

SUBSISTENCE

LEGAL

QUESTIONS

(FILE 2)



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

February 16, 1982

MEMORANDUM

TO: Representative Tony Vaska

FROM: Leslie Longenbaugh, Research Staff

RE: Legislative History of ch 151 SLA 1978  
Research Request Number 82-37

You asked that we research the history of ch 151 SLA 1978, the State's subsistence law. In particular, you asked for dates, places, and names of those who were in attendance and/or gave testimony, at meetings or hearings called for the discussion of the law before its passage.

Each of the four legislative committees that reviewed HB 960 in May and June 1978 held at least one meeting for that purpose. Records of the House Resources and the Senate Resources meetings are not available and may no longer exist. We checked newspapers of the time in hopes of finding some mention of the hearings, with no success. We were able to listen to a tape of the meeting of the House Special Committee on Subsistence, and we obtained the minutes of the House Finance Committee meetings. In addition, we obtained lists of the witnesses at public hearings held around the state in 1977 by the Interim Committee on Subsistence and by the Alaska Public Forum.

Attached to this memorandum are appendices including: a brief history of ch 151 SLA 1978 (Appendix A); as complete a description as we could piece together of each hearing or committee meeting pertaining to the bill (Appendix B); and a brief description of the statewide public hearings on subsistence, including for each hearing a list of the witnesses and some of those who attended (Appendix C).

If we are able to obtain any additional information on the hearings we will pass it on to you; please call on us if we can be of further assistance.

LL/dlp

Attachments: Appendices A, B and C

APPENDIX A

Legislative History of ch 151 SLA 1978

History of ch 151 SLA 78

- May 1, 1978 -- HB 960 introduced by House Rules at the request of the House Special Committee on Subsistence; first reading; referred to House Special Committee on Subsistence, House Resources and House Finance
- May 1, 1978 -- Meeting of House Special Committee on Subsistence
- May 2, 1978 -- House Special Committee on Subsistence passed HB 960 with amendments; referred to House Resources
- May 2, 1978 -- Meeting of House Resources Committee
- May 4, 1978 -- House Resources offers its committee substitute for HB 960; CSHB 960 is referred to Finance
- May 4, 1978 -- Fiscal note on HB 960 is printed in House Supplement
- May 12, 1978 -- House Finance meeting to consider CSHB 960
- May 12, 1978 -- Letter of intent on HB 960 from House Special Committee on Subsistence is printed in House Journal
- May 15, 1978 -- House Finance meeting to consider CSHB 960
- May 19, 1978 -- House Finance offers its committee substitute for CSHB 960; CSHB 960 is referred to House Rules
- May 26, 1978 -- HB 960 is read for the second time; House adopts CSHB 960 (Fin) in lieu of HB 960; CSHB 960 (Fin) is amended by the House; CSHB 960 (Fin) am is read for the third time; CSHB 960 (Fin) am passes the House on a vote of 28 yeas to 8 nays, with 4 excused
- May 26, 1978 -- CSHB 960 (Fin) am is engrossed, signed by the Speaker and sent to the Senate for consideration
- May 30, 1978 -- First reading in Senate of CSHB 960 (Fin) am; referred to Senate Resources and Finance Committees
- June 5, 1978 -- Senate Resources meeting to consider CSHB 960 (Fin) am
- June 9, 1978 -- Senate Resources meeting to consider CSHB 960 (Fin) am
- June 14, 1978 -- Senate Resources meeting to consider CSHB 960 (Fin) am

- June 16, 1978 -- Senate Resources committee substitute for CSHB 960 (Fin) am is adopted by the Senate; Senate reads SCS CSHB 960 am S for the second time; Senate waives referral to Senate Finance
- June 16, 1978 -- Letter of intent from Senate Resources regarding SCS CSHB 960 am S is printed in the Senate Journal
- June 16, 1978 -- SCS CSHB 960 am S advances to third reading in the Senate; SCS CSHB 960 am S passes the Senate on a vote of 17 yeas to 3 nays; notice of reconsideration
- June 17, 1978 -- Reconsideration of SCS CSHB 960 am S, which passes the Senate on a vote of 14 yeas to 2 nays, with one absent and three excused
- June 17, 1978 -- House concurs in Senate amendment to CSHB 960 (Fin) am, adopting SCS CSHB 960 am S
- June 29, 1978 -- SCS CSHB 960 am S is signed by presiding officers in House and Senate and is sent to the Governor for his signature
- July 22, 1978 -- SCS CSHB 960 am S is signed into law, ch 151 SLA 78, by the Governor

APPENDIX B

Committee Hearings Regarding HR 960, 1978

HOUSE SPECIAL COMMITTEE ON SUBSISTENCE

Date: May 1, 1978

Place: Court 650

Time: 12:30 p.m. (until approximately 1:00 p.m.)

Membership of Committee: Nels Anderson, Chair  
Sam Cotten  
William Akers  
Leo Schaeffer  
Al Nakek  
Joe Hayes  
Steve Cowper

Attending:\* Nels Anderson, Chair  
Sam Cotten  
Al Nakak\*\*  
Joe Hayes\*\*

Don Clocksin, Anchorage

Transcript: A tape of this meeting is on file at the Legislative  
Affairs Library.

Product: amendments for HB 960

\*The record of this meeting is on tape. Most of those in attendance  
did not identify themselves; only those who spoke are listed here.

\*\*Two of the men who spoke were identified only as "Joe" and "Al" on  
the tape.

HOUSE RESOURCES COMMITTEE

Date: May 2, 1978

Place: Room 118, Capitol

Time: 1:30 p.m.

Membership: Alvin Osterback, Chair  
Merle Snider, Vice-chair  
William Akers  
Don Bennett  
Richard Eliason  
Hugh Malone  
Mike Miller  
Sally Smith  
Richard Urion

Attending: Unknown

Transcript: not available; Legislative Affairs Library does not have any record of this meeting.

Product: committee substitute for HB 960

HOUSE FINANCE COMMITTEE

Date: May 12, 1978

Time: 1:30 p.m. (adjourned at 4:40 p.m.)

Membership: Steve Cowper, Chair  
Oral Freeman, Vice-chair  
Thelma Buchholdt  
Jim Duncan  
Clark Gruening  
Phillip Guy  
E. J. Haugen  
Russ Meekins, Jr.  
Leo Rhode  
Leo Schaeffer  
Leslie Swanson

Attending: Committee: Freeman, Buchholdt, Duncan, Gruening, Guy,  
Haugen, Meekins, Rhode, and Schaeffer

Others: Representative Nels Anderson\*  
Judy Dubois and Naomi Kipp,  
Department of Labor (HB 920)  
Commissioner Ron Skoog\* and Bob Rausch\*,  
Department of Fish and Game  
Roger Lang\*, Alaska Federation of Natives  
Ross Soboleff\*, Rural Cap, Tlingit-Haida  
Central Council  
Bob Lohr\*, Director, Upper Tanana Development  
Corporation  
Lloyd Telfon, Native Student Organization,  
UA Anchorage  
Bob Schroeder, Fiscal Analyst, Legislative  
Finance Division (HB 920)

Transcript: minutes of this meeting are available through Legisla-  
tive Finance Division; a copy of the minutes is attached.

Product: no new version of the bill

\*These people gave testimony regarding HR 960.

HOUSE FINANCE COMMITTEE

Date: May 15, 1978

Time: 8:45 a.m.

Members: Steve Cowper, Chair  
Oral Freeman, Vice-chair  
Thelma Buchholdt  
Jim Duncan  
Clark Gruening  
Phillip Guy  
E. J. Haugen  
Russ Meekins, Jr.  
Leo Rhode  
Leo Schaeffer  
Leslie Swanson

Attending: Committee: Freeman, Gruening, Guy, Haugen, Rhode, and Swanson\*

Others: Representative Nels Anderson

Transcript: Minutes available through the Legislative Finance Division; a copy of the minutes of the pertinent portion of the meeting is attached.

Product: reported out Finance committee substitute

\*Other members arrived after the discussion of CSRB 960 an (Fin)

SENATE RESOURCES COMMITTEE

Date: June 5, 1978

Place: Room 126, Capitol

Time: 2:30 p.m.

Members: Kay Poland, Chair  
John Butrovich, Vice-chair  
Chancy Croft  
John Huber  
Pete Meland  
Bill Sumner  
Clem Tillion

Attending: unknown

Transcript: documented information on the meeting is not available

Product: no new version of the bill

SENATE RESOURCES COMMITTEE

Date: June 9, 1978

Place: Room 126, Capitol

Time: 1:30 p.m.

Members: Kay Poland, Chair  
John Butrovich, Vice-chair  
Chancy Croft  
John Huber  
Pete Meland  
Bill Sumner  
Clem Tillion

Attending: unknown

Transcript: documented information on the meeting is not available

Product: no new version of the bill

SENATE RESOURCES COMMITTEE

Date: June 14, 1978

Place: Room 126, Capitol

Time: 9:00 a.m.

Members: Kay Poland, Chair  
John Butrovich, Vice-chair  
Chancy Croft  
John Huber  
Pete Meland  
Bill Sumner  
Clem Tillion

Attending: unknown

Transcript: documented information on the meeting is not available

Product: committee substitute for CSHB 960 (Fin) am

APPENDIX C

Interim Committee on Subsistence  
Testimony at Public Hearings, 1977

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Kotzebue; NANA Regional Corporation Museum

Date: September 16, 1977

Time: 3:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Steve Cowper  
Senator Pat Rodey

Committee Staff: Adelheid Herrmann

Testifying: John Schaeffer, Kotzebue  
Lena Sours, Kotzebue  
Willie Goodwin, Kotzebue  
Keith Lawton  
Fletcher Gregg, Sr., Kotzebue  
Elvira Downey, Kotzebue  
Levi Kowunna, Point Hope  
Judith Allen, Kotzebue  
Robert Newlin, Kotzebue  
Marty Strauss (Mauneluk)

Record: a record of the testimony given at the hearing is on file  
at the State Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Nome Elementary School

Date: September 17, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair

Committee Staff: Adelheid Herrmann

Testifying: Gerald Trigg, Nome  
Duane Oozeva, Gambell  
Charles Johnson, Nome  
Perry Mendenhall, Nome  
Dan Thomas, Nome  
Nick Wongittilin, Nome  
Nancy Mendenhall, Nome, Norton Sound Health Corporation  
Teresa Sockpealuk

Registered: Helen M. Fagerstrom, Nome, Resident  
Franklin Kanimgak, Gambell, Resident  
Mark A. Hoelskin, Nome, KNOM Radio  
Nancy Millheisler, Nome, Resident  
Brenda Johnson, Nome  
Esther Bourdon, Nome, Resident  
Rita Hukill, Nome, Resident

Record: a written record of the testimony given at the hearing is  
on file at the Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Glennallen High School

Date: October 3, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Steve Cowper

Committee Staff: Dorothy Larson

Registered: Bill Joe, Chistochina  
Chuck McMahan, Gakona  
Steven John, Chistochina  
Ken Roberson, Glennallen, Dep't. of Fish and Game  
Francis Hunt, Jr., Copper Center  
Frances Hibble, Kenny Lake, Kenny Lake Community League  
John F. Goertz, Kenny Lake  
Sterling Eide, Glennallen, Dep't. of Fish and Game  
Bud Carlson, Cantwell  
Maggie Oliver, Anchorage, Cantwell-Yedatene Na Corporation  
Helen Geisert, Anchorage, Chitina Native Corporation  
Christine Yazzie, Glennallen  
Millie Buck, Glennallen  
Wilson Justin, Gakona  
Lee Adlen, Glennallen  
Clara (Billie) Peters, Gakona  
Joe Roach  
Sam Agaier, Gakona  
Ruth Taylor, Glennallen  
Patricia Hunt, Kenny Lake via Copper Center

Record: a record of the testimony given at this hearing is on file  
at the State Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Fairbanks; USO Building

Date: October 4, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Steve Cowper  
Rep. Joe Hayes  
Sen. Pat Rodey

Committee Staff: Dorothy Larson

Testifying: Harold Gillam, Fairbanks  
Jim Kowalsky, Fairbanks, Friends of the Earth  
Alfred Fabian, Fairbanks  
Bud Wiese, Fairbanks, Interior Wildlife Association  
Samuel Demientieff, Fairbanks, Tanana Chiefs Conference  
George Matz, Fairbanks, Fairbanks Environment Center  
Hardy Smith, North Pole  
Dan Rodey  
Mrs. Samuelson  
Tom Scarborough, Fairbanks, Tanana Valley Sportman's Assoc.  
Rosita Worl  
Gene Carlson  
Dave Snarski, Ester, Alaska Conservation Society  
Marian Hao, Fairbanks  
Chris Anderson, Fairbanks  
David Hawthorne  
Mary E. Binkley, Fairbanks  
Jonathan Solomon, Fort Yukon, Gwitchyea Zhee Corporation  
Moses Samuelson, Fairbanks  
David G. Kelleyhouse, Fairbanks  
A. M. Swarner, Fairbanks  
T. Stell Nauman, Eagle River, NPS

Registered: Richard Stern, Fairbanks  
Bob Rogers, Fairbanks  
Jim Kubanyi, Fairbanks  
Carole Yazzie, Fairbanks, Deloycheet, Inc.  
Mark Baumgartner, Fairbanks  
R. Clar, Fairbanks  
E. Carlson, Fairbanks  
Fred M. Anderson, Fairbanks, Dep't. of Fish and Game  
John Wright, Fairbanks  
Moris Samuelson, Fairbanks  
Keith Samuelson, Fairbanks  
Geoff Kennedy, Fairbanks

Record: a record of the testimony given during this hearing is on  
file at the Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Nenana; George Hall

Date: October 5, 1977

Time: 6:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Steve Cowper

Committee Staff: Dorothy Larson

Testifying: Mitch Demientieff, Nenana  
Lawrence A. Persley, Nenana  
Ron Musinginya  
Andrew Souders, Clear  
Chris Anderson  
Steve Matthew, Fairbanks  
Mary Demientieff, Nenana  
Joe Williams, Nenana  
Jeff Kennedy, Fairbanks

Registered: Winnie Charlie, Nenana  
Eli Charlie, Nenana  
Colleen Loard, Nenana  
Paul Esau, Nenana  
Danial Betcis, Nenana  
Paul George, Nenana  
John Gonsazles, Clear  
Walter Lord, Nenana  
Richard Ketzler, Nenana  
Larry Ketzler, Nenana  
Victor Lord, Nenana  
Henry Ketzler, Nenana  
Cathy Demientieff, Nenana

Record: a record of the testimony given at this hearing is on file  
at the Legislative Library.

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Kodiak; Kodiak Borough Assembly

Date: October 17, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Chair  
Rep. Joe Hayes  
Rep. Steve Cowper  
Sen. Kay Poland

Committee Staff: Dorothy Larson

Testifying: Charles Naughton, Anchorage  
David "Stick" Morrison, Kodiak  
Bill Donaldson, Kodiak  
Ivar Malutin, Kodiak  
Jack Wick, Kodiak, Pres. of Koniag  
George Binder, Kodiak  
Gene Sundberg, Kodiak  
Karl Armstrong, Kodiak, Kodiak Is. Conservation Society  
Frank Peterson, Kodiak, KANA Exec. Dir.  
Dick Wamser, Kodiak  
Pete Olson, Kodiak  
Fred Zharoff, Kodiak  
Jack Christianson, Old Harbor  
Larry Matfay, Old Harbor  
Alaska Conservation Society: submitted a position paper

Registered: Yvonne Zharoff, Kodiak  
Bob Worl, Anchorage  
Gust Rastopsoff, Larsen Bay  
Thomas Peterson, Kodiak  
Janet Wente, Kodiak  
Wayne Marshall, Kodiak  
Bill Hartman, Kodiak  
Ron Brockman, Kodiak  
Sylvia Barnes, Kodiak  
Bill Berestoff, Kodiak

Record: a record of the testimony given at this hearing is on file  
at the Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Nome; King Island Community Center

Date: October 27, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Al Nakak

Committee Staff: Adelheid Herrmann

Testifying: George Dan, Stebbins  
Emma Willoya, Nome  
Tomi Schubert, Nome, Student  
Eddie Schubert, Nome  
Evan Schubert, Nome  
Caleb Pungowiyi, Nome, Kawerak, Inc.  
Ralph Willoya, Nome  
Vernon Kugzruk, Nome  
Perry Mendenhall, Nome, Nome IRA Village  
Henry Adams, Koyuk, Kawerak, Inc.  
Richard Miller, Nome, Situasuak Native Corporation  
Roger Seetot, Brevig Mission  
Elmer Seetot, Sr., Brevig Mission  
Ellie Kulukhon, Nome  
Wesley Ahmasuk, Nome  
Aaron Simon, White Mountain  
Jenny Alowa, Nome  
Jacob Ahwinona, Nome  
Bill Dann, Nome, NHSC  
Tereasa Sockpealak, Shaktoolik  
Jeanette Martin, Nome  
Sue Matthenis, Nome  
John Larson  
Ton Ellanna, Nome, King Island IRA and Kewarak, Inc.  
Dan Thomas, Nome, NSHC  
Carolyn Schubert, Nome, Council Native Corporation  
John Waghyyi, Sr., Nome  
Alfred S. Sahlin  
Dan Karmun  
Bessie Moses, Nome  
Della Waghyyi, Nome

Registered: Charlie Kowchee, Nome, Kawerak  
Ralph Kowchee, Nome  
Mark Hoelsken, Nome, KNOM Radio  
Little Sisters of Jesus, Nome  
Charles M. Kokukuk, Nome, King Island TRA  
Agatha Kokuluk, Nome  
Heinrich Springer, Nome  
Ronald Davena, Nome  
Bertha Wilkalkia, Nome  
Herbert Wilkalkia, Nome  
Harold Ahmasuk, Sr., Nome  
John Jemewouk, Elim, Elim General Council  
Mina Pungowiyi, Nome  
Nanci Millheisler, Nome  
Chuck Blem, Nome  
Mike Willoya, Nome  
Jackie Wilson, Nome, Adult Basic Education  
Charles Fagerstrom, Nome  
Ralph Willoya, Golovin  
Andrew Daniels, Elim, IRA Council - Elim  
Ruth Wright, Nome  
Tersa Smith, Anchorage, State Affairs Commission  
Frances Binford, Nome  
David Roeng, Anchorage, Counsel, State Affairs  
Commission  
Jeff Kowchee, Nome  
Bernard Kasgnoc, Nome  
Brenda Johnson, Nome  
Truman Johnson, Nome  
Alfred S. Sahlin, Nome, Sitnasusauk  
J. J. Pullock, Nome, King Island

Record: a record of the testimony given at this hearing is on file  
at the Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Anchorage Community Center

Date: November 10, 1977

Time: 6:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Sam Cotten  
Rep. Steve Cowper  
Rep. Al Nakak  
Rep. Leo Schaeffer  
Rep. Joe Hayes  
Rep. William Akers

Committee Staff: Dorothy Larson  
Adelheid Herrmann

Testifying: Mitch Demientieff  
Isaac Juneby  
Charles Nelson  
Dale Bondurant  
Mark Jacobs, Jr.  
Judy Rosander  
Woodrow Morrison  
Irene Catalone  
Peter Demoski  
Phil Smith  
Hank Ostrosky  
Andy Jimmy  
Phillip Dembroski  
Joe Clark  
Ed Norman

Record: a record of the testimony given at this hearing is on file  
at the Legislative Library.

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Anchorage; AFN Convention, Westward Hilton Hotel

Date: November 12, 1977

Time: 5:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Sam Cotten  
Rep. Joe Hayes  
Rep. Leo Schaeffer  
Rep. Al Osterback

Committee Staff: Dorothy Larson  
Adelheid Hermann

Testifying: Byron Mallot  
Betty Miller  
Rosita Worl  
Doug Motig  
Carl Jack  
Evelyn Pete  
Larry Edwards  
Luke Titus  
Nelson Frank  
Bill Wood  
Nick Lunde  
Dorothy Pegan  
Peggy Woodly  
Charlie Johnson  
Ed Thomas

Record: a record of the testimony given at this hearing is on file  
at the Legislative Library

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Galena; Community Hall

Date: November 12, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Steve Cowper  
Rep. Sam Cotten

Committee Staff: Dorothy Larson

Testifying: Roger Huntington, Galena  
Ronald Sam, Allakaket  
Alfred Attla, Hughes  
Norm Yaeger, Galena  
David K. anberg  
Charlie Rhea  
Ivan Sipary, Nulato  
Harvey Stranberg, Galena  
Gerald Walker, Holy Cross  
Sam Demientieff, Fairbanks

Registered: Harold Semaken, Galena  
Russ Griffin, Galena  
Edgar Nollner, Jr., Galena  
Goodwin J. Semaken, Kaltag  
Sanders Cleaver, Galena  
Bruce Barber, Galena  
Nicholas Grimaldi, Galena  
JoAnn Grimaldi, Galena  
Margaret Hegarty, Fairbanks  
Jo Meacham, Fairbanks  
Al Yatlin, Fairbanks  
Bergman Moses, Galena  
Alfred Evan, Galena  
Robert Thurnond, Galena  
Roland Quimby, Galena  
Bill Demoski, Galena

(continued on the following page)

Registered: John Starn, Galena  
Harry Pitka, Galena  
Marjorie Attla, Galena  
Lorraine Vent, Galena  
Annie Vent, Galena  
Larry W. Beary  
Frank Thurmond, Galena  
Jack Haklulen, Fairbanks

Record: a record of the testimony given at this hearing is on file  
at the Legislative Library.

