsistence stocks and populations by area;
- an exclusion from subsistence harvest of stocks and populations which the boards do not identify as subject to subsistence uses. Examples would probably be bison, elk, and mountain goats, most populations of Dall sheep and some steelhead and trout stocks and brown bear populations;
- a requirement that subsistence users be given a reasonable opportunity to harvest;
- a provision that all takings of fish and game are subject to reasonable regulation of seasons, bag limits, and methods and means, including prohibitions on wanton waste;
- a prohibition against the use of the subsistence defense in violations of fish and game laws.

I believe we agree that all of these are important improvements to last year's bill. Unfortunately we seem to

disagree on the major principle of whether or not the legislature should pass a bill that complies with federal law. I believe passage of a bill that lacks that compliance would be a meaningless charade and a deception of the public. Lack of compliance will cause a federal takeover of management of our fish and game on all public lands on June 1, 1986. Management of our own resources was one of the driving forces in our becoming a state, and I am not going to be part of giving away that principle.

There may be many who would like to characterize the danger of federal takeover on June 1st as an empty threat or as federal bullying. Unfortunately, neither is true. The Department of Interior certainly wishes to avoid takeover and has neither the money nor manpower to do a decent job of management of our fish and game. Assistant Secretary Horn emphasized that point, but he also made it plain that this is an issue on which the department does not have discretion.

If the department tries to ignore the federal law, I believe we would immediately see the issue in court under Section 807, the Judicial Enforcement section of ANILCA. We would then be faced not only with a federal takeover of fish and game management, but with the very real risk of a federal judge deciding that he is going to personally supervise that management. Before anyone dismisses that risk, I would suggest that he or she look very carefully at what happened in Washington State with Judge Boldt.

I realize that there are persons, including some in the legislature, so strongly opposed to subsistence that they would welcome such a scenario, believing the results would be so onerous that out of the resulting political chaos a strong movement would develop to change the federal law. That approach is playing Russian roulette with our resources. The State Affairs and Resources committees have worked very hard with people on all sides of the issue to hammer out a subsistence bill that will work for all of us, rather than yielding to easy rhetoric based on how we wish things were.

I should point out that there are ongoing private court suits challenging the constitutionality of the federal subsistence law. Enactment of legislation will have no effect on the outcome of those suits. Such legal battles can take years, however, with very uncertain results. The same can be said for attempts to change the federal law. We need a fair and equitable law now, one that retains our own control of our resources, and is enforceable and constitutional. The Senate Resources Committee Substitute for House Bill 288 is such a bill.

In your letter you raise the issues of need and residence. As you well know, the use of a criterion based on individual economic need is clearly not in compliance with federal law.

Assistant Secretary Horn testified to that during his appearance before the Senate Resources Committee on March 5, 1986. The federal legislative history on the subject states in part, "The policy also requires that regulatory systems which employ income requirements may not be imposed on rural residents."

Also, as you well know, the federal law explicitly and repeatedly refers to "rural residents." A bill which ignores this fact would also clearly not comply. Again the federal legislative history is specific on this point. It states, "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." This leaves us a good degree of flexibility, however, in defining "rural area" for the purpose of this bill.

Your interpretation of which areas of the state would have subsistence use eliminated in them may have been correct for the bill as it was originally introduced by the governor. That interpretation is clearly incorrect, however, for the Senate Resources Committee substitute.

"Rural area" in the bill is defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a significant characteristic of the economy of the community or area." The bill's accompanying sectional analysis cites Congress's intent to protect subsistence uses where "...such uses have played a long established and important role in the economy and culture of the community...". The sectional further states, "It is expected that the boards ...would review areas as conditions change to assure a rural or nonrural classification is still appropriate."

Whether or not a community or area is classified as a "rural area" for the purposes of this bill will be a factual determination by the Boards of Fish and Game. Subsistence will exist in areas only after the boards have made a factual determination based on the economy of the particular area and then only on stocks and populations identified by the boards as subject to subsistence use. The result of limiting the subsistence preference to those who live in areas so identified will be to protect subsistence where it is really needed, but limit it to a small percentage of our population so conflicts will be dramatically reduced. All of this is in perfect compliance with federal law.

We realize that many Alaskans in every part of our state eat a great deal of fish and game. This bill is not intended to limit that in any way. What is intended, however, is to limit the number of people who have a preference over the rest of us when it comes times to harvest that food.

In closing, I feel the need to respond briefly to your last two paragraphs which left me more than a bit bemused. Your interpretation of the 1982 vote is one of the most interesting attempts at revisionist history I have ever come across. Since you spearheaded the move to repeal the existing law in 1982, I take it you felt differently then.

Your expressed concern for the lack of public hearing falls in a similar category. As this bill has made its way through the legislature, it has had as many public hearings as any piece of legislation I am aware of. There have been numerous statewide teleconferences as well as two-day public hearings in Fairbanks and Anchorage. These hearings culminated in a statewide teleconference by the Senate Resources Committee where we listened to every person who wished to testify.

I am sorry you were not aware of the meeting, but I feel compelled to point out that it was thoroughly advertised, very well attended, and included testimony by Roberta Booher who officially represented the Alaska Outdoor Council, the organization of which you are the former executive director.

I will present your letter to the Senate Resources Committee. I appreciate the depth of your feeling on this issue, and as I said in the beginning of this letter, though we disagree on some aspects, I always value your opinions.

Sincerely yours,

Arliss Sturgulewski

Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

cc: Senate Resource Committee Members

Jim Rearden
413 E. Lee Drive
Homer, Alaska 99603

Phone: (907) 235-8543

Member, American Society
of Journalists & Authors

Jan. 15, 1986

Representative Mike Davis
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Mike:

I believe there is a simple and satisfactory solution to the subsistence issue that could:

1. Provide rural residents who depend on game for food with maximum opportunity to get their game.
2. Put every Alaskan hunter on equal footing.
3. Meet the federal requirement for providing a subsistence priority for rural residents.
4. Put an end to squabbling, end racism, end divisiveness in hunting/fishing matters.
5. End the controversial and unworkable "point system" for individuals.
6. Allow the board of game to get back to managing game instead of wrangling about and trying to understand an impossible subsistence law.
7. Simplify hunting regulations so that they can be easily understood.
8. End the discrimination that non-residents feel exists for big game hunting in Alaska.
9. Put game management back on a biological basis.
10. Be legal and constitutional. It should also be acceptable to reasonable Alaskans.

The idea is so simple that you may have difficulty in accepting it. I urge that you to give it some thought.

It would be necessary to repeal the present state subsistence priority law.

In its place I suggest that the legislator hammer out a law that would require the Board of Game to provide longer seasons and larger bag limits, within biological limits, for rural game management units, than for urban game management units.

As you know, there are 26 game management units (GMU) in the state. Some are clearly "rural", others are clearly more heavily utilized by urban residents. Many are used by both rural and urban hunters.

A study of game regulations since the 1940's clearly shows that rural areas have consistently had longer seasons and larger bag limits than "urban" game management units. Common sense dictated this: where hunting pressures are lower, more generous seasons and bag limits can be allowed.

Whether intentionally or accidentally, the Alaska Game Commission, the old Board of Fish and Game, and even the (1975

to date) present Board of Game, enacted regulations that clearly favored rural residents of Alaska with longer seasons and larger bag limits than were set for areas hunted by urban residents.

Obviously, an easily-reached rural GMU with generous seasons and bag limits would attract urban hunters. The solution to this has already been worked out by the Board of Game.

The legislature could direct the Board to establish controlled use areas, and to establish seasons favored by local residents - which are often seasons that discourage hunters from outside the area from participating.

The controlled-use area concept solved a lot of problems when urban aerial hunters started hunting the middle and lower Yukon areas. Local residents accepted and liked the idea. Airplane hunters had to land their planes and hunt afoot or from boats, as most local residents do. This slowed the ingress of urban hunters, and controlled those who did come in. Ask Game Board member Sidney Huntington of Galena about this. ATV's can be controlled, as can boats, or other methods of hunting, by establishing a controlled use area.

Urban hunters don't show up in great numbers in a distant and rural GMU in Nov., Dec., Jan., Feb., or March for a moose or caribou hunt. November hunts have been popular in rural areas because it is easier traveling at that time with snowmachines, and easier to haul meat. Meat keeps without refrigeration in November and after, an advantage to rural residents.

During the period 1950-78 in the face of growing urban populations and increasing hunting pressures, this system worked, although it was not formalized by law. Rural residents had ample opportunity to take the game they needed - and providing that opportunity is really all that any subsistence priority law can do.

My suggestion is simply that the legislature formalize by law a common sense game management approach that has already proven itself.

A clear statement of intent, passed by the legislature, along with a law that provides the Board of Game no choice but to establish longer seasons and larger bag limits in rural GMU than in urban GMU's (within biological limitations), should make it possible for the Game Board to effectively provide subsistence users with abundant hunting opportunity. The controls to prevent overhunting, mechanized hunting, too much competition, or crowding, are already in place and have long been used by the Game Board.

My proposed solution does not address the subsistence fishery. At the time the priority subsistence law passed in 1978, subsistence fisheries existed all over the state, and they

were not and have not since really been in dispute. The subsistence fishery could be worked into my suggestion, but I think it would unnecessarily complicate it. New subsistence fishery legislation should be easily accomplished.

Most of the opposition to the subsistence law is not because Alaskans oppose the use of fish and game for subsistence, but because they don't like its discriminatory aspects. State game biologists have repeatedly warned that the law threatens the proper management of the resource. I agree with them.

If regulations in each GMU applied equally to all hunters, there would be few complaints. The regulations are already tailored to the hunting pressures, game populations, and transpsortation problems of each Game Management Unit. No new concepts would be needed.

In the four or five years I wrestled with the present subsistence law as a Board of Game member, I never got a clear picture as to how it could or should work. The fact that legal council to the Board disagreed with one another, and gave different interpretations from one meeting to the next, didn't help.

It also appeared to me and some other Board Members that the Dept. of Law was misinterpreting the Legislature's action and intent. The state Supreme Court's decision confirmed that, of course, when it said that all Alaskans were eligible for subsistence privileges.

I've been involved in fish and game management in Alaska for more than 35 years as a U.S. Fish and Wildlife Service employee, a professor of wildlife management at the University of Alaska at College, as a fishery biologist for ADF&G, and as a an 11-year member of the old Board of Fish and Game and the Board of Game. I've been Outdoors Editor of ALASKA magazine for 17 years. My suggestion for a subsistence solution is a personal one.

I hope you'll give this suggestion serious thought and consider it a concept, not a detailed plan. Input from a lot of knowledgeable people on the concept might result in a suprisingly simple and effective solution to the subsistence issue.

Sincerely,

Jim Rearden

Jim Rearden

P.S. I am sending personally addressed copies of this letter to other members of the legislature - members I either personally know, or those who have shown an interest and knowledge on the subsistence issue.

United States Department of the Interior

NATIONAL PARK SERVICE

ALASKA REGIONAL OFFICE
2525 Gambell Street, Room 107
Anchorage, Alaska 99503 - 2892

FEB 17 1986

IN REPLY REFER TO:
L7019 (ARO-ONR)

12 FEB 1986

Honorable Arliss Sturgulewski
Chairman, Senate Resources Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Sturgulewski:

It is our understanding that the Senate State Affairs Committee recently amended and forwarded Bill No. 288 (State Subsistence Bill) to your Committee on Natural Resources. The National Park Service, as you might suspect, has a special interest in this legislation. It is our hope that a bill can be devised to put the state back in compliance with Alaska National Interest Lands Conservation Act (ANILCA) and, perhaps, resolve some other issues related to subsistence as well.

It is in this context that we offer to you and your committee the attached suggestions and comments. Please keep in mind that these suggestions and comments are coming from one federal agency, the National Park Service, and we are not attempting to speak for others.

The underlined phrases indicate suggested wording and the "Discussion" portions are intended to provide you with our rationale for the suggested wording. Additionally, we are attaching some of the Congressional Legislative History associated with Sections 803-804-805 of ANILCA which might be of particular interest and assistance to you and other committee members.

Your task is complicated and, as you know, there is a minimum amount of time in which to act. If the National Park Service can be of assistance to you during the legislative process, please do not hesitate to call upon us.

Sincerely,

Boyd Evison
Regional Director
Alaska Region

Enclosures

Many of us believed that the question of subsistence rights in rural Alaska was settled with the election of 1982. Since that time, a Supreme Court opinion has opened the question again. Today, a bill is locked up in the Alaska Senate which would again insure subsistence priority for rural Alaskans. I am writing to urge your assistance in helping pass this important law.

The question of subsistence priority is more than one of access to our state's fish and game. It is a question of our state's responsibility to assist in maintaining cultural distinctions which predate most Alaskan's arrival here by thousands of years. It is the responsibility of all of us to protect the rights of Alaskans who depend on fish and game for their daily food and to insure that they have priority access to this food source.

You can assist me in the passage of this legislation by writing letters and sending public opinion messages to members of the Alaska State Senate. With your assistance, we can again insure that the subsistence rights of our fellow Alaskans are protected.

Warmest regards,

Stephen McAlpine
Lieutenant Governor

Alaska State Legislature

House of Representatives

FEB 13 1986

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: MEMBERS, HOUSE SUBCOMMITTEE ON SUBSISTENCE

FROM: Representative John G. (Jack) Fuller

DATE: February 13, 1986

SUBJECT: SCS CSHB 288(SA)

As you know, the Senate State Affairs Committee has passed out it's version of the subsistence bill, HB 288. Please find attached a copy of the latest version of the bill, along with an analysis prepared by Larri Spengler of the Attorney General's office and one by Don Mitchell, for the Alaska Federation of Natives. The bill is in Senate Resources, and is scheduled for February 19.

During our hearings last fall, information was [illegible]d on subsistence as an economic system, on hunting [illegible]shing patterns over time in the Copper Basin area, and on a subsistence study done in the Kodiak area. These reports are attached for your review. Recent news articles are also included.

cc: Senator Arliss Sturgulewski

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

February 10, 1986

TO: AFN Board of Directors

FROM: Don Mitchell

SUBJECT: Abood Subsistence Bill

On February 4th the Senate State Affairs Committee unexpectedly reported a subsistence bill. A copy of the bill is attached. The bill is a substitute for HB 288, the bill passed by the House last session. Although it includes several of the concepts embodied in the House bill, the Abood bill makes a number of changes to title 16 which have nothing to do with subsistence.

BILL ANALYSIS

1. Drafting: Independent of its substantive effect the Abood bill has a number of technical drafting problems which should be remedied.

Sec. 3 amends A.S. 16.05.251(a) to delegate the Board of Fisheries authority to regulate personal use fishing, but the bill includes no definition of "personal use fishing".

Sec. 4 establishes an elaborate methodology which the Board of Fisheries and Board of Game must each follow to adopt hunting and fishing regulations (including but not limited to subsistence regulations). The first step in this process is to identify "subsistence uses" of a fish stock or game population. The second step is to determine if the stock or population is healthy enough to sustain any harvest (for subsistence or any other purpose). The order in which these steps must be performed is nonsensical. If a stock or population which is the subject of "subsistence uses" cannot safely sustain a subsistence harvest no such harvest may be authorized. That being the case, identifying subsistence uses of a stock or population prior to determining whether the stock or population can safely sustain a harvest of any kind is a waste of time. The process should be reversed. An assessment of biological status should be the first step in the process for adopting regulations.

Sec. , establishes new definitions of the terms "subsistence fishing" and "subsistence hunting". The definitions state that subsistence fishing and hunting is hunting and fishing "by a resident domiciled in a rural area of the state for subsistence uses". However, the new definition of "subsistence uses" in the bill limits subsistence uses to "a resident domiciled in a rural area of the state". Consequently, inserting this phrase in the "subsistence fishing" and "subsistence hunting" definitions is redundant.

2. Shifting Subsistence Uses To Alternative Stocks And Populations: The bill repeals A.S. 16.05.251(b) and .255(b) - the sections which presently govern the adoption of subsistence regulations - and establishes a new section A.S. 16.05.258 in their place. The new section establishes a new process for subsistence rulemaking. Subsection (f) of the new section provides:

> In making allocation decisions the boards may apportion subsistence use among species, stocks, and populations that are similar and reasonably available.

If this provision were to become law the Board of Fisheries, for example, may shut down the king salmon fishery at Tyonek on the theory that it was providing the subsistence priority by shifting subsistence fishing to reds or some other species of salmon less coveted by sportsmen. Similarly, the Board of Game would be authorized to shut down subsistence hunting for moose or bear in a particular area if it could find another species of game to move the subsistence hunting effort to. Needless to say, this provision makes a mockery of the subsistence priority. It is also inconsistent with the regulatory standards set forth in title VIII of ANILCA. The legislative history of title VIII indicates that the federal subsistence priority is stock and population specific. Consequently, if this provision is enacted, the State will continue to be out of compliance with ANILCA.

3. Curtailing Nonsubsistence Uses Before Curtailing Subsistence Uses: Proposed section A.S. 16.05.258(c) is ambiguous as to whether all nonsubsistence uses of a stock or population must be eliminated before subsistence uses can be curtailed. In pertinent part, subsection (c) states:

> If a surplus is not sufficient to accommodate all consumptive uses of the surplus, but is sufficient to accommodate subsistence uses of the surplus, then subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy subsistence

uses of the surplus, and may provide opportunities to satisfy other consumptive uses of the surplus. (Emphasis added)

The federal subsistence priority requires all nonsubsistence uses of a stock or population to be eliminated before subsistence uses may be curtailed. If the language cited above authorizes the boards to do otherwise and the language is enacted, the State will continue to be out of compliance with ANILCA.

4. Sustained Yield, Sound Management, and the Maintenance of Healthy Fish Stocks and Game Populations: The Alaska Constitution requires fish stocks and game populations to be managed on a sustained yield basis. Consistent with this constitutional mandate, sustained yield is the regulatory standard in title 16 which presently triggers the ability of the Board of Fisheries and Board of Game to adopt any hunting and fishing regulations. For reasons that remain unclear, in addition to "sustained yield" the Abood bill establishes two additional standards, i.e., "sound management" and "the maintenance of healthy populations fish stocks and game populations", each of which must be met before a board may adopt any hunting or fishing regulations, including sport and commercial as well as subsistence. See proposed A.S. 16.05.258(b). If a fish stock is at sustained yield the Board of Fisheries would have no legal authority to adopt regulations authorizing fishing on the stock unless it first determined that such fishing would also be consistent with "sound management" and "the maintenance of a healthy stock". Neither of the new terms is defined. Instead the bill instructs the boards to adopt regulations defining all three terms. The addition of these new biological standards has nothing whatsoever to do with the subsistence controversy or the holding in the Madison case which the legislation is ostensible trying to fix. However, if enacted into law, the new biological standards will have a profound effect on all hunting and fishing. Since no one in Alaska has complained about the "sustained yield" standard, why Abood wants to use the subsistence bill to make such a radical change in fish and wildlife management policy is perplexing.

5. Subsistence Permits: Sec. 6 of the bill requires the boards to issue subsistence permits "for areas, villages, communities, groups, or individuals" whenever the implementation of the subsistence priority requires a reduction in nonsubsistence hunting opportunities. The language of the section provides no flexibility. The boards must issue subsistence permits regardless of how stupid it may be to do so.

6. Limitation of "Subsistence Uses" to Residents of Rural Alaska: The only reason subsistence legislation is needed is to limit the class of hunters and fishermen eligible to engage in "subsistence uses" to residents of rural Alaska. The Abood bill

appears to accomplish this goal, but in an unconstitutional way. On the one hand Sec. 7 satisfactorily amends the definition of "subsistence uses" in A.S. 16.05.940(23) to limit the purview of the definition to Alaska residents "domiciled in a rural area of the state". However, the bill then establishes a new definition of the term "domicile" which establishes a 12 month residency requirement. In addition to again taking the State out of compliance with title VIII (the legislative history of title VIII specifically prohibits durational residency requirements), a 12 month residency requirement is patently unconstitutional.

The above analysis highlights the provisions of the Abood bill which raise the most serious problems. The bill contains additional provisions which are either obnoxious or unnecessary but which do not conflict with the protection of subsistence hunting and fishing or with bringing the State back into compliance with the regulatory standards in title VIII of ANILCA. The Abood bill is now before the Senate Resources Committee chaired by Arliss Sturgulewski. The first work session on the bill has been scheduled for February 19th.

MATANUSKA VALLEY SPORTSMEN

BOX 1875

PALMER. AK 99645

To all interested persons:

At a general meeting of the Matanuska Valley Sportsmen, with a quorum present, the membership voted to support the recommendations of the Alaska Sport Fishing Association on the subsistence issue.

Please contact Noel Woods for any clarification and/or further help upon this very important issue.

Yours truly,

Noel W. Woods

member, Board of Directors

KENAI RIVER SPORTFISHING ASSOCIATION
2819 Dawson
Anchorage, Alaska 99503
907-276-2222

October 31, 1985

Senator Mitch Abood
1024 West 6th Avenue
Anchorage, Alaska 99501

Dear Senator Abood:

The Kenai River Sportfishing Association wishes to go on record as being in support of the position put forth by the Alaska Sportfishing Association advocating six specific revisions to the subsistence statute. (see attached)

We feel these revisions are entirely reasonable and can be implemented in this legislature, if necessary. In most cases these suggested amendments are things the Board of Fisheries has attempted to implement during past regulatory meetings.

If we are to realistically manage and allocate our resources fairly among all Alaskans, the Boards of Fish & Game must have the power and flexibility to make realistic allocation decisions based on biological concerns.

Sincerely,

Robert C. Penney, Chairman
Kenai River Sportfishing Association

cc: Alaska Sportfishing Association

November 5, 1985

Alaska Sportfishing Association
Anchorage, Alaska

Att: Russ Redick

Dear Russ,

Thank you for attending the October 1985 meeting of Alaska Professional Sportfishing Association and explaining your organizations position on SUBSISTANCE USE in Alaska.

A.P.S.A. is in agreement with the six points of SUBSISTANCE USE pointed out in your position paper and give you our unanimous support in following this effort to resolve subsistance use in the State.

Sincerly.

William R. Martin, President
Alaska Professional Sportfishing Association

ALASKA SPORTFISHING ASSOCIATION INPUT - SUBSISTENCE

(1) POSITION STATEMENT

Subsistence harvests should be based on meeting the protein needs and, in some cases, significant cultural needs of the harvesters. One species should be substitutable for another comparable species, and harvest should occur on those species that are most abundant and best able to withstand the harvest.

BACKGROUND

The need for the Board of Fisheries to be able to shift subsistence harvests to the most abundant species is statewide in application. However, it is most clearly demonstrated by the existing Cook Inlet situation. Current law stipulates that subsistence harvests are based on "customary and traditional" harvest patterns. The courts, as in the Tyonek case in Cook Inlet, ruled that harvests originally were a spring fishery on King Salmon, and thus the Board of Fisheries could not shift to a more abundant species of salmon for the Tyonek fishery.

The history of modern subsistence in Cook Inlet is that it was chiefly conducted by commercial fishermen who already owned gill nets. These people fished for subsistence early in the season until sufficient salmon were available to harvest commercially. They then fished commercially until the late fall, when they again subsistence fished for their winter food supply. In recent years the Board of Fisheries allocated early and late runs to sport fishermen and the large mid-season runs to commercial interests. The result, at least in Cook Inlet, was that subsistence fisheries are directed upon the small runs given to sport fishermen rather than the huge mid-season runs which have a commercial priority.

A classic example is the fall Kenai Silver run, which has a long-term average harvest of 13,200 fish. Currently, the subsistence allocation from this run is 13,000 Silvers...essentially the entire run.

(2) POSITION STATEMENT

Certain areas exist where the fishery resources are so sensitive that the efficient harvest methods associated with subsistence fishing (gill nets?) would destroy those resources. The Board of Fisheries must continue to have the authority, upon a formal finding of fact, to close such areas to subsistence fishing while still allowing less efficient methods, such as pole and line.

BACKGROUND

An example of this problem is the trophy Rainbow trout streams of the Illiamna Lake Drainage. Trout in these streams grow very slowly with some

large trout being over 10 years of age. These trout also occur in limited numbers. Counts by Alaska Department of Fish and Game personnel have, during some years and in some streams, found less than 1,000 adult trout. About 1975 one gill net, set illegally during one night, caught nearly ten percent of the adult Rainbow trout in Lower Talaric Creek. The Board of Fisheries has recognized the fragile state of the Rainbow trout resource in that area, and current regulations allow only one Rainbow trout to be taken per day; no bait or treble hooks are allowed to reduce incidental hooking mortality. Gill nets have been banned in and near these streams for approximately 10 years. However, since subsistence fisheries were allowed in these areas at one time, the Madison decision appears to grant priority to the use of subsistence gill nets over pole and line angling.

(3) POSITION STATEMENT

That the definition of subsistence gear in AS 16.05.940(22) is proper and should not be amended. That definition does not normally allow pole and line to be used as subsistence gear.

BACKGROUND

We strongly believe that pole and line should not be included for subsistence use for several reasons:

(1) The present problem with subsistence is principally that one Alaskan has been given priority over another Alaskan based solely on where he lives. We disagree with that concept. Including pole and line users in subsistence would simply increase the problem by giving more people a priority. We call for a major reduction in the number of people having a priority or preference. We have, since 1978, disagreed with the concept of giving priority to one person over another. Adding pole and line would be nothing more than giving sport fishermen a priority over commercial users. We reject that premise.

(2) Pole and line subsistence users would create an enforcement nightmare. How would we distinguish between subsistence harvesters and sport (non-resident?) fishermen?

(4) POSITION STATEMENT

That a set of personal-use fishing regulations is needed to allow the harvest of fish, when they occur in numbers excess to escapement and commercial/consumptive needs.

BACKGROUND

In many areas of the state, large numbers of fish (commonly salmon) occur which are excess to spawning needs and are not harvested by commercial, subsistence, or sport fishermen. Personal-use regulations may be an ideal tool for the Board of Fisheries to allow the harvest of the fish on an equal

priority basis with other user groups. Personal-use regulations were created by the Board of Fisheries for exactly this purpose. However, the Madison decision vastly expanded subsistence qualifications, and personal-use harvesters have now been included in subsistence with a priority over other users. The legislature should enact personal-use regulations, by statute, to permit harvest of fisheries resources on an equal priority basis.

(5) POSITION STATEMENT

Rainbow/Steelhead trout shall not be subject a subsistence priority. The Board of Fisheries shall continue to have the authority to allocate the harvest of this species to any user group without priority on a case by case basis.

BACKGROUND

Despite Alask reputation as having some of the world's best Rainbow fishing, Rainbow trout in this state are limited both in number and location. Only in Bristol Bay and Cook Inlet do major numbers of Rainbow trout occur. For 1983, the latest year for which complete catch data exist, the entire statewide Rainbow harvest was less than 175,000 fish. Approximately 125,000 of these fish were from Cook Inlet waters, and over half of the statewide total were small stocked trout from lakes adjacent to urban centers.

Rainbow trout in Alaska are not only limited in number, they are slow-growing, and stocks are very easily damaged. In recognition of these facts, the Board of Fisheries regulates wild Rainbow stocks with very stringent bag limits, in many cases allowing only one trout per day.

(6) POSITION STATEMENT

Subsistence fishing in Cook Inlet waters should be limited to the areas adjacent to English Bay, Port Graham, and Tyonek, as previously designated by the Board of Fisheries. All other non-commercial net fishing in Cook Inlet should be conducted under personal-use regulations.

BACKGROUND

This is the only recommendation of the Alaska Sportfishing Association relating to a specific area of the state. We must face the fact that Cook Inlet is unique. Over half the state's population resides in this drainage. Most of these people have access only to Cook Inlet fishery stocks. According to Fish and Game data, approximately 140,000 sport fishermen and several thousand commercial fishermen utilize Cook Inlet fisheries, in addition to persons wishing subsistence fishing privileges.

Regulations promulgated by the Board of Fisheries, after passage of the 1978 subsistence law, restricted gill net subsistence fishing to remote villages of Cook Inlet. These regulations successfully avoided the intense conflict which resulted when priority mandated subsistence gill netting was opened in high-use waters accessable to the Cook Inlet highway systems.

We have no objection to continued subsistence harvests by any Alaskan in the three communities noted above. However, in basic fairness to all Alaskans living in Cook Inlet and to avoid the inevitable future chaotic controversy associated with priority mandated gill net fisheries, in the remainder of Cook Inlet subsistence fisheries should not be permitted. We wish to make clear that we believe that gill net, or dip net fisheries, may be desirable in certain times and for sites in Cook Inlet waters. However, it is critical that these fisheries be permitted on a non-priority basis by the Board of Fisheries under personal-use regulations.

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Chairman, Senate Resources Committee
Vice-Chairman, Senate Health, Education and Social Services Committee
Member, Senate Community and Regional Affairs Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

The Editor
The Anchorage Times
Box 40
Anchorage, Alaska 99510

May 2, 1986

Dear Sir:

One of the main reasons we fought to become a state was to control our own resources. We are now on the brink of giving that control away. If the Senate fails to pass a subsistence bill that complies with federal law by June 1, we will lose management of our own fish and game on public land.

Despite this, some legislators are determined to block passage of a subsistence bill or pass one that does not comply with federal law. They believe that out of the resulting political chaos a strong movement would develop to change federal law. Such an approach is playing Russian roulette with our resources.

Nothing in the passage of a bill precludes court challenges or legislative attempts to change federal law. These things, however, take long periods of time with doubtful results. It is not necessary to put our resources at risk to make a symbolic point.

The Senate Resources Committee Substitute for HB 288 is a good bill. It has widespread public acceptance, complies with federal law, and is a fair and workable solution for the subsistence issue. It is vital that this bill pass.

Sincerely yours,

Senator Arliss Sturgulewski
Senate District F

DEPARTMENT OF THE ARMY
HEADQUARTERS, 6th INFANTRY DIVISION (LIGHT)
FORT RICHARDSON, ALASKA 99505-5000

April 15, 1986

REPLY TO
ATTENTION OF:

Office of the Staff Judge Advocate

Mr. McKie Campbell, Senior Advisor
Alaska State Legislature
Senate Resources Committee
Pouch V
Juneau, Alaska 99811

Dear McKie:

I have finished my review of HB 288 and the Sectional as we discussed. As I told you, I am disappointed that the bill does not address military lands as a separate Federal issue as 10 USC 2671 dealing with military lands, predated ANILCA and as ANILCA by its terms, does not change existing Federal law on subsistence hunting issues. It is perhaps even more unfortunate that the Sectional refers throughout to "Federal law" (meaning ANILCA) and occasionally makes a statement which directly contradicts 10 USC 2671. You tell me that you don't see that as much of a problem, but I have spent a lot of time during the last year discussing this problem with State officials and their attorneys, and there is a tremendous amount of confusion in this area already. You tell me that HB 288 will return us to the pre-1985 status quo and since we had few problems then with our military hunts, we should have few in the future. The pre-1985 status quo is not a solution since it also provided for Tier I and Tier II subsistence hunts.

I am enclosing a copy of the letter from Mr. Johnson, Deputy Assistant Secretary of the Army, to Senator Stevens in the hope you can include it in the record with the documents accompanying HB 288. I also want to accept your offer to add some clarifying language to the record to indicate that the references to "Federal law" in the Sectional is a reference solely to ANILCA.

Thank you for your efforts to ameliorate some of the confusion in this area.

Sincerely,

C[illegible]. Basham
Lieutenant Colonel, Judge Advocate
Corps
Staff Judge Advocate

Enclosure

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

13 MAR 1986

Honorable Ted Stevens
United States Senate
Washington, D. C. 20510

Dear Senator Stevens:

Reference is made to your request regarding Department of the Army hunting policy on military lands, specifically as it pertains to compliance with state fish and game laws.

The basic federal law regulating hunting on military reservations is 10 USC 2671. This is implemented by Army Regulation 420-74, Natural Resources Land, Forest and Wildlife Management. The policy as stated in Army Regulation 420-74 is that all hunting, fishing or trapping on a military installation or facility under the control of the Department of the Army will be in accordance with federal laws and the fish and game laws of the state in which it is located. Any individual who desires to hunt on a military reservation must obtain a license from the state in which the installation is located except when state laws do not recognize residency status of military personnel permanently assigned as specified in 10 USC 2671. The installation commander may then issue a permit to military personnel to hunt on the installation without securing an appropriate state license. This is the situation in Alaska since the state does not grant residency privileges to military personnel until they have resided within the state for twelve months. All other state game laws (e.g. bag limits, seasons, etc.) are still applicable.

It is the Army's policy to permit maximum public use of installations for hunting in keeping with safety, security and other management constraints and after the needs of the military are met. It is the installation commander's responsibility to determine the degree of public use which can be accommodated.

As you know, the Commanding General, 172nd Infantry Brigade (Alaska), chose to postpone scheduled subsistence hunts on military land until an agreement is reached ensuring that military personnel will not be subject to discrimination based on non-residency status. I have been advised that the Alaska Department of Fish and Game did not object to this decision and supports legislation to correct inconsistencies between the state and federal laws. We will advise the appropriate Army activities to work toward an early resolution of this matter so that subsistence hunting can be assured this next season. In the interim, our legal counsel will be asked to review the issue and advise, before the next hunting season, on how the legal inconsistencies can be corrected. Be assured our concerns are both for the people of Alaska and our military personnel. Your support is appreciated.

Sincerely,

Paul W. Johnson
Deputy Assistant Secretary of the Army
(Installations and Housing)
OASA(I&L)

Hein ✓
3/4/86

Original sponsor: Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 288 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND 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. AS 16.05.251(a)(6) is amended to read:

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

* Sec. 2. AS 16.05.251(a) is amended by adding a new paragraph to read:

(12) regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries.

* Sec. 3. AS 16.05.255(a) is amended by adding a new paragraph to read:

(10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game.

* Sec. 4. AS 16.05 is amended by adding new sections to read:

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

(b) The boards shall determine

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

sustained yield; and

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

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria:

(1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood;

(2) local residency; and

(3) availability of alternative resources.

(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.

(e) Fish stocks and game populations, or portions of fish stocks and game populations, not identified under (a) of this section

may be taken only under nonsubsistence regulations.

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

Sec. 16.05.259. ADMINISTRATIVE APPEALS. The Board of Fisheries and the Board of Game, acting jointly, may establish by regulation an appeal procedure for persons aggrieved by the adoption or repeal of a regulation.

* Sec. 5. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.261. NO SUBSISTENCE DEFENSE. In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses.

* Sec. 6. AS 16.05.330 is amended by adding a new subsection to read:

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating and monitoring the subsistence harvest of fish and game. The boards shall adopt these regulations when the subsistence preference requires a reduction in the harvest of a fish stock or game population by nonsubsistence users.

* Sec. 7. AS 16.05.940(22) is amended to read:

(22) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources <u>by a resident domiciled in a rural area of the state</u> for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

* Sec. 8. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the <u>noncommercial,</u> customary

and traditional uses [IN ALASKA] of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in [FOR THE PURPOSES OF] this paragraph, "family" means [ALL] persons related by blood, marriage, or adoption, and a [ANY] person living in [WITHIN] the household on a permanent basis;

* Sec. 9. AS 16.05.940 is amended by adding new paragraphs to read:

(28) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

(29) "fish stock" means a species, subspecies, geographic grouping or other category of fish manageable as a unit;

(30) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(31) "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 means defined by the Board of Fisheries;

(32) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a significant characteristic of the economy of the community or area;

(33) "subsistence hunting" means the taking of, hunting for or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game.

* Sec. 10. AS 16.05.251(b), 16.05.255(b), and 16.05.257 are repealed.

* Sec. 11. This Act takes effect June 1, 1986.

Alaska State Legislature

POUCH
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Senate
Committee on Resources

TO: Senate Resource Committee Members March 5, 1986

FROM: Senate Resources Committee Staff

RE: SCS for CS for HB 288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date."

SECTION BY SECTION ANALYSIS

This legislation is designed to comply with Title VIII of Public Law 96-487, the Alaska National Interest Lands Conservation Act.

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Small personal use fisheries exist on the Copper River and on some salmon stocks on the Kenai Peninsula, in Southeast Alaska, and on the Naknek River. In addition to areas where personal use fishing already occurs, it is envisioned that personal use fisheries would be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

Section 2

Section 2 adds a new paragraph to the authority of the Board of Fisheries.

This paragraph tracks the purposes of the Board of Fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Section 3 is identical to paragraph (13) in section 2 except that section 3 applies to game. Two minor drafting changes are suggested for this section. In Alaska statutes, "game" is defined to include all wild animals.

Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law. AS 16.05.259, is the second statute dealt with in this section. It addresses administrative appeals of decisions made by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the detailed analysis of AS 16.05.258 is by subsection. In brief, AS 16.05.258(a) provides for the identification of those fish stocks and game populations that are subject to subsistence uses. Subsection (b) provides for a determination of what portion of those stocks or populations can be harvested consistent with sustained yield and how much of that portion is needed to provide a reasonable opportunity for subsistence uses of the stocks and populations. AS 16.05.258(c) describes the preference that shall be accorded for nonwasteful subsistence uses.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are the subject of customary and traditional uses in each rural area.

In making these identifications, the boards should look at which fish stocks and game populations are normally used for subsistence in each rural area. The boards should consider the patterns of local use as established over time. It is not the intention of this bill to exclude from subsistence use any stock or population that is regularly used in that area, even if the level of use is small. It is the intention, however, to exclude from subsistence use those stocks and populations that are not normally used for subsistence and whose use is limited to an occasional individual animal.

The identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentally win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that use by those eligible for the subsistence preference is protected.

The identification of customary and traditional stocks leaves those that are not identified to be harvested by all Alaskans under nonsubsistence regulations as specified in proposed subsection (e) of AS 16.05.258. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout stocks and brown bear populations.

Whether or not these are or are not subsistence stocks and populations is not decided by the proposed legislation. That matter should be left to factual determinations made by the boards. This bill gives them authority to make those determinations.

This section call for game populations and fish stocks to be identified in each rural area. Stocks and populations are geographically specific groups of animals and fish, as specified in the definition section of this bill. The identification of each stock or population subject to subsistence uses should be factually determined on a case by case basis.

Areas, as set by the board, should be large enough to include both where a particularly stock or population is normally taken and where it is normally used. As an example, the boundaries of areas should not pose a barrier to village residents who traditionally travel to a fish camp some distance from the village.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable portion exists and how much of that portion is necessary to provide a reasonable opportunity for subsistence. The determination of whether a harvestable portion exists must be consistent with sustained yield. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is a "reasonable opportunity to satisfy subsistence uses". Reasonable is a commonly accepted concept in law frequently used in statutes and applied by courts. Reasonable currently appears 1,356 times in the Alaska Statutes. The standard means that the boards' decisions should be based on available information,for example, a consideration of the customary and traditional levels of harvest. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

A "reasonable opportunity to satisfy subsistence uses" does not guarantee that every subsistence user will get every fish or animal he or she wants before any uses of lower priority are allowed. In hunting and fishing, that type of guarantee is impossible to provide. What this standard does provide is that every subsistence user, shall be able to hunt or fish with the reasonable expectation of taking the amount of fish and game needed.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with ~~Federal law.~~ ANILCA It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the ~~Federal law~~ ANILCA clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough of a harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough portion to allow a reasonable opportunity for subsistence. At Tier I, the preference allocates enough of the resource to provide that reasonable opportunity, with any surplus that is left going to other consumptive uses.

Tier II is when there is not enough of a harvestable portion to provide a reasonable opportunity for subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, almost all of the Tier II hunts that occurred after the Madison decision will be reopened by this bill. The Tier II hunts will be reopened by dramatically reducing the number of hunters eligible to participate in subsistence hunts. The effect of this will be to leave more game for sports hunters. Also, some hunts that are presently Tier II hunts are on game populations that will probably no longer be classified as subject to subsistence uses. Bison are an example.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal law, as stated in the policy and intent sections of the Federal law. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks or other areas, and administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) authorizes the boards to adopt regulations for stocks and populations identified under (a) to provide for nonsubsistence harvest of that portion of the harvestable portion that is not needed for subsistence. This would be the normal state of affairs for almost all hunts and fisheries.

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations under (a) may only be harvested under nonsubsistence regulations. This section is previously discussed in more detail in the discussion of subsection (a).

AS 16.05.258(f)

Subsection (f) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, bag and catch limits, methods and means, and other such restrictions including prohibitions of wanton waste.

AS 16.05.259

This new section grants the boards authority to establish administrative appeal procedures. It should be emphasized that this ability to adopt an appeal procedure is strictly optional at the boards' discretion and that there are a variety of forms the appeal procedure could take.

Section 5

Section 5 amends AS 16.05 by adding a new section, AS 16.05.261, which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. This section requires a person who disagrees with a board action or statute to seek to correct that action or statute through appeal, petitions for reconsideration, court action, etc. rather than permitting the person to violate the statute or regulation and claim subsistence as a defense. This eliminates the "subsistence defense" as arose in the Eluska and Skuse cases.

This section does not effect AS 16.05.930 (b) which allows people to take fish and game in case of emergency.

Section 6

Section 6 amends AS 16 05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within a rural area, for rural communities or villages, or for groups or individuals in rural areas. The boards are required to adopt a permit program when the subsistence preference requires reductions in the harvest by nonsubsistence users. Such a reduction should only take place in case of a resource shortage compared to the number of users. When that situation exists, the Department and boards should have such a system in place so they can closely monitor the harvest and the demand on the resource.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and traditional trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises. As specified in Section 2, it is understood that subsistence uses shall be nonwasteful. The definition of subsistence uses is also amended to to make plain that subsistence uses have to be by a resident domiciled in a rural area of the state.

Section 9

Section 9 addresses several other definitions. The first of these is "domicile" which is defined as a person's "true and permanent home...". The definition states that domicile may be proved by presenting evidence acceptable to the boards. The board of fisheries already has regulations on domicile and it is anticipated that the board of game would adopt similar regulations.

Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

A definition of personal use fishing is contained in this section. This definition is very similar to the definition in the House version of this bill. Neither sport, commercial, or personal use fishing is afforded any priority over any other type of fishing in this legislation. As indicated in section 1 it is envisioned that personal

use fishing may be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill. This legislation is not intended to statutorily increase or decrease existing personal use fishing. The scope of these fisheries is an allocation decision left to the board.

The bill adopts a definition of "rural area" similar to the definition added in the House. It is defined as a community or area of the State where the noncommercial, customary and traditional use of fish and game for personal and family consumption is a significant characteristic of the economy of the community or area. The definition is designed to mesh with the definition of subsistence uses. The definition is not meant to preclude an area from being rural simply because there may also be significant elements of the cash economy in the area, such as commercial fishing.

The focus in this bill on the significance of the noncommercial, customary and traditional harvest and use in a particular area is consistent with ANILCA and its legislative history. In that history, Congress indicated an intent to protect subsistence use in areas of Alaska where subsistence "...uses have played a long established and important role in the economy and culture of the community...". The legislative history lists several communities that were considered rural in 1979, but acknowledged that the economic development and rural character of such communities may change over time. It is expected that the boards would look at ANILCA's legislative history when establishing rural areas and would review areas as conditions change to assure a rural or nonrural classification is still appropriate. As mentioned earlier in this sectional, areas, as set by the board, should be large enough to include both where a particular stock or population is normally taken and where it is normally used.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above.

Section 10 .

Section 10 repeals three portions of subsistence law. AS 16.05.251(b) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

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Advance Courtesy Draft.

Please call me, McKie, Thanks 9/1

March 2, 1986

Honorable Arliss Sturgulewski
Chairman, Senate Resources Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

re: Subsistence Bill;
SCS CSHB 288(SA)

Dear Senator Sturgulewski:

This is to inform you that I am concerned that the Senate Resources Committee draft subsistence bill may soon face substantial opposition from the sport community of the nature that contributed to a stalemate over subsistence legislation last year. The environmental community may also take a closer look at the draft bill in light of recent changes affecting ANILCA compliance.

Over the past few days leaders of five sport organizations have asked my opinion of the legislation as it now stands. They are concerned that the draft bill is becoming unnecessarily rigid since leaving the Senate State Affairs Committee. I have told them my opinion that the bill, as amended by your committee, is less flexible than ANILCA, is less flexible than the Senate State Affairs bill, and is less flexible than the governor's bill. As such, I regret that I can not in good faith give leaders of the sport community firm arguments that they would be better off with your draft bill than they would with ANILCA and a temporary federal takeover of subsistence management on federal uplands on June 1, despite the implications of such a takeover. I also see problems with ANILCA compliance. I sincerely regret those conclusions, so I will state my grounds for them later in this letter.

First, let me state the deficiencies of the Resouces Committee draft bill when compared to ANILCA, because identifying the deficiencies underlie my recommendations. The two greatest deficiencies which I have conveyed to sport leaders are:

(1) the failure of Resources Committee draft bill to adopt authority, consistent with ANILCA, for the Board of Fisheries and the Board of Game to look at "alternative resources" when determining customary and traditional subsistence use, which is prior to Tier II situations in which alternative resources are also to be considered, and

(2) the failure of the Resources Committee draft bill to recognize ANILCA standards, which say that on federal lands subsistence must be consistent with "sound management principles" and "the conservation of healthy populations", and additionally that on National Park Service lands (including preserves open to sport hunting) subsistence must be consistent with the "conservation of healthy and natural populations". See ANILCA, sections 802, 805, 808, 810, 815.

Based on both of these shortcomings in the Senate Resource Committee draft bill, I believe that ANILCA and its legislative history are legally, biologically, and administratively preferable to the Resource Committee bill from the sport perspective, and ANILCA may end up being preferable from the environmental and non-consumptive perspectives as well. ANILCA is less restrictive of sport, commercial and nonconsumptive use than is the latest draft of the Resource Committee bill.

I hope you will not mistake my intentions, Senator. I do not want a federal takeover on federal uplands, for I view that as creating problems for the boards, the biologists and the public. I want a good, flexible law that is consistent with ANILCA and the flexibility in it. Presently, the Resource Committee draft bill does not achieve that.

Before focusing on the need for flexibility and consistency with ANILCA, I will touch briefly on what might happen if there is a "federal takeover." The Department of the Interior is most likely to simply adopt state regulations for subsistence on federal uplands and the few federal waters that exist. The Department has authority to do so. The Department would then allow only rural people to subsistence hunt on federal uplands and subsistence fish in federal waters. State sport regulations are currently adopted this way by the federal government. When the Assistant Secretary of the Interior, William P. Horn, testifies before your committee, I suggest that you inquire if this is how the Department is likely to proceed in the event of federal involvement.