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Juneau; ANB Hall

Date: December 9, 1977

Time: 7:00 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Leo Schaeffer

Committee Staff: Dorothy Larson

Testifying: Robert Willard, Juneau, Tlingit-Haida Central Council  
Amy See, Juneau, Sealaska Corporation  
John Norton, Haines  
Cliff Lobaugh, Juneau, Sierra Club

Registered: George See, Juneau, Sealaska Corporation  
Vic White, Juneau, SEACAP  
J. E. Leisu, Juneau, Southeast Alaska Empire  
Harold Howard, Douglas  
Peter Williams, Juneau, ANB

Record: a record of the testimony given at this hearing is on file at  
the Legislative Library.

INTERIM COMMITTEE ON SUBSISTENCE  
PUBLIC HEARING

Place: Barrow; North Slope Borough Assembly

Date: December 12, 1977

Time: 7:30 p.m.

Attending:

Committee Members: Rep. Nels Anderson, Jr., Chair  
Rep. Leo Schaeffer  
Rep. Sam Cotten

Committee Staff: Dorothy Larson

Testifying: Eben Hopson, Barrow, Mayor, North Slope Borough  
William Thomas, Barrow, Arctic Slope Regional Corporation  
Daniel Leavitt, Barrow, Whaler  
Michael Jeffrey, Barrow, Barrow Office, ALSC

Registered: Eugene Brower, Barrow, North Slope Borough, Whaler  
Morgan P. Soloman, Barrow, Alaska State Human Commission  
Eugene S. Lawn, Juneau  
Diane Baum, Barrow  
Jonah Leavitt, Barrow, Hunter  
Zachariah Alumalak, Barrow  
Morgan A. Sakeagak, Barrow

Record: a record of the testimony given at this hearing is on file at  
the Legislative Library.

ALASKA PUBLIC FORUM  
PUBLIC WORKSHOP ON SUBSISTENCE

Place: Dillingham

Date: October 3, 1977

Attending:

Speaking: Governor Jay Hammond  
Nancy Brunck, Anchorage, Moderator  
Frank Woods

Registered: Bill Luria  
Sue Green  
Adelheid Herrmann, Staff, Interim Committee on Subsistence  
Dave Cereson, Dillingham, City Council  
Jim Bingham, Dillingham, City Council  
Duane Bell, Dillingham, City Council  
Gordon Ryan, Dillingham, City Manager  
Harvey Samuelson, President, Bristol Bay Regional Corp.  
Two employees of the Department of Fish and Game

Record: a record of the testimony given at this workshop is on file at  
the Legislative Library.

HOUSE FINANCE COMMITTEE

May 12, 1978

1:30 p.m.

All members of the Committee were in attendance, except Chairman Cowper and Representative Swanson. Representatives Duncan, Buchholdt, Schaeffer and Gruening arrived later in the meeting. Also in attendance: Representative Nels Anderson; Judy DuBois, Administrative Officer, and Naomi Kipp, OSHA, Department of Labor; Commissioner Ron Skoog and Bob Rausch, Director, Division of Game, Department of Fish & Game. Those testifying on HB 960: Roger Lang, Vice President, Alaska Federation of Natives, Sealaska; Ross Soboleff, Rural Cap, Tlingit-Haida Central Council; Bob Lohr, Director, Upper Tanana Development Corporation; Lloyd Telfon, Native Student Organization, UA Anchorage. Also: Bob Schroeder, Fiscal Analyst, Legislative Finance Division.

PRESENT

Vice Chairman Freeman call the meeting to order and stated the first bill up for consideration is HB 920:

HB 920

"An Act making FY 78 appropriation adjustments for the Department of Labor, OSHA; and providing for an effective date."

[Representative Duncan arrived at this time.]

Ms. DuBois testified briefly regarding the change in status of the federal funding ratio of the OSHA program from 50% to 90%, with the State now contributing 10%. She advised this results in a substantial savings to the general fund. However, she added, the Department is in need of additional funding to expend the claims awards approved by the Fishermen's Fund Advisory and Appeals Council, to meet the increased cost of medical payments and for payment of disability awards, training and related costs incurred in FY 78. She discussed the Training and consultation areas of the OSHA program with regard to increased expenses. In answer to a question, she indicated the Department's intent is addressed in the workdraft of the Finance Committee Substitute for HB 920 and that she finds no problem with it.

At this time, Vice Chairman Freeman asked Mr. Schroeder to explain the workdraft of the Finance CSHB 920.

Mr. Schroeder advised the workdraft consists of the original bill, which reflects the change in the federal funding ratio, plus two additional requests; one, a \$35,000 appropriation from the Fishermen's Fund to the Department for payment of claims awarded in FY 78, and (2) a

\$254,800 appropriation from the Second Injury Fund to the Department for the payment of disability awards, training and related costs for FY 78.

In answer to a question, he explained the OSHA program is made up of five components: General Administration, Compliance Inspection, Health Inspection, Training and Consultation, and Planning and Standards. He advised the \$61,700 appropriation increase results from an increase of \$122,900 in federal funds, with a net reduction of \$61,200 in matching general funds that will lapse effective with this bill.

[Representative Buchholdt arrived at this time.]

In answer to a question regarding Section 8 of the work-draft, Ms. DuBois replied the Department has an agreement with the insurance company, whereby the Department reimburses them. She discussed the State's liability to ALPAC.

Representative Duncan moved and asked unanimous consent that Finance Committee Substitute for HB 920 be reported out. There being no objection, it was so ordered. Finance CS for HB 920 was reported out with a "do pass" recommendation.

FINANCE CS  
FOR HB 920  
REPORTED OUT

[Representatives Schaeffer and Gruening arrived at this time.]

At this time, Vice Chairman Freeman appointed Representative Duncan chairman of a special subcommittee to review HB 908 (Telecommunications). He advised Representatives Meekins and Brown and one other person would also serve. He requested the subcommittee report back to the full Committee on Monday morning May 15.

SUBCOMMITTEE  
ASSIGNMENT  
HB 908

The next bill to come before the Committee was HB 960:

HB 960

"An Act relating to fish and game management."

Mr. Rausch presented testimony on behalf of the Department of Fish and Game. He stated, in general, the Department opposes HB'960. He then cited specific sections of the bill (see attached) which the Department objects to and explained the reasons why.

RAUSCH  
TESTIMONY

Representative Buchholdt requested that Commissioner Skoog appear before the Committee. Vice Chairman Freeman asked if it were possible for him to make an appearance today. Mr. Rausch then made a telephone call, and informed the Committee that Commissioner Skoog would arrive shortly.

Representative Meekins solicited the Department's views regarding the creation of the Division of Subsistence. Mr. Rausch stated they objected to the director of that division being appointed by the Governor. He advised, as outlined in the bill, this division appears to be separate from the Commissioner, which would cause problems in coordinated management. He pointed out the other division directors are appointed by the Commissioner--a position the Department supports. He further added the Department feels it can accomplish the intent of HB 960 within the existing organization, provided support funding is made available. Discussion followed, with Representative Meekins stating the purpose in creating the Division of Subsistence is to reorient the Department's priorities. Mr. Rausch commented, since 1972-73, subsistence has been the highest priority in the Department.

The definition of "barter" was discussed, with Mr. Rausch explaining the Department recommends the language contained in SB 506 ("...to exchange, trade for, or otherwise give and receive subsistence-taken fish or game or their parts in exchange for other subsistence-taken fish or game or their parts."), as opposed to the definition presently in HB 906 ("...the exchange or trade of fish or game taken for subsistence uses for valuable consideration other than money."). He stated the Department feels the former sticks more closely with the terms of "barter", and that the latter is not in this context. He commented "valuable consideration" could mean a snowmobile, etc., and that this would be opening up a "Pandora's box". Discussion followed, with Representative Buchholdt indicating the definition should be more broad to include such things as articles of clothing and food; while the Department maintained the definition should be more "traditional". The commercial aspect of "barter" was further debated.

[Commissioner Skoog arrived at this time.]

Representative Meekins referred to Section 16.05.221(a) (b) and asked why the Department is opposed to this. Mr. Rausch answered that, initially, the bill contained certain language which the Department felt made membership of the Boards of Fisheries and Game biased. He pointed out this does not pertain to the current Resources committee substitute, where that language has been omitted.

There was discussion on Section 7(c) of the bill, where the Department recommends deletion. Mr. Rausch stated this is a subjective matter, in that no consensus exists among user groups in determining when the season should be cut off. There was discussion on the definition of

"edible". Representative Guy gave a brief description of his life as a child with regard to subsistence hunting. Mr. Rausch commented, if item (c) is adopted, the Board of Game would not be able to accommodate the user group--use by the local people. He stressed the Board needs this flexibility.

Commissioner Skoog commenting on the palatability of game, used the moose as an example, and stated the larger animals are not as edible as the younger calves. But, he pointed out, there would be a lack of concensus as to which is edible. Representative Schaeffer requested the Department provide the Committee with information as to how they arrive at a concensus. Representative Haugen commented, when the rutting season was the open hunting season in Sitka, the hunters were taking only the antlers and leaving the carcass.

SKOOG  
TESTIMONY

In answer to a question regarding the Department's position the creation of the Division of Subsistence, Commissioner Skoog replied this allows for a special appointment of the director by the Governor. He indicated this arrangement sets aside subsistence in a kind of special category--a line that exists outside the power of the Division of Game. He stated this would foster a lack of control and continuity, and he advised the Department is currently working on a departmental reorganization. In answer to a question, he advised there are four divisions within the Department, plus the Division of Administration--the operating division; Division of Game, Division of Sport Fish, Division of Commercial Fisheries and Division of FRED.

Representative Meekins commented he understood the Department's objection but that it would seem reasonable for the Department to appoint a Division of Subsistence, as they maintain it is their number one priority. Commissioner Skoog replied the Department feels this is not necessary as they can meet the needs of subsistence within the Division of Game. He stated he would prefer appointing a special assistant to the Commissioner--Special Assistant for Rural Affairs--who would function as a liason between the rural areas and the Department and who would look after the resources and identify surpluses that can be made available to the various users. He noted setting up another division along these lines would be a duplication of effort and mean more people and more funds; he feels the Division of Game is sufficient to handle the subsistence matter. In answer to a question, he stated this is currently being considered in the reorganization of the Department and noted the appointment of a Special Assistant for Foreign Affairs is also in the planning.

Representative Meekins commented he feels the subsistence question should be solved statutorily this year, as opposed to waiting until next year. He cited the possible replacement of the Administration, Legislature, etc., as being the reason. Discussion followed, with Commissioner Skoog noting the Legislature could put out a directive to the Department regarding subsistence. He also commented there should be new definitions for "subsistence users", "barter", "subsistence fishing", etc. In discussing the meaning of subsistence, Commissioner Skoog stated HR 39 was to preclude those people who move in to live off the land. He further stated, based on this definition alone, it would mean that anyone qualifies as a subsistence user.

Representative Guy commented on those people taking away game from the Native users, particularly in the Yukon-Kuskokwim area. Commissioner Skoog concurred in this but stated the constitution forbids discrimination against users. He stated the regulation of the use of aircraft should help the situation but noted the Department does not have the enforcement capability. Representative Guy commented this practice has been much too permissive.

Commissioner Skoog commented there is a restriction on the taking of moose and caribou in the the Yukon-Kuskokwim area, but no restriction on other animal species. He stated there are simply not enough moose and caribou. There was discussion on establishing quotas, with Commissioner Skoog advising this has been wherever possible. He further commented aircraft hunting is a definite problem, but that it is the snowmobile which really does the damage.

Representative Schaeffer stated restricting the users presents problems and asked about replenishing the herds. Commissioner Skoog discussed the natural fluctuation in the herds which is typical in wild species, but advised nothing is gained in a transplanting method. He further advised human utilization and the wolf are the only ways the Department has to control the threat to moose and caribou. In answer to a question, he replied, with big game animals the cycle of a herd may be over a period of 25-30 years, where they experience various highs and lows. In answer to a question, he advised disease is a factor in the thinning of a herd, but it is not the only factor. He advised the Department does have projects on moose and caribou.

With regard to Section 11, and the Department's recommendation for deletion, Commissioner Skoog answered a question by stating this requires that "The department shall investigate every petition or request...", which

means they would have to do this. He explained this would shift their entire effort and place a constraint on the Department. Representative Guy commented this is why a separate division is needed.

Representative Buchholdt asked if there were any problem with the definition of "family", page 7, lines 28-29, and Commissioner Skoog answered he has no objection to that at all. Representative Buchholdt then asked if the food could be transported from one area to another, and Commissioner Skoog replied that is permitted now. He added the problem stems from the term "barter", in that moose are being taken illegally and transported from one area to another. Mr. Rausch stated, in the transportation of game, there has to be some sort of certification, such as a letter.

At this time, Mr. Lang testified in favor of the bill. He stated all management of historic data points out there is a crisis as this relates to subsistence hunting and fishing--there is no management; no organization of subsistence hunters and fishermen; no protective mechanism for their voice to be heard. He discussed Title 7 in HR 39 and also indicated there is a period of 18 months after HR 39 is passed before there is federal management in the State of Alaska.

LANG  
TESTIMONY

He advised he is more concerned with the overall policy regarding subsistence, rather than definitions, and strongly urged passage of the bill. He stated: "Pass the law; then you can amend it; but we need this now."

Vice Chairman Freeman asked Mr. Lang to comment on the director of the subsistence division being appointed by the Governor. Mr. Lang answered he understood the Department's objection to that portion of the bill and advised, "If this will kill the bill; then amend it."

Representative Gruening brought up the definition of "barter", stating SB 506 might be too restrictive, but it should not be defined too broadly, because then you get into the commercial aspect. Mr. Lang stated there shouldn't be that much of a problem, if you establish what you mean in intent. He added it wasn't so much the overfishing, but the misuse of the roe that resulted in the tight definition of "barter" in SB 506. There was further discussion, with Mr. Lang stating the AFN believes the best use of the resources "is for someone to eat."

Representative Anderson advised he concurred with Mr. Lang's testimony and stated he would answer questions from the Committee at this time. He commented he has put a lot of time into HB 960 and that it is a culmination of 10 month's work.

ANDERSON  
TESTIMONY

Representative Gruening asked him to explain his position regarding the differences on the definition of "barter" in SB 506 and HB 960. Representative Anderson referred to Section 16(e) of the Resources CS, and stated the Boards of Fish and Game have the power to restrict barter, except where traditional. Vice Chairman Freeman commented he can see problems with barter in almost everyway you go. Discussion followed.

Commenting on the selection of the director of subsistence hunting and fishing, Representative Anderson pointed out it was his opinion the Commissioner should appoint this director. He noted, however, during the teleconference on subsistence, the public wanted the Governor to select a director; this is a direct reflection of public testimony. He commented he feels the safest thing to do, politically, is to change this and said he would have no hesitation in doing so. He stated he feels the Commissioner has done a good job, considering his longevity in the job, and feels he should have a chance to do the job.

Mr. Soboleff testified briefly at this time. He stated the Rural Cap board met and passed a resolution in support of HB 960. He noted subsistence has been a high priority of Rural Cap this session and that he agreed with the testimony of Mr. Lang.

SOBOLEFF  
TESTIMONY

Next to testify in support of HB 960 was Mr. Lohr. He discussed the areas where people do not have access to "cash economy". Representative Rhode asked how he felt about the suggested amendments, and Mr. Lohr answered he feels it is a good bill either way--that the main purpose is to establish subsistence as the highest priority.

LOHR  
TESTIMONY

Mr. Telfon, from Eagle River, testified the student government endorsed this bill to see that the State meets its responsibility in the area of subsistence. He commented he testified against the subsistence director being appointed by the Commissioner, but that he is not "hung up" on this, and would not be opposed to its being amended. He discussed "barter", stating in his area, they depend a lot on trade with the rural students. He commented sometimes they have something fresh and trade that for seal oil or dried fish or something that they need that others might have. Brief discussion followed.

There being no further testimony to be presented, Vice Chairman Freeman appointed Representative Gruening, chairman, of a special subcommittee to review HB 960 and to come up with a compromise definition on "barter" and report back to the full Committee on Monday, May 12. He asked that Representative Schaeffer and whoever else wished to work with Representative Gruening do so. Representative Anderson volunteered his services.

SUBCOMMITTEE  
HB 960  
APPOINTED

The meeting adjourned at 4:40 p.m.

ADJOURN (

-----  
HFC 78-110 #1496 - End  
78-111 #0001 - End  
78-112 #0001 - #0948

HOUSE FINANCE COMMITTEE  
May 15, 1978  
8:45 a.m.

All members of the Committee were in attendance except Representatives Buchholdt and Schaeffer. (Several members arrived later in the meeting.) Also in attendance was Representative Anderson.

PRESENT

Vice-Chairman Freeman called the meeting to order and brought HB 960 up for consideration.

HB 960

"An Act relating to fish and game management."

Representative Gruening presented proposed amendments to the Committee Substitute. He advised that one amendment deals with the appointment of the director of the Division of Subsistence Hunting and Fishing, and changes it from the Governor to the Commissioner. He stated there were two other amendments; one replaces section 7 (c), and the other replaces section 17 (27).

Representative Gruening moved to report out a finance committee substitute for HB 960 incorporating these three amendments. There being no objection, it was so ordered. CSHB 960 was reported out with a "do pass" recommendation.

HB 960  
REPORTED  
OUT

Representative Gruening stated they didn't examine the fiscal note for HB 960, but they might want to cut it down somewhat. He suggested that the fiscal analyst check over the fiscal note and revise it. No objection.

(Representatives Cowper and Duncan arrived.)

Chairman Cowper stated they would continue working on the CAPITAL BUDGET, in EDUCATION.

CAPITAL  
BUDGET  
EDUCATION

Chairman Cowper moved to add \$100.0 to the Public Broadcasting budget for the cost of equipment line in Ketchikan, Wrangell, and Petersburg. There being no objection, it was so ordered.

TRANSPORTATION

TRANSPOR-  
TATION

Representative Freeman stated in the Capital Budget for Transportation, the majority of the projects are included in the bond bill (HB 711). There was discussion on bond bills. Chairman Cowper stated these would be taken up last.

(Representative Meekins arrived.)

5/15/78

HOUSE RESEARCH AGENCY  
Pouch Y - State Capitol  
Juneau, Alaska 99811  
465-3991

MEMORANDUM

DATE: February 16, 1982  
TO: Files  
FROM: Leslie Longenbaugh  
RE: Research Performed Out of Sequence

Research request # 82-37 was filled before other requests preceding it for the reason or reasons checked below:

Other prior requests assigned to me were ones for which legislators had indicated no pressing need and flexible deadlines well into the future. This request had a firm deadline, i.e. could not be extended and was not set by the legislator making the request. Examples of such deadlines are the deadline for introduction of personal legislation and scheduled committee hearing dates.

The hours required to complete this request were minimal and the work could be done without significantly delaying work on other projects.

More than one request by the same legislator had been assigned to me. The requesting legislator indicated that this request had higher priority than the others he/she had made preceding it.

I was awaiting clarification or further direction from legislators on requests made prior to this one.

Data necessary to complete other research requests preceding this one had not been received.

No partisan considerations or preference to legislative leadership was a factor in the decision to perform work on this request out of sequence.

Additional Comment:



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

February 25, 1982

MEMORANDUM

TO: Representative Tony Vaska

FROM: Leslie Longenbaugh, Research Staff <sup>LL</sup>

RE: Legislative History of ch 151 SLA 1978  
Research Request Number 82-37  
Additional Information

In going through my files this afternoon I discovered the enclosed copies of telegrams and other correspondence relating to HB 960 (1978). These pieces of correspondence came from a file marked "HB 960" given by Senator Kay Poland, Chair in 1978 of the Senate Resources Committee, to the Legislative Library. Presumably, they were sent by their authors to her office during her committee's consideration of HB 960 in June 1978.

Although such letters and telegrams are not precisely testimony, they do constitute the communication of a position on the bill and so may be of interest to you. I apologize for having overlooked these materials when I sent my memorandum of February 16. Please let me know if I can be of further assistance.