The consequences of a federal takeover would be that Tier II hunts closed to sport on federal lands would pop open. Tier II hunts closed to sport on state lands would remain a problem, unless the Office of the Attorney General changed its advice, as it should, that all Alaskans are qualified for subsistence under the Madison decision. What that advice ignored was the Board's Joint Policy Statement, 5 AAC 99.010, listing criteria for determining whether a use was customary and traditional. Those criteria would have excluded almost all urban Alaskans. The advice ignored common sense, for almost every urban Alaskan knows he or she is not a customary and traditional subsistence user. The consequences of a federal takeover could become more difficult over time if state and federal wildlife

regulations pursued divergent paths so as to stain biologically against each other or if the federal government eventually sought to expand its authority over nonfederal lands. But, those are more distant possibilities and in the near term they are unlikely.

Russ Redick of the Alaska Sportfishing Association said before your committee that subsistence legislation must be flexible to allow the boards appropriate authority to allocate subsistence to alternative stocks in some situations and deal with mixed stock issues in some fisheries. Such flexibility is clearly appropriate and consistent with ANILCA when it is not a significant detriment to subsistence use. The Resource Committee draft bill does not contain that flexibility. It does not contain authority, as does ANILCA, to look at alternative resources prior to Tier II situations, at which point nonsubsistence consumptive uses have already been eliminated and nonconsumptive uses have already been diminished. It also does not contain authority to address problems of mixed stocks.

In contast, the Senate State Affairs bill contains those authorities in three places and is consistent with ANILCA.

First, the section-by-section analysis of the Senate State Affairs bill said that alternative resouces are one of several factors to be considered in identifying customary and traditional subsistence uses as well as in Tier II management. ANILCA legislative history concurs on this point and is quoted in full below. That portion of the section-by-section analysis of the Senate State Affairs bill was a vehicle for addressing mixed stock problems in fisheries, and it was a basis for fully accommodating subsistence needs while at least partially accommodating consumptive and nonconsumptive concerns that might conflict with subsistence. To the detriment of the Senate Resouces Committee draft bill, the reference to this authority has been deleted from the section-by-section analysis.

Second, the Senate State Affairs bill contained authority to apportion subsistence use among similar, available stocks. That is consistent with ANILCA's recognition of "sound management principles" and ANILCA's recognition that alternative stocks may be considered in identifying subsistence uses. This authority in the Senate State Affairs bill was also a flexible mechanism for addressing mixed stock problems in fisheries and for fully accommodating subsistence needs and partially accommodating consumptive and nonconsumtive desires that may conflict with subsistence use. This authority has been deleted from the Senate Resouces Committee draft bill.

Third, the Senate State Affairs bill recognized, as does ANILCA, that subsistence must be consistent on all federal lands with "sound management principles" and "conservation of healthy populations", and that as stated in the section-by-section analysis of the Senate State Affairs bill, subsistence on national

parks and preserves must be consistent with "conservation of natrual and healthy populations". Based on discussions with Assistant Attorney General Larri Spengler, I understand the term "sound management principles" includes social and political considerations in making allocation decisions for particular types of management, such as trophy management for hunting or fishing, catch and release fishing, and wildlife viewing. I believe that such management regimes may effectively be diminished or prohibited in many instances throughout the state by the Resouces Committee draft bill, because, unlike ANILCA, the Senate Resources draft requires only that subsistence be consistent with "sustained yield." "Sustained yield" usually reflects only biological considerations. Therefore, I conclude that the Resource Committee draft is more harmful to the interests of sport and non-consumptive users than is ANILCA or the Senate State Affairs bill.

Most people conversant with subsistence issues understand that at Tier II, under sec. 804 of ANILCA and AS 16.05.251(b), 16.05.255(b) of current state law, the boards are to consider the factors of dependency on the resource, local residency and availability of alternative resources in allocating subsistence use. These are the criteria upon which subsistence use is restricted when there is not enough of a resource to accommodate all subsistence demand. However, what is often not understood is that, under ANILCA, the boards also can and should apply those same factors, along with others, in determining what uses are "customary and traditional subsistence uses," even before the boards are faced with Tier I or Tier II situations. Thus, the three criteria play a dual role.

The dual role for these criteria is clear from the legislative history of ANILCA. It says:

> "However, the phrase 'customary and traditional' is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources ... in which such uses 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. The factors of local residency, economic dependence, and availability of alternative resouces have been included in section 804 [the preference at Tier II] rather than the definition [of subsistence use]. Although a truly comprehensive definition of 'subsistence uses' must include a mix of those factors, the committee has determined that they should be incorporated through appropriate action by the

> State rulemaking authority [i.e. the boards] in conjuntion with recommendations of regional councils established pursuant to section 805 to implement the subsistence preferance set forth in section 804. Sections 803-805 are intended to establish a dynamic process for the regulation of subsistence resources and uses which will enable rural people to participate in the decisionmaking process of the State rulemaking authority in the inclusion of the local residency, economic dependence, and availability of alternative resources factors into the definition of "subsistence uses" on a case-by-case basis to meet the needs of a particular management situation in a particular area."

Sen. Rept. No. 96-413, 96th Cong., 1st Sess, at p. 269, emphasis added.

A fair analysis of this legislative history is that the boards, in conjunction with regional councils, are to determine customary and traditional subsistence use by considering: (1) whether the use is long established and important, (2) whether it is accompanied by customs and beliefs, (3) dependency on the resource, (4) local residency, and (5) availability of alternative resources. As a matter of policy, three other considerations might be worth adding to this list, even though they are not required by ANILCA or its legislative history. Those are: (6) the season at which the resource in question is harvested since many subsistence harvests are important in an opportunistic and temporal context, (7) the relation the resource has to other subsistence resources that are also harvested, and (8) the cultural values associated with the resource. As I recall, Steve Benhke, the Director of the Subsistence Division, suggested these last three factors to me in our discussions. His suggestion is good.

The problem that now confronts your committee is (as it always has been throughout this issue) a drafting problem. It is not whether to hurt or help subsistence or nonsubsistence people. It is how to draft language that allows flexibility to address alternative stocks and flexibility to undertake sound management without having that language become a vehicle for the boards to deny satisfaction of subsistence use. However, as Don Mitchell, counsel for the Alaska Federation of Natives (AFN), correctly points out, the boards unfortunately do not have a perfect track record on this matter. Therefore, I make the following suggestion.

I assume, perhaps naively, that a successful law should foster trust between subsistence and nonsubsistence users and that generosity should prevail over avarice and fear. Therefore, section 16.05.258 in the draft bill, which involves identifications of customary and traditional subsistence stocks

and determinations of how much of a harvest is needed to reasonably satisfy subsistence use, should be amended to involve advice from regional councils and to give the boards and the councils the flexibility to look to alternative stocks in allocating fish and game and in dealing with mixed stock problems, so long as subsistence needs are met and the preference is fulfilled. I suggest the following language:

> Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME.
>
> (a) The Board of Fisheries and the Board of Game, after consultion with the appropriate regional advisory councils, shall identify customary and traditional subsistence uses of fish stocks and game populations in each rural area identified by the boards.
>
> (b) Consistent with satisfaction of subsistence uses, sustained yield, sound management principles, the maintenance of healthy populations, and federal law, the boards shall determine after consultation with appropriate regional advisory councils:
>
> (1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested; and
>
> (2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses.
>
> (c) In making the decisions under (a) and (b) of this section, the boards may consider factors including but not limited to: (1) whether the harvest and use is long established and important, (2) whether the use incorporates custom, tradition and belief, (3) dependency on the resouce, (4) local residency, (5) avialability of alternative resources, (6) the season at which the resouce is harvested or used, (7) the relation the resource and its use have to other resources used for subsistence, and (8) cultural values associated with the resource.

I would thereafter reletter the existing subsections (c) through (g).

The section-by-section analyses of both the Senate State Affairs bill and the Senate Resources draft bill recognize the role of the regional councils in identifying subsistence use and making allocation decisions. However, because the AFN has fought the notion of addressing alternative stocks in the context of identifying and allocating to subsistence use, I have therefore suggested the above amended subsections in order to specifically involve the regional councils and assure statisfaction of subsistence uses. I hope this, in conjunction with the existing authority of the councils (5 AAC -----), would assure sensitivity on the part of the boards and the councils when they look to alternative stocks, are confronted with mixed stock problems, or seek to apportion use between similar, available stocks. I hope

this would also reduce the perception on the part of some rural people that the boards are distant and insensitive. The regional councils have not been fully staffed or funded, so they have not been as successful as possible in dispelling perceptions of the boards as dominated by hostile urban sport interests. Legislative recognition of the regional councils would foster trust between rural people, urban people, and the boards.

I think that if you made this suggested change you would have a bill that would be acceptable. I understand that McKie Campbell of your staff believes it would be more convenient to address these matters in legislative history. That will not work well under the current Resource Committee draft bill, given the proposed AS 16.05.258(a) and (b), their interplay with recent court decisions in Eluska and Skuse, and the deletion of apportioning authority. Changes in the legislative history of the current Resource Committee draft would be legally meaningless in the face of the plain language of the draft. It is important to understand that Eluska and Skuse stand for two propositions: (1) the "subsistence defense," and (2) a requirement that the boards adopt subsistence regulations for all subsistence stocks. The Senate State Affairs bill delt with both aspects of these cases; the Senate Resources draft bill deals only the defense.

I will now turn to demonstrating why this alternative language is necessary, rather than just an abstract point.

Don Michell has long spoken of an error by the Board of Fisheries several years ago that demonstrates erroneous shifting of Tyonek subsistence to an alternative stock. I have always agreed with him that the boards should not be allowed to shift subsistence to alternative resouces when doing so is in any significant way to the detriment of subsistence use. However, the rule against shifting to alternative resources should not be so hard and fast as to deny the boards flexibility when it is reasonable. I hope that four examples will flesh out the problem, and I recommend that you utilize them in the section-by-section analysis to facilitate understanding of how alternative resources might be looked to without detriment to subsistence needs. I will stick mostly to fishery examples, because I am a dabbling dilettante in fisheries management and ignorant in game. However, the priciples suggested by these examples apply to both fish and game.

Example #1: Tyonek King Salmon.

The first fresh meat on the beaches at Tyonek is the Susitna bound king salmon. Several years ago the Board of Fisheries did not allow subsistence harvest of these fish when they were migrating past the Tyonek beaches but did allow sport harvest of these fish when they reached the Susitna tributaries. The subsistence take is and would have been small in relation to the size of the run. The board's decision was improper because it forced Tyonek people to stand and wait for later and less

accessible stocks -- chum, sockeye and silver salmon -- while urban sport people, less in need, fished. Therefore, the Board of Fisheries should not be allowed to shift the Tyonek subsistence harvest of king salmon to a later stock of salmon. Subseqent litigation overturned the board's decision of allowing sport and disallowing subsistence in this case, and few who try to deal fairly with the subsistence issue argue that the result should have been otherwise. Dependency on the resource and lack of alternatives were demonstrable. Therefore, when AFN gives the Tyonek case as an example of why alternative resources should not be considered, AFN is putting forward a "straw man" argument. No sensible person would suggest any shifting in the Tyonek situation, and no legislation has ever been drafted to allow that sort of a shift.

Example #2: Late Kenai River Coho.

The late Kenai River coho demonstrates that any rule on alternative stocks should be flexible and fair. This fish runs along the east beaches of Cook Inlet in late August and through September. It is a small run that is highly valued by sport anglers. Non-commercial harvests (at various times called "subsistence" harvests) have harvested upwards of 13,000 of these fish annually. Although runs for the past two years have been much larger than the recent average, this level of harvest has led in some recent years to closing the sport fishery in the river. I would have no objection to this closing, but for the fact that from late June till early August the same beaches are packed with hundreds of thousands to millions of sockeye salmon that are catchable with the same gear and are recognized by the market and the public generally as a more desirable fish. The Board of Fisheries has at various times sought to fully or partially shift the noncommercial fishery for late Kenai cohos to the more abundant sockeye running a few weeks earlier. The Senate State Affairs bill would allow a shift, at least in part. The Senate Resources draft bill does not to allow it.

Example 3: Mixed Stocks

Mixed stocks also demonstrate the any rule on alternative stocks should be flexible and fair. On the same east beaches of Cook Inlet there are several mixed stock fisheries conducted by gill nets. Kenai king salmon run contemporaneously with sockeye. Several coho stocks are contemporaneous with sockeye, pinks, chum and even some of the second Kenai king run. These mixed stock fisheries have produced substantial conflicts between sport and commerial fishermen. If portions of the Kenai Peninsula qualify for subsistence, then a rigid state subsistence law that does not allow the Board of Fisheries the flexibility to apportion subsistence between stocks or to focus it on some stocks in a reasonable manner will simply add to these conflicts. Acceptance of the subsistence law by the sport community would inevitably be less than it has been to date. This problem could be compounded by subsistence nets displacing some commercial set

nets to a limited extent, because the beaches would have to accommodate additional nets and subsistence could be entitled to the best sites. The Senate State Affairs bill could deal with this problem, by giving the boards some flexibility to apportion use between stocks and to focus on some stocks more than others. The only flexibility in the Senate Resource draft bill is found in the words "reasonable opportunity". That is a frail hook upon which to hang a heavy hat.

Example 4: Non-target, Minimal Target, and Incidental Target Stocks.

A potential problem of non-target, minimal target and incidental target stocks also demonstrates the need for flexibility to address alternative stocks. If we have a rigid bill we may end up with the boards having little ability to minimize impacts on rainbow trout and steelhead trout stocks, or other highly sensitive stocks, in several situations around the state.

Numerous Federal and State reports (eg., USDOI, FWS, Subsistence Management and Use, 1985; USDOI, FWS, Kodiak Refuge Comprehensive Management Plan, 1986; USDOI, FWS & BLM, Burger, et al, 1983, on Copper River steelhead; USDOI, BIA, Worl, 1982, "Synopsis of Alaska Native Subsistence Economies and Projection of Research Needs: Subsistence Data Base Phase II"; ADF&G, Subs. Div., Stanek, 1982, Report No. 32; ADF&G, Subs. Div., Fall, Report No. 74) document subsistence harvest of rainbow and steelhead trout. I have had no great problem with this because I do not know of many demonstrable impacts. However, the Attorney General and the Board of Fisheries might have a problem because current state regulations, 5 AAC 99.___, prohibit subsistence harvest of rainbow trout and steelhead. I have always wondered whether that regulation would survive a subsistence challenge. Eluska and Skuse indicate the regulation would fall, based on the court's requirement that the boards adopt subsistence regulations for every subsistence stock. Whether the regulation would stand or fall is, I believe, an important question to the sport community because the regulation helps sustain a strong recreational interest and a multi-million dollar sport, guide and lodge industry that are focusing increasingly on catch and release of older age, world class trophy rainbows and steelhead.

Based on State estimates in the Bristol Bay Regional Plan and the Kenai River studies, the sport fishing industry in the Bristol Bay drainages, in which world class rainbows play a very significant role, is far more important economically than the Kenai River guide industry. If low levels of subsistence targeted on rainbow or subsistence targeted primarily on other stocks significantly impact over time the prevalence of the relatively scarce older age fish, then we will suffer a loss of international interest to anglers. Perhaps we should suffer that loss, but I don't think the law does or should require it. There are only three world class rainbow fisheries in the world. Alaska,

primarily in the Bristol Bay drainages, is the best, and the other two are in Patagonia and New Zealand.

Several sport regulations, involving special management regimes for rainbow trout, could eventually loose much of their effectiveness in providing quality sport fisheries if the boards are without flexibility in providing for subsistence. Talchalitna River rainbows are managed for catch and release. Bristol Bay drainage rainbows are managed primarily for trophy. Kenai River rainbows are managed for trophy. The draft Cook Inlet Rainbow Trout Management Plan proposes increasing the number of trophy and catch and release streams and prohibiting the taking of rainbows through the ice on several west side Susitna River tribularies. These decisions are currently or will be based fully or partly on "sound management principles" involving social allocations of older age fish, rather than biological considerations under "sustained yield." I doubt that the present sport size limitations, bag limits, and methods and means restrictions could legally be applied to subsistence. The best alternative is flexibility in targeting and apportioning subsistence use among stocks.

The Senate State Affairs bill, like ANILCA, is capable of addressing these potential problems, because it allows flexibility to address alternative resources, apportion subsistence between resources, and requires that subsistence be consistent with "sound management principles" and the "maintenance of healthy populations." The Senate Resouces draft does not do that.

I will close with a brief discussion of how five hypothetical law suits would fare under the Senate State Affairs bill and the Senate Resources draft. For the most part all five hypotheticals involve real issues or situations that have confronted the State. The fifth hypothetical demonstrates that the Resource Committee draft will not be in compliance with ANILCA if challenged by a well put together set of facts and legal arguments. My hypothetical plaintiffs are thinly disguised, so as not to imply intentions.

<u>Case #1</u>:

My first hypothetical suit involves that fountain of controversy: Wolf Control!

Suppose the Alaska Wolf Alliance alleges and proves that wolf control programs involve subsistence use of moose and are based on "sound management principles" reflecting attempts to create and allocate more moose, rather than on "sustained yield principles." To prove that, the Wolf Alliance could prove the following three points: (1) that wolf control, aerial trapping, and trapper education programs are designed to temporarily reduce wolf populations in order to increase moose popuations (Board of Game records will prove this), and (2) that depressed moose

populations have resulted in part from subsistence harvest of cows often contrary to regulations (deposition of present and former Game Board members and ADF&G officials I believe would prove this), and (3) that none of the moose populations are below sustained yield if unhunted or if hunted only for subsistence (easily provable). The Wolf Alliance would then argue that wolf control programs are essentially ways of avoiding implementing the Tier I and Tier II subsistence priority and that nonsubsistence harvest must cease, and that wolf control programs must cease because they are based on social allocation considerations underlying "sound management", rather than the biological considerations of "sustained yield."

Under the Senate State Affairs bill, the Wolf Alliance looses, because "sound management principles" are recognized. Therefore, the flyboys fly, the subsistence and sport hunters hunt, and the trappers trap. However, under the Resouces Committee draft, the Wolf Alliance wins. The flyboys, the hunters, and the trappers take a walk. The irony is that rural subsistence and urban sport hunters have both supported wolf control programs. Therefore, both interests are hurt by the Resource Committee draft. To compound the irony, though, the nonconsuptive interests of the Wolf Alliance are also hurt by the failure of the Resource Committee draft to afford flexibility and recognize wildlife viewing interests through the social allocation underpinning of "sound management principles." Thus, the Wolf Alliance wins on wolves and loses on other matters under the Resource Committee draft.

Case #2:

Suppose the following happens. The Alaska Union of Natives sues to stop sport hunting of moose on lands east and west of Fairbanks, where moose populations are depressed, and in the Nushagak drainage. The Union alleges and proves that subsistence hunters are having to hunt vastly larger areas to get moose. (The Bristol Bay Regional Plan and depositions of ADF&G officials might prove this.) The Union asks that the preference be implemented.

How this hypothetical case would fare under the Senate State Affairs bill and the Senate Resources draft is difficult to say. I know too few facts. However, the State would have a better chance of prevailing under the State Affairs bill than under the Resources draft, because the flexibility in the State Affairs draft allows the Board to reasonablly apportion subsistence use of red meat between moose and caribou so long as the preference is retained on both.

Case #3:

Suppose the following happens. George is apprehened for gill netting rainbow trout in Lower Talarik Creek 25 miles west of his home in Iliamna. The State prosecutes George for violation of

the subsistence ban on rainbow trout. George challenges the validity of the regulation.

As discussed previously, the regulation falls under the Senate Resource Committee draft. Under the Senate State Affairs bill, the regulation might prevail if the board has been reasonable in not depriving George of satisfying his subsistence needs. Flexibility and reasonableness are the key to the Senate State Affairs bill. However, the breadth of this regulation makes it vulnerable under either bill.

Case #4:

Suppose Cooper Landing on the Kenai Peninsula qualifies as rural for purposes of subsistence. Helen of Cooper Landing puts her motor boat in either the permanent non-motorized zone downstream from Russian River or the seasonal non-motorized zone downstream from Skilak Lake. Both zones were established in January by the Department of Natural Resources. Helen engages in subsistence fishing for rainbow trout and is apprehended for using a motor. She alleges that the Kenai River rainbow trout stock is most prevalent in the non-motorized zones and that the non-motorized regulation is invalid with respect to subsistence use.

Under the Resources Committee draft bill, Helen wins, subsistence boats motor, nonsubsistence boats don't motor, state troopers are perplexed by the horrible enforcement problem of having to figure out who qualifies for a motor. Under the Senate State Affairs bill, the Department of Natural Resources wins if the Board of Fisheries has provided reasonable alternative trout or other fish stocks in the Cooper Landing area.

Case #5:

Suppose the Board of Game authorizes subsistence hunting of moose in the ANILCA additions to Denali National Park and authorizes sport and subsistence hunting in the Denali National Park/Preserve, and that the board does so based on "sustained yield." Suppose further that the American Professional Hunting Association, Denali Tours (a hypothetical association of Denali tourist hotel, guide and service companies), and Defenders of Moose for Tourists jointly sue the board on the following grounds: (1) American Professional Hunting and Denali Tours acknowledge that there should be a preference on moose in the Preserve for subsistence, but that the board's allocation of moose in the Preserve between sport and subsistence hunters violates federal law because the board failed to look to alternative stocks (eg. caribou) and "sound management principles," to more appropriately fulfill consumptive interests in making the allocation and in implementing the subsistence preference, and (2) Denali Tours and Defenders of Moose for Tourists allege that the level of subsistence moose hunting allowed by the board in the ANILCA additions to the Denali National Park violates "sound management principles" and the "conservation of natural and healthy

populations," which protect nonconsumptive interests, and (3) American Professional Hunting, Denali Tours and Defenders all allege that the State subsistence law therefore is not in compliance with sections 802, 803, 804, and 815 of ANILCA as they relate to alternative stocks, the identification of subsistence use, allocation between sport, subsistence and nonconsumptive interests, the subsistence preference, the relation between consumptive (subsistence and sport) and nonconsumptive uses, the social allocation underpinnings of sound management principles, and conservation natural and healthy populations.

I think the State is likely to loose on all counts under the Senate Resources bill. The State subsistence law will fall. Alaska will be out of compliance. We will be right back where we are now. Under the Senate State Affairs bill the board would presumablly have reached different allocation decisions initially, and if those decisions were reasonable, then these issues would not even arise under the State Affairs bill.

I hope these five hypothetical cases demonstrate the differnces between the bills. I am not trying to be for or against wolf control, subsistence, sport use, commercial use, nonconsumptive use, or even my finny friends -- rainbow trout. I am only concerned with getting a good bill. When I started working on this issue last October, I believed then that there are two measures of a good bill. First, it should change the nature of future subsistence debates from the present unproductive conceptual debate to factually oriented debates over whether particular stocks are subsistence stocks, whether particular areas or communities qualify, and how much of a stock is necessary to satisfy subsistence. Such factual questions are always worth pursuing. Second, the legislature will have succeeded if no one can say in the coming elections that he or she "did this for you on subsistence" or he or she "did this to you on subsistence." Such statements will be a sign of failure, because one side of the issue will have prevailed more than it should. It will mean that the generalized, devisive, and unproductive debate will still be with us.

A good subsistence bill will make the general subsistence debate go away. The Resource Committee draft can still do that if something like the amendments I have suggested is adopted. They stay close to and do not wander from ANILCA. They provide needed flexibility and fairness.

I wish you the best in dealing with these matters.

Sincerely,

Geoffrey Y. Parker

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

1600 RHODE ISLAND AVENUE, N.W.
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RUPE ANDREWS
FIELD REPRESENTATIVE
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9416 LONGRUN DRIVE
JUNEAU AK 99801
907/789-7422

March 12, 1986

Senator Arliss Sturgulski
Chairman, Senate Resources Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Arliss:

I hope that this letter helps to 'make your day'. Permit me to take this means rather than intrude on your busy schedule to say that I believe that yourself and staff, and members of the Senate Resources Committee have worked long and hard to put before the Alaska public a very much improved subsistence bill over that received from the House. A great number of improvements were incorporated which we in the outdoor user community recommended last summer. We didn't hit one hundred per cent but four out of five will win ballgames every day of the week.

I have no way of knowing whether the Legislature will indeed approve this bill or even a subsistence bill but the Senate Resources bill is a workable document and a much fairer bill then we have had to date. If I may-- the Alaska public needs to know why a preference is provided to a certain segment of the Alaska public of a common property resource. I believe that Alaskans will accept, as they have in the past, a preference that is based on sustinence.

On another subject, many thanks for voting for the resolution to urge the House of Represntatives to adopt the McLure-Volmer Bill that reforms the Federal Firearm Act. I know that you had questions and a short lead time to consider the material. I take this as a vote of confidence in myself which I deeply appreciate. S-49 is a good bill and we can talk later about this.

Please pass on to McKie Campbell that I think he does a Trojan job for you and your Resources committee.

Best regards,

Rupe

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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.

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: Don Collinsworth, Commissioner
Department of Fish and Game

DATE: March 8, 1983

FILE NO: 166-423-83

TELEPHONE NO:

FROM: Norman C. Gorsuch
Attorney General
LIS
By: Larri I. Spengler
Assistant Attorney General
Natural Resources-Anchorage

SUBJECT: Relative resource shortage activating the priority in the subsistence law

During the meeting of the Joint Boards of Fisheries and Game which began in Anchorage on November 30, 1982, several board members requested clarification regarding how and when a priority applies under the subsistence law. Under AS 16.05.251(b) and .255(b), the priority becomes active only when a relative resource shortage occurs, caused, for example, by increase in competition or decrease in harvestable surplus. The following diagram might aid in applying the subsistence law.

Relative abundance of resource	Board action	Priority status
1. No shortage*	Regulations allowable (for example, setting areas and seasons)	Subsistence uses must be allowed, but priority inactive; other uses may be allowed
2. Shortage*	Restrictions necessary	Subsistence uses must be allowed, with a priority over other uses which are allowed
3. Greater Shortage*	Further restrictions necessary	Only subsistence uses are allowed, with priority distinguishing among subsistence users.

4.	Critical Shortage*	Total closure necessary	No uses may be allowed

---

* Shortage means 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 diagram is based upon the first sentence of AS 16.05.251(b) and 255(b):

> The Board . . . shall adopt regulations . . . permitting . . . subsistence uses unless . . . such regulations will jeopardize . . . the . . . sustained yield. . . .

Part 1 of the diagram reflects that when there is no relative shortage of fish or game, the boards are required by these statutes to allow opportunities for subsistence uses and may under AS 16.05.251(a) and .255(a) allow opportunities for non-subsistence uses. Subsistence uses are identified by the eight criteria which the boards established in 5 AAC 99.010(b). In a non-shortage situation the priority is not active under state law, nor under the federal Alaska National Interest Lands Conservation Act, Title VIII (ANILCA). The ANILCA provision, which parallels AS 16.05.251(b) and 255(b) is §804. Regarding that provision, the Senate committee report states:

> If a particular fish or wildlife population . . . in a particular area is sufficient to sustain a harvest by all persons engaged in subsistence and other uses, the implementation of restrictions on taking set forth in this section need not be imposed by the state rulemaking authority.

S.Rep.No. 413, 96th Cong., 1st Sess. 269 (1979).

As with other uses, regulation of subsistence uses even when there is no relative shortage is authorized. Regulations should be structured to provide opportunities for customary and traditional uses (for example, through the setting of areas and seasons); unconstrained harvests were not contemplated by the legislature. Indeed, regulation of subsistence uses on a case by case basis has been and is part of sound resource management, and was expected by the legislature. For example, the introduction

to Alaska's subsistence law, SLA 1978, Chapter 151, Section 1, states that beneficial use of Alaska's fish and game resources by all state residents "should be carefully monitored and regulated . . . ." The Board of Fisheries has adopted regulations called "subsistence fishing regulations." The Board of Game has generally regulated subsistence uses without designating the regulations as "subsistence regulations." The fact that subsistence uses are to be allowed by the boards does not amount to a guarantee that each participant will achieve a particular harvest. Rather, it is the opportunity to engage in customary and traditional uses which is assured, as long as sustained yield of the resource is not thereby jeopardized. 5 AAC 99.010(c).

Part 2 of the diagram is based upon the second sentence of AS 16.05.251(b) and 255(b):

> Whenever it is necessary to restrict the taking . . . to assure the . . . sustained yield . . . or . . . the continuation of subsistence uses of such resources, subsistence use shall be the priority use.

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 comes into play. The boards can use any of the many management options available to them in imposing the needed restrictions on non-subsistence uses and in continuing to regulate subsistence uses in a way that protects the opportunity for subsistence harvests. For example, seasons could be altered, or the use of aircraft prohibited. Of course, in extreme cases the option of precluding non-subsistence harvests remains available.

Part 3 of the diagram is based upon the third sentence of AS 16.05.251(b) and 255(b):

> 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 more serious resource shortage resulting from greater increase in competition or decrease in harvestable surplus may require still further restriction of harvest opportunities. If so, subsistence uses will be the last to be precluded. At the point that only subsistence uses remain, the criteria listed in the statute would form a basis for distributing the allowable harvest among subsistence users. This is the only point at which the boards may make distinctions among users based upon their individual characteristics, rather than distinguishing among uses by examining the characteristics of those uses.

Part 4 of the diagram reflects the underlying constitutional and statutory mandate that sustained yield is always the paramount concern. Alaska Constitution, Article VIII, Section 4; AS 16.05.251(b) and .255(b). If the status of a fish or game resource is such that maintenance of sustained yield requires that all harvest cease, no use (including subsistence) may be allowed.

We hope this diagram and explanation clarify that under the subsistence law, the priority becomes active only in times of relative resource shortage.

LIS/jmo

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

March 8, 1985

M E M O R A N D U M

TO: Honorable Bill Sheffield
Governor

FROM: Norman C. Gorsuch
Attorney General

RE: Attached bill regarding the taking of fish and game for subsistence and personal use
Our file: 377-176-85

Attached is a bill regarding the taking of fish and game for subsistence and personal use. It was requested in order to return to the Boards of Fisheries and Game the regulatory authority they had exercised before Madison v. Alaska Department of Fish and Game, Supreme Court Opin. No. 1911 (Alaska, February 22, 1985).

This bill would allow the boards to continue implementing the law as they had before Madison, by (1) specifying that subsistence uses are customary and traditional uses of fish and game by rural Alaska residents, and (2) statutorily establishing personal use fishing as a means for the Board of Fisheries to provide access to fish by nets or other means for personal use for Alaskans throughout the state. The combination of these two amendments would return fish and game regulatory authority to its pre-Madison status.

A draft transmittal letter to the legislature, explaining the bill in more detail, is also attached.

NCG:LIS:dlm

cc w/enc.: Honorable Don Collinsworth
Commissioner
Department of Fish and Game

D R A F T

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

377-176-85

[redacted]

Introduced: 3/13/85
Referred: State Affairs, Resources, Judiciary and Finance

referred to house = resources and judiciary

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 231 (House bill 238)

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

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).

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;

USC 1601 ite.

(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

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 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

16 USC 3113.

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—

(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

16 USC 3114.

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:

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 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.

Implementation.

(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.

Reimbursement to States.

(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.

Report to Congress.

(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.

FEDERAL MONITORING

Report to congressional committees.
16 USC 3116.

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

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

6 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

ubsistence unting pro- ram.

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

16 USC 3119.

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.

SUBSISTENCE AND LAND USE DECISIONS

16 USC 3120.

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—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

Hearing.

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(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.
2 USC 4332.

(b) 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 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.

Publication in Federal Register.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

REGULATIONS

16 USC 3124.

SEC. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title.

LIMITATIONS, SAVINGS CLAUSES

16 USC 3125.

SEC. 815. Nothing in this title shall be construed as—

(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 or 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. 1187), 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), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

C 3126. SEC. 816 (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

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TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

SUBMERGED LANDS STATUTE OF LIMITATION

1631. SEC. 901. (a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to 1601 the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years 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 the date of enactment of this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action.

(b) No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to the date of enactment of this Act. The execution of an interim conveyance or patent (whichever is executed first) by the Bureau of Land Management conveying a parcel of submerged land to a Native Corporation or Native Group shall be the final agency action with respect to a decision by the Secretary of the Interior that the water covering such parcel is not navigable, unless such decision was validly appealed prior to the date of enactment of this Act to an agency or board of the Department of the Interior other than the Bureau of Land Management. 43 USC 1601 note.

(c) If the court determines that a parcel of submerged land which is the subject of a civil action described in subsection (a) is owned by the Native Corporation or Native Group to which it was conveyed pursuant to the Alaska Native Claims Settlement Act or this Act, each defendant Native Corporation and Native Group shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal. Costs and attorney fees. 43 USC 1601 note.

(d) No Native Corporation or Native Group shall be determined to have been conveyed its acreage entitlement under the Alaska Native Claims Settlement Act until—

(1) the statutes of limitation set forth in subsection (a) have expired with respect to every parcel of submerged land conveyed to such Corporation or Group; and

(2) a final judgment or order not subject to an appeal has been obtained in every civil action filed pursuant to subsection (a).

(e)(1) Whenever a parcel of submerged land to be conveyed to a Native Corporation or Native Group is located outside the boundaries of a conservation system unit such Corporation or Group and the State of Alaska may mutually agree that such parcel may be selected by and conveyed to the State under the provisions of section 6(b) of the Alaska Statehood Act. Agreements or reconveyances with State. 48 USC note prec. 21.

(2) In any instance in which the State could have selected a parcel of submerged land pursuant to an agreement between the State and a Native Corporation or Native Group pursuant to paragraph (1) if such parcel had not previously been conveyed to such Corporation or Group, such Corporation or Group is authorized to reconvey such parcel to the Secretary, and the Secretary shall accept such reconveyance. If the surface estate and subsurface estate of such parcel are owned by different Native Corporations or Native Groups, every Corporation and Group with an interest in such parcel shall reconvey its entire interest in such parcel to the Secretary.

(3) In any agreement made between a Native Corporation or Native Group and the State of Alaska pursuant to paragraph (1), and in any reconveyance executed by a Native Corporation or Native Group pursuant to paragraph (2), each affected Corporation or Group shall disclaim its interest in the parcel which is the subject of the agreement or reconveyance. If such parcel underlies a lake having a surface area of fifty acres or greater or a stream having a width of three chains or greater, the Secretary shall determine the acreage

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, 1985

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 Cooperati

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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;

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>
> (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 AC 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.

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 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;

(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 all 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 indica ed 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 Gjosund) 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.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

September 23, 1985

Honorable Bill Sheffield
Governor of Alaska
Juneau, Alaska 99811

Dear Governor Sheffield:

On May 14, 1982, former Secretary of the Interior James Watt certified that the State of Alaska's subsistence program complied with the requirements of sections 803, 804 and 805 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. SS 3113, 3114 and 3115. Accordingly, the State has for the last three years assumed primary responsibility for the management of the program providing the preference for subsistence uses on the public lands in Alaska. Unfortunately, the Department of the Interior finds it necessary to advise you formally that the State subsistence program is no longer in compliance with the requirements of ANILCA as specified in Title VIII.

As you are aware, the Alaska Supreme Court, in Madison v. Alaska Department of Fish and Game, 696 P.2d 168, Op. No. 2911 (Alaska Feb. 22, 1985), invalidated a State Board of Fisheries regulation designed to determine eligibility for subsistence fishing in the Cook Inlet Region because the regulation was inconsistent with the State subsistence statute. This ruling held that under the State statute the subsistence preference must be extended to both "rural" and "urban" subsistence users. Because section 803 of ANILCA limits the subsistence preference to "rural Alaska residents," the Madison decision raised questions as to the continuing eligibility of the State to manage subsistence on public lands in Alaska under section 805(d) of ANILCA. In an effort to determine the State's views on this issue prior to Departmental action, I requested on April 7, 1985, the legal opinion of the State Attorney General on the effect of the Madison decision. To date we have received no formal response from the State on the effect of Madison on the State's eligibility under section 805(d) of ANILCA. We did receive a letter outlining the administrative actions taken by the State in the wake of Madison but it offered no opinion regarding compliance with Title VIII. Nonetheless, the absence of legislative action this year to amend the State subsistence statute to conform to ANILCA has confirmed our preliminary determination that the State is no longer in compliance with the requirements of section 805(d).

You are hereby advised that the State has until June 1, 1986, to revise its subsistence program to bring it back into compliance with the requirements of sections 803, 804 and 805 of ANILCA. Compliance will require that the subsistence preference be limited to those rural Alaska residents who customarily and traditionally make use of subsistence resources. If the State has not conformed its subsistence program to the requirements of ANILCA by that date, the Department will be obligated to discharge its obligations pursuant to section 805. As we noted to the State Boards of Fisheries and Game in 1982, there are various ways to comply with the requirements of section 805; the regime in force when the Madison decision was handed down represented one possible approach. I am confident and hopeful that the State can make the necessary changes in its program within this period, and I offer the full cooperation and assistance of the Department in this effort.

The Department has concluded that section 805(d) does not require an immediate Federal take over of the subsistence program, given the circumstances by which non-compliance with the ANILCA requirements has occurred. Section 805(d) provided the State with a one year period of grace following enactment of ANILCA in order to give the State an adequate amount of time to prepare and implement a program that met the requirements of ANILCA. After successfully establishing an adequate program, the State made a good faith effort to keep in compliance with the requirements of Title VIII of ANILCA. Indeed, the recent problems that have befallen the State's program have not been the result of legislative repeal of the program; instead, an unexpected State Supreme Court ruling in a case that was vigorously defended by the State has altered the State's subsistence program and created a non-compliance situation. Under these circumstances, we are persuaded that the spirit and intent of section 805(d) warrants a grace period in order to provide the State with a reasonable opportunity to make the necessary adjustments to its program. We have chosen as a deadline June 1, 1986, because it is roughly one year from the time the State legislature failed to rectify the State subsistence statute.

This course of action is further justified due to the fact that it appears unlikely that any adverse impact on rural subsistence uses will occur during the grace period. The State subsistence program will continue to ensure that the Title VIII class of rural subsistence users are able to hunt, trap, and fish for necessary resources. The problem is that the Madison decision permits urban residents to be included in the subsistence class, contrary to the requirement of ANILCA that the preference be limited to rural residents. My decision that a grace period is warranted would, of course, have to change if significant adverse impacts on rural, customary and traditional subsistence users and on subsistence resources subsequently become apparent.

I fully expect that the State, in cooperation with the Department, will bring its subsistence program back into compliance with the requirements of Title VIII of ANILCA prior to June 1, 1986. I have, however, directed the U.S. Fish and Wildlife Service, in cooperation with the Office of the Solicitor, to begin preparation of a contingency plan for providing the subsistence preference on public lands that meets the requirements of ANILCA. My goal is to ensure that, in the event that the State is not able to bring its program into compliance by June 1, 1986, the Department is ready and able to discharge effectively its obligations under sections 803, 804 and 805 of ANILCA.

As a matter of information, the Madison ruling does not expand eligibility to pursue subsistence activities in those national parks and monuments where subsistence taking is authorized. Eligibility to engage in subsistence activities within those units of the National Parks System in Alaska is still determined pursuant to Federal regulations issued in 1981, since the State of Alaska never sought to acquire control of this aspect of the ANILCA subsistence program.

I regret the unexpected decision by the Alaska Supreme Court in the Madison case that has moved the State subsistence program out of compliance with the requirements of ANILCA. I am confident, though, that the State will be able to bring its program back into compliance by within one year.

Sincerely,

Bill Horn

William P. Horn
Assistant Secretary
Fish and Wildlife and Parks

cc: AK Delegation
CHM-Sen Energy
CHM-House Interior
Ranking Minority of both Committees
Asst. Sec, Peter Myers, U.S. Dept. Agriculture

Alaska State Legislature

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House of Representatives

CHAIRMAN
SPECIAL COMMITTEE
ON FISHERIES

MEMBER
TRANSPORTATION
COMMITTEE

DISTRICT 28

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ALEKNAGIK
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DILLINGHAM
DUTCH HARBOR
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EKWOK
FALSE PASS
IGIUGIG
ILIAMNA
KING COVE
KING SALMON
KOKHANOK
KOLIGANEK
LEVELOCK
MANOKOTAK
NAKNEK
NELSON LAGOON
NEWHALEN
NEW STUYAHOK
NIKOLSKI
NONDALTON
PEDRO BAY
PILOT POINT
PORT ALSWORTH
PORT HEIDEN
PORT MOLLER
PORTAGE CREEK
SAND POINT
SOUTH NAKNEK
SQUAW HARBOR
ST GEORGE
ST PAUL
TOGIAK
TWIN HILLS
UGASHIK
UNALASKA

MEMORANDUM

TO: Representative Ben Grussendorf
Speaker of the House

FROM: Representative Adelheid Herrmann
Co-Chair, House Resources Committee

DATE: April 29, 1985

SUBJECT: Chronology of Events on House Bill 288, An Act relating to the Taking of Fish and Game for Subsistence and Personal Use

As Co-Chair of the House Resources Committee, I would like to report to that I am satisfied that House Bill 288, an act relating to the taking of fish and game for subsistence and personal use, was given a thorough review in committee, and that ample time for public testimony was provided. We held a total of seven hearings on this bill, many lasting for hours at a stretch, and this is considerably more than the committee has devoted to any other bill this session. Extras meetings were scheduled in order to accommodate the interests of the public in this bill, and I am pleased to say, that despite the extra hours, the meetings were well attended by members.

Four of the seven hearings were statewide teleconferences that were devoted to taking testimony from the public. By way of the teleconference, the committee heard approximately ten hours of testimony from members of the public alone. In addition another seven hours were spent taking testimony from expert witnesses. Our final meeting was a marathon five hour meeting at which time we addressed all concerns and a total of nine amendments raised by committee members.

With the exception of the final hearing, all the other hearings were part of the teleconference network. Three of these were provided to give the public an opportunity to testify, and another three of these were made available so that the public could listen to the committee take testimony from expert witnesses. In addition, throughout the committee process written testimony and letters were reviewed and included as part of the record and as a part of members' files.

The committee heard from many in favor of the bill and from many against, but also from many who had no position but just comments or insights to offer. Testimony was taken from across the state and ended early on one occasion because no one else wished to testify, and was extended on another occasion in order to give everyone a chance to speak.

I was pleased that after these lengthy deliberations the committee saw fit to move the bill out as was indicated by a seven to one vote. The summary of the committee report with members signing with individual recommendations is discussed below.

Because of the interest in this legislation, I am providing an account of each meeting in summary form, and each amendment addressed by the committee. Should you find any additional information helpful, please do not hesitate to contact me.

1st Hearing

March 25, 1985
8:30 AM to 9:47 AM
1 hour and 15 minutes
Statewide Teleconference
Short statements by representatives of:
the Department of Fish and Game
the Department of Law
the Board of Fisheries
Opened up for witness testimony beginning with those witnesses present in Juneau
Witness Register and minutes attached
No action on the bill

2nd Hearing

March 26, 1985
8:30 AM to 9:58 AM
1 hour and 38 minutes
Statewide Participation Teleconference
Witness Register and minutes attached
No action on the bill

3rd Hearing

April 2, 1985
8:30 AM to 9:55 AM
1 hour and 25 minutes
Statewide Listen-In Teleconference
Testimony from attorneys involved in the case (other than the Attorney General): Chuck Robinson, Martin Friedman, and, Don Mitchell
No action on the bill

4th Hearing

April 4, 1985
8:39 AM to 11:54 AM
4 hours and 15 minutes
Testimony ended 35 minutes earlier than scheduled, witness testimony was exhausted.
Statewide Public Participation Teleconference
Draft Witness Register attached
No action on the bill

5th Hearing

April 8, 1985
5:30 PM to 9:07 PM
3 hours and 37 minutes
Scheduled time for testimony was extended to accommodate everyone who signed up to testify
Statewide Public Participation Teleconference
Draft Witness Register attached
No action on the bill

6th Hearing

April 9, 1985
8:32 AM to 9:58 AM
1 hour and 26 minutes
Statewide Listen-in Teleconference
Testimony from the Department of Fish and Game and the Department of Law
No formal action on the bill, although the committee did agree to drafting a committee substitute to include a definition of rural presented to the committee by Representative Goll. Representative Goll also suggested language for a letter of intent.

7th Hearing

April 13, 1985
1:13 PM to 6:10 PM
4 hours and 57 minutes
The committee addressed all amendments presented and a letter of intent. A summary of the ten amendments is provided below.
The committee moved to pass the bill out with individual recommendations and requested staff to redraft a letter of intent which was approved by the committee on Monday April 15.

For your convenience, I am providing the list below as a summary of the amendments addressed by the committee on this bill. For the purposes of this summary, the amendments are paraphrases. For the exact wording, please refer to the minutes.

Amendment 1

by Shultz: would have set a population limit of 5,000 to define rural communities.

failed by a 7 to 1 vote.

Amendment 2

by Shultz: would have included in the personal use fishery those fishing with hand held hook and line.

failed by a 5 to 3 vote.

Amendment 3

by Shultz: would have established a priority for allocating fish and game stocks for commercial uses by residency.

failed by a 6 to 2 vote.

Amendment 4

by Shultz: inserted the word "non-commercial" into the definition of subsistence uses so that subsistence would mean the "customary and traditional noncommercial uses of..resources..."

passed by a 5 to 3 vote.

Amendment 5

by Shultz: would have deleted language in the findings so that the paragraph would have addressed the importance of fish and game stocks to all Alaskans instead of those domiciled in rural communities or areas.

failed by a 6 to 2 vote.

Amendment 6

by Jenkins: would have defined priority as a preferred rather than as an "exclusive" use, and would have required that when restrictions were necessary that they be on a step by step basis.

failed by a 4 to 4 vote.

Amendment 7

by Sund: in the definition of subsistence uses this amendment changed "an Alaskan domiciled in rural areas of the state," to "a resident domiciled in a rural area of the state..;" also, added the following definition: "rural area" to means a community or area of the state in which the taking of fish or wildlife for personal and family consumption is a significant characteristic of the economy of the community or area."

passed by a 7 to 1 vote.

Amendment 8

by Shultz: would have added language to require that subsistence taking of the resource be "by customary and traditional methods."

failed by a 6 to 2 vote.

Amendment 9

by Jenkins: would have included a "sunset clause enacting this legislation until October 31, 1985 at which time it would be replaced with the existing law.

failed by a 6 to 2 vote.

Letter of Intent

the committee agreed to adopt the letter of intent conceptually. This was approved in final form on Monday, April 15. At the hearing April 13, the committee agreed to pass out the letter of intent by a 7 to 1 vote.