LL/bf

Attachments: Memorandum from Ken Fanning, REAL Alaska Coalition  
Position paper from Sidney Huntington, REAL Alaska  
Coalition  
Three letters from Commissioner Skoog, State Dep't. of  
Fish and Game  
Five telegrams concerning HB 960, sent in June 1978

# The REAL Alaska Coalition

Regional Offices  
Box 4 1977  
Anchorage, Alaska 99503  
(907) 278 4379

P.O. Box 31229  
Fairbanks, Alaska 99703  
(907) 479 4193  
(907) 473 6602

Box 3072 R J  
Juneau, Alaska 99801  
(907) 586 6111

DATE: May 25, 1978

TO: All Alaskan State Representatives  
and Senators

FROM: The REAL Alaska Coalition  
Board of Directors

**Member Groups**

- Alaska Chapter Safari Club International (Anchorage)
- Alaska Fur Trappers Association (Tetl)
- Alaska Gun Collectors (Anchorage)
- Alaska Professional Hunters Association (Anchorage)
- Alaska Rifle Club (Anchorage)
- Alaska Sports & Wildlife Club (Ketchikan)
- Alaska State Rifle & Pistol Association (Anchorage)
- Alaska Waterfowl Association (Anchorage)
- Baranof Rifle & Rifle Club (Sitka)
- Chena River Sports Club (Fairbanks)
- Chitina Dismanters (Fairbanks)
- Coalition of Interior Alaska Outdoorsmen (Fairbanks)
- Eagle River Sportsmen Preservation Association
- Essement Defense Fund (Anchorage)
- Interior Alaska Trappers Association (Fairbanks)
- Interior Wildlife Association of Alaska (Fairbanks)
- Isaac Walton League (Anchorage)
- Juneau Rifle & Pistol Association
- Kodiak Rifle & Pistol Association (Palmer)
- Moose Pass Sportsmen Association
- Nome Sportsmen Club
- Old Sitka Trap Club
- Petersburg Rod & Gun Club
- Sitka Sportsmen Association
- Sno Shoe Gun Club (Kenai)
- TVS Rifle & Pistol Club (Fairbanks)
- Tanana Valley Sportsmen Association (Fairbanks)
- Territorial Sportsmen (Juneau)
- Totem Shooters (Eagle River)
- Upper Kuskokwim Sportsmen Association (McGrath)

We would like to take this opportunity to introduce ourselves, and to share with you some of our viewpoints in regards to our fish and game resources and the majority of sportsmen's/conservation organizations in Alaska.

We would appreciate it if you could personally keep us advised of legislation relating to fish and game resources, management, and any of our member groups.

We realize it is late in the session. We apologize for not having organized sooner, but we are together now, and have an efficient pipeline of communication to our thirty-six (36) member organizations throughout the State. Although spontaneous communication is possible, we do make weekly mailings which should, in most circumstances, handle any opinions or responses to questions you may have of us.


We urge you to review the results of Statewide hearings conducted by the Department of Fish and Game, and the enclosed testimony by Sidney Huntington (given in Galena in April, 1978, and before the Senate Energy and Resources Committee in Washington, D.C., on May 23, 1978), prior to any decision on legislation pending in the State legislature relating to either D-2 legislation or fish and game management.

We have a full-time office in Fairbanks, and coordinating points in Anchorage and Juneau. Our hours are 9:00 to 5:00, Monday through Friday; and our address is P.O. Box 73478, Fairbanks, Alaska 99707. Our phone number is 479-3367.

If you would care to further discuss these or other issues, please contact us at any time.

Thank you very much.

Sincerely,

  
Ken Fanning  
Director, (1 of 4)

Encl.

# The REAL Alaska Coalition

Regional Offices  
 Box 4-1932  
 Anchorage, Alaska 99503  
 (907) 274-4359

P. O. Box 80929  
 Fairbanks, Alaska 99708  
 (907) 479-4383  
 (907) 479-6602

Box 3072 R 3  
 Juneau, Alaska 99801  
 (907) 586-6114

## Member Groups

Alaska Chapter Safari Club  
 International (Anchorage)  
 Alaska Fur Trappers Association  
 (Tok)  
 Alaska Gun Collectors (Anchorage)  
 Alaska Professional Hunters  
 Association (Anchorage)  
 Alaska Rifle Club (Anchorage)  
 Alaska Sports & Wildlife Club  
 (Ketchikan)  
 Alaska State Rifle & Pistol  
 Association (Anchorage)  
 Alaska Waterfowl Association  
 (Anchorage)  
 Baranof Pistol & Rifle Club (Sitka)  
 Chena River Sports Club  
 (Fairbanks)  
 Chitina Digniters (Fairbanks)  
 Coalition of Interior Alaska  
 Outdoorsmen (Fairbanks)  
 Eagle River Sportsmen Preservation  
 Association  
 Easement Defense Fund  
 (Anchorage)  
 Interior Alaska Trappers  
 Association (Fairbanks)  
 Interior Wildlife Association of  
 Alaska (Fairbanks)  
 Isaac Walton League (Anchorage)  
 Juneau Rifle & Pistol Association  
 Kodiak Rifle & Pistol  
 Matanuska Valley Sportsmen  
 Association (Palmer)  
 Moose Pass Sportsmen  
 Association  
 Nome Sportsmen Club  
 Old Sitka Trap Club  
 Petersburg Rod & Gun Club  
 Sitka Sportsmens Association  
 Sno Shoe Gun Club (Kenai)  
 TVS Rifle & Pistol Club (Fairbanks)  
 Tanana Valley Sportsmen  
 Association (Fairbanks)  
 Territorial Sportsmen (Juneau)  
 Totem Shooters (Eagle River)  
 Upper Kuskokwim Sportsmen  
 Association (McGrath)

Sidney Huntington, an Athabascan Indian, struck out on his own trapline, by himself, at age twelve. He earned his own living even at that age, and is completely self-taught. His formal education stopped at the third grade.

From that beginning, Sidney has lived from the land, and grown in every aspect of human development. Today, after more than sixty years of self-teaching and application, he and his wife have a grown family of twelve sons and daughters (one son won the world's longest dog sled race, the Iditarod, a few years ago; another is on the Alaska Board of Fish; one is President of Doyon, Ltd., the largest land-holding corporation in the world); a daughter is attending the University of Alaska, and Sidney runs a small, but thriving mercantile company in his home in Galena. He is still famous for his hand-crafted wooden river boats which ply the Yukon and helps hundreds of natives make a living from the fishery resource. He offers a fish-buying service for the middle Yukon.

For thirty-five years he earned a living from the land and from fish and game resources, hunting, fishing, and trapping. All of his life he has been intimately involved with individual self-sufficiency and local uses and users of fish and game. He knows the people and he knows the resources.

Just as he has shown a deep concern for proper education of future generations of Alaskans by devoting some eighteen years of service on various school boards; he likewise shows a deep concern for the fish and wildlife resources for all Alaska, has served first on the Joint Boards of Fish and Game in 1950 and since that time on the Alaska State Board of Game.

Jim Rearden, a well-respected outdoor writer, most knowledgeable game manager, current and past member of the Alaska Board of Game pays Sidney a most worthy compliment, "I have watched and been actively involved with fish & game management policies in Alaska since statehood, both as a department employee, and for the past twelve years, as a board member. Without qualification or reservation, I can say Sidney Huntington is by far the best Native representative we have ever had on either board for nineteen years, since inception as a State." Jim goes on to explain, "to him, the resources are of primary importance, and he is equally concerned about all of Alaska."

Sidney speaks with frankness and a far-sighted wisdom which Americans would do well to heed.

My name is Sidney Huntington. My address is P.O. Box 49, Galena, AK 99741. I've lived in Alaska for 60 years. For 35 of those years, I made my living by trapping and hunting. Presently, I own and operate a small retail business in Galena. During the summer I do commercial fishing and also buy and sell fish commercially. I am presently serving on the Game Board of Alaska. I also have served as a member of different school boards for the past 18 years. Right now I belong to the Galena City School Board.

I find myself in a rather difficult position developing testimony to what I consider counteracting our Federal Government because of some very undesirable conditions and situations they seem to want us to live by and with in the future. Conditions promoted by politicians, mostly from the Lower 48. Things such as the D-2 Bill or what have you - all brought upon us by a compromised Land Claims Settlement Bill. The results of a mass of rotten politicians maneuvering against the voting citizens of Alaska. *Since The Bill Passed*

Alaska is large and in the state there are many different conditions. At times it calls for different methods of handling situations at hand in each separate area. For instance, the Eskimo living in the Point Barrow area hasn't the slightest idea how the Eskimo in the Chevak area lives.

You have the Indians in the Interior who used early day methods and had a more primitive live that can in no way compare with either the Eskimo of the South or on the Chän. Go to the sub-areas of Anchorage or any other larger city, no one way of life is exactly the same as another. Only that he or she is alive. Yet Mr. Udal's or whoever's bill, we may have to live by, applies to all who lives on or off this land. Sounds like some quack doctor prescription - what's good for one is good for all until you are all dead.

To put subsistence into practice before attempting to define it or say how you are going to use it, where you are going to use it, and who is going to use it will make it much harder to define. Everybody needs it now and then.

There are possibly areas where you may not have much trouble applying more subsistence if it was the people's desire to eliminate what little they now have. It might do right well along coastal areas. I've never lived there, though I am sure no resource can stand up anywhere under pressures that this fast moving new way of life man has developed. It destroys the habitat and eliminates the resources. Keeping up with the Joneses takes more dollars than it use to. How you acquire those dollars, who is to care? You have the right given you by subsistence to use that God given resource until it is no more. Blame the Department of Fish and Game when it is gone. It has got to be their fault.

I can in no way see the complete management of the resources and habitats by local control, by however many regions you want. I can see it on an advisory capacity regionally or on an area wide basis made up of people with a high concern for the resources and not for themselves. The people would be trained by the Department of Fish and Game to function as a board, to operate in the most productive manner and to get the most out of the habitat and fish and game resources. These resources are products that are renewable, almost yearly sometimes. They have been used as food and have been the very livelihood of people over many years in the past. With proper management and much effort, these resources would and should feed many more, for years to come.

One of the biggest factors against these very game resources is in most areas. The people themselves, living in their own areas, are over-hunting, hunting out of season, and killing unnecessarily, at times. These factors and many more boil down to destruction of our resources

Looking back over the years, I see two outstanding factors that almost eliminated two species of game. One is the geese on the Huslia and Dalby Rivers. The numbers of those geese are still not yet up to its normal level or what it used to be. We used to hunt those geese about the 20th of July when the older

geese or the goslin could not yet fly. We killed hundreds of them with clubs and ground-sluiced them with shotguns. In a very few years, there were no more. What brought this on? The outboard motor did. When an outboard motor you could cover hundreds of miles over night and see hundreds of geese. The old Indians used only birch bark canoes, only going a short distance getting just a few geese from one flock. They did not hurt the resource.

The beaver is the other animal which was almost eliminated. I remember so clearly, in the early 1900's, beaver pelts were selling at high prices, about \$6.00 each. Heavy shooting with rifles was used to take the beaver, both in the fall and the spring. The beaver was almost eliminated by 1922. At that time the law stepped in - I mean LAW - The season for harvesting beaver was closed - Period. By 1926, it reopened only to have it closed again. The take was heavy as the price was up to \$40.00 each. They opened the season again in 1929 for trapping only. Again, the expert subsistence user got his 22 rifle out and began crack shooting the beaver in the eye or the mouth leaving no bullitt mark anywhere. A high take out on the Innoko River was 140 beaver for a short spring hunt. The local Game Warden at that time was Sam White whom many people highly respected. He put into effect the now standing season, March 31 - with all beaver being tagged and sealed within 30 days. He went from camp to camp or village and taught anyone interested how to trap beaver. That set is still being used today. I do say the population of beaver is good today because, it was caught in time to make a recovery. So, I say again, be careful with subsistence. The above people were much more dependent on subsistence at that time than we are so today, but greed got the best of them. I know because, I was one of them.

To say local management and control would be sure death to our available resources. Greed alone is cutting them short. With all the high powered mechanized equipment that is readily available, the resources have nocchance. When the good Lord created Alaska, he did it so as to provide for a certain number of people who could exist on the resources this land could provide, I am sure.

4  
With modern methods and means, a good portion of the resources  
: been reduced due to the high priority given the dollar.

most of the gold gone, nearly all of the salmon gone at one  
it, the timber going, only one noticeable item seems to grow  
number each year. That is the people, demanding more from  
fast depleting resources. All demanding the same right to  
all of the fish, all of the game, all of the time.

With the people here now, and more coming all the time, our  
h and game is not going to stand the pressure. To top it  
, we even let any foreigner from other countries load up with  
s and ammo to roam at will, to destruct our game and possibly  
: habitat. No questions asked.

The members of the Game board are unable at times to cope  
th do-gooders in the Lower 48 and in Alaska. We have our hands  
ed by Wolf lovers with warped minds- most likely warped by  
amunistic teachings to disrupt our way of life.

The harvest of moose is heavy and getting heavier each year  
adding more hunters from all directions - with the wolf taking  
very healthy share. The do-gooders have done their best to  
srupt our efforts to manage predator control. This control  
a proven tool. To manage and maintain a good healthy number  
moose and other game by thinning out a few wolves which is  
very valuable fur bearing animal. Not a big game species,  
unless you want your dog classed as big game also.

The Federal government D-2 land or what ever concept is  
deoted, the management of our fish and game should be done by  
he State of Alaska. Preferably by a game board or whatever, to  
nclude predator control on all land in Alaska, not to eliminate  
ut control to maintain the resources with high priority given  
o any part of the game resource showing signs of weakening.

I feel it is very unconstitutional to use the word subsistence  
to define the way of life of one person over another. Being so  
our government says we do just that, it seems that we are being  
forced to discriminate against each other both here in Alaska and  
other citizens who make up the U.S. A very undesirable condition.

Remember, over-practice of subsistence in some areas, when  
made into law, eliminates certain species in that area because

it will be over exercised and will mean ruination to most other resources and habitats also.

Those that promoted the concept of subsistence so strongly are not going to shoulder the blame, but will put the blame directly on the Department of Fish & Game whether it is in operation or not. I feel sure that the Dept. of Fish & Game is being forced to accept whatever concept is adopted - That concept could be rotten.

Who is eligible for subsistence? I am sure there is no way anyone could define it so it will be honest and fair to everyone in an area or region. If there were no one getting food stamps or on welfare, it would be somewhat easier to determine who is eligible for subsistence.

Our older people are a thousand times better off than they were in say 1925, which I am sure they deserve.

Is a man, 35 years old, with a family of ten and has a small income more eligible than a man, 50 years old, with a family of three? If a man lived in Alaska for 60 years and had a healthy income but used subsistence type food all of his life, is he cut off from subsistence? Where does the well-to-do or somewhat wealthy woman that has supplied food for her family all her life from the local resources stand?

There are many more <sup>many of the same</sup> circumstances to confront us. Each one is just as discriminative as any other you might want to bring up. I see no fair way or means to really honestly define subsistence for one citizen over another. It is a task like it would be to tell one of my children that he should get more than the other.

Our fish and game should be managed by the State of Alaska Game board and State what have you. There should be well trained advisory boards on a regional basis. They will be on an advisory capacity only. The training to be done by qualified staff or personell.

More active Field Law Enforcement officers are needed to enforce the laws. Foreigners from other countries should not be allowed to hunt without a guide to roam free our land and to destroy our game. Our game can not be killed to leave the meat rot in the field.

If, under any adopted subsistence regulation, it is found that our fish and game resources will not maintain a productive level because of over hunting by any hunters, subsistence or otherwise, ~~issuing~~ <sup>issuing</sup> subsistence permits could be issued or else all hunting stopped. This would provide the <sup>desireable</sup> amount of subsistence needed. The subsistence regulation that is adopted will determine how much subsistence is needed. *W. Hoff*

I do not think any law has been made that says the State of Alaska or the Department of Fish & Game deprives anyone the use of the resource as a subsistence need. There are regulations that say you must do things in season. All seasons should be recognized if we are going to preserve our resources. Even if the subsistence law was passed, you still should have to abide with the law. I don't see any gain in not doing so. To break the laws would promote hardship on the so-called subsistence user in the future. The season for harvesting the animal resource, that is getting fewer in number would have to be closed, until their population regained to a desired level. Don't kill just because you may have the right as a subsistence user to do so.

I can't foresee our Federal Government and the people who help run our United States be so small minded as to want us citizens of the U.S. because we live in Alaska to accept such undesirable legislation. I am sure in many instances that it could be fatal to some if not all our fish and game resources.

Thank you for letting me express what I feel.

# STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

SUPPORT BUILDING  
JUNEAU 99801

June 7, 1978

The Honorable Kay Poland  
Senate Resources Committee  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Dear Senator Poland:


It has just come to my attention that there would be one other discrepancy in the current Title 16 statutes should the present CSIB 960 pass in the legislature. A change would be necessary in AS 16.05.940 Definitions relative to definition number (17) "subsistence fishing." Presently this definition reads as follows:

(17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources for personal use and not for sale [OR BARTER] with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

It would be necessary to eliminate "or barter" from this definition in order to comply with the language in CSIB 960. Actually it would be well to eliminate these words from that definition regardless of whether the bill passes or not, because it has caused numerous problems with our enforcement people in many areas of Western Alaska where barter has been a traditional activity. If this latter action were taken, then the definition proposed for "barter" should be added to the section.

Sorry for not having addressed this problem either in my testimony or in my June 6 letter. Thank you for your consideration.

Sincerely,

  
Ronald O. Skerfving  
Commissioner

# STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

SUPPORT BUILDINGS  
JUNEAU 99901

June 6, 1978

The Honorable Kay Poland  
Senate Resources Committee  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Dear Senator Poland:

I would like to comment further upon the language in CSMB 960 (Finance) am, relative to certain sections upon which there seems to be some controversy. My comments below follow the section numbers as referred to in the Bill.

Section 2. AS 16.05.090. I would like to restate the Department's position that the duties proposed for a "subsistence group" within the Department of Fish and Game could be better served by having that "group" designated as a "Section" in the Commissioner's Office. In that position the Section would carry greater authority in dealing with the other Divisions--Sport Fish, Commercial Fisheries, and Game--in providing the necessary coordination between the staff biologists of these Divisions and the "subsistence" staff in providing for adequate regulatory proposals to the Boards.

Section 8. AS 16.05.257(e). We still are concerned that the proposed wording used presently in the Bill will be too demanding on our staff biologists to supply all of the requested information for every such request. I had recommended in my testimony yesterday that this new language be deleted and that the existing language in Title 16 remain. The eight kinds of information identified as required would create a great burden upon Department staff. In substitute I recommend instead that the following language preface the existing language in AS 16.05.257(e):

The department shall investigate every petition or request made under (a)(2), (3) or (4) of this section and provide the biological evidence needed to evaluate each such petition or request. No subsistence area may be created under this section if the Board of Game determines that biological evidence indicates that the creation

June 6, 1978

of such an area is likely to adversely affect a resource in that it would fall below the level of sustained yield determined to be adequate.

Section 15. AS 16.05.940(26). "Subsistence uses." I would recommend that if "subsistence uses" is to be defined that it might be best to follow the definition that currently is in the (d)(2) legislation now before Congress, as it seems likely that this definition will survive in whatever legislation finally emerges. That definition is as follows:

(26) "Subsistence uses" means the noncommercial, customary and traditional utilization within the State of wild, renewable resources for--

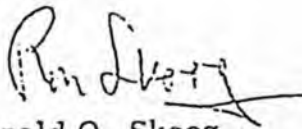
- (1) direct personal or family use for food, shelter, fuel, clothing, tools, or transportation;
- (2) the making and selling of handicraft articles (including clothing), but only out of nonedible byproducts of fish and wildlife taken for such personal or family use; or
- (3) customary trade, barter, or sharing among subsistence users for personal or family use.

Section 15. AS 16.05.940(27): I reiterate my statement that the definition of "barter" should try to exclude the commercial aspects of any exchange. In this respect I think that the definition as contained in Senator Hohman's SB 506 (shown below) is quite appropriate. It eliminates the commercial problem while recognizing the "traditional" barter or trade being carried out by rural residents.

"Barter" means to exchange, trade for, or otherwise give and receive subsistence-taken fish or game or their parts in exchange for other subsistence-taken fish or game or their parts.

We have attached a revised fiscal note to cover the suggested changes to AS 16.05.300.

Sincerely,



Ronald O. Skoog  
Commissioner

Enclosure

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

SUPPORT BUILDING  
JUNEAU 99801

June 10, 1978

The Honorable Kay Poland  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Dear Senator Poland:

Yesterday you requested the Department to poll the Board of Game to determine their views regarding CSHB 960 (Finance) as written regarding the "subsistence issue" and the establishment of a "Division of Subsistence" in the Department by legislative mandate. Insofar as was possible we contacted the Board members yesterday afternoon and evening with the results as indicated below. Six of the seven members were reached--Jim Rearden, Clint Buckmaster, Charles Evans, Darrell Farmen, Pete Nelson, and Sam Harbo; Sidney Huntington was not available.

- (1) All six were opposed to the legislation as written; I feel confident in saying that I believe Sidney Huntington also would be opposed.
- (2) Four, and to that I would add Huntington to make five, were opposed to any such legislation being passed regardless of language; two--Chuck Evans and Clint Buckmaster--felt they could support CSHB 960 if the Department's suggested amendments were adopted.

In addition, we attempted to poll the Board of Fisheries as well, but were less successful. Only four of the seven were reached--Nick Szabo, Gordon Jensen, Herman Schroeder, and Calvin Fair. All were opposed to CSHB 960 as written. Szabo was opposed to any legislation being passed. Jensen, Schroeder, and Fair felt they could support the bill if the Department's suggested amendments were adopted.