Motion to Pass the Bill

The motion to pass the bill from committee with individual recommendations was passed by a 7 to 1 vote.

Individual Recommendations on the Committee Substitute and the Letter of Intent

Representative Herrmann, Co-Chair - Do Pass
Representative Cato - Do Pass
Representative Thompson - Do Pass
Representative Sund - Do Pass
Representative Wallis - Do Pass
Representative M.W. Miller - Do Not Pass
Representative Drue Pearce - Do Not Pass Without Amendment
Representative Roger Jenkins - Do Not Pass
Representative Dick Shultz, Co-Chair - Do Not Pass Unless Amended

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 24, 1986

Honorable Tim Kelly
Chairman, Senate Rules Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 288 (Subsistence)

Dear Senator Kelly:

The subsistence bill (HB 288) has been transmitted to the Senate Rules Committee from the Judiciary Committee. Attached for your information is a briefing paper on the background of HB 288, which I introduced last year to solve the problems created by the Madison case. However, I have grave concerns about the recent Senate Judiciary Substitute for HB 288, which does not comply with ANILCA and which would result in federal takeover. (See the discussion in part VII of the attached background briefing.)

The federal government has indicated that it is gearing up to assume management of fish and wildlife on federal lands and waters -- which make up at least 60% of the state -- as of June 1, unless Alaska's statutes are brought into alignment with the requirements of the federal subsistence law. I therefore strongly urge your committee to adopt a substitute for HB 288 that deletes the language in the Judiciary Substitute on page 4, lines 10 through 27, and to pass it on to the Senate floor as soon as possible. Such an amendment is essential to achieve a bill that is constitutional, enforceable, complies with ANILCA, and returns to the Boards of Fisheries and Game the flexibility to treat all Alaskans fairly.

Sincerely,

Bill Sheffield
Governor

Enclosure

Background Briefing on

HB 288 (Subsistence)

I. Introduction

In February 1985 the Alaska Supreme Court interpreted the state subsistence law for the first time in Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985). The decision caused numerous problems for the state, which the governor sought to address in House Bill 288. The bill passed the House in 1985 and the Senate is currently considering it. This analysis describes the effect of Madison, the goals of the Governor's bill, how the Senate Resources Committee substitute for HB 288 would work if enacted, and the serious problems with the Senate Judiciary Committee substitute.

II. The Situation Before Madison

A. The state statutes: In 1978, the legislature enacted a state subsistence law which did four things.

1. It defined subsistence uses as "the customary and traditional uses" of fish and game for

food, clothing, trade and other specified purposes.

2. It required the Boards of Fisheries and Game to authorize subsistence hunting and fishing, unless sustained yield would be threatened.

3. It required that in cases of relative resource shortage, subsistence uses would have priority over other uses.

4. In situations where only subsistence uses could be authorized and not all those eligible for subsistence could be allowed to hunt and fish, it required that the boards determine who should be authorized to harvest based on three criteria: dependence, local residency, and available alternatives.

B. The boards' interpretation: The boards adopted a joint procedural regulation interpreting the subsistence law. The regulation did several things.

1. It limited subsistence uses to "customary and traditional uses by rural Alaska residents."

2. It listed eight criteria the boards would use to identify subsistence uses of a community or area, such as skills being passed from generation to generation, and reliance on a wide diversity of resources.

3. It clarified that the boards would provide a reasonable opportunity for subsistence, unless the resource would be jeopardized.

4. It clarified that subsistence uses could not be cut back until all other uses were first cut back, and, if necessary, eliminated. Subsistence uses would be the last to go in times of limited resources.

C. Personal use: The Board of Fisheries in regulation established the personal use fishing category, so that people from areas which did not have subsistence uses (for example, the Fairbanks people who fish at Chitina) would be able to harvest fish with efficient means, such as nets, for their own use, without a priority. The board could allocate among personal use, sport, and commercial fishing in its reasonable discretion in any particular situation.

III. Madison

A. The decision: The Alaska Supreme Court ruled that the state legislature in 1978 had not intended that subsistence be limited to rural customary and traditional uses, and did not mean for it to be authorized on a community or area basis.

B. ANILCA consequences: ANILCA allows the state to continue managing fish and game on all land and water in Alaska if the state provides in a law of general applicability, among other things, the same definition of subsistence uses as appears in ANILCA, "customary and traditional uses by rural Alaska residents" of fish and game.

C. Harvest disruptions: Madison in combination with State v. Eluska 698 P.2d 174 (Alaska App. 1985) resulted in extensive disruptions in 1985 of harvest opportunities.

1. Eluska held that the Board of Game had to have a separate set of regulations for subsistence uses, and could not simply accommodate subsistence through the general hunting regulations, and it also held that unless subsistence hunting regulations were

adopted, people could raise the "subsistence defense" in prosecutions for out-of-season hunting.

2. Since Madison meant that hunting by all Alaskans for food was subsistence hunting, action by the Board of Game in response to Eluska resulted in numerous "tier 2" hunts.

   a. The statutes' three criteria (dependency, local residency, and alternative resources) were used in a point system to rank everyone who wanted to participate in those hunts and to decide who could participate.

   b. The board could not after Madison use permit drawing lotteries, which had been a standard tool in selecting which non-rural Alaskans could hunt, for example, the Nelchina caribou.

3. Further disruptions can be expected, since at least one lower court has interpreted Madison to give sport fishing by Alaska residents a priority over commercial fishing. State v.

Skuse, 3KN-85-1111 CR (January 17, 1986).

IV. The Governor's Bill

Shortly after Madison, the Governor introduced HB 288, designed solely to address the problems created by Madison.

A. It would amend the definition of "subsistence uses" in statute to clarify that they are the customary and traditional uses by rural Alaska residents of fish and game.

B. It would add a definition of "personal use fishing" to the statutes to provide a category for non-rural Alaskans to harvest fish for their own use by efficient means, such as nets.

1. For example, the residents of Fairbanks and other parts of Alaska have long fished with dip nets at Chitina for salmon, and the residents of Kenai and Anchorage have long fished with gill nets in Cook Inlet for salmon.

2. The category would be used in the board's discretion on a situation by situation basis, along with sport and commercial fishing, and none would automatically be the last priority, nor the second priority to subsistence.

V. The Senate Resources Substitute Compared to the Governor's Bill

A. Similarities: The Senate Resources Substitute does accomplish the two necessary results which the Governor's bill addressed. It:

1. Adds a clarification that "subsistence uses" are uses of fish and game by rural Alaska residents.

2. Establishes as a definition of "personal use fishing" in statute.

B. Differences: The Senate Resources Substitute also substantially reorganizes the current statutes in ways not necessary to address Madison. It additionally provides the following:

1. Requires the boards to identify fish stocks and game populations used for subsistence.

   a. This should not result in ANICLA problems if the identification process takes into account the fluctuations which Congress recognized are inherent in subsistence uses, which are often dependent on the sporadic movement of game over time (e.g. the varying migration patterns of caribou).

   b. This should not result in implementation problems if the intent is an ongoing identification process as data becomes available.

2. Authorizes the boards to establish an administrative appeal process.

   a. This could be cumbersome to implement.

   b. This would be redundant to the reconsideration and petition procedures already in existence.

3. Prohibits the use of the "subsistence defense" by individuals being prosecuted for violations of a statute or regulation.

   a. People who feel the regulations do not adequately accommodate a reasonable opportunity for subsistence may submit a proposal or a petition to the appropriate board requesting change.

   b. People still unsatisfied by the board response may file a civil suit challenging the regulation.

4. Mandates that the boards require subsistence permits in many situations where the boards may not find that useful.

   a. The boards already may require subsistence permits when useful.

   b. This would burden the public with extra paperwork.

   c. This could be difficult to implement and administer, if the boards required

individual permits in all cases instead of community or area permits.

5. Requires the Board of Fisheries to adopt criteria upon which to base its allocation decisions.

6. Makes explicit the existing requirement that non-subsistence uses -- sport, commercial, and personal use -- be treated fairly.

7. Provides that Alaska residents have a preference over non-state residents in the use of moose, caribou, elk, and deer consistent with and in addition to the subsistence preference.

VI. The Senate Resources Substitute: How Subsistence Uses Would Be Identified and Regulated

A. The Boards of Fisheries and Game would be required to adopt subsistence regulations

1. The Senate Resources Substitute requires the Boards of Fisheries and Game to adopt subsistence fishing and hunting regulations for each fish stock and game population which

has been subject to subsistence uses, and for which there is a "harvestable portion." Subsistence regulations would have to provide a reasonable opportunity to satisfy subsistence uses (AS 16.05.258(c)).

2. The bill also clarifies that subsistence hunting and fishing are subject to reasonable regulation of seasons, catch or bag limits, and methods and means (As 16.05.258(f)).

B. The bill sets out procedural requirements for the boards to follow in developing subsistence regulations

1. The bill requires the boards to make several specific findings in adopting subsistence regulations. Under AS 16.058(a)and(b), the boards must;

   a. identify the specific fish stocks and game populations or portions of stocks and populations which have been customarily and traditionally used for subsistence in each rural area;

b. determine what portion, if any, of these stocks and populations can be harvested consistent with sustained yield;

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

2. In making these findings the boards will have to identify, by community or area, the residents "domiciled in a rural area of the state" who are engaged in subsistence uses of the fish stocks or game populations for which regulations are being developed. This will require the boards to determine which areas of the state are rural and which uses of fish and game are subsistence uses.

C. The bill changes the definition of "subsistence uses" and adds a definition of "rural area."

1. "Subsistence uses" are defined as the "noncommercial, customary and traditional uses of wild renewable resources by a resident domiciled in a rural area of the

state for direct personal or family consumption as food, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption" (AS 16.05940(23)). (The new portions are underlined.)

2. "Rural area" is defined in the bill as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principle characteristic of the economy of the community or area" (AS 16.05.940(23)). This is very similar to the definition used in the Governor's bill, except for the term "principal", which replaced the term "significant" in the Governor's bill.

D. The boards could use the eight criteria to identify subsistence uses and rural areas.

1. The Senate Resources version clarifies that definition of subsistence uses has been narrowed to rural areas, as the boards were doing by regulation before the Madison decision. The boards could therefore go back to identifying subsistence uses using the eight criteria set out in the joint boards procedural regulation (5 AAC 99.010) discussed in II(B) above.

2. The boards could therefore implement this section of the bill by using the eight criteria, or a similar regulation, to determine, area by area, which uses of fish and game qualify as subsistence uses by the people living in the area.

3. This section also clarifies that the boards have the authority and flexibility to evaluate the facts and determine that there are no subsistence uses on some stocks or populations or portions of stocks or populations. For example if bison, sheep or goat populations are not customarily and traditionally used by residents of rural areas the Board of Game does not need to

adopt subsistence regulations for these populations.

4. If there are customary and traditional uses by particular communities or areas of stocks or populations the boards must provide reasonable opportunities for rural residents in those areas to satisfy their subsistence uses.

5. In making the required findings, the boards would rely heavily on information from the public, the fish and game advisory committees, the regional councils, and the Department of Fish and Game, including the Division of Subsistence.

6. The boards would have to determine, based on this information, whether regulations provide a reasonable opportunity to satisfy subsistence uses, or whether they restrict ("significantly impair") subsistence uses.

E. <u>The bill continues to provide a preference for subsistence uses.</u>

1. The preference for subsistence uses would operate as it does in the existing statute.

2. Non-subsistence uses of fish stocks and game populations can be authorized by the boards as long as there is enough of the resource to accommodate subsistence uses.

3. If there is not enough of a fish stock or game population to accommodate all consumptive uses, then regulations must give subsistence uses a preference over other consumptive uses and provide a reasonable opportunity to satisfy the subsistence uses (AS 16.05.258 (c)). This situation, when all subsistence uses can be accommodated, has been called "Tier One."

4. The boards can use a wide range of regulatory options to provide for subsistence uses and the Tier One preference, including limiting transportation methods, providing winter hunting seasons, and providing different seasons or larger bag limits to rural residents.

5. All non-subsistence hunting or fishing must be closed before subsistence uses can be restricted ("significantly impaired").

6. If it is necessary to restrict ("significantly impair") subsistence uses in order to assure sustained yield or continue subsistence uses, the boards must distinguish among subsistence users by applying the following criteria:

   a. customary and direct dependence on the fish stock of game populations as the mainstay of livelihood;

   b. local residency; and,

   c. availability of alternative resources.

7. The situation where not all subsistence users can hunt or fish has been called Tier 2. With a rural definition Tier 2 situations would not occur in as many areas, or be as disruptive as they were in 1985 under Madison, because the group to be protected would be so much smaller.

VII. The Senate Judiciary Welfare Amendment

The Senate Judiciary Committee amended the Senate Resources Substitute to provide that people whose family's gross income is above 130% of the federal poverty level (which changes depending on other indices) will not qualify for subsistence hunting and fishing. This raises the following major problems.

1. An income level test is inconsistent with ANILCA, and would mean federal takeover. Congress clearly stated that ANILCA:

   "requires that regulatory systems which employ income requirements not be imposed upon rural residents. Income requirements are by their very nature capricious classifications in rural Alaska..."

   126 Cong. Rec. H10546 (daily ed. Nov. 12, 1980).

2. An income level test will result in families making more than the specified amount a year no longer qualifying for subsistence hunting and fishing even if they had relied upon subsistence in the past.

3. Any income level test is likely to violate equal protection.

   a. Any income chosen is likely to be arbitrary and not linked to patterns of use and reliance on fish and wildlife.

   b. Great variances in income, employment opportunities, and cost of living in different areas of the state would make it impossible to establish a single state-wide standard of economic need which would treat people similarly situated to fish and game resources alike.

4. A definition based on income is not consistent with reality in bush areas of Alaska.

   a. Often the most successful members of communities are the most productive in terms of income and in terms of harvest, which is shared throughout the community.

   b. In bush Alaska, even people with reasonably high incomes do not have

supplies available to buy with the money.

c. Hunting and fishing is not viewed as a subsidy, but rather as a way of life, in those bush areas.

d. A definition based on need would disrupt long established social and economic patterns in those bush areas.

5. Administrative problems would arise in constructing a system which would accurately identify individuals eligible under some kind of income level test; a system which was geared to be accurate would also be intrusive into people's lives in that some verification of income level might be necessary.

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510

April 29, 1986

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

Dear Ben:

As the end of your session draws near, I am growing increasingly concerned that the Legislature may not take final action to bring Alaska's existing subsistence law into compliance with the subsistence title of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). As you know, if the Legislature does not act by June 1, the federal government will be required to assume regulatory control of fishing and hunting on federal lands in Alaska to ensure the continuation of the federal subsistence preference. Such a takeover would have a devastating effect on state control of fish and wildlife management in Alaska.

From the moment Alaska became part of the Union, as Alaskans, we have had to fight to retain traditional state fish and wildlife management authority. The Statehood Act included a provision that expressly delayed transfer of that authority to the new State of Alaska until the Secretary of the Interior certified to Congress that the Alaska State Legislature had made adequate provision for the conservation of Alaska's fish and wildlife resources. At that time, I was an assistant to the Secretary and obtained certification rapidly. Our new state then went on to build a management program that achieved worldwide recognition.

The second great challenge to Alaska's traditional fish and wildlife management authority came in the late 1970s during the Alaska lands controversy. Maintenance of that authority on all lands in Alaska was one of the major goals of the Alaska Lands Resolution that our Legislature adopted in 1979.

The extreme environmentalist bloc that dominated consideration of the Alaska lands issue in the House of Representatives refused to affirm state management authority and proposed granting the Secretary of the Interior new authority to close federal lands in Alaska to hunting and fishing. Through great effort, Alaska's Congressional Delegation was eventually able to overcome this bloc and secure the inclusion of language in ANILCA that recognized and affirmed the traditional authority of the State to manage fish and wildlife on federal lands within its borders, subject to the provisions of ANILCA's subsistence title.

I opposed the addition of a comprehensive federal subsistence title to the Alaska lands bill. (You'll recall that the State adopted its own comprehensive subsistence preference program in 1978 before the passage of ANILCA in 1980.) When it became clear that a comprehensive subsistence title would be included in the final bill, the Alaska Congressional Delegation did all we could to limit the impact of that title on state fish and wildlife management authority. As enacted into law, the subsistence title did not require the State to change its subsistence law. The Interior Department was able to certify state compliance with the federal subsistence preference without requiring changes in state statutes.

The subsistence title requires federal intervention only if Alaska fails to maintain a subsistence program that gives preference to customary and traditional uses of fish and wildlife by rural Alaska residents. The State has substantial discretion to define the scope of this preference.

The subsistence title does not immunize subsistence activities from state regulation, nor does it grant rural Alaska residents an absolute right to take as much fish and wildlife as they want. The State is completely free to regulate subsistence activities to prevent waste and to maintain the health of wildlife and fish populations. The only limitation imposed on the State's authority is that during a period when harvest of a fish or wildlife population must be restricted for biological reasons, the traditional and customary level of nonwasteful subsistence use of the resource must be the last consumptive use reduced.

Sports hunters and fishermen will be the big losers if Alaska does not meet the June 1 deadline for compliance with the federal subsistence preference. The Fish and Wildlife Service has informed my office that even if a federal takeover proceeded smoothly -- which is unlikely -- sports hunting and fishing seasons throughout Alaska would be closed during the transition period. It could take years to straighten out the regulatory mess created by a federal takeover. And, regardless of what happened to sports hunting and fishing, subsistence hunting and fishing would continue.

Over the long term, a federal takeover will seriously erode the principle of state primacy in fish and wildlife management -- a principle that we have defended, at considerable cost, since statehood. First, the longer such a takeover persists, the more accustomed federal land managers will become to intervening in state fish and wildlife management decisions. Even if the takeover eventually ends, that precedent will haunt us for decades to come.

Second, nothing in existing law provides for a return of management authority to the State after a federal takeover has occurred. In my judgment, if the State forfeits its present authority by failing to maintain a state subsistence preference that complies with ANILCA, powerful extremist groups will argue in the courts and in Congress that the Department of the Interior must retain that authority permanently.

Third, even if management authority can eventually be returned to the State, the Interior Department will still have to certify the State's compliance with the federal subsistence preference. Obviously, that means that the Legislature will have to approve a new subsistence law. If control of the Interior Department shifted after the 1988 elections in a way that greatly increased the influence of the extreme environmentalists, the certification process would, I feel, be used to extract major resource management concessions from our state.

You know that I try to refrain from comment on matters pending before the Legislature. I speak in this case only because of the substantial federal issues involved in the subsistence debate.

If a federal takeover occurs, the Legislature will have to approve a new subsistence law in order to regain Alaska's fish and wildlife management authority. In light of that fact, I cannot understand the logic of allowing a federal takeover now that will permanently damage the principle of state primacy in fish and wildlife management. The Legislature can eliminate that threat this year by approving a bill that will restore the state subsistence preference program so that it once again shields Alaska from a federal takeover under ANILCA.

I request that I be given an opportunity to appear before a Joint Session of this Legislature on May 9, 1986, to discuss the subsistence issue <u>if</u> action on a bill to bring Alaska into compliance with federal law has not been completed before that date. I seek this opportunity to make one last attempt to answer any questions that individual legislators may have about the federal implications of the subsistence issue. Questions, if such an appearance becomes necessary, ought to limited to that subject.

I do not make this request lightly. To me, a federal takeover would be a catastrophe for our state. It would also be an enormous victory for the extremists who have tried since statehood to deny Alaskans control over our own natural resources.

With best wishes,

Cordially,

<u>P.S.</u>: An identical letter has been sent to the Honorable Don Bonnett, President of the Alaska State Senate. Either or both of you may release this letter.

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510

APR 29 1986

April 29, 1986

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
[illegible]
Juneau, Alaska 99811

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Second, nothing in existing law provides for a return of management authority to the State after a federal takeover has occurred. In my judgment, if the State forfeits its present authority by failing to maintain a state subsistence preference that complies with ANILCA, powerful extremist groups will argue in the courts and in Congress that the Department of the Interior must retain that authority permanently.

Third, even if management authority can eventually be returned to the State, the Interior Department will still have to certify the State's compliance with the federal subsistence preference. Obviously, that means that the Legislature will have to approve a new subsistence law. If control of the Interior Department shifted after the 1988 elections in a way that greatly increased the influence of the extreme environmentalists, the certification process would, I feel, be used to extract major resource management concessions from our state.

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I do not make this request lightly. To me, a federal takeover would be a catastrophe for our state. It would also be an enormous victory for the extremists who have tried since statehood to deny Alaskans control over our own natural resources.

With best wishes,

Cordially,

TED STEVENS

P.S.: An identical letter has been sent to the Honorable Ben Grussendorf, Speaker of the Alaska State House of Representatives. Either or both of you may release this letter.

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

M E M O R A N D U M February 26, 1986

TO: Senator Jan Faiks

FROM: Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

RE: Kenai River Special Management Area

As you know, the conflicts along the Kenai River led to the creation of the Kenai River Special Management Area by the legislature in 1984. The desire was to have one agency responsible for the management, and this task fell to the Department of Natural Resources. The planning process is continuing, and a draft plan is due this summer.

A 19-member Kenai River Advisory Board was established that included people from state agencies, municipalities, special interest groups, and local citizens. The Board further established subcommittees, and additional local citizens became involved. As you know public hearings were held throughout the Kenai Peninsula and in Anchorage to gather local comments and recommendations. The Board then advised the Commissioner of Natural Resources that even before the final plan was adopted, regulations should be adopted this summer to restrict outboard motor horsepower on the river.

The Commissioner of Natural Resources then held public hearings on the Kenai Peninsula and Anchorage on these regulations. After extensive public involvement the Commissioner adopted the present horsepower limitations.

The public continues to be involved with this process, as the Kenai River Advisory Board is still active in the development of the Kenai River Special Management Area Plan. This plan will be subject to further public hearings this summer. If you feel that significant errors have resulted from this public planning process, I would be very willing to work with you in trying to find a solution.

With the limited time available before the end of the session and the public hearing coverage that would be necessary on the Kenai Peninsula and in Anchorage, I am concerned that our efforts could not be as extensive as the planning process now in place. With limited time, I am concerned that any efforts we could make could not duplicate the comprehensive attention already given to this issue.

Because of the substantial number of bills on such major statewide issues as subsistence, local hire, and natural resource development, scheduling of those bills must be a priority. Since there is no legislation before the Senate Resources Committee dealing with the Kenai River issue at the present time and there will be a continuing opportunity for public hearings on the local level, I do not feel justified in denying a hearing to other legislation already before the committee. However, if you feel that legislation is necessary regarding the Kenai River Special Management Area, and sponsor such legislation, I'm sure the Senate Resources Committee would hold hearings expeditiously.

Alaska State Legislature

CO-CHAIRMAN
FINANCE COMMITTEE

907-465-3740

JAN FAIKS
POUCH V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

Senate

February 19, 1986

MEMORANDUM

TO: Senator Sturgulewski, Chairman
Senate Resources Committee

FROM: Senator Jan Faiks

SUBJECT: Hearing on Kenai River Regulations

I have received countless calls, letters, and POM's from constituents who are upset with DNR's proposed regulations to limit the size of outboard motors on the Kenai River.

Thus, I would appreciate your scheduling a public hearing on this issue before the Resources Committee. Since most of the complainants are from the Anchorage area, it may be appropriate to schedule the meeting up there.

Thank you.

OUT OF SESSION
1024 WEST SIXTH AVENUE, SUITE 302 ANCHORAGE, ALASKA 99501 907-274-6611

More copies - I will on hand

The Senate Resources committee substitute which we will be considering today, and its sectional, has been sent to all teleconference sites which have telescan abilities. The bill is being pouched to other sites and should be there tomorrow. For those persons at sites without telescan facilaties, you should have no problem following along on the markup of the bill labled S.R.C. Work Draft 2/7/86 which was distributed to all sites last week.

Before we start testimony, I would like to say a few words about the committee substitute you have before you.

I feel it is vital we take a sensible approach to subsistence that protects people truly dependent on fish and game, protects the rights of all Alaskans to hunt and fish, and ensures retention of state control of our resources.

Some people would like subsistence restored to its prior status, while others want to ignore federal law and pretend subsistence doesn't exist. Neither view is realistic.

When the Supreme Court rendered the Madison Decision, it let subsistence out of the box. Politically, it will never again fit back into that same box.

To invite federal take over of our fish and game in over eighty percent of Alaska, because we fail to act, makes no sense. Some argue, correctly, that the federal government doesn't have the money or manpower to effectively manage our fish and game. Unfortunately, that only guarantees that the feds will do a bad job, not that they won't take over.

I think this ~~This~~ bill is fair, constitutional, enforceable, and complies with ANILCA. It ~~will~~ can ensure our continued management of our own resources. ~~It is a necessity for our state.~~

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

April 18, 1985

Honorable Peter Goll
Chairman, House Special Committee
on Fisheries
Alaska State Legislature, Pouch V
Juneau, Alaska 99811

Dear Mr. Goll:

Thank you for your letter of April 1 regarding the State of Alaska's subsistence program and the recent Madison decision. In early 1982, the Department of the Interior certified that Alaska's subsistence program was in compliance with Title VIII of the Alaska Lands Act (ANILCA). This action followed extensive consultation between the State authorities and the Department. We had advised the State that the program which was certified (and the focus of the Madison case) was not the only approach that would comply with Title VIII. Although the focus during recent years has been on the urban and rural classifications, ANILCA specifies that rural residency is not the only criterion to be used in determining eligibility for the preference for nonwasteful subsistence taking. Section 803 provides that eligibility for the preference may be limited to those rural residents for whom subsistence is customary and traditional.

Our preliminary review of the Madison decision indicates that it puts the State in a position of non-compliance. The decision appears to require that, under Alaska law, the subsistence preference be extended to urban residents--an extension barred by Title VIII. We have written your Attorney General and asked for his opinion on this preliminary assessment. We prefer not to make a final ruling on the effect of a State of Alaska court decision which focused solely on a State statute and State implementing regulations without the views of Alaska's chief legal officer.

If our final determination remains the same as our preliminary assessment, we would afford the State an opportunity to correct the program deficiencies. Since the apparent non-compliance is the result of an unexpected court ruling rather than willful action by the State's executive or legislative branches, we are persuaded that Title VIII implicity requires us to provide the State with a reasonable opportunity to take appropriate corrective action. Efforts by the State to comply with the spirit if not the letter of Title VIII would lend support to this approach. Consequently, the Department has no immediate plans to undertake activities to discharge its obligations under Sections 805 (a), (b), and (c) if it is finally determined that the Madison decision puts the State in non-compliance and there are indications that the State will act to come into compliance. Please note, however, that this course of action is not completely free of risk. It is possible someone could pursue the judicial remedy specified in Section 807 and argue that we must take immediate action under Sections 805 (a), (b), and (c). Should a Federal court agree with that assertion, the Department could be compelled to assume subsistence management on public lands notwithstanding our decision to afford the State an opportunity to come back into compliance with Title VIII.

You posed a series of questions regarding how we would take action pursuant to Section 805. Since we have not yet prepared plans for assumption of subsistence management, many of your questions cannot be answered. Nonetheless, it is likely that some form of NEPA compliance will be required. We could however, invoke the emergency rulemaking authorities under the Administrative Procedures Act to save additional time.

If Federal action is required, coordination with the State would be extremely important since the one-third of Alaska that is non-Federal land would remain subject to State fish and game management. The resulting dual management scheme would cause many problems and is one of the primary reasons why we are strongly supportive of continued State management and hope that the State will cure the apparent deficiencies created by the Madison decision.

You also inquired about an arrangement, following Federal action, under which the State would continue on-the-ground management of fish and wildlife resources under the aegis of the Federal Government. The legality of such an arrangement is currently

under review but your Department of Fish and Game might be barred from complying with the statutorily-required Federal directions if existing State law did not permit distinctions to be made between customary and traditional rural subsistence users and other users of fish and wildlife resources.

Your last question addressed the Department's ability to discharge the management responsibilities it might have to assume under Section 805. Presently we do not have such capabilities; however, we shall take all required steps to acquire such capability if necessary to fulfill our legal obligations.

I trust that this is responsive to your concerns. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

William P. Horn

DEPUTY UNDER SECRETARY

Official Business

Alaska State Legislature

House of Representatives

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-4924

Special Committee on Fisheries

April 1, 1985

Mr. Bill Horn
Deputy Undersecretary
Department of the Interior
Washington, D.C. 20240

Dear Mr. Horn:

A recent ruling by the Alaska Supreme Court striking down regulations governing subsistence fishing in Cook Inlet has resulted in the submission of Legislation modifying the state's subsistence law. State compliance with the provisions of ANILCA is an issue that concerns many lawmakers as the legislation is being dealt with in committee.

A timely response by Department of the Interior to the following issues would help the Legislature in its deliberations.

1) Has the Department of Interior reviewed the Madison decision? If so, has it made a determination of whether it would put the state in the position of non-compliance with ANILCA?

2) What kinds of situations would put Alaska in non-compliance with ANILCA?

If the courts or federal government determines the state is not in compliance with ANILCA and the federal government steps in to manage fish and wildlife on federal lands:

1) What kind of regulation promulgating process would the Department of the Interior undertake for fish and game management? Do you envision a NEPA-type process? If so, how long would it take from regulation proposal to enactment?

2) How would the Department of the Interior coordinate its fish and wildlife management on federal areas with state management within state jurisdiction? Does Interior envision problems with a dual management system?

3) Would Interior opt for a management approach where the state continues to be the fish and wildlife manager with federal approval?

4) Does Interior have the in-house expertise to adequately handle the management responsibilities that it might be delegated?

I respectfully request your prompt response to these questions as the subsistence Legislation is under consideration in the House. Please contact me if you need clarifications. Thank you for your consideration of my informational request.

Sincerely,

Representative Peter Goll
Chairman, House Special Committee on Fisheries

RURAL ALASKA RESOURCES ASSOCIATION
P.O. BOX 3-3908
ANCHORAGE, ALASKA 99501-3908
(907) 279-2511

September 4, 1985

Honorable Arliss Sturgulewski
Alaska State Senate
Alaska State Legislature
Pouch V (MS3100)
Juneau, Alaska 99802

RE: Proposed Subsistence Amendments to Title XVI

Dear Senator Sturgulewski:

For the Rural Alaska Resources Association I recently presented testimony to the Senate State Affairs Committee regarding proposed amendments to Alaska Statutes Title XVI, Fish & Game, concerning subsistence.

I have enclosed a copy of that statement plus an adendum to the original statement. The latter addresses the need to also amend the statute to authorize the state's system of regional fish and game councils. Regional councils are already in place and functioning, but Alaska Statutes Title XVI is absent any mention of them, while federal law (ANILCA, P.L. 96-487, Dec. 2, 1980) does, in fact authorize regional councils. In summary, the State of Alaska is not only not in conformance with federal law regarding subsistence priority, but seems clearly also not fully consistent with federal law in the matter of regional councils.

This is a relatively simple matter to tend to now. Please let me know if we can assist you in any manner to help achieve a satisfactory resolution of the entire matter. To the extent that "RARA" is a statewide rural subsistence umbrella organization I feel that we can network information and provide helpful information back to you.

Please contact me as noted below, or our RARA staff person, Vernita

Zilys at the letterhead address or telephone.

Thank you.

Sincerely,

RURAL ALASKA RESOURCES ASSOCIATION
Jim Kowalsky, Chairman
c/o Tanana Chief's Conference, Inc.
Doyon Building
201 1st Avenue
Fairbanks, Alaska 99701
Phone: 452-8251 ext. 220

JK:de

February 20, 1986

Mr. Ron Williams
Grand Camp President
Alaska Native Brotherhood
318 West Willoughby Avenue
Juneau, AK 99801

Dear Mr. Williams:

Thank you for your letter of February 3. You asked how the state is preparing to respond if the federal government intervenes in fish and game management after June 1 if it determines that Alaska has failed to bring its subsistence law into conformance with Alaska National Interest Lands Conservation Act (ANILCA) Title VIII.

The questions you raise are very important ones. I am deeply concerned that both fish and game resources and Alaskan users will suffer if the basic authority to manage resident fish and game is divided between the state and federal governments. While we have not had further formal communication with the U.S. Department of Interior about the approach it will take if the state law is not amended, we understand that it is in the preliminary stages of developing emergency plans. However, the great number of uncertainties and the complexity of the legal and political issues make it difficult for either the state or the federal government to develop realistic contingency plans.

One area of uncertainty, of course, is how the state and the federal governments will deal with the Alaska Federation of Natives' petition requesting that the Alaska Boards of Fisheries and Game regulate hunting and fishing on the federal public lands directly under ANILCA, applying the federal subsistence standards. As you know, the joint boards deferred action on this petition to give the Legislature time to take corrective action.

Another major unresolved question is where the federal government's authority to protect subsistence uses applies. For example, in the case of fish stocks or wildlife populations used for subsistence on federal public lands which also migrate across state lands, it is not clear whether federal regulations and allocations take precedence over state regulations on state and private lands. This question has major implications for Alaska's

ability to regulate its sport, commercial, and subsistence fisheries, as well as hunting for migratory wildlife such as caribou.

Your letter mentions the possibility of the state contracting or developing a cooperative agreement with the federal government to carry out federal regulations. If the Department of the Interior continues to find Alaska out of compliance with ANILCA, we will certainly explore every possible avenue for avoiding disruption of fish and game management. While we expect to continue to have a good cooperative working relationship with federal agencies, eventually the courts would probably play a significant part in defining the federal role. However, there are some complex issues that may be difficult to resolve even with good working relationships between agencies.

Contracting, for example, could pose several problems. First, depending on the services needed, it is possible that the federal government would not legally be able to delegate certain types of responsibilities to the state. Second, the state may not be able to perform certain functions if they are not authorized by state law, or if state and federal law conflict. Third, a major question in this time of declining budgets for both the state and federal agencies is whether the federal government would have money available to reimburse the state for services, especially since the effects of non-compliance would be statewide. For example, Congress has never met even its current obligations under ANILCA §805(e) to reimburse the state for half of the expenses incurred in subsistence management.

These uncertainties continue to argue strongly for legislative resolution this session. House Bill 288, which I introduced last year, is still the most straightforward way to solve the problem. However, I am confident that we can work with the Legislature to get a workable bill that will protect subsistence uses in rural Alaska, is constitutional and enforceable, will allow the state to retain fish and game management throughout Alaska, and will provide fair hunting and fishing opportunities for all Alaskans. Thank you for your continuing support and efforts.

Sincerely,
/s/ Bill Sheffield

Bill Sheffield
Governor

cc: Senator Mitch Abood
Representative Jack Fuller
Representative Peter Goll
Representative Adelheid Herrmann

bcc: Don W. Collinsworth
BS/DWC/SRB/sj

2 July 1985
PO BOX 75067
Fairbanks, AK 99707
Ph: 907-479-3044

STATE of ALASKA
Ester C. Wunnicke - commissioner
Pouch 7-034
Anchorage, AK 99510

Ref: Amendments to Regulations
11 ACC 83.700 ----------

Dear Commissioner,

Please accept this letter as "COMMENTS" on the proposed amendments to the Regulations.

The majority of the leases to be effected by these proposed changes were leased in State Sale No. 31 on September 16, 1980 by a group of individuals from Fairbanks, Alaska.

The terms set forth by the State were the best terms the State has ever received. 20% Royalty and 30% NPSL as a ten year lease with a five year work commitment.

In the year 1980 the state Department of Natural Resources were so enchanted with the world oil crisis and what it ment to Alaska that DNR predicted and published in their reports that oil would reach $90.00 a barrel before the year 1990. Under this scenario the lease terms were justified or maybe leaned to favor the leaseholder. Today things have changed dramatically with current predictions of oil prices dropping to $20.00 or even $15.00 per barrel. Now with changing world oil markets the terms of these leases are not realistic.

Today, in every form of world trade, marketing, industry, union, employement and etc., it is common to renegotiate any issue that has changed critically and adjust the benefits of one or both sides of the issue.

I, as a citizer of Alaska feel the work commitments for these leases could be dropped completely without any loss of face to the State of Alaska.

If the present lease holders can produce any of these leases then Alaska will receive revenue under present terms. If the lease holders cannot produce the leases will terminate but in the mean time DNR has received $3.00 per acre rentals and hopefully the world oil market will again favor Alaska by 1990.

If a moratorium were placed on the work commitment for these leases, I believe the Governor of Alaska, the State Legislation and the people of Alaska would applaud you for this consideration.

Very truly yours,

James C. Long

cc: Governor B. Sheffield
other parties

Post Office Box 2699
Fairbanks, AK 99707
June 24, 1985

State of Alaska
Department of Natural Resources
Office of The Commissioner
Pouch 7-034
Anchorage, Alaska 99510

Dear Commissioner Wunnicke:

With reference to Cliff Burglin's letter of June 11, 1985 to you and your letter of June 13, 1985 to him, I am wondering why the proposed amendments weren't dealt with when Senate Bill #232 was being discussed prior to being passed and signed by Governor Sheffield on June 2, 1985 and what caused them to suddenly take on so much importance after the bill was signed into law.

According to your time-schedule we would, at best, have only two months and that can go fast with delays, etc. November 1st is the dead-line and if the leases are not renewed or extended, a lot of people will have lost a great deal of money. If they are extended at the last minute, we still have to line up rent renewal cash, and I personally would suffer a tremendous hardship having had no income in almost 8 years.

I'm enclosing a copy of Brian Burglin's rough-draft to show you how we feel about the 100,000 bond for every lease. On a unit perhaps but not every lease.

My proposal is that you grant the two-year extensions now as per Senate Bill #232. That would give you two years to evaluate the amendments without having to work under pressure of time, allowing you to come up with a solution to the problem that would be more equitable and agreeable to all parties concerned. It would also give us the assurance needed to continue to help develop Alaskan Resources by Alaskans who would otherwise not know who or what in the Alaskan government they could trust or rely on in the future.

A number of people involved with the leases including the Burglins were born and raised up here, others have lived here most of their lives, and I have lived here over 29 years so we are not "Johnny-Come-Latelys" or "fly-by-nighters".

Sincerely yours,

James R. Johnson

James R. Johnson

FAIRBANKS, AK.
6/18/85

State of Alaska
Department of Natural Resources
Pouch 7-005
Anchorage, Alaska 99510

Dear Commissioner Wunnicke:

I wish to comment on the proposed amendments to the regulations concerning Senate Bill #232 which was recently signed into law by the Governor on June 2, 1985.

I strongly object to any bonding penalties on each and every lease to be considered for a work commitment waiver. It is impossible to acquire enough knowledge before drilling initial exploratory wells to determine exactly what type of work commitment for each lease will be required. To require bonding or specific plans on adjacent, adjoining leases before analyzing information from initial exploratory wells I feel would not be prudent or in the best interest of the State of Alaska or the lessees. I do agree a plan to develop should be put forth by the applicant to the Commissioner. These plans should give the lessee the opportunity to unitize, form P.A.'s or form drilling blocks should an initial exploration program prove successful. I feel this would lessen environmental impact on the area and will also make development of adjacent and adjoining leases more economically feasible. To force the drilling of every lease is not only unsound financially but against all of the State's prior decisions environmentally. This plan should also extend to the lessees their right to terminate their lease with the State of Alaska without penalty should the information from initial exploration indicate further development to be unreasonable and uneconomic.

I feel this would be in the best interest of the State of Alaska and lessees for it would not promote needless drilling and development work on the exploration areas.

Sincerely, James R. Johnson

I did not write this but agree with it completely. It was a rough draft drawn up by Brian Burglin.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH 7-005
ANCHORAGE, AK 99510
PHONE: (907) 276-2653

June 13, 1985

Mr. Cliff Burglin
Land Consultant
P.O. Box 131
Fairbanks, AK 99707

Dear Mr. Burglin:

This is to acknowledge receipt of your written request for two-year waivers of the work commitments for thirty-seven of your North Slope oil and gas leases. For the reasons which I will explain below, it is premature to act on your request at this time.

As you are probably aware, the department just last week published draft amendments to 11 AAC 83.700, the regulations which govern the administration of work commitments. As a result of the passage of Senate Bill 232, I anticipate that there will be numerous requests for work commitment waivers before the end of this October, and that each of those requests will be based upon unique factual circumstances.

Consequently, in the interest of assuring equitable review for all requests, I feel that it is important that each lessee be provided a clear indication of the standards under which the department will review each request. I believe the most effective way of accomplishing this is through the expedited adoption of these amendments to the regulations.

Public hearings on the proposed amendments are scheduled in Fairbanks and Anchorage during the first week of July. Following those meetings, it is my intent that the regulations be adopted as quickly as possible. I anticipate that the Department of Law will complete its review and submit the regulations to the Lieutenant Governor by August 1, 1985. If this schedule can be maintained, the regulations should become effective September 1.

It would then be timely to consider your request for waivers in early September following the adoption of the amendments. At that time you can submit written waiver requests which provide the information specified by the regulations, as they are ultimately adopted.

In case you failed to receive a copy of the proposed amendments, I have attached a copy for your review. If you have any additional questions, please feel free to call.

Sincerely,

Esther C Wunnicke

Esther C. Wunnicke
Commissioner

Attachment as stated

cc: Kay Brown
Mark Worcester

-J56LH

Cliff, your June 3 letter to me was delivered to Division of Oil and Gas June 12. Esther

C. Burglin
Land Consultant
P.O. Box 131
Fairbanks, Alaska 99707
(907)452-5149

June 11, 1985

Commissioner Wunnicke
Pouch 7-034
Anchorage, Alaska 99510

Dear Commissioner Wunnicke:

SB 232 clearly gives you the power to waive onerous work commitments on 10 year leases for Sales 30 and 31. Without this bill you have already waived work commitments for Amoco, Amerada Hess and others. This bill does not give you the power or permission to write regulations or law. If it did, there would be no need for the legislature.

I am enclosing a copy of your proposed regulations concerning this bill to all of the legislators. As far as I am concerned your intent is very clear. You intend to stall through bureaucratic implementation the clear intention of the legislature and legislation.

If the legislators allow you or anyone else to get by with these tactics, they should resign because obviously there is no need for them.

Isn't this blatant discrimination? J.R.G.

Sincerely,

C. Burglin

CB/mbg

enclosures

copies- all interested parties

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

POUCH 7-005
ANCHORAGE, AK 99510
PHONE: (907) 276-2653

June 6, 1985

Dear Alaskans:

The Alaska Department of Natural Resources, Division of Oil and Gas, is proposing to amend the regulations governing work commitments of State oil and gas leases (Title 11, Chapter 83, Article 7 of the Alaska Administrative Code). This change in the regulations is being made to implement Senate Bill No. 232, which was passed by the legislature on May 12, 1985, and signed into law by the Governor on June 2, 1985.

The effect of Senate Bill No. 232 is to permit the Commissioner of the Department of Natural Resources to waive work commitments attached to oil and gas leases for a period of up to two years under certain circumstances. The amendments to the regulations being considered will set out the criteria the Commissioner will use in determining whether such a waiver of work commitment is justified, the terms under which such a work commitment waiver will be granted, and the procedure for application for waiver of a work commitment.

A copy of the proposed amendment to the regulations is attached. Language proposed to be added to the existing regulations is underlined. Ellipses in the form of three hyphens (- - -) indicate that intervening unchanged subsections of the regulations have been omitted.

You are invited to comment on the proposed amendments to the regulations. Comments must be in writing and must be received by the Division of Oil and Gas by July 12, 1985 to be considered. All written comments should be addressed to the Alaska Department of Natural Resources, Division of Oil and Gas, Pouch 7-034, Anchorage, AK 99510, Attn: Catherine Fortney. Additional copies of the proposed regulations may be obtained from the same address.

The Division of Oil and Gas will also hold public hearings on these regulation changes on the following dates:

ANCHORAGE
Date: July 2, 1985
Time: 10:00 A.M.
Place: Conference Room
Mountain View Library
120 S. Bragaw Street

FAIRBANKS
Date: July 1, 1985
Time: 1:30 P.M.
Place: Conference Room
North Star Borough Library
1215 Cowles Street

ncerely,

Esther C. Wunnicke

her C. Wunnicke, Commissioner
ska Department of Natural Resources

CHAPTER 83. OIL AND GAS LEASING.

Article

- - -
7. Work Commitment (11 AAC 83.700 -- 11 AAC 83.705)
- - -

ARTICLE 7. WORK COMMITMENT.

Section
700. Work commitment
705. Work commitment modification

11 AAC 83.700 is amended to read as follows:

11 AAC 83.700. WORK COMMITMENT. (a) If a work commitment is a condition of the lease, the work commitment will be specified in terms to be announced by the commissioner of the Department of Natural Resources (commissioner) in the notice of sale for the original term of the lease. The stipulated commitment will state the minimum annual requirement for exploration and development commitment on a specific lease. The lessee shall file annual reports with the commissioner substantiating adherence to the work commitment terms.

(b) The commissioner will, at his discretion, alter or abrogate the terms of the work commitment if

(1) the lessee presents evidence that the lease will be unproductive and/or uneconomic under the terms of the work commitment;

(2) the lessee presents evidence that the existing terms of the work commitment cannot be performed by reason of war, riots, acts of God, unusually severe weather, or any other cause beyond the lessee's reasonable ability to foresee or control (including delays caused by judicial decisions or lack of them), whether similar to those enumerated or not;

(3) the lessee becomes party to a un greement; or

(4) the lessee relinquishes the lease.

(c) The commissioner may waive for up to two years any work commitment imposed on a lease under subsection (a) of this section if the commissioner makes a written finding either that conditions preventing fulfillment of the work commitment were beyond the lessee's reasonable ability to foresee or control, or that the lessee has demonstrated through good faith efforts the intent and ability to fulfill the terms of the work commitment during the term of the waiver. The commissioner will consider the following factors when determining whether a lessee has demonstrated the intent and ability to fulfill the terms of a work commitment during the term of any waiver that may be granted

(1) whether the lessee has undertaken appropriate actions to fulfill the work commitment, including the acquisition of necessary permits, materials, and financing required to meet the work commitment;

(2) reasons why the lessee did not meet the terms of the work commitment during its initial term;

(3) the lessee's specific plans and actions taken to meet the work commitment during the term of the waiver; and

(4) the fulfillment or lack of fulfillment of other work commitments or similar obligations by the lessee within th state.

(d) As a condition of waiver of any term of a minimum work commitment under subsection (c) of this section the commissioner will require the lessee to post a performance bond of $100,000 to ensure the fulfillment of the work commitment during the period of waiver. The bond will be returned to the lessee if the work commitment is fulfilled by the end of the waiver period,

and will be forfeited automatically to the state if the work commitment is not fulfilled by the end of the waiver period. A separate bond will be required for each lease for which a waiver of a work commitment is granted.