I will stick my neck out and say that I think all members of the two Boards believe that there is little need for this kind of legislation and that the subsistence question can be handled quite adequately under a modified

regulatory system (which we are working on now). I believe too that all would object to the Legislature establishing any organizational unit within the Department by State law, as has been done already with regard to the Fisheries Rehabilitation, Enhancement and Development Division.

The Department would like to propose two additional amendments to CSHB 960. Again, both were overlooked in our previous review and, again, I apologize for that lack. Our proposals are as follows:

- (1) p.5 Sec. 11 (Sec. 10 as per Dept.'s earlier recommendations)  
AS 16.05.257(h)(2) lines 26-29.

We suggest the elimination of this section, and instead leave the existing language presently in the Statutes. Present language reads as follows:

(2) "subsistence hunting area" means an area designated by the board as primarily important for subsistence use and in which it is unlikely that subsistence needs will be met if recreational hunting, including hunting for trophy purposes, is permitted or if certain methods and means are continued. (s 1 ch 199 SLA 1975; am s 2 ch 269 SLA 1976)

The language stated in CSHB 960 would be too narrow and I believe not in compliance with the State Constitution because of discrimination in permitting only subsistence hunting in a "subsistence hunting area." The existing Statute language is more flexible in that control of hunting also could be handled via "methods and means," as well as by other regulatory constraints.

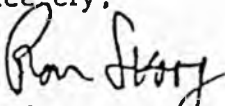
- (2) p.6 Sec. 14. AS 16.05.930(e), lines 17-18.

Language here needs to recognize the responsibility of the Boards to set regulations. I suggest that it be amended to the following:

Line 17-18 "...except that the appropriate Board or the Commissioner by delegation of the appropriate Board may prohibit...."

Thanks again for allowing us to state our views regarding this important piece of legislation.

Sincerely,

  
Ronald O. Skoog  
Commissioner

#  
27007 WL BETHEL ALASKA 90 06-07 12P ADT

PMS CHAIRPERSON KAY POLAND

SENATE RESOURCE COMMITTEE

POUCH V. JUNEAU ALASKA

NUNAMKITLUSISTI AS PART OF THE ASSOCIATION OF VILLAGE  
COUNCIL PRESIDENTS WHICH IS REPRESENTATIVE OF 57 VILLAGES  
IN THE YUKON KUSKOKWIM DELTA WOULD LIKE TO EXPRESS  
ITS SUPPORT OF HB960 AS IT ARRIVES IN THE SENATE RESOURCE  
COMMITTEE. WE FEEL THAT ANY AMENDMENTS TO IT WOULD WEAKEN  
ITS POWERS. AS A DIVISION WITHIN THE STATE REGULATORY SYSTEM,  
THE IMPORTANCE OF SUBSISTENCE AND RESOURCE INVOLVED WOULD  
BE ADEQUATELY PROTECTED AND EFFECTIVELY REALIZED FOR THE  
CONTINUING EXISTENCE OF THESE IMPORTANT RENEWABLE RESOURCES  
TO THE STATE OF ALASKA AND ITS RESIDENTS.

TONY VASKA, NUNAMKITLUSISTI

SENATE RESOURCES

AND	120	Butrovich	525
ft	106	Huber	114
and	205	Colletta	107
lion	109		

A21 4042 13.16 JA01 0025 20.22 05/06/78

PLEASE DELIVER THE FOLLOWING MESSAGE TO THE SENATE RESOURCE COMMITTEE:

URGE THAT YOU NOT VOTE HB960 OUT OF RESOURCES COMMITTEE. BILL IS INCONSTITUTIONAL, UNFAIR AND VIOLATES NOT ONLY PRINCIPLES OF MODERN GAME MANAGEMENT, BUT UPSETS AN EFFECTIVE EXISTING SYSTEM.

FAIRBANKS ADVISORY COUNCIL  
P. O. BOX 659  
FAIRBANKS, AK 99707  
10 PHONE

EOM

LA21 3802 16.57 JA01 0013 17.24 06/05/73

PLEASE DELIVER THE FOLLOWING MESSAGE TO THE SENATE RESOURCES COMMITTEE:

ALASKAN HUNTERS, FISHERMEN AND TRAPPERS HAVE NOT HAD PROPER OPPORTUNITY TO TESTIFY ON HB960. WE RESPECTFULLY REQUEST AN OPPORTUNITY TO SEND A REPRESENTATIVE OR 2 BEFORE YOUR COMMITTEE. VITAL INFORMATION HAS NOT YET BEEN PRESENTED. PLEASE SCHEDULE HEARINGS NEXT WEEK IF POSSIBLE. AS WRITTEN, THE BILL IS INTOLERABLE. THANK YOU.

THE REAL ALASKA COALITION REPRESENTING THE 37 SPORTSMEN CONSERVATION ORGANIZATION THROUGHOUT ALASKA  
P. O. BOX 73478  
FAIRBANKS, AK 99707

EOM

TELETYPE

ALASKA COMMUNICATIONS, INC  
PHONE: 554-6440

02243 ANCHORAGE ALASKA 6000153P ADT

PM SENATOR KAY POLAND

JUN

DEAR SENATOR POLAND, REFERENCE HR960 (SUBSISTENCE  
PRIORITY BILL)

WE URGE YOU TO DEFEAT THIS BILL IN THE SENATE.

THE IMPORTANCE OF LEGITIMATE SUBSISTENCE NEEDS HAVE BEEN  
ADEQUATELY PROVIDED FOR BY STATUTES AND POLICIES OF  
THE FISHERIES AND GAME BOARD.

THIS BILL IS TOTALLY UNNECESSARY, AS IT IS CUMBERSOME,  
EXPENSIVE, AND WOULD ESTABLISH AN ADDITIONAL BUREAUCRACY  
WHICH FURTHER COMPLICATES THE ALREADY COMPLICATED ISSUE  
OF FISH AND GAME MANAGEMENT. IF WE THINK IN TERMS OF  
SPENDING VAST SUMS OF MONEY, THE FUNDS SHOULD BE USED IN  
FIELD WORK TO ENHANCE FISH AND WILDLIFE POPULATIONS  
INSTEAD OF ESTABLISHING ANOTHER ADMINISTRATIVE DIVISION  
TO ADDRESS A PROGRAM THAT IS ALREADY BEING ADEQUATELY  
ADMINISTRATED.

RAY MCNUJT PRESIDENT ALASKA PROFESSIONAL HUNTERS ASSOC

LA11 3959 17.52 06/07/78 JA01 0004 07.37 06/08/78

TO: PRESIDENT JOHN RADER AND ALL MEMBERS OF THE SENATE

FROM: RAY MC NUTT, PRESIDENT  
ALASKA PROFESSIONAL HUNTERS ASSOCIATION  
PO BOX 4-1932  
ANCHORAG AK 99509

THE FOLLOWING IS A COPY OF A TELEGRAM SENT JUNE 7, 1978, TO SENATOR  
POLAND RE HB 960 (SUBSISTENCE PRIORITY BILL):

WE URGE YOU TO DEFEAT THIS BILL IN THE SENATE.

THE IMPORTANCE OF LEGITIMATE SUBSISTENCE NEEDS HAVE BEEN ADEQUATELY  
PROVIDED FOR BY STATUTES AND POLICIES OF THE FISHERIES AND GAME BOARDS.

THIS BILL IS TOTALLY UNNECESSARY AS IT IS CUMBERSOME, EXPENSIVE, AND  
WOUD ESTABLISH AN ADDITIONAL BUREAUCRACY WHICH FURTHER COMPLICATES THE  
ALREADY COMPLICATED ISSUE OF FISH AND GAME MANAGEMENT. IF WE THINK IN  
TERMS OF SPENDING VAST SUMS OF MONEY, THE FUNDS SHOULD BE USED IN FIELD  
WORK TO ENHANCE FISH AND WILDLIFE POPULATIONS INSTEAD OF ESTABLISHING  
ANOTHER ADMINISTRATIVE DIVISION TO ADDRESS A PROGRAM THAT IS ALREADY  
BEING ADEQU, ELY ADMINISTERED.

EOM/CCD/



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

May 19, 1982

MEMORANDUM

TO: Representative Bob Bettisworth

FROM: Leslie Longenbaugh, Research Staff <sup>LL</sup>

RE: History of Subsistence Law  
Research Request Number 82-132

Margaret King of your staff asked that we provide information on the history of the 1978 State subsistence law and subsequent bills regarding subsistence. In particular, Ms. King asked for a legislative history of the subsistence law, information on legislators' voting records on the issue since 1978, and a discussion of the 1978 Alaska Supreme Court case that helped to engender the passage of the subsistence law.

Legislative History of Subsistence Law

House Bill 960 was introduced by the House Rules Committee, at the request of the House Special Committee on Subsistence, in May 1978. Before its enactment in June of that year, the bill was considered by the Resources Committees of both houses, by the Finance Committees of both houses, and by its sponsor, the House Special Committee on Subsistence. Below is a detailed history of the passage and amendment of HB 960 through both legislative bodies and to the governor for his signature. Appendix A contains the voting record for the subsistence law in both houses.

History of ch 151 SLA 78

- May 1, 1978 -- HB 960 introduced by House Rules at the request of the House Special Committee on Subsistence; first reading; referred to House Special Committee on Subsistence, House Resources and House Finance
- May 1, 1978 -- Meeting of House Special Committee on Subsistence
- May 2, 1978 -- House Special Committee on Subsistence passed HB 960 with amendments; referred to House Resources
- May 2, 1978 -- Meeting of House Resources Committee
- May 4, 1978 -- House Resources offers its committee substitute for HB 960; CSHB 960 is referred to Finance

Representative Bettisworth  
May 19, 1982  
Page 2

- May 4, 1978 -- Fiscal note on HB 960 is printed in House Supplement
- May 12, 1978 -- House Finance meeting to consider CSHB 960
- May 12, 1978 -- Letter of intent on HB 960 from House Special Committee on Subsistence is printed in House Journal
- May 15, 1978 -- House Finance meeting to consider CSHB 960
- May 19, 1978 -- House Finance offers its committee substitute for CSHB 960; CSHB 960 is referred to House Rules
- May 26, 1978 -- HB 960 is read for the second time; House adopts CSHB 960 (Fin) in lieu of HB 960; CSHB 960 (Fin) is amended by the House; CSHB 960 (Fin) am is read for the third time; CSHB 960 (Fin) am passes the House on a vote of 28 yeas to 8 nays, with 4 excused
- May 26, 1978 -- CSHB 960 (Fin) am is engrossed, signed by the Speaker and sent to the Senate for consideration
- May 30, 1978 -- First reading in Senate of CSHB 960 (Fin) am; referred to Senate Resources and Finance Committees
- June 5, 1978 -- Senate Resources meeting to consider CSHB 960 (Fin) am
- June 9, 1978 -- Senate Resources meeting to consider CSHB 960 (Fin) am
- June 14, 1978 -- Senate Resources meeting to consider CSHB 960 (Fin) am
- June 16, 1978 -- Senate Resources committee substitute for CSHB 960 (Fin) am is adopted by the Senate; Senate reads SCS CSHB 960 am S for the second time; Senate waives referral to Senate Finance
- June 16, 1978 -- Letter of intent from Senate Resources regarding SCS CSHB 960 am S is printed in the Senate Journal
- June 16, 1978 -- SCS CSHB 960 am S advances to third reading in the Senate; SCS CSHB 960 am S passes the Senate on a vote of 17 yeas to 3 nays; notice of reconsideration
- June 17, 1978 -- Reconsideration of SCS CSHB 960 am S, which passes the Senate on a vote of 14 yeas to 2 nays, with one absent and three excused
- June 17, 1978 -- House concurs in Senate amendment to CSHB 960 (Fin) am, adopting SCS CSHB 960 am S

Representative Battisworth  
May 19, 1982  
Page 3

June 29, 1978 -- SCS CSHB 960 am S is signed by presiding officers in House and Senate and is sent to the Governor for his signature

July 22, 1978 -- SCS CSHB 960 am S is signed into law, ch 151 SLA 78, by the Governor

#### Voting Records on Subsistence

Appendix A provides a brief description of each of the eight bills related to subsistence that have come to the House or Senate floor since 1978, and a record of the final vote on each bill.

#### 1978 Court Case

A case brought in 1976 against the State by a sportsman's association brought up the question of the State's legal right to regulate the taking of game on the basis of need. The lower court held that there was no statutory authority for issuing hunting permits using need as the most important criterion. By the time the case was decided by the Supreme Court, in September 1978, the issue of whether subsistence was a valid criterion in regulating fish and game had been settled by the enactment of ch 151 SLA 1978. The following summary of the events leading up to the suit derive from the facts as stated by the Supreme Court decision<sup>1</sup> and, to a lesser extent, from a brief filed in the case by the Alaska Federation of Natives as a friend of the court.

Because the size of the western arctic caribou herd had declined drastically over the preceding five years, the Alaska Department of Fish and Game began in 1976 taking steps to ensure the continuation of the herd. In August of that year, the Department announced an emergency closure for human kills of the caribou, and released proposed recommendations for consideration during a meeting scheduled to be held the next month.

In September, the Board of Game met in Fairbanks to hear statements and recommendations from members of the public and from department staff regarding the proposed regulations. The Board considered the evidence and took the following actions by filing emergency regulations in October 1976:

---

<sup>1</sup>Tanana Valley Sportsmen's Association, Inc., and Mark A. Wartes v. State of Alaska, 583 P.2d 854.

Representative Bettisworth  
May 19, 1982  
Page 4

- 1) required that the taking of caribou in the affected areas be by permit only;
- 2) set the season at October 1 to March 31;
- 3) required that the permit total not exceed 3,000 bull caribou;
- 4) authorized the distribution of the 3,000 permits in 16 villages, specifying the number to be distributed in each village;
- 5) established a quota system for issuing permits; the quotas would be based upon the recommendations of village councils and corporations, the criteria to be used including population, need, and the availability of other food sources and employment.

The regulations gained permanent status in November 1976, and became effective in December of that year; in their permanent form, the regulations no longer contained reference to issuing permits on the basis of need. The Boards of Fisheries and Game gave their agents oral instructions to require proof of need before issuing the permits.

In December 1976 the Tanana Valley Sportsmen's Association and Mark A. Wartes filed suit against the State, asking that the State be enjoined from issuing any permits for the taking of caribou, and that the court issue an order restraining the State from enforcing the emergency regulations. The complaint charged: that the permits were distributed only to members of native corporations, and only to those who could demonstrate need; that the Department had no authority to issue permits on the basis of need; that the distinction apparently made by the Board between those in need of caribou and those not in need could not be grounded in the definition of "subsistence hunting" that was then found in the statutes; and that the State constitution did not permit such a distinction.

The superior court granted Tanana Valley summary judgment in April 1977, enjoining the State from enforcing the emergency regulation regarding the taking of caribou, and restraining it from issuing permits for this purpose. The State appealed the judgment to the State Supreme Court; the court's decision, which was published in September 1978:

- 1) affirmed the portion of the court's decision that prohibited the issuance of permits based on oral instructions regarding need, because such verbal additions to the regulations were both unauthorized and unenforceable;

Representative Bettisworth  
May 19, 1982  
Page 5

- 2) reversed the court's injunction against issuing permits for the killing of caribou in the designated game management areas; and not rule on the statutory authority to increase permits based on need or on the constitutional challenge to statutes and regulations.

In 1977, the lower court judge's ruling prompted concern among legislators and others, who sponsored and supported the subsistence legislation that was enacted in 1978. One portion of the 1978 law outlines the criteria to be used by the Boards of Fisheries and Game in allocating restricted resources among subsistence users; these criteria were those originally devised by the Board of Game for the emergency regulation of the caribou.<sup>2</sup> Thus, it could be said that the Tanana Valley suit acted as an impetus and concrete inspiration to the 1978 law.

We have copies of and legislative histories for each of the subsistence bills discussed in Appendix A, which we would be happy to share with you. If we can provide any further information or assistance, please call on us.

LL/

Attachment: Appendix A

---

<sup>2</sup>The criteria are: dependence on the resource; proximity to the resource; and availability of alternative resources.

APPENDIX A

Votes Recorded in Both Houses of  
the Alaska Legislature:  
Subsistence Legislation

---

House Bill 960 (ch 151 SLA 1978)

HB 960, enacted by the legislature in 1978, is known as "the subsistence law." The bill, as passed by both houses, established a division of subsistence hunting and fishing within the Department of Fish and Game, and set out criteria for use by the Boards of Fisheries and Game in permitting the taking of fish and game for subsistence use:

- 1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- 2) local residency; and
- 3) availability of alternative resources.

Both the House and the Senate versions of HB 960 define "subsistence uses" as:

...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.

The version of HB 960 that was voted on by the members of the House included a few provisions that were not included in the Senate version. Most notably, the House version would have enlarged the membership of the Boards of Fisheries and Game, and would have established a subsistence committee as a permanent interim committee of the legislature. As is described in more detail in the attached memorandum, HB 960 was sponsored originally by the Rules Committee at the request of the Special Committee on Subsistence. The bill was amended by House and Senate Resources Committees.

CSHB 960 (House vote)

Yeas:	Akers	Freeman	Nakak
	Anderson	Gardiner	Ose
	Beirne	Gruening	Osterback
	Brown	Guy	Phillips
	Buchholdt	McKinnon	Rhode
	Cotten	Malone	Rudd
	Cowper	Meekins	Schaeffer
	Duncan	Miles	Smith
	Eliason	Miller	Snider
			Swanson
Nays:	Bennett	Haugen	Parr
	Carpenter	Kelly	Urion
	Dankworth	Lovseth	
Excused:	Bradley	Chatterton	Hayes
			Lethin

SCSCSHB 960 (Senate vote)

Yeas:	Butrovich	Meland	Sackett
	Colletta	Poland	Sumner
	Ferguson	Rader	Tillion
	Hackney	Ray	Ziegler
	Hohman	Rodey	
Nays:	Huber	Willis	
Absent:	Bradley		
Excused:	Croft	Kerttula	Orsini

Senate Joint Resolution 37 (1978)

Senate Joint Resolution 37, passed by both houses in 1978, requested the U.S. Secretary of Commerce "to allocate adequate funding to a comprehensive long-term research program on the status of bowhead [whales] as well as all other arctic whales." The Secretary was also asked "to cooperate with the State of Alaska and the Alaska Eskimo Whaling Commission in the management of the bowhead whale conservation program, including the enforcement of the bowhead whale harvest quota." Senator Ferguson sponsored the resolution.

SJR 37 (Senate vote)

Yeas:	Bradley	Kertulla	Rodey
	Butrovich	Meland	Sackett
	Colletta	Orsini	Sumner
	Ferguson	Poland	Tillion
	Hackney	Rader	Willis
	Hohman	Ray	Ziegler
	Huber		
Nays:	-0-		
Excused:	Croft		

SJR 37, 1978 (Hcuse vote)

Yeas:	Akers	Freeman	Miller
	Anderson	Gardiner	Nakak
	Beirne	Gruening	Ose
	Bennett	Guy	Osterback
	Bradley	Hayes	Parr
	Buchholdt	Kelly	Phillips
	Carpenter	Lethin	Rhode
	Cotten	Lovseth	Rudd
	Dankworth	McKinnon	Schaeffer
	Duncan	Malone	Smith
	Eliason	Miles	Swanson
			Urion
Nays:	-0-		
Excused:	Brown	Cowper	Meekins
	Chatterton	Haugen	Snider

House Joint Resolution 53 (1977)

House Joint Resolution Number 53, passed by both houses in 1977, requested that the U.S. Department of Commerce "reimburse the actual expenses incurred in traveling to and attending the negotiating sessions of those Alaska fishing industry representatives who have been invited to advise the chief U.S. negotiator." The negotiations in question were those over Pacific salmon interceptions. The resolution was sponsored by Representative Gardiner.

HJR 53 (House vote)

Yeas:	Akers	Eliason	Miles
	Anderson	Freeman	Miller
	Beirne	Gardiner	Ose
	Bennett	Gruening	Osterback
	Bradley	Guy	Parr
	Brown	Haugen	Phillips
	Buchholdt	Hayes	Rhode
	Carpenter	Kelly	Rudd
	Chatterton	Lethin	Smith
	Cotten	Lovseth	Snider
	Cowper	McKinnon	Swanson
	Dankworth	Malone	Urion
	Duncan	Meekins	
Nays:	-0-		
Excused:	Nakak	Schaeffer	-0-

HJR 53 (Senate vote)

Yeas:	Bradley	Huber	Ray
	Colletta	Kerttula	Rodey
	Croft	Meland	Sackett
	Ferguson	Orsini	Sumner
	Hackney	Polard	Tillion
	Hohman	Rader	Willis
			Ziegler
Nays:	-0-		
Absent:	Butrovich		

Senate Bill 197 (ch 56 SLA 1977)

Senate Bill Number 197, when passed by the Senate in 1977, extended the expiration date on ch 99 SLA 1975, a statute that relates to the sale of subsistence-caught fish eggs. The House version added a section that required the Department of Fish and Game to make a recommendation to the legislature concerning the prohibition of the sale of such fish eggs, and called on the Department of Public Safety to help in gathering the information necessary to such a recommendation. SB 197 was sponsored by Senators Hohman and Sackett.