(e) If a lessee fails to meet any term of a work commitment by its due date, including any additional period granted by extension, alteration, or waiver, the lease will automatically terminate. In addition, any penalty provisions established by the commissioner in the work commitment stipulation, or as a condition to any extension, alteration, or waiver, will take effect immediately if the work commitment is not completed by its due date, including period of extension and waiver. [FAILURE TO COMPLY WITH THE MINIMUM ANNUAL WORK COMMITMENT CONSTITUTES GROUNDS FOR FORFEITURE OF THE LEASE.] (Eff. 11/9/79, Register 72; am / / Register)

Authority: AS 38.05.020
AS 38.05.180

11 AAC 83.705 is amended to read as follows:

11 AAC.83.705. WORK COMMITMENT MODIFICATION. (a) Application for modification under AS 38.05.180(h) must comply with 11 AAC 88.105 and must

(1) state all the facts that may entitle the applicant to modification;

(2) state location and status of all past and present activities on the lease;

(3) contain a detailed report of all activity on the lease preceding the filing of the application and include an accounting for all expenses and costs of operating the lease;

(4) be d not later t 30 days before the existing deadline for the fulfillment of the term of the w k commitment;

(5) address all pertinent factors listed in 11 AAC 83.700(b) or 11 AAC 83.700(c), as appropriate; and

(6) in connection with applications for waivers under 11 AAC 83.700(c), affirm the lessee's readiness and ability to post a performance bond.. (Eff. 11/9/79, Register 72; am / / Register)

Authority: AS 38.05.020
AS 38.05.180

2366A

C. Burglin
Land Consultant
P.O. Box 131
Fairbanks, Alaska 99707
(907)452-5149

June 3, 1985

Esther Wunnicke
Commissioner of Natural REsources
Pouch 7-034
Anchorage, Alaska 99510

Re: Extension of Oil and Gas Leases

Dear Commissioner Wunnicke:

Under the terms of Senate Bill No. 232, we are formally requesting a waiving of the work commitment for two years on the following leases, as of November 1, 1985:

ADL#'s: 318612, 318613, 318618, 318620, 318621, 318623, 318624, 318626, 318631, 318632, 318635, 318639, 318651, 318652, 318653, 318654, 318655, 318659 318660, 318661, 318662, 318663, 318664, 318665, 318666, 318667, 318668, 318669, 318670, 318671, 318674, 318677, 318678, 318680, 318681, 318682, 318558

We justify this request on the basis of an extensive drilling program for these leases plus extensive work and evaluation already done plus unit applications that have been applied for and are under discussion with your office at this time.

We see no reason for the leases not to be extended within the next ten days. Please let us know, in writing, by June 15, whether or not this extension will be granted.

Sincerely yours,

C. Burglin

CB/mbg

Offered: 5/11/85
Referred: Rules

Original sponsor: Rules/Governor

IN THE SENATE BY THE RULES COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 232 (Rules) am H

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to minimum work commitments in oil and gas leases; and providing for an effective date."

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

* Section 1. AS 38.05.180(h) is amended to read:

(h) The commissioner may include terms in any oil and gas lease imposing a minimum work commitment on the lessee. These terms shall be made public before the sale, and may include appropriate penalty provisions to take effect in the event the lessee does not fulfill the minimum work commitment. If [SHOULD] it is [BE] demonstrated that a lease has been proven unproductive by actions of adjacent lease holders, the commissioner may set aside a work commitment. The commissioner may waive for a period not to exceed one two-year period any term of a minimum work commitment if the commissioner makes a written finding either that conditions preventing drilling or exploration were beyond the lessee's reasonable ability to forsee or control or that the lessee has demonstrated through good faith efforts an intent and ability to drill or develop the lease during the term of the waiver.

* Sec. 2. This Act takes effect immediately in accordance with AS 01.-10.070(c).

6/25/85

Dear ~~Senator~~ Skurzelewski,

Anything you have done or will do on our behalf in this matter will be appreciated and remembered.

Sincerely, James R. Johnson

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

DIVISION OF BOARDS

BILL SHEFFIELD, GOVERNOR

BOX 3-2000
JUNEAU, ALASKA 99802
PHONE (907) 465-4110

August 27, 1986

Dear Reviewer:

Enclosed is information describing the subsistence law adopted by the 1986 Legislature and how the Boards of Fisheries and Game will implement it. At their joint meeting in Anchorage November 23-26, the boards will determine what communities or areas in the state have economies in which non-commercial customary and traditional use of fish and wildlife for personal or family consumption is a principal characteristic. These areas will be considered "rural areas" for purposes of the subsistence law. The Legislature clarified that subsistence uses occur only in rural areas.

Written public comments on rural designations and oral testimony will be taken at the board meeting. The boards need a wide variety of information about fish and wildlife use and its role in the economies of Alaskan communities in order to make these decisions. They will be using information from the Alaska Department of Fish and Game and other agencies, but they also need to hear from fish and game advisory committees, regional advisory councils, and other members of the public about the significance of fish and wildlife to their local economies.

If you wish to have your written comments included and indexed in the board's working books, they must be delivered to the Alaska Department of Fish and Game, Division of Boards, P. O. Box 3-2000, Juneau, AK 99802 before November 17, 1986. Further sources of information about the board process are listed at the end of the enclosed report.

Sincerely,

Don Collinsworth
Commissioner

Enclosure

ALASKA'S NEW SUBSISTENCE LAW-- WHAT DOES IT MEAN AND HOW DOES IT WORK?

Alaska Department of Fish and Game

August 27, 1986

In May 1986, the Alaska Legislature adopted several major changes to the state's subsistence law. These changes ensured that the state retained management of fish and game on all lands in Alaska. In June 1986, the Board of Game held an emergency meeting and eliminated the controversial Tier II hunting regulations. The emergency meeting provided some experience in implementing the new law.

Beginning with the next meeting of the Joint Board in November, both the Board of Fisheries and the Board of Game will begin to implement routinely the requirements of the new subsistence law, which are similar, but not identical to, the boards' approach before the Madison decision by the Alaska Supreme Court in 1985.

This report describes the subsistence law and how it works. It is intended to give the public, including fish and game advisory committee members, the information they need to participate in the board process.

WHAT DOES THE NEW SUBSISTENCE LAW REQUIRE?

The changes made in 1986 clarified what the Legislature intended the subsistence law to do. They confirmed that the Boards of Fisheries and Game should identify subsistence uses as customary and traditional uses of fish and game by people living in rural communities and areas. They also confirmed that hunting and fishing regulations should provide for subsistence uses. And they confirmed that subsistence has a preference over other uses when there is a resource shortage.

Under the new law, for a use of fish and game to be a subsistence use, the boards must make two findings:

1) that the area or community where the use occurs is "rural," that is, noncommercial, customary and traditional use of fish and game for personal and family consumption is a principal characteristic of its economy; and

2) that the use by an area or community of the particular game population or fish stock is customary and traditional, as determined under the eight criteria in 5 AAC 99.010 (Enclosure 1).

If those two conditions are met, the residents of that area or community are eligible for subsistence fishing or hunting for that specific fish stock or game population, if the resource can sustain a harvest.

The Legislature also clarified that subsistence hunting and fishing are subject to reasonable regulations, and that these will be separate from other hunting and fishing regulations. Subsistence fishing has long occurred under separate subsistence regulations, but subsistence hunting has not. Subsistence regulations will spell out which game populations and fish stocks are used for subsistence and who may harvest each population and stock for subsistence uses.

The identification of subsistence uses will be made on a community or area basis rather than for individual people. It will not be based on an individual's income, but rather on the role that use of fish and wildlife plays in the economy of communities and areas in the state.

To guide the boards in their decisions, the Legislature adopted a letter of intent. The letter specifically mentions eight criteria for identifying customary and traditional uses of fish and game resources, criteria similar to those previously adopted by the board which were subsequently overturned in the Madison case. The legislative record makes it clear that the criteria are consistent with the Legislature's intent. These eight criteria appear in regulation 5 AAC 99.010.

The Legislature also clarified in statute that non-subsistence uses (sport, commercial, and personal use) of fish are to be fairly and reasonably provided for. In addition to the protections for subsistence, the statute gives Alaska residents a preference over non-residents in the hunting of moose, caribou, elk, and deer. It also creates a new category, personal use fishing, to provide opportunities for residents who do not qualify for subsistence fishing to take fish by net for their own use.

HOW WILL THE THE NEW LAW WORK?

The Boards of Fisheries and Game are responsible for implementing the law. They will adopt hunting and fishing regulations which conform to the new law and are consistent with the requirements of public participation, the constitutional mandate to provide for sustained yield, and the available information on subsistence uses.

Alaskans who live in rural areas where customary and traditional uses of fish stocks and game populations have been identified by the boards may hunt and fish for those populations and stocks under subsistence regulations. Other

Alaskans will hunt and fish under non-subsistence regulations--in many cases the same general hunting and sport and personal use fishing regulations that existed before the Madison decision.

To implement the new law, the Board of Fisheries and the Board of Game will be conducting a systematic review of all areas, fish stocks, and game populations in the state. The review involves these specific steps:

(1) In November, the two boards will meet jointly to decide which areas or communities are rural. The law says that a "rural area" is a place where the "noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy...." To make a decision on a particular area, the board will take into account many aspects of its economy.

To identify rural areas, the boards need to know what role fish and game play in the economy of those areas. They will examine such things as communities' income, employment, businesses, population growth, population characteristics, settlement patterns, distance from urban areas and boundaries, and levels of use of fish and game.

No single indicator or formula determines whether a community or area qualifies as rural. For example, the boards cannot consider income alone. Nor can they consider per capita harvests alone. Many factors have to be weighed together. The boards need to consider the whole pattern of how personal and family use of fish and wildlife fits into the economy of each area or community. This information will come from the Department of Fish and Game, other agencies, the public, and advisory committee members.

The Joint Boards will deal with three types of communities and areas: those that clearly satisfy the standards for rural, those that clearly do not, and those that seem to be near the dividing line between rural and non-rural. The third type will probably get the most attention at the November meeting.

Remote parts of the state with isolated, small communities, few jobs, and heavy reliance on fish and game are most likely to be readily identified as rural. People living there will fish and hunt under subsistence regulations for resources that have customarily and traditionally been used in that area. When game populations that rural people customarily and traditionally use are in short supply, and

subsistence uses must be cut back, these uses will be given preference over non-subsistence uses.

Because the Alaska Legislature intended the changes in the state statute to be consistent with federal law, the boards can use federal legislative intent in interpreting what is meant by rural. The 1979 legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) described Anchorage, Fairbanks, Juneau, and Ketchikan as urban. Residents of those areas will fish and hunt under sport and personal use fishing regulations, and general hunting regulations. They will be able to hunt under these regulations in rural areas.

The boards will probably devote more time to decide whether moderately sized or more recently settled communities are rural or non-rural. People in these places have been able to fish, in many cases, under subsistence regulations, while hunting under general regulations.

ANILCA legislative history also described certain communities (Bethel, Nome, Kotzebue, Dillingham, and Barrow) as rural. At its emergency meeting in summer 1986, the Board of Game determined that Bethel and Kotzebue are rural, but did not have occasion to examine Nome, Dillingham, or Barrow.

These examples will help guide the boards in determining which communities are rural. In reaching their conclusions the boards have to be reasonable. They must do the best they can with the available information to decide if personal use of fish and game is a principal component of the economy of each area or community they examine.

(2) Each board, during their normal separate meetings, will determine whether specific fish stocks and game populations can sustain a harvest. The Division of Game and the fisheries divisions will provide biological information to aid in these decisions.

(3) If a harvest can be allowed, the boards must determine whether the specific fish stock or game population had customarily and traditionally been used by the residents of specific areas or communities for "food, shelter, clothing . . ." or the other purposes listed in the law. The boards will use information from the department and the public in making this determination. The Division of Subsistence provides information on the characteristics of local resource use throughout the state. The Divisions of Game, Commercial Fisheries, and Sport Fish also provide

information about levels, seasons, and methods of harvest. The public, fish and game advisory committees, and regional advisory councils will provide testimony on their uses. The board examines these data against the eight criteria in 5 AAC 99.010 to determine if there are customary and traditional uses.

(4) Each board must then authorize subsistence fishing or subsistence hunting on these specific fish stocks and game populations by the residents of specific rural areas or communities which have customary and traditional uses of those resources.

(5) If there is a harvestable surplus after subsistence uses are provided for, the Board of Fisheries may adopt commercial, personal use, or sport fishing regulations, and the Board of Game may adopt general hunting regulations. In many cases, these additional regulations already exist. The boards must provide for fair and reasonable opportunities for non-subsistence uses, taking into account factors set out in the law, and must give Alaska residents a preference over non-residents in harvesting moose, caribou, elk, and deer.

Obviously, this is a great deal of work for the boards. There is no simple formula, but the law and the eight criteria provide extensive guidelines for decisions.

Because some important hunting seasons would have opened before the next regularly scheduled meeting, the Board of Game held an emergency session to deal with these critical hunts. Here are some examples of how the process worked during that board meeting:

The board decided that Delta bison could be harvested. But the board concluded that bison, a recently introduced species, were not the subject of customary and traditional uses. Therefore they will not be harvested under subsistence regulations. Alaskans will hunt bison under general hunting regulations; and because of the high demand, opportunity will be based on a drawing permit system.

In another case, the board found that moose in the Yakutat area could be harvested; were used for customary and traditional subsistence purposes by the residents of Yakutat; and that Yakutat is rural. Therefore, Yakutat area moose will be harvested under subsistence regulations by residents of Yakutat. The board also determined that there were enough moose to provide for both subsistence and non-subsistence hunting. Thus, Yakutat area moose will be available to all Alaskans under general hunting regulations.

In this case subsistence and general regulations are identical.

Under the subsistence law, subsistence hunting and fishing are subject to seasons, bag limits and other conservation and management measures, just as are all hunting and fishing. Subsistence uses will be provided for, and given a preference when necessary through separate seasons, bag limits, limits on methods of access, etc. In a few extreme cases, such as very low moose populations in the Minto Flats, only local residents will be allowed to hunt. In most cases, however, all Alaskans will have the opportunity to participate in general, drawing permit, registration, or open hunts.

PUBLIC INVOLVEMENT

Like all board decisions, board deliberations on rural areas, customary and traditional uses, and the regulations governing subsistence fishing and subsistence hunting are open to public comment, and to modification. The public and advisory committee members may recommend that certain communities or areas be found to be rural or non-rural, or that certain fish stocks or animal populations be identified as being subject to customary or traditional uses, and may provide information supporting the proposed result. The most useful information on whether an area is rural or not is that concerning the role of noncommercial use of fish and game in the area's economy. The eight criteria identify the factors and types of information that the boards use to determine whether a game population or fish stock is subject to customary and traditional uses.

At their November meeting, the boards will hear testimony on rural areas, including those areas examined in June by the Board of Game. Additionally, at the next regular board meetings, advisory committees and the public will have opportunities to comment on subsistence hunting and fishing regulations, and whether they correctly identify and adequately provide for subsistence uses. The process of fine-tuning the regulations will then become part of the boards' normal regulatory cycles.

FOR MORE INFORMATION

If you have questions about the upcoming Board of Fisheries and Game meetings, please contact any of the following:

Arctic Region

Victor Karmun Division of Boards	P. O. Box 686 Kotzebue, AK 99752	443-3420

Interior Region

Mitch Demientieff Division of Boards	1300 College Road Fairbanks, AK 99701	479-6211

Western Region

Clara Kelly Division of Boards	P. O. Box 90 Bethel, AK 99559	543-3107

Southwest Region

Dorothy Wilson Division of Boards	P. O. Box 199 Dillingham, AK 99576	842-5925

Southcentral Region

Karen Brandt Division of Boards	333 Raspberry Road Anchorage, AK 99518	267-2353

Southeast Region and Statewide

Beth Stewart, Director Division of Boards	Box 3-2000 Juneau, AK 99802	465-4110
Steven Behnke, Director Division of Subsistence	Box 3-2000 Juneau, AK 99802	465-4147

THE EIGHT CRITERIA

Before Madison, the Boards of Fisheries and Game developed eight criteria in 5 AAC 99.010 which were used to identify customary and traditional uses by rural Alaska residents. The Department of Interior had certified that the eight criteria identified subsistence uses in a way which complies with ANILCA. The state subsistence law as recently amended again authorizes their use.

(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~~ 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 changes 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 in which that pattern of subsistence uses provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

MAR 7 1986

R O N S O M E R V I L L E

FOR

GOVERNOR OF ALASKA
8800 Glacier Hwy., Suite 250
JUNEAU, AK. 99801

March 5, 1986

Senate Resources Committee
State of Alaska
Senator Arliss Sturgulewski, Chairman
Pouch V
Juneau, AK. 99811

Dear Senators:

It is my understanding that your review of Senate CS for HB 288 (subsistence) is coming to an end and there may not be any further public testimony on this piece of legislation in your committee. Unfortunately, I was unaware of your one teleconference on the bill and thus was not able to testify. I do believe, however, that there are a few points that have not been stressed adequately and since it appears that I will not be able to present them personally, I am putting them in writing.

First, I want to stress that all Alaskans are praying that a fair and workable law will be forthcoming which will lay the subsistence controversy to rest, once and for all. We are also appreciative of the complexity of the problem and the seriousness of the issue as, in one way or the other, it affects the daily lives of most Alaskans.

I would like to compliment the State Affairs and Resource Committees attempts to improve on the simplistic legislation introduced by the Governor and narrowly passed by the House during the last session. There are definite improvements in the legislation.

The provisions which provide the authority to regulate subsistence taking, give the Boards authority to identify subsistence stocks, authorize issuance of subsistence permits, provide that subsistence users be given a reasonable opportunity to harvest and allow no subsistence defense for fish and wildlife harvested outside the regulations are all important and crucial additions to the original bills.

The major stumbling blocks of the su stence law debates are, however, still left unattended. The committe chose to eliminate

a critical section of an early draft which allowed the Boards to apportion subsistence use among species, stocks and populations that are similar and reasonably available. The committee also chose to insert the word "rural" into the state law without providing a definition which would possibly narrow a subsistence priority down to the "true subsistence users" which most Alaskans would agree deserve some preferential treatment.

The committee has also chosen to ignore the overwhelming testimony of most Alaskans that any preferential allocation of our common property resources for subsistence should be based on need rather than residency. Alaskans have also strongly endorsed a revision of the existing policy to base subsistence on individual or family need rather than on a community basis where "need" is totally ignored.

We all fully realize that you are under pressure from the Federal government and subsistence advocates to adopt a state law precisely in line with their narrow interpretations of the existing Federal law. Unfortunately, most Alaskans are not going to endorse a law which descriminates based on where a person lives in Alaska.

One of the most volatile issues has been concerned with identifying "who" is a subsistence user. In your legislation, by complying with the Federal law and inserting the word rural, the only residents that are really eliminated from the priority use are those that live in Anchorage, Fairbanks, Juneau and Ketchikan. I fully realize that you have provided direction, through the letter of intent, for the Boards of Fisheries and Game to further delineate "subsistence uses" and "rural areas". In my opinion, by passing the buck to the regulatory boards, the legislature is neglecting its responsibilities. It is obvious that if each legislator is forced to define which area is or is not a subsistence area and thus which constituents are subsistence users, that it is going to be extremely difficult to draft legislation which will pass both houses.

I maintain that the boards are even less prepared to deal with the construction of socially descriminatory laws than is the legislature and further more it is not the function of an allocation board. It is clearly the function of the legislature to develop clear guidelines by which the boards would follow in implementing the laws. Most importantly, every Alaskan would be able to judge and comment personally on the legislation. It is critical that everyone be able to determine whether he or she is "in" or "out" directly from the proposed legislation.

I believe it is hypocritical for the legislature to consistently criticize the administrative agencies for developing broad regulatory authority and then pass a piece of legislation as poorly constucted as this legislation with almost unlimited regulatory options. It is clear that because the legislature cannot deal with the politics of this issue, they are pulling the pin and throwing the hand grenade to the Boards in hope that they

will develop the political guts to do what the legislature is apparently unable to do.

I personally feel you should craft a subsistence law which is acceptable to most Alaskans based on some criteria of need and lack of alternative resources and let the courts settle whether or not it is in compliance with the Federal law. I also strongly urge you to face up to your public responsibilities if you decide to descriminate against urban residents by giving a priority to rural residents by precisely defining what is rural. The public deserves that much consideration on this volatile issue.

I would like to point out in closing that despite recent testimony to the contrary, Alaskans voted in 1982 to retain the exisiting State law which clearly does not descriminate against urban users. For some reason, subsistence advocates have twisted the 1982 vote as an endorsement of the privilege for only rural residents.

It is also important to express my concern for your lack of consideration for public input into the constantly changing legislation. One poorly advertised teleconference can hardly be considered public participation.

Thank you for considering my comments.

Sincerely,

Ron Somerville

RIC DAVIDGE
Assistant to the Director
US FISH AND WILDLIFE SERVICE
(907) 786-3435

5/24/96

Mickie Campbell

Per your FOIA request I am forwarding a copy of the DRAFT regulations developed by the federal agencies. Other materials you have requested are being finalized and they should be sent once a complete admin record is approved. The DRAFT regs have been sent to the subsistence div of ADF&G for review and comment.

Ric

Cordova Chamber of Commerce

P.O. Box 99
Cordova, Alaska 99574
(907) 424-7260

May 22, 1986

Senator Arliss Sturgulewski
2957 Sheldon Jackson
Anchorage, AK 99508

Dear Senator Sturgulewski:

The Cordova Chamber of Commerce wishes to extend its thanks for your efforts toward passage of a reasonable subsistence bill. In the Cordova area, past fish and game management policies have provided for both adequate access to the resources and protection from overharvest. As we understand it, the bill just passed by the legislature will allow state management to be implemented as it had been prior to the Madison court decision.

Again, thank you for your sincere interest and work on this important issue.

Sincerely,

Connie Taylor
President

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

fair
in compliance
Const, tutional
enforceable

March 10, 1986

Ron Somerville
c/o Somerville for Governor
8800 Glacier Highway, Suite 250
Juneau, Alaska 99801

Dear Ron,

Thank you for your letter which I received Friday. As you are aware, though we have agreed on some aspects of the subsistence issue and disagreed on others, I have always valued your opinions.

I share your opinion that we all deeply desire a fair and workable subsistence law that will lay the subsistence issue to rest once and for all. The Senate State Affairs and Resources Committees have worked long and hard to make such a bill a reality. I appreciated your compliments on the improvements to the bill.

As you mention, the subsistence bill now has a number of important provisions that were lacking last year. Among these are:
- a requirement that the boards identify subsistence stocks and populations by area;
- an exclusion from subsistence harvest of stocks and populations which the boards do not identify as subject to subsistence uses. Examples would probably be bison, elk, and mountain goats, most populations of Dall sheep and some steelhead and trout stocks and brown bear populations;
- a requirement that subsistence users be given a reasonable opportunity to harvest;
- a provision that all takings of fish and game are subject to reasonable regulation of seasons, bag limits, and methods and means, including prohibitions on wanton waste;
- a prohibition against the use of the subsistence defense in violations of fish and game laws.