SB 197 (Senate vote)

Yeas:	Bradley	Hohman	Ray
	Butrovich	*Kerttula	Rodey
	Colletta	Meland	Sackett
	Croft	Orsini	Sumner
	Ferguson	Poland	Tillion
	Hackney	Rader	Willis
			Ziegler
Nays:	Huber		

(\*Changed his Nay vote to Yea.)

SB 197 am H (House vote)

Yeas:	Akers	Freeman	Miller
	Anderson	Gardiner	Nakak
	Beirne	Gruening	Ose
	Bennett	Guy	Osterback
	Bradley	Haugen	Parr
	Brown	Hayes	Phillips
	Buchholdt	Kelly	Rhode
	Chatterton	Lethin	Rudd
	Cotten	Lovseth	Schaeffer
	Cowper	McKinnon	Smith
	Dankworth	Malone	Snider
	Duncan	Meekins	Swanson
	Eliason	Miles	Urion
Nays:	-0-		
Excused:	Carpenter		

Senate Resolution 4 (1981)

Senate Resolution Number 4, passed by the Senate in 1981, urged the Board of Fisheries "to define subsistence fisheries use in a manner that will minimize the impact on hook and line personal use and commercial fisheries in Cook Inlet" and that the Board "allocate the fish resources in a manner similar to the intent of the 1977 upper Cook Inlet fish resources management plan." The original sponsors of SR 4 were Senators Rodey and Kelly; the Senate Rules Committee amended the resolution before it came to a vote.

CS SR 4 am Recon (Senate vote)

Yeas:	Bennett	Gilman	Parr
	Dankworth	Kelly	Ray
	Fahrenkamp	Kerttula	Rodey
	Ferguson	Mulcahy	Sturgulewski
			Ziegler
Nays:	Eliason	Hohman	
Excused:	Bradley	Fischer	Sackett
	Colletta		
Absent:	Stimson		

House Bill 544 (1980)

House Bill Number 544, which passed the House in 1980, would have classified sport, commercial and subsistence fishing as the only categories of fishing activity that are permitted in the state. The bill would not have affected the right of the Board of Fisheries to change the number of permitted categories of fishing activity. Representative Parr was the original sponsor of HB 544; the House Resources Committee changed the bill before it came before the entire House.

CSHB 544 (House vote)

Yeas:	Anderson	Eliason	Montgomery
	Beirne	Freeman	Munson
	Bettisworth	Fuller	Osterback
	Branson	Gardiner	Parker
	Brown	Halford	Parr
	Buchholdt	Hurlbert	Phillips
	Carney	McKinnon	Rogers
	Chatterton	Malone	Schaeffer
	Cotten	Martin	Smith
	Duncan	Miller	Zharoff
Nays:	Barnes	Hayes	O'Connell
	Guy		
Not Voting:	Haugen	Metcalfe	Moss
	Meekins	Miles	Randolph

Senate Bill 113 (ch 5 SLA 1979)

Senate Bill Number 113, enacted in 1979, related to hunting activities. The Senate version of the bill had to do with wasting the meat of hunted animals; the bill classified additional portions of the animal as meat that may not be wasted. The House version retained the Senate provisions and added restrictions on non-residents' hunting without a guide for large animals for which "big game tags" are required. The bill was sponsored originally by Senators Sackett and Ferguson; the House amendments were made by the Judiciary Committee.

SB 113 (Senate vote)

Yeas:	Bennett	Hackney	Ray
	Colletta	Kelly	Sackett
	Dankworth	Kerttula	Stimson
	Fahrenkamp	Meland	Sturgulewski
	Ferguson	Mulcahy	Sumner
			Tillion
			Ziegler
Nays:	-0-		
Absent:	Bradley	Hohman	Rodey

HCSSB 113 am H (House vote)

Yeas:	Anderson	Fuller	Moss
	Beirne	Gardiner	Munson
	Brown	Hurlbert	Osterback
	Bucholdt	McKinnon	Parker
	Carney	Malone	Parr
	Cotten	Meekins	Phillips
	Duncan	Miles	Rogers
	Freeman	Miller	Schaeffer
			Zharoff
Nays:	Barnes	Eliason	Martin
	Bettisworth	Halford	Metcalfe
	Branson	Haugen	Montgomery
	Chatterton	Hayes	O'Connell
			Randolph
			Smith
Not Voting:	Guy		

House Bill 199 (1979)

House Bill Number 199, passed by the House in 1979, would have made the present subsistence hunting and fishing section within the Department of Fish and Game into a division, with expanded duties and powers. The bill was introduced by the Special Subsistence Committee.

HB 199 (House vote)

Yeas:	Anderson	Fuller	Miller
	Beirne	Gardiner	Moss
	Branson	Guy	Osterback
	Brown	Hurlbert	Parker
	Buchholdt	McKinnon	Phillips
	Cotten	Malone	Rogers
	Duncan	Meekins	Zharoff
	Eliason	Miles	
	Freeman		
Nays:	Barnes	Haugen	Munson
	Bettisworth	Hayes	O'Connell
	Carney	Martin	Parr
	Chatterton	Metcalfe	Randolph
	Halford	Mostgomery	Smith
Not Voting:	Schaeffer		



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

May 21, 1982

MEMORANDUM

TO: Representative Bob <sup>1</sup>  
L<sub>gh</sub>. Research  
FROM: Leslie Longenbaugh, Research Staff  
RE: History of Subsistence Law  
Research Request Number 82-132

Enclosed are copies of three research memoranda prepared by this Agency, all containing information regarding issues of subsistence hunting and fishing in Alaska; I neglected to provide these with my memorandum to you of May 19. If you have any questions, or would like further research on any of the issues presented in these papers, please call.

LL/

Attachments: Research Request Number 81-14  
Research Request Number 82-37  
Research Request Number 82-100

JILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 276-3550

1st NATIONAL CENTER  
100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701  
PHONE: (907) 452-1568

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 24, 1985

Honorable John L. Sund  
House of Representatives  
Pouch V  
Juneau, Alaska 99811

Re: Equal protection and the  
definition of subsistence  
uses in CSN3 238 (judiciary)  
AG Files 366-375-85 and  
377-176-85

Dear Representative Sund:

You have asked for an analysis under equal protection principles of the definition of subsistence uses contained in CSN3 238 (judiciary), an act relating to the taking of fish and game for subsistence and personal use. The classification of those eligible to participate in subsistence hunting and fishing under the bill is supported by information about the different ways Alaskans use fish and game, and would be defensible against an equal protection challenge. (See the attached April 23, 1985, memorandum to me from Don W. Collinsworth, Commissioner of Fish and Game.)

The bill defines "subsistence uses" as the "customary and traditional noncommercial uses of wild, renewable resources by a resident domiciled in a rural area of the state" for certain specified purposes. Further, the bill defines "rural area" as

a community or area of the state in which the taking of fish or wildlife for personal or family consumption is a significant characteristic of the economy of the community or area....

These definitions, then, establish a class of people eligible to participate in subsistence hunting and fishing, which under AS 16.05.251(b) and 255(b) must be authorized by the Boards of Fisheries and Game unless sustained yield would be jeopardized, and must be given a priority if restrictions are required.

The state equal protection test generally has been discussed in connection with article I, section 1 of the Alaska

Constitution, which provides in part that "all persons are equal and are entitled to equal rights." In addition, article VIII, section 17, is in essence an equal protection guarantee with regard to natural resources:

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

The equal protection guarantee is designed to ensure that those situated similarly with regard to the subject matter and purpose of a law will be treated equally under that law. Ketchikan Gateway Borough, Alaska v. Breed, 639 P.2d 995 (Alaska 1981). A classification must bear "a fair and substantial relationship to a legitimate governmental objective." Commercial Fisheries Entry Commission v. Anchadsk, 606 P.2d 1255, 1264 (Alaska 1980). Finally, equal protection does not demand absolute perfection in the classification system. Id. at 1267. As the court noted in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982):

The focus of our inquiry under Alaska equal protection analysis is whether the legislative classification is a reasonable means to accomplish a legitimate state purpose.

The Alaska Supreme Court has developed a three part test in analyzing whether legislation offends the equal protection clause of the Alaska Constitution. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 - 270 (Alaska 1984). The first inquiry involves what weight should be afforded the constitutional interest impaired by the challenged enactment. Depending on the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation. Next, the court looks at the purposes served by the challenged statute. Again, depending on the level of review determined, legitimate objectives may suffice, or compelling state interest may need to be demonstrated. Finally, and closely entwined with the preceding examination, the court evaluates the particular means employed to further the purported goals. Depending on the level of review, a substantial relationship may be constitutionally adequate, or a closer fit between means and ends may be required.

Turning to the first step in the equal protection analysis, the Alaska Supreme Court has noted that commercial fishing does not involve a suspect classification nor a

Hon. John L. Sunu  
House of Representatives  
File No. 366-373-85 & 377-176-85

April 24, 1985  
Page 3

fundamental right so as to require the application of the compelling state interest test. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). Therefore it would seem that the objectives of this bill, also relating to harvesting of resources, must be examined to see if they are legitimate, and the means employed to further those objectives must bear a substantial relationship to the ends.

Defining "subsistence uses" and "rural area" bears a fair and substantial relationship to a legitimate governmental objective, as required by the equal protection test. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1264 (Alaska 1980). The findings in section 1 of the bill indicate that its purpose is to protect "the taking of fish stocks and game populations for personal and family consumption and related uses" which the legislature finds is

essential to the health, safety, and general welfare of Alaskans domiciled in rural areas or rural communities in which the taking of fish and game for such uses is a significant part of the economy of the community or area....

(Emphasis added.) This is certainly a legitimate governmental objective. State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854, 859-860 n.18 (Alaska 1978), acknowledged the critical importance in Alaska of preserving and protecting subsistence uses, and in Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 397, 903 (Alaska 1981), the court noted that the state subsistence statutes addressed that important issue on a statewide basis.

After receiving your request for an equal protection analysis, I asked the Alaska Department of Fish and Game for an evaluation of the definition of "rural area" contained in the bill and an assessment of whether the data available to the department indicates that fish and game have a different role in the lives of people in rural areas as defined by the bill, compared to the role occupied in the lives of other Alaskans.

The attached April 23, 1985, memorandum to me from Don W. Collinsworth, Commissioner of Fish and Game, indicates that the data available support the definitions and the classifications which the bill would establish. It compares the roles fish and game play in rural areas, as defined by the bill, to the function of those resources in non-rural areas, and notes a number of general differences.

The memorandum outlines those variances with regard to:

The social organization of the economy of the area.

Economic differentiation and specialization.

Wage employment.

Cash income.

Cost of goods and services.

Variety of fish and wildlife species used.

The seasonal cycle of economic activity.

Participation in hunting and fishing or using wild resources.

Harvest levels.

Values associated with the use of fish and game.

Where hunting and fishing occur.

Sharing and exchange of fish and game.

After detailing those general comparisons, the memorandum concludes that people living in rural areas and rural communities as defined in the bill "have in general a very different relationship to fish and game resources than people living in other parts of Alaska." \*/

---

\*/ One of the sources of information evaluated by the department is Technical Paper No. 61 of the Alaska Department of Fish and Game, Division of Subsistence, Technical Paper Series, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, compiled by Dr. Robert J. Wolke and Dr. Linda J. Elianna in March 1983. That paper examined case studies of sixteen communities, and then compared, contrasted, and analyzed the information derived from each study to reach certain conclusions about the socioeconomic systems present. What emerges is an understanding of the importance of the socioeconomic system of an area to all the individuals living there.

The Alaska Supreme Court has acknowledged the vast differences which exist between rural communities or areas and other parts of Alaska. In Alvarado v. State, 486 P.2d 891, 394 (Alaska 1971), the court discussed these differences in terms of the usual conveniences available, the degree of modern facilities such as running water, the number of roads, available transportation, the ease and frequency of access, the level of industry, the type and regularity of employment, the importance of cash income to the community, and the degree of interaction and dependence among residents.

It has been suggested that there may be some individuals who do not live in rural areas and rural communities which

---

and the relationship of the system to fish and wildlife resources. The report demonstrates that communities and areas with subsistence-based socioeconomic systems show a much higher degree of reliance on fish and game resources than do other socioeconomic systems, based predominantly on manufacturing, trade, government, finance, or defense, for example. The paper concludes:

Alaska is characterized by a diversity of socioeconomic systems and patterns of resource use. Our understanding of these contemporary systems is just beginning. Research like these case studies contributes information on the role of fishing and hunting in the diverse socioeconomic systems of the State. 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.

Id. at 274.

will be identified under the definition in the bill who have a somewhat similar relationship to the resource as individuals living in those areas and communities. Even if that is the case, specific assertions about particular individuals are not determinative in an equal protection analysis. As noted by the Alaska Supreme Court in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982) "to require a reasonable nexus between legislative means and ends is not to demand perfection in classification." Similarly, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1267 (Alaska 1980), notes that equal protection does not demand absolute perfection in a classification system. Thus, it would be reasonable for participants in rural areas as defined in the bill to be eligible to participate in subsistence uses, no matter what a particular person's personal statistics may be, for it would be the reliance of the economic system of the area or community upon the personal and family consumption of fish and game resources that would be relevant.

It has also been suggested that the legislature could develop a list of communities and areas either included or excluded from eligibility for subsistence uses. The advantage of delegating to the boards the authority to identify rural areas and rural communities and to authorize customary and traditional uses of fish and game for the residents for those communities and areas is that modifications can be made relatively soon after available data shows the necessity. For example, if a community initially identified as a rural community grew substantially, hunting and fishing for personal or family consumption may no longer be a significant component of the economy of the community. The board could respond to that new information by modifying the appropriate regulations. On the other hand, if that community were contained on a list in the statute, subsistence uses would have to be continued to be authorized. Further, allowing the boards to apply the law on an area by area and community by community basis will insure that the evaluations will be based on information as it is available. Information may not presently be available for some communities, and it would be difficult at this point and time for the legislature to develop a comprehensive list which would treat similarly situated individuals the same.

Similarly, there could be equal protection problems in another suggested approach, defining "rural" by the use of an arbitrarily selected population level, unless that level were shown to correlate to differences in the use of fish and game for personal and family consumption. Those problems are also avoided by the delegation in the bill to the boards to identify rural

Hon. John L. Sund  
House of Representatives  
File No. 365-375-85 & 377-176-85

April 24, 1985  
Page 7

areas on an area by area and community by community basis.

Under the bill, Alaskans who do not live in rural areas or rural communities in the state "in which the taking of fish or wildlife for personal or family consumption is a significant characteristic of the economy of the community or area" are not precluded from harvesting fish and game. For example, the personal use fishing category which CSMB 288 (judiciary) would establish in statute would provide an opportunity for Alaskans to harvest fish by efficient methods such as gill or dip net, seine, fish wheel, or long line. Whenever the Board of Fisheries evaluates the uses of an area or community, if it determines that the uses are not customary and traditional uses by residents "domiciled in a rural area of the state," the board could authorize personal use fishing instead of subsistence fishing.

In conclusion, the definitions of "subsistence uses" and "rural area" contained in CSMB 288 (judiciary) establish a classification of Alaskans eligible for subsistence hunting and fishing which is supported by available data, and which would be defensible against an equal protection challenge. The information demonstrating that the distinction is a reasonable one, related to differences in the situations of Alaskans living in those different areas and communities is summarized in the attached April 23, 1985, memorandum from Don W. Collinsworth, Commissioner of Fish and Game. If you have any further questions, please do not hesitate to contact this office or the Department of Fish and Game.

Sincerely,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By: *Larri Irene Spengler*  
Larri Irene Spengler  
Assistant Attorney General

LIS:rn

Attachment

cc: w/attachment  
Don Collinsworth  
Dennis Kelso  
Jim Ayers  
Beth Stewart

Hon. John L. Sund  
House of Representatives  
File No. 365-375-25 & 377-170-65

April 24, 1985  
Page 3

Steve Behnke  
ADF&G

Liza McCracken  
Dept of Law

Adelheid Herrmaan

Peter Coll

# MEMORANDUM

State of Alaska

TO: Larri Spendler  
Assistant Attorney General  
Department of Law

DATE: April 23, 1985

FILE NO

TELEPHONE NO: 465-4100

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

SUBJECT: Fish and  
Wildlife Use  
and the  
Definition of  
"Rural Areas"

You have asked the department to examine the definition of "rural area" contained in CS HB 288 (judiciary) in relation to subsistence uses. The bill defines "subsistence uses" as "the customary and traditional noncommercial uses of wild, renewable resources by a resident domiciled in a rural area of the state" for certain specific purposes.

The bill defines "rural area" as:

A community or area of the state in which the taking of fish or wildlife for personal or family consumption is a significant characteristic of the economy of the community or area.

You have asked for an assessment of whether the data available to the department indicate that fish and game have a different role in people's lives in rural areas, under the bill's definition, as opposed to other areas of the state. The Division of Subsistence has gathered information on use of fish and game in over 150 communities in Alaska and has compiled data from a variety of other sources. We have summarized here the major conclusions from that research in order to answer your question.

Alaska has a wide diversity in ways of life and types of communities. Most people in the state (about 62 percent) live in the three major population concentrations: Anchorage, Fairbanks, and Juneau. Most of the rest reside in approximately 389 smaller communities averaging fewer than 500 people each. Many of these places have fewer than 100. A relatively small number of people live dispersed outside these communities.

Research by the Division of Subsistence and other social scientists indicates that an individual's relationship to, and uses of, wild resources are typically part of a larger community pattern of wild resource use, which is determined by the community's history, customs, and socioeconomic conditions.

In many areas of Alaska, social and economic life centers on the use of wild resources. This dependence is most apparent in the less populated areas. In these areas communities are economically and socially dependent on hunting and fishing for local use.

These communities have what may be termed "mixed subsistence-cash economies" (Wolfe and Ellanna, 1983). In them, harvesting and processing of wild resources by families are an important component of the communities' economy, relative to other sectors such as wage employment. These are the areas to which CS HB 288 refers as rural.

In contrast to these places are large Alaskan cities which have economies and ways of life based on industry and capital rather than the use of fish and wildlife. These places are not economically or socially dependent on hunting and fishing for local uses in the same way as the areas described above. In this memorandum they will be referred to as non-rural, for the purposes of contrasting them with rural areas, as defined in the bill.

These non-rural places have economies similar to those of communities in the rest of the United States. The pattern of fish and wildlife use and its relationship to the community's economy and social structure differ significantly from those in the mixed subsistence-cash economy described above.

The following sections compare the roles fish and wildlife play in rural and nonrural areas:

#### The Social Organization of the Economy

- ° In rural areas, kinship groups (family units) are the major economic units. These units combine production, exchange, and consumption functions (a "domestic mode of production").
- ° In non-rural areas, corporate and other business structures are the basic units of the economy. Most economic production occurs outside the kinship unit, although families are important consumption units.
- ° In rural areas, economic activities, including hunting and fishing, are directed primarily toward family use and toward sustaining family relations and community stability.
- ° The economy of non-rural areas is organized around profit accumulation and earning cash to exchange for goods and services.

### Economic Differentiation and Specialization

- ° In rural areas, there is a limited variety of economic opportunities, services, and goods available locally.
- ° The non-rural area's economy is much more differentiated and specialized, including well-developed private and public business sectors, and a broader variety of services and goods.

### Wage Employment

- ° Generally, wage employment opportunities in rural communities with a mixed subsistence-cash economy are limited, seasonal, part-time, and in jobs in the commercial fisheries, other primary resource extraction, or in public sector employment. There usually is not a well-developed private wage sector.
- ° As a whole, wage employment opportunities are numerous in non-rural areas, and full-time wage employment is the norm for at least one person in a household.

### Cash Income

- ° Average household and per capita cash incomes are lower in rural areas of the state than in non-rural areas.
- ° In the rural communities where detailed studies have been conducted, no simple relationship exists between level of monetary incomes and wild resource productivity and use, however. In fact, households with the highest monetary incomes within a rural community typically have been found to be the most productive fishers and hunters, and typically provide food for many other families through customary distribution and exchange of harvested fish and game.

### Costs of Goods and Services

- ° Purchasing power is lower in rural areas than in non-rural areas because the costs of goods, including food and services, are significantly greater in rural areas. This is largely due to the smaller economies of scale and greater transportation costs in rural areas.

### Variety of Fish and Wildlife Species Used

- ° In rural areas, most households use a wide range of the available fish and wildlife species.
- ° In non-rural areas, most households typically harvest few of the available species, and generally focus on those which have a high recreational value.

### The Seasonal Cycle of Economic Activity

- ° In rural areas, the economy follows a regular yearly, community-wide cycle of activities based on the seasonal appearance of fish and game resources. Social groupings and economic pursuits are modified to accommodate natural cyclic changes in the biotic resources.
- ° In non-rural areas, the economy is not organized around seasonal appearance of fish and game resources (that is, there is no community-wide seasonal round of activities synchronized with cyclic changes in biotic resources). Hunting and fishing are performed on periodic breaks from regular work routines.