I believe we agree that all of these are important improvements to last year's bill. Unfortunately we seem to

disagree on the major principle of whether or not the legislature should pass a bill that complies with federal law. I believe passage of a bill that lacks that compliance would be a meaningless charade and a deception of the public. Lack of compliance will cause a federal takeover of management of our fish and game on all public lands on June 1, 1986. Management of our own resources was one of the driving forces in our becoming a state, and I am not going to be part of giving away that principle.

There may be many who would like to characterize the danger of federal takeover on June 1st as an empty threat or as federal bullying. Unfortunately, neither is true. The Department of Interior certainly wishes to avoid takeover and has neither the money nor manpower to do a decent job of management of our fish and game. Assistant Secretary Horn emphasized that point, but he also made it plain that this is an issue on which the department does not have discretion.

If the department tries to ignore the federal law, I believe we would immediately see the issue in court under Section 807, the Judicial Enforcement section of ANILCA. We would then be faced not only with a federal takeover of fish and game management, but with the very real risk of a federal judge deciding that he is going to personally supervise that management. Before anyone dismisses that risk, I would suggest that he or she look very carefully at what happened in Washington State with Judge Boldt.

I realize that there are persons, including some in the legislature, so strongly opposed to subsistence that they would welcome such a scenario, believing the results would be so onerous that out of the resulting political chaos a strong movement would develop to change the federal law. That approach is playing Russian roulette with our resources. The State Affairs and Resources committees have worked very hard with people on all sides of the issue to hammer out a subsistence bill that will work for all of us, rather than yielding to easy rhetoric based on how we wish things were.

I should point out that there are ongoing private court suits challenging the constitutionality of the federal subsistence law. Enactment of legislation will have no effect on the outcome of those suits. Such legal battles can take years, however, with very uncertain results. The same can be said for attempts to change the federal law. We need a fair and equitable law now, one that retains our own control of our resources, and is enforceable and constitutional. The Senate Resources Committee Substitute for House Bill 288 is such a bill.

In your letter you raise the issues of need and residence. As you well know, the use of a criterion based on individual economic need is clearly not in compliance with federal law.

Assistant Secretary Horn testified to that during his appearance before the Senate Resources Committee on March 5, 1986. The federal legislative history on the subject states in part, "The policy also requires that regulatory systems which employ income requirements may not be imposed on rural residents."

Also, as you well know, the federal law explicitly and repeatedly refers to "rural residents." A bill which ignores this fact would also clearly not comply. Again the federal legislative history is specific on this point. It states, "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." This leaves us a good degree of flexibility, however, in defining "rural area" for the purpose of this bill.

Your interpretation of which areas of the state would have subsistence use eliminated in them may have been correct for the bill as it was originally introduced by the governor. That interpretation is clearly incorrect, however, for the Senate Resources Committee substitute.

"Rural area" in the bill is defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a significant characteristic of the economy of the community or area." The bill's accompanying sectional analysis cites Congress's intent to protect subsistence uses where "...such uses have played a long established and important role in the economy and culture of the community...". The sectional further states, "It is expected that the boards ...would review areas as conditions change to assure a rural or nonrural classification is still appropriate."

Whether or not a community or area is classified as a "rural area" for the purposes of this bill will be a factual determination by the Boards of Fish and Game. Subsistence will exist in areas only after the boards have made a factual determination based on the economy of the particular area and then only on stocks and populations identified by the boards as subject to subsistence use. The result of limiting the subsistence preference to those who live in areas so identified will be to protect subsistence where it is really needed, but limit it to a small percentage of our population so conflicts will be dramatically reduced. All of this is in perfect compliance with federal law.

We realize that many Alaskans in every part of our state eat a great deal of fish and game. This bill is not intended to limit that in any way. What is intended, however is to limit the number of people who have a preference over the rest of us when it comes times to harvest that food.

In closing, I feel the need to respond briefly to your last two paragraphs which left me more than a bit bemused. Your interpretation of the 1982 vote is one of the most interesting attempts at revisionist history I have ever come across. Since you spearheaded the move to repeal the existing law in 1982, I take it you felt differently then.

Your expressed concern for the lack of public hearing falls in a similar category. As this bill has made its way through the legislature, it has had as many public hearings as any piece of legislation I am aware of. There have been numerous statewide teleconferences as well as two-day public hearings in Fairbanks and Anchorage. These hearings culminated in a statewide teleconference by the Senate Resources Committee where we listened to every person who wished to testify.

I am sorry you were not aware of the meeting, but I feel compelled to point out that it was thoroughly advertised, very well attended, and included testimony by Roberta Booher who officially represented the Alaska Outdoor Council, the organization of which you are the former executive director.

I will present your letter to the Senate Resources Committee. I appreciate the depth of your feeling on this issue, and as I said in the beginning of this letter, though we disagree on some aspects, I always value your opinions.

Sincerely yours,

Arliss Sturgulewski

Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

cc: Senate Resource Committee Members

Richards

DNR - F&G - DEC } nat. Resources —

Reg — oversite } w/ Div of mining

Coastal Control Zone } leg approval

multiple Use - comprehensive

Sec 402. To Alaska

Dering r. dev 2477

Joint Fund BLM.

Changing rights

Clear argument by using the statistical data
objective

Enforcement / mineral development

Relax standards - on stream of turbidity, settleable solids
minerals

Alaska State Legislature

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

Rick Davidge
Special Assistant to the Director
U.S. Fish and Wildlife Service
1011 E. Tudor Rd.
Anchorage, Alaska 99503

May 19, 1986

Dear Rich ~~Mr. Davidge~~:

Pursuant to the Freedom of Information Act, I request copies of the materials the federal government used to develop its proposed policies dealing with subsistence. As part of this request, please include internal memos, decision documents, etc., as well the proposed policies actually developed.

Thank you for your help in this matter.

Sincerely,

McKie Campbell
Senior Advisor
Senate Resources Committee

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

May 1, 1986

Senator Arliss Sturgulewski
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Sturgulewski:

At your request, I would like to confirm and clarify two of the points that I made when I testified before your committee on March 5, 1986. The first is whether the legislation approved by the Resources Committee of the Alaska Senate in March 1986 is consistent with the requirements of Title VIII of ANILCA. The second is whether ANILCA allows reasonable regulation of subsistence uses even in situations where all non-subsistence uses have not been eliminated.

When I appeared before the Resources Committee of the Alaska Senate on March 5, 1986, I was asked whether the bill then being considered by the Committee was consistent with the requirements of ANILCA. I noted that I could give only a preliminary opinion and that an official opinion would have to be based on a formal submission by the State and a formal review by the Department of the Interior. Subject to that limitation, I answered that the bill appeared to meet the ANILCA requirements. I also stated that an amendment under consideration by the Committee concerned with "personal use" fishing would not, if adopted, alter my conclusion on the bill's consistency with ANILCA.

The bill ultimately passed by the Committee contained the "personal use" fishing amendment, but is otherwise identical to the bill I referred to. Given my understanding of the bill, which is derived from review of the bill and conversations with Alaska legislature staff, my preliminary conclusion is that the bill is in accordance with the interpretations of ANILCA requirements provided in the April 4, 1986, letter to the Alaska Attorney General sent by Gale Norton, the Associate Solicitor for Conservation and Wildlife. Once the State's legislative process is completed, we would expect to review whatever State legislation is enacted and make a formal determination as to whether the legislation is consistent with the requirements of ANILCA.

The second issue concerns reasonable regulation of subsistence use in situations where the resource is plentiful enough to allow for both subsistence and non-subsistence use. Such regulations, which might concern seasons, means of taking, and daily bag limits, are allowed by ANILCA. The subsistence preference provided for in ANILCA is designed to ensure that opportunities for subsistence

use at customary and traditional use levels are not lost to competition from consumptive non-subsistence uses. It is not designed to strip the State and Federal governments of any ability to regulate subsistence uses when subsistence resources are sufficient to allow for non-subsistence uses. Even when a particular population is sufficient for all subsistence and non-subsistence users, ANILCA provides for reasonable regulation of the subsistence uses in order to avoid wasteful subsistence uses and ensure conservation of healthy and viable fish and wildlife populations. The imposition of such regulations does not require that all non-subsistence uses be eliminated. As stated by Representative Udall:

> If the population is sufficiently viable [to satisfy the demands of all users groups] then all user groups may participate in the harvest, but regulations concerning such subjects as seasons and means of taking must be adopted that have the least adverse impact upon rural residents engaged in subsistence uses of the population.

126 Cong. Rec. 29280 (Nov. 12, 1980). ANILCA thus authorizes subsistence "regulations concerning such subjects as seasons and means of taking," without requiring termination of all non-subsistence uses, so long as the regulations do not unreasonably impede opportunities to satisfy subsistence uses.

I appreciate this opportunity to confirm the views I expressed before your committee.

Sincerely,

Bill Horn

Assistant Secretary for Fish and Wildlife and Parks

cc: Acting Director, Fish and Wildlife Service
Regional Director, Fish and Wildlife Service
Anchorage, AK

AUG 21 Kie 1985

STATE OF ALASKA

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4941

HOUSE SPECIAL COMMITTEE ON OIL AND GAS

NOTICE OF MEETING

To: All Interested Persons

From: Rep. Mike Davis, Chairman

Date: August 20, 1985

Re: Meeting of the House Special Committee on Oil & Gas

The House Special Committee on Oil and Gas will be meeting in Anchorage on Monday, September 16. The meeting will be held in the teleconference room of the Anchorage Legislative Information Office at 1024 W. 6th Ave. The meeting will also be teleconferenced to Juneau, Fairbanks, Homer, Kenai and Kotzebue. The agenda for the meeting is as follows:

9:00 am - 11:00 am	Discussion of proposed revisions to AS 38.05 and AS 38.06. Discussion of draft hazardous substance release and oil discharge response funds.
11:00 am - 12:00 pm	Commissioner Wunnicke will speak on royalty oil contract proposals.
12:00 pm - 1:00 pm	Lunch
1:00 pm - 4:00 pm	Review by the Division of Oil and Gas of negotiations regarding Cook Inlet royalty gas revaluation, and an overview of unitization and future North Slope oil production.

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

August 6, 1985

The Honorable Mike Davis, Chairman
House Special Committee on Oil & Gas
Alaska State House of Representatives
542 Fourth Avenue, Suite C
Fairbanks, AK 99701

Dear Representative Davis:

Thank you for your letter of July 26 concerning the TAPS settlement. I read your comments with interest, and I have directed the Department of Law to give them full consideration.

I am pleased that we both agree that the State, although it should proceed with caution, also has an obligation to deal in good faith with the parties who have signed the settlement. As I stated in my previous letter to you, I believe that means that we do nothing directly or indirectly to subvert the approval process before the Federal Energy Regulatory Commission (FERC). Thus, we will let the companies take the lead in attempting to gain approval of the settlement; if they succeed we will willingly go along with those results. I do not intend to put any roadblocks in their way -- this includes raising arguments or taking positions that would induce procedural complications which might jeopardize the November 30 "drop dead date."

I would note, however, that the FERC recently ruled against the State's request to split the approval process into one proceeding with all non-objecting parties (and thus resulting in an "uncontested" settlement), and one proceeding with parties that object to the settlement (thus giving rise to the probability of a contested settlement). In so doing, the administrative law judges stated that "examination of the initial round of comments that have been filed on the settlement agreement (the reply comments are yet to come) demonstrates the settlement proposal will be a contested one even with respect to the consenting carriers." I have been informed that the State does not intend to challenge that assumption.

Otherwise, we intend at this time to simply support the carriers' reply comments by reference, and do not intend to raise any

arguments of our own (except possible responses to technical inaccuracies about how the settlement works). Up to this point, the State has carried the ball -- we now intend to hand it off to the other signing parties.

I hope that this responds to your concerns. Should you have additional questions, please call either me, Hal Brown, or Bob Maynard. Thank you again for your thoughtful consideration. I expect that we will be able to continue working together to reach an appropriate resolution of this complex matter.

Sincerely,

Bill Sheffield
Governor

RURAL ALASKA RESOURCES ASSOCIATION
P.O. BOX 3-3908
ANCHORAGE, ALASKA 99501-3908
(907) 279-2511

September 4, 1985

Honorable Peter Goll
Alaska State House
Alaska State Legislature
Pouch V (MS3100)
Juneau, Alaska 99802

RE: Proposed Subsistence Amendments to Title XVI

Dear Representative Goll:

For the Rural Alaska Resources Association I recently presented testimony to the Senate State Affairs Committee regarding proposed amendments to Alaska Statutes Title XVI, Fish & Game, concerning subsistence.

I have enclosed a copy of that statement plus an adendum to the original statement. The latter addresses the need to also amend the statute to authorize the state's system of regional fish and game councils. Regional councils are already in place and functioning, but Alaska Statutes Title XVI is absent any mention of them, while federal law (ANILCA, P.L. 96-487, Dec. 2, 1980) does, in fact authorize regional councils. In summary, the State of Alaska is not only not in conformance with federal law regarding subsistence priority, but seems clearly also not fully consistent with federal law in the matter of regional councils.

This is a relatively simple matter to tend to now. Please let me know if we can assist you in any manner to help achieve a satisfactory resolution of the entire matter. To the extent that " RARA" is a statewide rural subsistence umbrella organization I feel that we can network information and provide helpful information back to you.

Please contact me as noted below, or our RARA staff person, Vernita

Zilys at the letterhead address or telephone.

Thank you.

Sincerely,

RURAL ALASKA RESOURCES ASSOCIATION
Jim Kowalsky, Chairman
c/o Tanana Chief's Conference, Inc.
Doyon Building
201 1st Avenue
Fairbanks, Alaska 99701
Phone: 452-8251 ext. 220

JK:de

Remarks to the State Affairs Committee of the Alaska State Senate Concerning Subsistence, Anchorage, Alaska, August 27, 1985.

My name is Jim Kowalsky. I speak today as chairman of the Rural Alaska Resources Association, or as we refer to it "R.A.R.A." Our board of directors is made up of representatives of each of ten regional non-profit Native corporations, and also of the Native village of Tyonek and the North Slope Borough. I am employed by the Tanana Chiefs Conference, Inc. as director of its subsistence program. R.A.R.A. is a statewide subsistence advocacy organization.

I wish to make one major point Mr. Chairman, and it is a point which I feel is being missed or which is becoming obscured in this debate, and it is or should be the main consideration of this committee and of the State Senate as they consider any legislative amendments to the state's subsistence law. The point is that the only thing that really matters in this debate to our Alaskan people who live in the far flung, remote rural communities of our state is that they have the opportunity to feed themselves, their families, and their communities - including the elderly, those who are handicapped, who are ill and/or too young, or otherwise unable to hunt or fish.

The animals and the fish are the mainstay of the economy of rural Alaska. Harvesting these resources is an economic activity and it is the only major economic activity in which rural Alaskans generally have any real confidence. On the other hand confidence in the cash economy is limited, not strong, not secure. Generally there is little cash, very few jobs. In some communities there have, at times, been no jobs. Coastal communities in many cases have a richer resource base than do Interior communities, and in some cases may have more seasonal jobs associated with commercial fishing or perhaps in the timber industry. By contrast Interior communities have less resource base.

But in any case no matter how each of you or others in our urban communities choose to discuss or debate subsistence solutions, the economic realities for our rural Alaska communities remains a fact of Alaskan life. This is a compelling and a major issue in the equation which we all seek - whatever local wealth exists in rural Alaska exists as natural harvestable renewable fish and wildlife, and the confidence to harvest these to support human life perpetuates this economic base. I should urge you to consider that there is now available a sizeable body of literature which very competently documents these socio-economic realities of rural Alaska's communities.

Mr. Chairman, I would respectfully like to make several suggestions to the committee.

1) Pass the Governor's proposed amendment to the existing subsistence statute. Return the system to what it was in past years, a system perhaps far from perfect, but one which protects the relative handful of rural people who may need the protection this amendment would provide from time to time, but will also allow Anchorage and other urban hunters to participate in, say, the Nelchina Caribou hunt for example. Few rural people like the Tier II subsistence hunt process either. Nikolai may be the one exception in the Interior where local people are able to hunt bison for the first time.

2) Don't put the rural subsistence economy on a lottery or drawing system. Can you imagine having your own opportunity to actually feed your family and community placed in a drawing, on a system of chance?

3) Don't attempt to devise legislation which will make subsistence into a welfare system which would for example, weed out and prevent a specific rural hunter from engaging in his "employment' just because he might

have a cash income higher than most others in his community. This hunter likely provides meat for a large family plus elderly or disabled community residents who may exist in substantial numbers and for whom few other reliable sources of meat or fish exist. Let your legislation reflect the fact of rural Alaskan life which is that communities subsist as communities, but that individuals do not subsist. Also, remarks urging your committee to adopt standards which consider a subsistence priority only be given to a community or individual at the point when they reach the poverty or even starvation level should not be followed. The assumptions made by the advocates of such standards are incorrect. Subsistence is a support system, not a last ditch life support system to which a dying patient is to be hooked onto just before death. A subsistence family and community ideally is a happy, healthy, prosperous people, not a people down and out, standing in the last ditch bread line waiting for the crumbs of a welfare handout.

To conclude, allow me to again emphasize that the subsistence economic system must remain a central or anchor point to your deliberations. In familiar cash flow terms, the rural communities which I attempt to characterize generally range from poor to very poor; but in terms of harvest of renewable resources, rural communities are not to be considered as poor. Rather, the consideration should be that the harvest, the actual physical act of going out to harvest, is the economic system of rural Alaska, it is the employment.

I believe this committee and the Alaska Legislature and the Administration generally do have an obligation to give this economic system the protection that is necessary to allow rural communities the confidence and the best opportunity possible to provide for and to help support themselves. I respectfully must

remind you that you have gone to enormous, far, far-reaching ends to protect, encourage and foster the economy and the economic system and opportunities of most other, if not all other sectors of the Alaskan population.

Thank you for hearing my testimony.

Addendum to Statement by Jim Kowalsky for the Rural Alaska Resources Association to the State Affairs Committee, Alaska State Legislature, Anchorage, Alaska on August 27, 1985.

Amend Title XVI to Authorize Regional Fish & Game Councils

An examination of Title XVI will demonstrate that the Alaska State Legislature has not addressed Regional Fish and Game Councils. It has, on the other hand, specifically addressed the system of local fish and game advisory committees. Notwithstanding this omission, the State of Alaska has created a system of regional fish and game councils by regulation only.

This combined system of local advisory committees, regional councils and game and fisheries boards gives the people of Alaska a major voice in fish and game management. This system is unequalled anywhere else in the nation. It would seem an oversight that the Legislature has overlooked the opportunity to authorize the States six regional councils by statute.

It also would seem that, if the Alaska Legislature is going to go through the task of revising the statute so as to make it complete that it might as well deal with all the necessary corrections at this time so as to avoid having to come back to the issue again yet one more time in the future.

Among the most compelling arguments in the Senate and, ultimately the House in a free Conference Committee, to add the authorization of regional fish and game councils to any legislative amendments to Title XVI likely are:

1) Regional fish and game councils, made up as they are of chairpersons of all the states fish and game advisory committees or their designees be they rural or urban, do increase and make complete the public participation element in the process of establishing fish and game regerlations - in otherwords, here urban and rural people get together and have a voice; and

2) the Legislature should take steps now to avoid having to come back yet a third time to fix the state fish and game statute.

Another reason for action on this matter exists:

3) Federal law, ANILCA, (PL 96-487 Dec. 2, 1980) Title VIII, Sec. 805,"Local and regional participation" states:

   (a) "-- the state shall establish -
   (3) a regional advisory council in each subsistence resource region.

Section 805 continues to set forth the requirements for the composition

and authorities of regional councils, and authorizes the Secretary of the Interior to establish such councils and local advisory committees. But Sec. 805 (d) states

> 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 consisted with, and which provide for the definition, preference and participation specified in, sections 803, 804, and 805 ---- (emphasis added)

On one hand critics of the request to amend to include regional councils may point to the fact that the State has provided for regional fish and game councils since before 1980 by regulation (if not by statute). However, I could argue, so has the state made certain subsistence provisions by regulation only, not by statute. This approach lacks statuatory foundation in both instances - subsistence preference and also regional fish and game councils.

I submit to you that the cure is simple, should lack all the controversy associated with subsistence preference, gives a voice to Alaskans, and, to take this action now will save having to deal with it later, a third time.

Regional councils should be added to any amendment package to Title XVI under consideration by the Senate and the full Legislature.

Thank you for considering these views.

Alaska State Legislature

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: MEMBERS, HOUSE INTERIM COMMITTEE ON SUBSISTENCE

FROM: Rep. Jack Fuller, Chairman

DATE: September 24, 1985

SUBJECT: Committee hearing schedule

With your concurrence, I have set up the following schedule of committee hearings:

Anchorage
Testimony from Anchorage area; all other sites may listen in
Wednesday, November 6
9:00 - 1:00; 2:30 - 5:30; 7:00 - 9:00
Location: Anchorage LIO, 1024 W. 6th

Fairbanks and Interior
Testimony from Fairbanks area and Interior; all other sites may listen in
Thursday, November 7
12:00 - 5:30; 7:00 - 9:00
Location: Fairbanks LIO, 315 Barnett Street, Suite 101

Southeast, Prince William Sound, Kodiak teleconference
Testimony from these areas; all other sites may listen in
Tuesday, November 12
9:00 - 1:00
Committee members and other Representatives present at their home sites

Western, Northwestern, Southwestern teleconference
Testimony from these areas; all other sites may listen in
Tuesday, November 12
2:00 - 6:00
Committee members and other Representatives present at their home sites

My office will send you a TR in October; please make your own travel and lodging arrangements. The Fairbanks hearing is timed so that members can take a morning flight up from Anchorage.

My plan is to begin the first hearing with an update on what has happened with the subsistence issue since the end of session. This portion will include a commentary from the Department of Fish and Game, a current status report on all litigation, the status of the federal response to the Governor's office and to the AFN petitions, and an update on the issues before the Fisheries and Game Boards. In addition, I will provide for the committee an analysis of the House-passed bill in light of current problems with game. Committee packets will be made available in advance of the meetings.

Enclosed are news clippings from August 4 to September 15.

Senator Arliss Sturgulewski
2957 Sheldon Jackson st.
Anchorage, Ak 99508

September 16, 1985

Dear Arliss:

In my research, I agree with Jeff Parkers written testimony in parts as follows:

a) The subsistence law need to be defined to comply with changes in use patterns, status of resources, and subsistence reusable areas. Methods. means needs to be more restrictive to generally acceptable aids in resource nacvesting.

b) The Subsistence law can always be amended, definitions:

Subsistence = Necessary to support life

Rural = Open country, open land, country people

Customary = Getting used to... life style or food

Traditional = Inherited pattern, of life style

Problem = If the ranks of subsistence uses will be thinned out by more restructive measures, that alone will strengthen the ranks of sports interest groups. That is not acceptable.

Unless a new category is established to fillin a gap created by more restictive subsistence law, such a personal use on Fish & Game, then that may be acceptable to subsistence use supporters of the State subsistence law.

In my opinion, the subsistence law supporters will support providing for non native or urban hunters , who also have a right to hunt and fish for personal use of the desired resources.

Those people are always accepted in their own right, but not as sports hunters or sports fishermen because of controversial position of some sports interest groups.

Thank you for your time.

Sincerely,

Jesse Foster

Jesse Foster, Member
Alaska Board of Fisheries

Melissa
Send copy to
Kit - Rebecca
to me a