### Participation in Hunting and Fishing or Using Wild Resources

- ° In rural areas, most households harvest or use fish and game.
- ° In non-rural areas, a smaller percentage of households harvest or use wild resources.

### Harvest Levels

- ° Harvests of fish and wildlife can be substantial, though variable in rural areas: community averages fall between about 100 lbs to 1,400 lbs per person per year.
- ° In non-rural areas, average per capita harvests are significantly lower; less than 100 pounds annually.

### Values Associated with Use of Fish and Game

- ° In rural areas, fishing, hunting, and processing have central social, economic, and cultural values to community members.
- ° In the non-rural economy, hunting and fishing are typically valued because they are a diversion from central work activities, but also because they have social significance and provide valued food.

### Where Hunting and Fishing Occur

- ° In rural areas, fishing and hunting primarily occur within a relatively well-defined community territory contiguous to the community.
- ° By contrast, non-rural residents typically travel long distances to fishing and hunting areas. The "territory" of use of a non-rural community may include large regions of the state, rather than a discrete well-defined area.
- ° In rural areas, customary, unwritten community "rules" control access to traplines, fishcamps, set net sites, fishwheels sites, and hunting territories.
- ° In non-rural areas formal legal limitations and personal experience are more significant than community customs in influencing where people hunt and fish.

### Sharing and Exchange of Fish and Game

- ° Sharing is a central feature of the economy of rural areas. Fish and game is distributed through kinship networks. Households with elderly or infirm members or large numbers of dependent children receive food through these networks. (These are called "non-commercial distribution and exchange networks" in the social science literature).
- ° While some sharing and exchange occurs in non-rural areas, this is not a central feature of their economy; relatively few people regularly distribute fish and game through social networks, although food is used for gifts.

In summary, existing data show that people living in rural areas--communities and areas in which the taking of fish or game for personal and family consumption constitutes a significant characteristic of the local economy--have in general a very different relationship to fish and game resources than people living in other parts of Alaska. That is not to say that people in other parts of Alaska do not value the harvest of fish and game; however, the role those resources play in their lives in general is quite different.

Wolfe, Dr. Robert J. and Linda J. Elianna, et. al., March 1983. Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 31, Division of Subsistence, Alaska Department of Fish and Game.

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 7, 1986

The Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V - State Capitol  
Juneau, Alaska 99811

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 276-3550

1st NATIONAL CENTER  
100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701  
PHONE: (907) 452-1568

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

Re: Subsistence: Equal protection and the use of "road connected" in the definition of "rural area" in SCS CSHB 288 (res) AG Files 663850375 and 773850176

Dear Senator Sturgulewski:

You have asked for an analysis under equal protection principles of including "road connected" as an exclusion in the definition of "rural area" contained in the proposed SCS CSHB 288 (res), an act relating to the taking of fish and game for subsistence and personal use. Experience with a definition of "rural" adopted by the joint Boards of Fisheries and Game in 1982 and repealed in 1983, and later board action based on information provided by the Department of Fish and Game indicates that a definition of "rural area" which incorporated an exclusion of road connected areas would be vulnerable to an equal protection challenge.

The proposed committee substitute defines "subsistence uses" as the "noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state" for certain specified purposes. Further, the bill defines "rural area" as:

a community or area of the state in which the non-commercial, customary, and traditional uses of fish or game for personal or family consumption is a significant characteristic of the economy of the community or the area....

These definitions establish a class of people eligible to participate in subsistence hunting and fishing. The definitions are very similar to the definitions incorporated in an earlier version of the bill considered by the House, CSHB 288 (jud). An analysis by this office based in part upon

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 2

information provided by the Department of Fish and Game concluded that the definitions in that version would be defensible against an equal protection challenge. You have inquired whether an amendment to the definition of "rural area" which would exclude those parts of the state connected by road would pose equal protection problems. 1/

The state equal protection test generally has been discussed in connection with Article I, section 1 of the Alaska Constitution, which provides in part that "all persons are equal and are entitled to equal rights." In addition, Article VIII, section 17, is in essence an equal protection guarantee with regard to natural resources:

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

The equal protection guarantee is designed to ensure that those people situated similarly with regard to the subject matter and purpose of the law will be treated equally under that law. Ketchikan Gateway Borough, Alaska, v. Bried, 639 P.2d 995 (Alaska 1981). A classification must bear "a fair and substantial relationship to a legitimate governmental objective." Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1264 (Alaska 1980). Finally, equal protection does not demand absolute perfection in the classification system. Id. at 1267. As the court noted in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982):

The focus of our inquiry under Alaska equal protection analysis is whether the legislative classification is a reasonable means to accomplish a legitimate state purpose.

The Alaska Supreme Court has developed a three part test in analyzing whether legislation offends the equal protection clause of the Alaska Constitution. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-270 (Alaska 1984). The first

---

1/ Depending on how the term "road" was used and defined, problems of vagueness might also be presented by such an amendment.

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 3

inquiry involves what weight should be afforded the constitutional interest impaired by the challenged enactment. Depending on the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation. Next, the court looks at the purpose served by the challenged statute. Again, depending on the level of review determined, legitimate objectives may suffice, or compelling state interests may need to be demonstrated. Finally, and closely entwined with the preceding examination, the court evaluates the particular means employed to further the purported goals. Depending on the level of review, a substantial relationship may be constitutionally adequate, or closer fit between means and ends may be required.

Turning to the first step in the equal protection analysis, the Alaska Supreme Court has noted that commercial fishing does not involve a suspect classification nor a fundamental right so as to require a the application of the compelling state interest test. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). Therefore it would seem that the objectives of this bill, also relating to harvesting of resources, must be examined to see if they are legitimate, and the means employed to further those objectives must bear a substantial relationship to the ends.

Defining "subsistence uses" and "rural area" bears a fair and substantial relationship to a legitimate governmental objective, as required by the equal protection test. Id. at 1264. State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854, 859-860 n.18 (Alaska 1978), acknowledged the critical importance in Alaska of preserving and protecting subsistence uses, and in Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 903 (Alaska 1981), the court noted that the state subsistence statutes addressed that important issue on a statewide basis.

Your request regarding the equal protection ramifications of the addition of "road connected" as an exclusionary component of the definition of "rural area" in the proposed committee substitute in part relates to the definition of "rural" adopted by the joint Boards of Fisheries and Game in 1982 as 5 AAC 99.020. The boards defined "rural" to mean:

outside the road connected area of a borough, municipality, or other community with a population of 7000 or more, as determined by the Alaska Department of Community and Regional Affairs.

This definition was never implemented, and a year after it was

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663&50375 & 773850176

March 7, 1986  
Page 4

adopted, the boards repealed it, based on the advice of the Department of Law that it appeared to violate equal protection. Information provided by the Department of Fish and Game had indicated that the factors employed in the definition did not correlate throughout the state to differences in use patterns of and reliance on fish and game resources by various communities and areas. 2/

After receiving your request for an analysis of possible consequences associated with the use of "road connected," I discussed with the Department of Fish and Game available information on the correlation of road connectedness to the use of fish and game. If a correlation could be shown, then presumably in general the use of the term in the definition would result in similar treatment for individuals situated similarly with regard to the use of fish and game. On the other hand, failing a correlation, equal protection problems are very likely.

The department data illustrate that some communities connected by road to major Alaskan cities have hunting and fishing patterns and reliance upon fish and game which are similar to those in small, remote communities off the road system. For example, the Board of Fisheries applied the eight criteria contained in 5 AAC 99.010 and determined that the Copper River basin area and certain upper Tanana communities qualified as being eligible for subsistence uses of Copper River salmon. (The Department of the Interior had certified that the method for identifying eligible rural communities and areas contained in 5 AAC 99.010 complied with the requirements of the Alaska National Interest Lands Conservation Act, Title 8.) The Department of Fish and Game had provided information to the board on the uses of fish and game in those areas. The board determined, based in part on that data, that the Copper River basin qualified, which encompassed road connected areas, 3/ and that some road connected upper Tanana communities qualified, including Tetlin,

---

2/ Wolfe, Dr. Robert J. and Linda J. Ellanna, et al., Mar. 1983, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, Technical Paper no. 61, Division of Subsistence, Alaska Department of Fish and Game.

3/ Information on this area was provided to the boards in Technical Paper 107, Division of Subsistence, Department of Fish and Game.

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 5

Northway, Tanacross, Tok, 4/ and Dot Lake. 5/ All these communities are "road connected," and the board's assessment of the uses of fish and game in those communities under standards which were consistent with ANILCA concluded that they were eligible for subsistence uses.

There are other communities in the state which are connected by the state's road system, about which research conducted by the Department of Fish and Game indicates that they are similarly situated to other communities not on the road system with regard to use patterns of and reliance upon fish and game resources. For example, the community of Klukwan is discussed in Technical Papers 69 and 95, Division of Subsistence, Department of Fish and Game, and the community of Minto, road connected and relatively close to Fairbanks, is covered by Technical Paper 122, Division of Subsistence, Department of Fish and Game.

It appears from these examples that road connectedness in itself does not mean that residents of certain communities or areas are differently situated with respect to the use of fish and game. Therefore, to insert "road connected" as an exclusionary factor in the definition of a "rural area" in which residents would be eligible to participate in subsistence uses could be vulnerable to an equal protection challenge. Of course, in a particular fact situation, the boards might conclude that roads were one factor which contributed to different patterns of use of fish and game resources, but as the examples above illustrate, such a factually specific determination could not be generalized to the entire state.

It appears, therefore, in answer to your question, that inserting "road connected" as an exclusionary component in the

---

4/ Information on Tetlin, Northway, Tanacross, and Tok was provided to the board in Technical Paper 115, Division of Subsistence, Department of Fish and Game.

5/ Information on Dot Lake was provided to the board in Technical Paper 19, Division of Subsistence, Department of Fish and Game, and in Technical Paper 61, Division of Subsistence, Department of Fish and Game, which compared case studies of a number of communities, and found that the hunting and fishing patterns of residents of Dot Lake were similar to the hunting and fishing patterns found in small communities off of the road system.

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 6

definition of "rural area" in the proposed SCS CSHB 288 (res)  
would pose significant equal protection problems.

Sincerely,

HAROLD M. BROWN  
ATTORNEY GENERAL

By: *Larri Irene Spengler*  
Larri Irene Spengler  
Assistant Attorney General

LIS:rn

cc: Don Collinsworth  
Jim Ayers  
Art Peterson

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 276-3550

1st NATIONAL CENTER  
100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701  
PHONE: (907) 452-1568

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

**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

March 7, 1986

The Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V - State Capitol  
Juneau, Alaska 99811

Re: Subsistence: Equal protection and the use of "road connected" in the definition of "rural area" in SCS CSHB 288 (res) AG Files 663850375 and 773850176

Dear Senator Sturgulewski:

You have asked for an analysis under equal protection principles of including "road connected" as an exclusion in the definition of "rural area" contained in the proposed SCS CSHB 288 (res), an act relating to the taking of fish and game for subsistence and personal use. Experience with a definition of "rural" adopted by the joint Boards of Fisheries and Game in 1982 and repealed in 1983, and later board action based on information provided by the Department of Fish and Game indicates that a definition of "rural area" which incorporated an exclusion of road connected areas would be vulnerable to an equal protection challenge.

The proposed committee substitute defines "subsistence uses" as the "noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state" for certain specified purposes. Further, the bill defines "rural area" as:

a community or area of the state in which the non-commercial, customary, and traditional uses of fish or game for personal or family consumption is a significant characteristic of the economy of the community or the area....

These definitions establish a class of people eligible to participate in subsistence hunting and fishing. The definitions are very similar to the definitions incorporated in an earlier version of the bill considered by the House, CSHB 288 (jud). An analysis by this office based in part upon

Honorable Arliss Sturgulewski.  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99801  
AG Files No. 663850375 & 773550176

March 7, 1986  
Page 2

information provided by the Department of Fish and Game concluded that the definitions in that version would be defensible against an equal protection challenge. You have inquired whether an amendment to the definition of "rural area" which would exclude those parts of the state connected by road would pose equal protection problems. 1/

The state equal protection test generally has been discussed in connection with Article I, section 1 of the Alaska Constitution, which provides in part that "all persons are equal and are entitled to equal rights." In addition, Article VIII, section 17, is in essence an equal protection guarantee with regard to natural resources:

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

The equal protection guarantee is designed to ensure that those people situated similarly with regard to the subject matter and purpose of the law will be treated equally under that law. Ketchikan Gateway Borough, Alaska, v. Bried, 639 P.2d 995 (Alaska 1981). A classification must bear "a fair and substantial relationship to a legitimate governmental objective." Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1264 (Alaska 1980). Finally, equal protection does not demand absolute perfection in the classification system. Id. at 1267. As the court noted in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982):

The focus of our inquiry under Alaska equal protection analysis is whether the legislative classification is a reasonable means to accomplish a legitimate state purpose.

The Alaska Supreme Court has developed a three part test in analyzing whether legislation offends the equal protection clause of the Alaska Constitution. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-270 (Alaska 1984). The first

---

1/ Depending on how the term "road" was used and defined, problems of vagueness might also be presented by such an amendment.

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 3

inquiry involves what weight should be afforded the constitutional interest impaired by the challenged enactment. Depending on the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation. Next, the court looks at the purpose served by the challenged statute. Again, depending on the level of review determined, legitimate objectives may suffice, or compelling state interests may need to be demonstrated. Finally, and closely entwined with the preceding examination, the court evaluates the particular means employed to further the purported goals. Depending on the level of review, a substantial relationship may be constitutionally adequate, or closer fit between means and ends may be required.

Turning to the first step in the equal protection analysis, the Alaska Supreme Court has noted that commercial fishing does not involve a suspect classification nor a fundamental right so as to require the application of the compelling state interest test. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). Therefore it would seem that the objectives of this bill, also relating to harvesting of resources, must be examined to see if they are legitimate, and the means employed to further those objectives must bear a substantial relationship to the ends.

Defining "subsistence uses" and "rural area" bears a fair and substantial relationship to a legitimate governmental objective, as required by the equal protection test. Id. at 1264. State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854, 859-860 n.18 (Alaska 1978), acknowledged the critical importance in Alaska of preserving and protecting subsistence uses, and in Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 903 (Alaska 1981), the court noted that the state subsistence statutes addressed that important issue on a statewide basis.

Your request regarding the equal protection ramifications of the addition of "road connected" as an exclusionary component of the definition of "rural area" in the proposed committee substitute in part relates to the definition of "rural" adopted by the joint Boards of Fisheries and Game in 1982 as 5 AAC 99.020. The boards defined "rural" to mean:

outside the road connected area of a borough, municipality, or other community with a population of 7000 or more, as determined by the Alaska Department of Community and Regional Affairs.

This definition was never implemented, and a year after it was

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 4

adopted, the boards repealed it, based on the advice of the Department of Law that it appeared to violate equal protection. Information provided by the Department of Fish and Game had indicated that the factors employed in the definition did not correlate throughout the state to differences in use patterns of and reliance on fish and game resources by various communities and areas. 2/

After receiving your request for an analysis of possible consequences associated with the use of "road connected," I discussed with the Department of Fish and Game available information on the correlation of road connectedness to the use of fish and game. If a correlation could be shown, then presumably in general the use of the term in the definition would result in similar treatment for individuals situated similarly with regard to the use of fish and game. On the other hand, failing a correlation, equal protection problems are very likely.

The department data illustrate that some communities connected by road to major Alaskan cities have hunting and fishing patterns and reliance upon fish and game which are similar to those in small, remote communities off the road system. For example, the Board of Fisheries applied the eight criteria contained in 5 AAC 99.010 and determined that the Copper River basin area and certain upper Tanana communities qualified as being eligible for subsistence uses of Copper River salmon. (The Department of the Interior had certified that the method for identifying eligible rural communities and areas contained in 5 AAC 99.010 complied with the requirements of the Alaska National Interest Lands Conservation Act, Title 8.) The Department of Fish and Game had provided information to the board on the uses of fish and game in those areas. The board determined, based in part on that data, that the Copper River basin qualified, which encompassed road connected areas, 3/ and that some road connected upper Tanana communities qualified, including Tetlin,

---

2/ Wolfe, Dr. Robert J. and Linda J. Ellanna, et al., Mar. 1983, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, Technical Paper no. 61, Division of Subsistence, Alaska Department of Fish and Game.

3/ Information on this area was provided to the boards in Technical Paper 107, Division of Subsistence, Department of Fish and Game.

Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.C. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 5

Northway, Tanacross, Tok, 4/ and Dot Lake. 5/ All these communities are "road connected," and the board's assessment of the uses of fish and game in those communities under standards which were consistent with ANILCA concluded that they were eligible for subsistence uses.

There are other communities in the state which are connected by the state's road system, about which research conducted by the Department of Fish and Game indicates that they are similarly situated to other communities not on the road system with regard to use patterns of and reliance upon fish and game resources. For example, the community of Klukwan is discussed in Technical Papers 69 and 95, Division of Subsistence, Department of Fish and Game, and the community of Minto, road connected and relatively close to Fairbanks, is covered by Technical Paper 122, Division of Subsistence, Department of Fish and Game.

It appears from these examples that road connectedness in itself does not mean that residents of certain communities or areas are differently situated with respect to the use of fish and game. Therefore, to insert "road connected" as an exclusionary factor in the definition of a "rural area" in which residents would be eligible to participate in subsistence uses could be vulnerable to an equal protection challenge. Of course, in a particular fact situation, the boards might conclude that roads were one factor which contributed to different patterns of use of fish and game resources, but as the examples above illustrate, such a factually specific determination could not be generalized to the entire state.

It appears, therefore, in answer to your question, that inserting "road connected" as an exclusionary component in the

---

4/ Information on Tetlin, Northway, Tanacross, and Tok was provided to the board in Technical Paper 115, Division of Subsistence, Department of Fish and Game.

5/ Information on Dot Lake was provided to the board in Technical Paper 19, Division of Subsistence, Department of Fish and Game, and in Technical Paper 61, Division of Subsistence, Department of Fish and Game, which compared case studies of a number of communities, and found that the hunting and fishing patterns of residents of Dot Lake were similar to the hunting and fishing patterns found in small communities off of the road system.

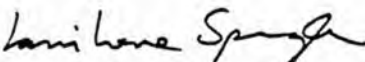
Honorable Arliss Sturgulewski  
Alaska State Legislature  
P.O. Box V, Juneau, AK 99811  
AG Files No. 663850375 & 773850176

March 7, 1986  
Page 6

definition of "rural area" in the proposed SCS CSHB 288 (res)  
would pose significant equal protection problems.

Sincerely,

HAPOLD M. BROWN  
ATTORNEY GENERAL

By:   
Larri Irene Spengler  
Assistant Attorney General

LIS:rn

cc: Don Collinsworth  
Jim Ayers  
Art Peterson

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 COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,	)	
	)	
Appellant,	)	File No. A-210
	)	
v.	)	<u>O P I N I O N</u>
	)	
DAVID ELUSKA,	)	
	)	
Appellee.	)	[No. 456 - April 12, 1985]
_____	)	

Appeal from the District Court of the State of Alaska, Third Judicial District, Kodiak, Roy H. Madsen, Judge.

Appearances: Sarah Elizabeth McCracken, Assistant Attorney General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellant. Michael J. Wall, Assistant Public Defender, Kodiak, and Dana Fabe, Public Defender, Anchorage, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

The state appeals the district court's dismissal of misdemeanor charges against David Eluska. Eluska was charged with possessing illegally taken game in violation of 5 AAC 81.320(6)<sup>1</sup> and 5 AAC 81.140(a).<sup>2</sup>

---

1. For the 1982-83 season, 5 AAC 81.320(6) limited the deer season in Game Unit 8 to the period between August 1 and January 31 and imposed the following bag limits:

(Footnote Continued)

Eluska sought dismissal of the charges on the ground that 5 AAC 81.320(6) was unenforceable against him because he was a subsistence hunter and the regulation failed to adequately provide for subsistence hunting. See AS 16.05.255(b); AS 11.81.220; AS 44.62.030.<sup>3</sup> Acting District Court Judge Roy H. Madsen found that the deer was taken to satisfy the subsistence needs of Eluska and his family and that the regulations which

---

(Footnote 1 Continued)

Aug. 1 - Jan. 31                      Seven deer; however, antlerless deer may be taken only from September 15 - January 31

2.     5 AAC 81.140(a) provides:

Possession and Transportation. (a) No person may possess, transport, or place into the possession of another, any game or parts of game that the person has taken in violation of AS 16 or a regulation promulgated thereunder.

3.     Alaska Statute 44.62.030 provides:

Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

Alaska Statute 11.81.220 provides:

All offenses defined by statute. No conduct constitutes an offense unless it is made an offense

- (1) by this title;
- (2) by a statute outside this title; or
- (3) by a regulation authorized by and lawfully adopted under a statute.

"Offense" is defined in AS 11.81.900(b)(33) as:

conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation.

prohibited him from taking the deer failed to provide adequately for subsistence uses as required by the enabling statute. AS 16.05.255(b). Consequently he concluded that the regulation was invalid as applied to Eluska and dismissed the case. The state appeals, contending that (1) adequate regulations had been promulgated providing for subsistence use of game; (2) Eluska lacked standing to challenge state game regulations because his possession of game was unlawful even if taken for subsistence uses; and (3) Eluska lacked standing to challenge the state game laws because he had not exhausted his administrative remedies. (This last argument was first made during oral argument.) We agree with Judge Madsen's conclusion that the state regulations applicable to Game Unit 8 do not on their face make adequate provision for subsistence hunting. We therefore recognize "subsistence use" as a defense to the charges brought against Eluska. In light of the substantial uncertainty regarding the proper resolution of the issues presented in this case at the time it was argued to the trial court, we have decided to remand the case to the trial court to give the parties an opportunity to litigate Eluska's subsistence defense as we define it in this opinion.

#### DISCUSSION

In 1978 the legislature substantially amended several fish and game statutes to reflect a policy favorable to subsistence hunting. The substantive changes were prefaced by the following statement of intent:

The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that those resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's

fish and game resources and to recognize the needs, customs and traditions of Alaskan residents. The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated, with as much input as possible from the affected users, so that the viability of fish and game resources is not threatened and so that resources are conserved in a manner consistent with the sustained-yield principle.

§ 1, Ch. 151, SLA 1978 (1978 Temporary and Special Acts and Resolutions).

Prior to the 1978 amendments, AS 16.05.255 did not mention subsistence, but provided in part:

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

. . . .

(2) establishment of open and closed seasons and areas for the taking of game;

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

(4) setting quotas and bag limits on the taking of game . . . .

The statute was amended in 1978 by adding a new subsection:

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

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

(2) local residency; and

(3) availability of alternative resources."

On May 14, 1983, when the deer season in Game Unit 8 was completely closed, Eluska was found in possession of a freshly killed doe. He was prosecuted pursuant to 5 AAC 81.320(6) and 5 AAC 81.140(a). Eluska argued and the trial court found that application of 5 AAC 81.320(6) to Eluska would be inconsistent with the requirements of AS 16.05.255(b) because the regulations governing hunting in Game Unit 8 made no specific provision for subsistence use. Eluska argued that nothing short of regulations which expressly distinguish between subsistence and sport hunting will satisfy section (b) of AS 16.05.255. On appeal, the state argues that the regulation need not expressly provide for subsistence uses and that the regulation in this case makes adequate provision for subsistence hunters. The clear language of the statute, the state continues, provides that the Board shall adopt regulations "permitting" the taking of game for subsistence uses, not that it must adopt special "subsistence regulations." Thus, where a hunting season can accommodate hunting opportunities for all user groups without infringing upon the continuation of subsistence uses, that season is consistent with the state's subsistence law and need not be specially designated as a "subsistence" season. It was incumbent upon Eluska, the state concludes, to show that a six-month season and a seven deer limit was insufficient to

---

4. The legislature also established a section on subsistence hunting and fishing within the Department of Fish and Game, and provided a procedure for creating "subsistence hunting areas," where subsistence is the only use. See AS 16.05.090(c) (creating a subsistence section within the Department of Fish and Game); AS 16.05.094 (defining the duties of the subsistence section); AS 16.05.257 (providing for the creation of "subsistence hunting areas"); AS 16.05.940(23) (defining "subsistence uses").

meet "subsistence uses" before he could prevail on his motion to dismiss.<sup>5</sup> Since there is nothing in the record indicating that there were insufficient deer in Game Unit 8 to meet all needs, including both sport hunting and subsistence uses, the state contends it was unnecessary for the Board to adopt any specific subsistence regulations, and therefore the trial court erred in finding that prosecution of Eluska under 5 AAC §1.320(6) and 5 AAC 81.140(a) was inconsistent with the enabling statute.

We believe that the parties' reliance on AS 44.62.030 obscures rather than illuminates the present controversy. The regulations in question are similar to regulations which were passed before the enactment of AS 16.05.255(b) and were apparently enacted under the authority granted in AS 16.05.255(a). They are clearly not inconsistent with the first subsection of the statute. Given the substantial burden that a party challenging an administrative regulation on inconsistency grounds must sustain, we are satisfied that Eluska has not proved that 5 AAC 81.320(6)

---

5. The state finds support for its position in a series of attorney general opinions and in the legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) P.L. 96-487, 94 Stat. 2371 (1980), particularly in section 804 (codified at 16 U.S.C. § 3114 (1982)). The state points out that the federal statute was intentionally patterned after Alaska's subsistence law and provides virtually identical language to that found at AS 16.05.255(b). H.R. Rep. No. 96-97, Part 2, 96th Cong., 1st Sess. 191 (1980). The legislative history of section 804 specifies that:

If a particular fish or wildlife population in a particular area is sufficient to sustain harvest by all persons engaged in subsistence and other uses, restrictions on taking for nonsubsistence uses are not required by this section.

*Id.* at 193. But see *Madison v. Alaska Department of Fish and Game*, P.2d \_\_\_, \_\_\_ n.13, Op. No. 2911 at 23-24 n.13 (Alaska, February 22, 1985) (rejecting an interpretation of the terms "customary and traditional" derived from ANILCA).

and 5 AAC 81.140(a) are on their face necessarily inconsistent statutory requirements of subsection (a), since, as the state pair is at least conceivable that sufficient deer existed on Kodiak Island to meet all subsistence needs despite the bag limits, seasons and other restrictions set by the regulations. But cf. Madison v. Alaska Department of Fish and Game, \_\_\_ P.2d \_\_\_, \_\_\_ n.9, Op. No. 2911 at 12 n.9 (Alaska, February 22, 1985) (holding Board of Fisheries regulations defining subsistence fisheries inconsistent with AS 16.05.940(22), (23), and 16.05.-251(b), which define "subsistence fishing" and "subsistence uses," and require the Board to adopt regulations permitting subsistence fishing).

This conclusion does not resolve the case, however, because we agree with the trial court that a proper resolution of this case requires consideration of AS 16.05.255(b) as well as AS 16.05.255(a). We must determine what the 1978 legislative enactment required the Board to do and then determine whether the Board properly carried out the legislative mandate. Finally, if the Board has not followed the legislative directive, we must determine what effect its failure would have on Eluska's prosecution. Having considered the record and the parties' arguments, we conclude that by enacting subsection (b) of AS 16.05.255, the legislature required the Board of Game to adopt specific regulations "permitting" the

---

6. The state's suggestion that the regulations "permitted" subsistence hunting to the extent that they did not prohibit it outright exhibits a misunderstanding of the statute. As the supreme court pointed out in Madison, P.2d at \_\_\_, Op. No. 2911 at 15-17 (in discussing the two-tier regulation established in the statute), the Board may not restrict subsistence hunting at all in an area in which sport or commercial hunting is permitted. Even if sport and commercial hunting are totally prohibited at all times in an area, the Board is still prohibited from restricting subsistence hunting unless the Board specifically finds that unrestricted

(Footnote Continued)

see page 16  
"restriction" means "an  
significant impairment  
of subsistence uses  
i.)"

taking of game for subsistence uses. No such regulations were governing Game Unit 8. Consequently, we are required to recog-  
"subsistence" defense to prosecutions under regulations adopted in accordance with AS 16.05.255(a) in order to carry out the legislative intent.

---

(Footnote 6 Continued)

subsistence hunting would interfere with sustained yield. Id. In the absence of evidence that all other hunting was prohibited in an area and that in addition subsistence hunting was restricted solely for sustained-yield purposes, any attempt to punish a subsistence use as a violation of a hunting regulation is suspect.

In reaching these conclusions we stress that we do not decide nor do we read Madison as deciding bright line rules for differentiating between subsistence uses, sport uses, and commercial uses. In fact the supreme court pointed out that a commercial fisherman might well be a subsistence user when he fishes for personal consumption. By the same token many men and women who think of themselves as sport hunters may well find that their taking satisfies the statutory definition of a "subsistence use." AS 16.05.940(23). It may be that most "sport hunting" qualifies as "subsistence hunting." We express no opinion on this question. It was precisely because the legislature believed that the rights of the various groups could only be determined through an understanding of the history of hunting in Alaska that the Board was given the power to interpret the statute and to promulgate regulations establishing a reasoned basis for distinguishing subsistence uses from sport uses and commercial uses. The Board's default in meeting this obligation leaves us with the problem faced today.

Finally, we do not read the supreme court's discussion of the legislative history regarding the use of the term "customary and traditional" as constituting an implicit finding that the statute is somehow void as a discrimination against outsiders and newcomers. See Madison, P.2d at \_\_\_, Op. No. 2911 at 20-21. We assume that the Board will be able to adopt regulations adequately answering the questions left open by this case and Madison without violating state and federal equal protection guarantees. See Zobel v. Williams, 457 U.S. 55, 60-61, 102 S. Ct. 2309, 2312-13, 72 L.Ed.2d 672, 677-73 (1982) (when a state distributes benefits unequally between past residents and newcomers the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment); cf. Alaska Constitution art. VIII (establishing limitations on state regulation of hunting and fishing).

## I. Legislative Mandate

We believe the Board's duty to publish regulations pursuant to AS 16.05.255(b) to have been mandatory. See Sisters of Providence in Washington, Inc. v. Department of Health and Social Services, 648 P.2d 970, 977-78 (Alaska 1982); Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973); United States Smelting, Refining and Mining Company v. Local Boundary Commission, 489 P.2d 140 (Alaska 1971). Our conclusion that the legislature intended a mandatory responsibility is based on two factors. First, the legislature uses the word "shall" which is mandatory language. See 1A C. Sands, Sutherland Statutory Construction § 25.04 (4th ed. 1972); 2A C. Sands, Sutherland Statutory Construction § 57.03 (4th ed. 1973). Second, the language of the statute, construed in light of its legislative history, demonstrates a legislative intention to have the Board of Game pass meaningful subsistence regulations. While the statute does not specifically state whether the regulations must be separate and clearly distinguishable from the regulations adopted pursuant to AS 16.05.255(a), it does require that provision for subsistence hunting must be made somewhere in the regulations.<sup>7</sup>

When Chapter 151, SLA 1978 was being considered in the legislature, the Special Committee on Subsistence issued a letter of intent which provided in part:

---

7. Cf. Madison, \_\_\_ P.2d at \_\_\_, Op. No. 2911 at 7, 16-17 (state may no longer allocate for subsistence uses at its discretion pursuant to AS 16.05.251(a), nor may state permit sport or commercial hunting in any area where subsistence hunting is restricted; even in those areas where sport and commercial hunting are totally prohibited, subsistence hunting may not be restricted unless the Board finds that

(Footnote Continued)

This bill is intended to provide a coordinated plan for clarifying what subsistence use of fish and game is and for documenting subsistence uses so that they can be integrated into fish and game management planning. This bill also provides a legislative framework for the State's policy of recognizing subsistence as the priority use of fish and game.

.....

Sections six and seven: These two sections, [AS 16.05.251(b) and .255(b)] 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. While there are presently regulations for subsistence fishing, there is no mechanism for the promulgation of subsistence hunting regulations except with the creation of subsistence hunting areas pursuant to A.S. 16.05.257. Section seven would allow for these regulations so that subsistence hunting could be distinguished by separate regulations from sports hunting. 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 subsistence use. If these restrictions are inadequate, restriction 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. It is the intent of the Committee that decisions and determinations by the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act.

Letter of Intent, Special Committee on Subsistence, 2 House Journal 1154, 1155 (1978).

---

(Footnote 7 Continued)

limitation on subsistence hunting is necessary for sustained-yield purposes).

The Committee's letter is entitled to substantial weight in determining the legislative intent in enacting the statutes. See Madison, \_\_\_ P.2d at \_\_\_, Op. No. 2911 at 18-19; 2A C. Sands, Sutherland Statutory Construction § 48.07 (4th ed. 1973). It indicates that the legislature intended the statute to change the existing system which did not provide a mechanism for establishing separate subsistence regulations.

## II. Board's Inaction

The Board of Game has not promulgated a specific regulation governing subsistence hunting in Game Unit 8, nor has it made specific provisions for a subsistence defense or exception to prosecutions under regulations adopted pursuant to AS 16.05.255(a). The time that has elapsed from 1973 to the present has provided more than adequate opportunity for the Board to carry out its statutory responsibility. Consequently, we conclude that the Board has failed to carry out its responsibilities and, under the authority of United States Smelting, 489 P.2d at 141-42, dismissal of Eluska's prosecution might have been justified. We believe the supreme court's comments regarding the Local Boundary Commission in United States Smelting are particularly appropriate to this situation:

In our view the Local Boundary Commission has had sufficient time to discover sensible principles pertaining to the changing of local boundaries. Permitting continued failure on the commission's part to promulgate standards for changing local boundary lines can no longer be justified by the need for further experience. Since under AS 44.19.260(a) the legislature required the commission to develop standards in order to recommend boundary changes, and the commission had not developed standards prior to the Nome annexation proceedings, we hold that the commission lacked the power to recommend the Nome boundary changes in question. To do otherwise would be to condone the commission's nonobservance of a

valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes.

489 P.2d at 142 (footnotes omitted).

### III. "Subsistence" Defense

We decline to affirm the dismissal of the prosecution, however, because we believe the statute interpreted in light of its legislative history suggests an alternate remedy which adequately balances the rights of Eluska and those similarly situated to engage in subsistence hunting and the state's legitimate interest in protecting the fish and game resources of the state. In the absence of specific regulations governing subsistence hunting applicable to Game Unit 8, we hold that Eluska was entitled to rely on a "subsistence" defense to prosecution under regulations implementing AS 16.05.255(a). We are guided in this decision by our supreme court's decision in Frank v. State, 604 P.2d 1068 (Alaska 1979). Frank was convicted for illegally taking and transporting a moose. He defended on the ground that the moose was necessary for a funeral potlatch which was an expression of religious belief and that prosecution operated to abridge his freedom of religion. The supreme court agreed and ordered dismissal of the complaint. Having found that the use of moosemeat in funeral potlatches was a necessary requirement of Frank's religious beliefs and having concluded that the state failed to prove a countervailing public policy, the court adopted the exemption in question. While Eluska's rights are based on a statutory protection of subsistence hunting, rather than a constitutional protection of religious freedom, we believe the same approach is in order.

In the absence of appropriate regulations,<sup>8</sup> we believe that the best way to accommodate Eluska's statutory right to subsistence hunting and the state's right to reasonably protect the state's game resources is to judicially recognize a defense for subsistence hunting. We therefore hold that when the trial court concludes, as a matter of law, that hunting occurs in an area in which the state has not adopted regulations pursuant to AS 16.05.255(b) providing for subsistence uses and recognizing the subsistence priority, conduct which would otherwise be a violation of a regulation adopted pursuant to AS 16.05.255(a) restricting hunting is justified as a "subsistence use" if the person whose conduct is alleged to have constituted hunting in violation of the regulation believed he or she was taking the game for subsistence uses (see AS 16.05.940(23)) and was not aware of and did not consciously disregard a substantial and unjustifiable risk that his or her taking was not a subsistence use of the game taken. (See AS 11.81.900(a)(3) defining the mental state "recklessly.") We use the term "defense" as it is defined in the revised criminal code, AS 11.81.900(b)(15):

"defense", other than an affirmative defense, means that

(A) some evidence must be admitted which places in issue the defense; and

---

8. The defense recognized in this opinion exists only to the extent that the state has not adopted detailed regulations providing for subsistence hunting within an area. Such regulations when and if adopted would have the additional effect of guarding against abuses and would aid in record keeping to determine the true impact of subsistence hunting upon game management. See Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979). Where the state has adopted valid regulations recognizing the subsistence priority they would be controlling and the defense recognized here would no longer apply. Whether given regulations are valid is of course a question of administrative law for the court not a question of adjudicative fact for the jury. Cf. Madison, \_\_\_ P.2d at \_\_\_, Op. No. 2911 at 13-15; Kelly v. Zamarello, 426 P.2d 906, 917 (Alaska 1971).

(B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt.

In order to permit a pretrial dismissal of charges where appropriate<sup>9</sup> and avoid delay in presenting such a defense, we will require a

---

9. We recognize that a statute which defines an offense in terms which require reasonable men and women to guess at its meaning is constitutionally invalid. *State v. Rice*, 626 P.2d 104, 109-10 (Alaska 1981). A statute which clearly defines an offense may nevertheless be constitutionally infirm, if exceptions or defenses are recognized but their scope is unclear. A potential subsistence user must be able to determine before he or she hunts whether the hunt will comply with the law before he or she can be subjected to criminal prosecution for his or her hunting. Uncertainty regarding a person's rights may discourage him or her from subsistence hunting thus indirectly accomplishing a result which the legislation sought to prevent. We address the problem of "fair notice" in three ways. (1) We depart from ordinary practice and permit a defendant to obtain a pretrial judgment of acquittal in an appropriate case. While summary judgments are recognized in the civil rules we have never recognized such a procedure before in criminal cases. Nevertheless, we believe it appropriate in this type of case to insure that subsistence hunters are not put to the cost and uncertainty of a jury trial in those cases in which the state will clearly be unable to disprove the subsistence defense. The pretrial judgment of acquittal will thus serve the screening function served by a grand jury proceeding or preliminary hearing in felony cases. (2) We establish a mens rea of recklessness to insure that only those who recklessly hunt in bad faith will be subject to prosecution. (3) Finally, we define the exception as a defense rather than an affirmative defense to insure that the state must prove guilt beyond reasonable doubt by convincing a jury that the hunting in question was not a subsistence use. We stress that our recognition of the defense is required by the state's failure to comply with the statutes by adopting appropriate regulations. Should the state remedy this deficiency then the defense would no longer be applicable.

We have considered making the defense one for the court by analogy to entrapment. See *Yates v. State*, 681 P.2d 1362, 1363-64 (Alaska App. 1984). Since the purpose of the defense is to substitute for regulations which would give guidance to those to be affected, a strong argument can be made for judicial decisions on a case-by-case basis that would have precedential value. See *Yates* at 1364, citing *People v. Moran*, 463 P.2d 763, 769 (Cal. 1970) (Traynor, C.J., dissenting). Nevertheless, we are satisfied that juries are in a particularly appropriate position to evaluate the subsistence defense. We have also considered and rejected making "subsistence use" an affirmative defense. AS 11.81.900(b)(1). We are satisfied that an affirmative defense would inappropriately distribute

(Footnote Continued)

party intending to rely upon a subsistence defense to make a preliminary showing a reasonable time before trial. In a pretrial order the court may establish procedures, including time limits, for raising the defense. Failure to give notice of the defense before trial or in the manner prescribed in the pretrial order may, unless excused for good cause, result in the forfeiture of the defense. See Alaska R. Crim. P. 12(b)(3), 12(e), and 16(f)(3). See also Davis v. United States, 411 U.S. 233, 93 S. Ct. 1577, 36 L.Ed.2d 216 (1973).

A defendant desiring a pretrial dismissal of the prosecution may make a preliminary showing which should consist of some evidence, which may be in affidavit form, that he believed in good faith that, under all of the circumstances which he understood to exist, his hunting constituted a subsistence use of the animal or animals taken.<sup>10</sup>

---

(Footnote 9 Continued)

the burden of proof in light of the Board's failure to enact regulations giving appropriate guidance as it was required to do by AS 16.05.255(b).

10. Subsistence use is defined in AS 16.05.940(23) as follows:

"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.

"Customary" and "traditional" are not further defined in the statute and therefore must be given their common meanings. AS 01.10.010. "Customary" means according to custom, the usual way of doing something. See Oxford American Dictionary 156 (1930). "Traditional" means according to tradition, a custom handed down from generation to generation

(Footnote Continued)

The statute only requires the state to provide for subsistence hunting. If the state has enacted regulations making adequate provision for subsistence hunting then the defense we have recognized would not exist. Consequently, if the defendant has made his preliminary showing, then the state should be given an opportunity to establish, if possible, either that the regulations which defendant allegedly violated did not in fact "restrict" the taking of game, AS 16.05.255(b), because, e.g., it was a regulation of time, place and manner that did not significantly impact or impair subsistence use or, alternatively, that any restriction on subsistence use recognized subsistence priority and was intended to protect sustained yield. (We interpret the term "restriction" to mean any significant impairment of subsistence uses AS 16.05.255(b).)

If, after hearing the evidence, the court is satisfied that a reasonable jury could not find guilt beyond reasonable doubt, i.e., there must be a reasonable doubt whether the defendant's taking constituted a subsistence use, the prosecution should be dismissed. If reasonable men and women could differ, the defense should be submitted to the trier of fact with appropriate instructions setting out the statutory definition of

---

(Footnote 10 Continued)

especially without writing, a long established custom or method of procedure. Id. at 728. But see Madison, \_\_\_ P.2d at \_\_\_, Op. No. 2911 at 20: "customary and traditional" should be defined in accordance with legislative history. 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.

subsistence use,<sup>11</sup> the requisite mens rea,<sup>12</sup> and the appropriate burden of proof. AS 11.81.900(b)(15)(B).<sup>13</sup>

Since the issues presented by the defense of subsistence involve mixed questions of fact and law which have not been addressed by the trial court, it is necessary for us to remand this case for further proceedings.

This case is REMANDED to the superior court for trial of Eluska's subsistence defense.<sup>14</sup>

---

11. See note 10 supra.

12. "Reckless." See note 9 supra.

13. See note 9 supra.

14. The opinion in this case was undergoing final editing at the time the supreme court issued its decision in Madison. The draft has been adapted to reflect our understanding of Madison. We recognize that future litigation will serve to clarify and refine both this decision and Madison.

What are the specifics on how the Governors will  
will correct the Glushko approach.

Is there anything in the constitution (state or fed)  
that prohibits ~~treating equally~~ persons who are situated differently

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 David Eluska, )  
 )  
 Respondent. )  
 )

REVISED

Dist. Ct. No. 3KO-83-465 Cr.  
Ct. App. No. A-210  
Supreme Ct. No. S-991

ON PETITION FOR HEARING FROM THE  
COURT OF APPEALS

BRIEF OF APPELLANT

HAROLD M. BROWN  
ATTORNEY GENERAL  
STATE OF ALASKA

By:  
Sarah Elizabeth McCracken  
Assistant Attorney General

Filed August 26, 1985 in the  
Supreme Court of the State  
of Alaska

DAVID LAMPEN, Clerk

By: *Cecilia D. Lewis*  
Deputy Clerk

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES . . . . .	ii
AUTHORITIES PRINCIPALLY RELIED UPON . . . . .	vii
STATEMENT OF JURISDICTION . . . . .	1
ISSUES PRESENTED FOR REVIEW . . . . .	2
STATEMENT OF THE CASE . . . . .	3
A. Statement of Fact . . . . .	3
B. Statement of Proceedings . . . . .	5
SUMMARY OF ARGUMENT . . . . .	7
ARGUMENT . . . . .	10
I. This Court Should Apply The "Substitution of Judgment" Standard of Review . . . . .	10
II. The New Judicially-Created "Subsistence" Defense Contradicts the Clear Legisla- tive Mandate of AS 16.05.920(a) . . . . .	10
III. The <u>Eluska</u> Decision Provides an Overly Broad Interpretation of this Court's <u>Madison</u> Opinion . . . . .	14
IV. The "Subsistence" Defense Created By The Court of Appeals Deviates From The Burden of Proof Standard For Challenging Administrative Regulations . . . . .	16
V. The Court of Appeals Erred in Creating A Subsistence Defense Absent A Showing That A Defendant Has Exhausted His Administrative Remedies . . . . .	21
VI. The <u>Eluska</u> Decision Should Not Apply Retroactively . . . . .	29
VII. This Case Is Not Moot . . . . .	30
VIII. CONCLUSION . . . . .	31

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191 (Alaska 1981) . . . . .	9,20
Alaska International Industries, Inc. v. Musarra, 602 P.2d 1245 (Alaska 1979) . . . . .	17
Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496 (9th Cir. 1980) . . . . .	22,23
Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3rd Cir. 1982) . . . . .	23
Chevron U.S.A., Inc. v. Le Resche, 663 P.2d 923 (Alaska 1983) . . . . .	20
Continental Research Corp. v. Train, 426 F.Supp. 713 (D. Mo. 1976) . . . . .	23
County of Lake v. MacNeal 181 N.E.2d 85, (Ill: 1962) . . . . .	27,28
Donaldson v. United States, 264 F.2d 804 (1976) . . . . .	23
Eluska v. Andrus, 587 F.2d 996 (9th Cir. 1978) . . . . .	22
Frank v. State, 604 P.2d 1068 (Alaska 1979) . . . . .	9,12,20
F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980) . . . . .	9
Guin v. Ha, 591 P.2d 1281 (Alaska 1979) . . . . .	10
Hawthorne Oil & Gas Corp. v. Department of Energy, 647 F.2d 1107 (Temp.Em.Ct.App.) . . . . .	23
Herscher v. State, Department of Commerce, 568 P.2d 996 (Alaska 1977) . . . . .	20
ICC v. Appleyard, 513 F.2d 575 (4th Cir. 1975). . . . .	24
Jordon v. State, 681 P.2d 346 (Alaska Ct. App. 1984). . . . .	11
Judd v. State, 482 P.2d 273 (Alaska 1971) . . . . .	29
Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971). . . . .	20

Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897 (Alaska 1981) . . . . .	19,20
Kingery v. Chapple, 504 P.2d 831 (Alaska 1971) . . . . .	19,20
Langesater v. State, 668 P.2d 1359 (Alaska Ct. App. 1983). . . . .	: 17,19
Madison v. Department of Fish & Game, 696 P.2d 168 (Alaska 1985) . . . . .	5,8,14, 15,30,31, 31
McGee v. United States, 402 U.S. 479, 91 S.Ct 1565 (1971) . . . . .	22,23
McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657 (1969) . . . . .	22,23
Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977) . . . . .	21,22
Northern Corp. v. Chugach Electric Association, 523 P.2d 1243 (Alaska 1974) . . . . .	28
Osness v. Dimond Estates, Inc., 615 P.2d 605 (Alaska 1980) . . . . .	10
Pacific States Box and Basket Co. v. White, 296 U.S. 176 (1935) . . . . .	17
People v. Calvar Corp., 36 N.E. 2d 644 (N.Y. 1941) . . . . .	23
Provo City v. Claudin, 63 P.2d 570 (Utah 1936) . . . . .	28
Ratcliffe v. Security National Bank, 670 P.2d 1139 (Alaska 1983) . . . . .	28
Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154 (Alaska 1982) . . . . .	19,20
Rutter v. State, 668 P.2d 1343 (Alaska 1983) . . . . .	31
Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) . . . . .	23
Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582 (1931) . . . . .	24

State, Commercial Fisheries Entry Commission v. Templeton, 598 P.2d 77 (Alaska 1979) . . . . .	10
State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985) . . . . .	1, 2, 5, 8 13, 15, 18 20, 24, 28, 29, 30, 31,
State v. Fairbanks North Star Borough School District, 621 P.2d 1329 (Alaska 1981) . . . . .	10
State v. Glass, 596 P.2d 10 (Alaska 1979) . . . . .	8, 29,
Stratman v. Watt, 656 F.2d 1321 (9th Cir. 1980) . . . . .	27
Union Oil Co. v. State, Department of Natural Resources, 574 P.2d 1266 (Alaska 1978). . . . .	7, 17
United States v. Boyd, 491 F.2d 1163 (9th Cir. 1973) . . . . .	7, 17
United States v. La Froscia, 354 F.Supp. 1338 (D.N.Y. 1973) . . . . .	23
<u>CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS</u>	
Alaska Constitution, article VIII, §§ 1 - 4 . . . . .	12
AS 11.81.900(b)(1) . . . . .	18
AS 16.05 -- AS 16.40 . . . . .	7, 12
AS 16.05.094 . . . . .	25
AS 16.05.221 . . . . .	12
AS 16.05.251(b) . . . . .	12
AS 16.05.255 . . . . .	17
AS 16.05.255(a) . . . . .	14
AS 16.05.255(b) . . . . .	2, 3, 5, 6, 7, 10, 12, 14, 15, 30

AS 16.05.260 . . . . .	25
AS 16.05.780 : . . . . .	12
AS 16.05.920(a) . . . . .	2,7,10, 12,13,16
AS 16.05.940(23) . . . . .	8,16
AS 16.30.010 . . . . .	11
AS 16.30.017 . . . . .	11
AS 22.05.020(b) . . . . .	1
AS 22.07.030 . . . . .	1
AS 44.62 . . . . .	19
AS 44.62.100 . . . . .	17
AS 44.62.220 . . . . .	26
5 AAC 81 . . . . .	4,
5 AAC 81.320(6) . . . . .	3
5 AAC 92.400 . . . . .	11
5 AAC 96.250 . . . . .	26
5 AAC 96.610 . . . . .	25
5 AAC 96.610(e) . . . . .	25
5 AAC 99.010 . . . . .	4,5,26
16 U.S.C. § 3115(c) . . . . .	25
Ch. 94, SLA 1959 . . . . .	25
Ch. 151, SLA 1978 . . . . .	4,15
Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 . . . . .	25
1970 Water Quality and Improvement Act, 33 U.S.C. § 1161 . . . . .	17

COURT RULES AND OTHER AUTHORITIES

H.R. Rep. No. 96-97, Part 2, 96th Cong,  
1st Sess. 191 (1980) . . . . . 15

Deuteronomy 22:6 . . . . . 13

Alaska Rule of Appellate Procedure 302(a) . . . . . 1

Alaska Rule of Evidence 201 . . . . . 26

Policy Statement on the Subsistence Utilization of  
Fish and Game . . . . . 4

Alaska Hunting Regulations Booklet No. 21  
(1980-81) . . . . . 4

Alaska Judicial Council, Alaska Fish and Game  
Sentences, 1980--1981 (April, 1983) . . . . . 9

A. Geis, "Population and Harvest Surveys," in  
Manual Of Wildlife Conservation (R. Teague,  
ed. 1971) . . . . . 14

A. Leopold, Principles of Wildlife Management (1933) . 14

T. Lund, American Wildlife Law, 1980 . . . . . 13,14

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitution, Art. VIII, §§ 1--4:

ARTICLE VIII

NATURAL RESOURCES

Statement  
of Policy

SECTION 1. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

General  
Authority

SECTION 2. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Common  
Use

SECTION 3. Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use.

Sustained  
Yield

SECTION 4. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

AS 11.81.900(b)(b):

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

AS 16.05.094:

Sec. 16.05.094. Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall

(1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;

(2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;

(3) make information gathered available to the public, appropriate agencies, and other organized bodies;

(4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;

(5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;

(6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;

(7) participate with other divisions in the preparation of statewide and regional management plans so that those plans reorganize and incorporate the needs of subsistence users of fish and game. (§ 3 ch 151 SLA 1978)

AS 16.05.255(b):

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

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

(2) local residency; and

(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980)

AS 16.05.920(a):

Sec. 16.05.920. Certain acts made unlawful. (a) Unless permitted by this chapter or by regulation adopted under this chapter, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

AS 16.05.920(23):

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

**HUNTING SEASONS AND BAG LIMITS (Continued)**  
**DEER HUNTING**

Species and Units	Open Seasons	Bag Limits
<b>(5) DEER</b>		
Units 1(A) and 2	Aug. 1 - Nov. 30	Three antlered deer
Unit 1(B)	Aug. 1 - Nov. 30	Two antlered deer
Unit 3, that portion south of Sumner Strait and Eastern Passage, including Level, Yank, Sokolof, Rynda and Kadin Islands	Aug. 1 - Nov. 30	One antlered deer
Remainder of Ugit 3	No open season	
Unit 4, all drainages of Baranof Island north and west of the divide between North Cape and Portage Point and all drainages of Chichagof Island south of the divide between Point Leo and Point Hayes and all adjacent islands within this area including Kruszof and Catherine Islands	Aug. 1 - Dec. 15	Four deer; however antlerless deer may be taken only from Oct. 15 - Dec. 15 and the daily bag limit from Dec. 1 - Dec. 15 is one deer.
Unit 1(C) and the remainder of Unit 4	Aug. 1 - Dec. 31	Four deer; however antlerless deer may be taken only from Sept. 15 - Dec. 31.
Units 1(D) and 5	No open season	
Unit 6	Aug. 1 - Dec. 31	Five deer; however antlerless deer may be taken only from Sept. 15 - Dec. 31.
Unit 8, that portion of Kodiak Island draining into Ugak Bay west of Pasagshak Road, ending at the mouth of Pasagshak River, and east of a line from the mouth of Saltery Creek to Crag Point	Aug. 1 - Jan. 31	One deer; however antlerless deer may be taken only from Oct. 1 - Oct. 31.
Unit 8, that portion of Kodiak Island north of the access road from Port Lions to Crescent Lake, and east of a line from the outlet of Crescent Lake to Mount Ellison Peak and from Mount Ellison Peak to Pokati Point at Whale Passage, and the remainder of Kodiak Island east of the Saltery Creek-Crag Point line	Aug. 1 - Oct. 31	One deer; however antlerless deer may be taken only from Oct. 1 - Oct. 31.

## Board of Game Policy Statement on Subsistence (1979):

### POLICY STATEMENT ON THE SUBSISTENCE UTILIZATION OF FISH AND GAME

The Board of Fisheries and the Board of Game recognize that existing cultures and life styles in Alaska are of great value and should be preserved. Accordingly, customary and traditional subsistence uses of fish and game are assigned a priority among beneficial uses.

The use of fish and game for subsistence is vital to the existence of many Alaskans, although limitations on the productivity of fish and game stocks may limit continued increases in the number of subsistence users.

Beyond directly satisfying food requirements, home consumption of fish and game tends to preserve cultures and traditions and gives gratification to a strong desire possessed by many Alaskans to harvest their own food. The latter functions seem genuinely important to the physical and psychological well-being of a large number of Alaskans.

In some circumstances, subsistence users may also be participants in sports or commercial harvesting. Where subsistence users can satisfy their harvest by commercial or sports methods, special regulations for the subsistence priority may not be needed. Where regulations are needed, commercial and sports uses may not need to be totally eliminated prior to restrictions on subsistence uses, but traditional and customary subsistence uses will receive a priority harvest opportunity in the Boards' regulatory systems.

Whenever possible, the subsistence priority should be achieved by existing regulatory techniques, such as open and closed seasons, bag limits, control of methods and means of take, and controlled use areas. When a resource is plentiful enough to accommodate all uses, the Boards may not need to distinguish between different types of use. Special regulations such as designation of a subsistence hunting or fishing area to allocate a subsistence resource to local subsistence users may be enacted if the above approach is inappropriate or ineffective.

If further restriction is necessary, priority among subsistence users will be based on (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 Boards will depend heavily on data gathered by the Subsistence Section in achieving priority for subsistence and in considering the three factors above.

Implicit in the two criteria of "direct dependence" and "availability of alternative resources" is the idea that a subsistence priority is based to some extent on the actual needs of people. Subsistence needs of individuals, families, and cultural groups may differ in type and degree. It is recognized that judgement will be an unavoidable necessity in weighing actual need. Elements to consider in establishing the level of subsistence need include location, local cultures, traditions, customs, and alternative resources.

The Boards recognize the need for regional differences in the approach to fish and game management and they will maintain flexibility by periodically examining social and economic conditions, as well as biological conditions which may warrant a change in subsistence uses and the Boards' regulations.

Adopted March 28, 1979  
Anchorage, Alaska

STATEMENT OF JURISDICTION

On April 12, 1985, the Alaska Court of Appeals issued its decision in State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985), on appeal by the State from dismissal of charges in Dist. Ct. No. 3KO-83-465 Cr. The opinion remanded the case to the district court. On June 18, 1985, this Court granted a stay of the Court of Appeals' decision.

On July 31, 1985, this Court granted the State of Alaska's Petition for Hearing, filed under Alaska Rule of Appellate Procedure 302(a).

This Court has jurisdiction to hear this petition under AS 22.05.020(b), AS 22.07.030, and Alaska Rule of Appellate Procedure 302(a).

ISSUES PRESENTED FOR REVIEW

1. Does the new judicially-created "subsistence" defense in State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985) impermissibly contradict the legislative mandate of AS 16.05.920(a)?
2. Does AS 16.05.255(b) require the Board of Game to adopt separate "subsistence" seasons and bag limits rather than provide subsistence hunting opportunities within the context of general hunting regulations?
3. Does the new judicially-created "subsistence" defense in State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985) deviate from the well-established burden of proof placed on a defendant who challenges an administrative regulation?
4. Should a person who illegally kills game in Alaska be allowed to raise a criminal defense of "subsistence" taking without first exhausting available administrative remedies?
5. Does AS 16.05.255(b) require the elimination of all hunting by non-Alaska residents before any restrictions may be imposed on residents taking game for food or other subsistence uses?
6. Should a "subsistence" defense, if allowed by this Court, operate prospectively only?

## STATEMENT OF THE CASE

This case involves the closed season taking of game and raises the question whether a defendant is entitled to a criminal defense of "subsistence take" as articulated by the Court of Appeals.

### A. Statement of Fact.

On May 14, 1983, State Fish and Wildlife Protection officers observed David Eluska in possession of a freshly killed doe deer at Olga Bay, on the southern tip of Kodiak Island. Court of Appeals Record, "R." 1. The officers charged Eluska with illegal possession of game. Eluska, a state resident, filed a motion to dismiss, alleging failure of the deer hunting regulations to expressly address subsistence uses, and submitted an affidavit asserting that he took the doe for subsistence. R. 2--19. The court, upon review of the motion and written opposition, and without hearing evidence, dismissed, holding that the deer regulations applicable to Kodiak Island were unenforceable because they did not specifically provide for subsistence uses, as required by the state's subsistence law, AS 16.05.255(b). R. 78--87.

The 1982--83 deer season for Kodiak Island was six months long (August 1 through January 31), with a seven deer bag limit; antlerless deer (including does) could only be taken from September 15 through January 31. 5 AAC 81.320(6). Before Eluska took the doe, neither he, the local fish and game advisory committee for Kodiak Island, the southwest regional council, nor

the subsistence division of the Department of Fish and Game had suggested to the board of game that the hunting season or bag limit for deer on Kodiak Island failed to accommodate subsistence uses. R. 31. Eluska's own affidavit did not indicate that he had made any effort to hunt for subsistence or other uses during the open season; however, his affidavit did indicate that during the previous year, his take of five or six deer, which were customarily shared in the village, satisfied his family's needs.

R.9

The 1982--83 Kodiak Island deer regulations were typical of hunting seasons and bag limits adopted by the board of game after enactment of the 1978 subsistence law; Ch. 151, SLA 1978. The Board of Game's response to that law had been, where possible, to incorporate into the general hunting regulations (5 AAC 81) management mechanisms such as winter seasons, overlapping seasons for different species, transportation limitations, and harvest method restrictions designed to recognize, and to give a priority to, subsistence uses. See Policy Statement on the Subsistence Utilization of Fish and Game, adopted by the Board of Game on March 28, 1979, printed in Alaska Hunting Regulations Booklet No. 21 (1980--81) p.8. Also, see generally 5 AAC 81 (1984) and 5 AAC 99.010. <sup>1/</sup> Accordingly, there were no

---

<sup>1/</sup> 5 AAC 81 was largely repealed and replaced by emergency regulations adopted in June, 1985. See n.2, infra.

separate, "specific" subsistence regulations, labeled as such, for Kodiak Island. 2/

B. Statement of Proceedings.

On April 12, 1985, the Court of Appeals issued Opinion No. 456 (698 P.2d 174 (Alaska Ct. App. 1985)), in which the court held that the board of game is required by AS 16.05.255(b) to adopt "specific regulations 'permitting' the taking of game for subsistence uses," and that "[n]o such regulations were adopted governing Game Unit 8 [Kodiak]." 698 P.2d at 178 (footnote omitted.) The court also ruled, citing Madison v. Department of Fish and Game, 696 P.2d 168 (Alaska 1985), that even if sport and commercial hunting are totally prohibited at all times in an area, the board is still prohibited from restricting subsistence hunting unless it specifically finds that subsistence hunting would interfere with sustained yield. 698 P.2d at 178, n.6. The court ruled that a defendant is entitled to a "subsistence"

---

2/ After the Eluska district court decision, the Department of Fish and Game provided express notice, in the game regulation pamphlets, clarifying that those regulations governed, inter alia, subsistence uses. Also, in certain instances the Board had established separate subsistence permit hunts where special harvest restrictions were necessary, (e.g. Nelchina caribou, Unit 12 moose, Unit 23 sheep.) As a result of the Court of Appeals' decision in this case, the Board of Game adopted emergency regulations in June, 1985, governing all hunting in Alaska, creating separate subsistence seasons and bag limits, eliminating non-resident (non-subsistence) hunting where restrictions on subsistence hunters applied, and creating "tier II" subsistence permit hunts based on the three criteria in AS 16.05.255(b) in situations where not all Alaska resident "subsistence" hunters could be accommodated.

defense if the trial court concludes that the State has not adopted regulations under AS 16.05.255(b) "specifically" providing for subsistence uses and recognizing the subsistence priority. The court noted that the State has the burden of disproving the existence of the defense beyond a reasonable doubt. 698 P.2d at 180.

On April 22, 1985, the State filed a timely petition for rehearing. On May 8, 1985, the Court of Appeals denied the petition. <sup>3/</sup>

On May 23, 1985, the State filed a motion for stay in the Court of Appeals, which was denied on May 28, 1985.

On June 3, 1985, the State filed a motion for stay of the Court of Appeals' decision as to persons other than Eluska, which this Court denied on June 5, 1985, without prejudice to the State to file a motion for stay as to Eluska. On June 5, 1985, the State filed a motion to stay the decision as to Eluska, which this Court granted on June 18, 1985.

On June 10, 1985, the State filed a timely Petition for Hearing, and motion for expedited review. <sup>4/</sup> On June 14, this Court granted the State's motion for expedited review, and on

---

<sup>3/</sup> Counsel for the State did not receive notice of that denial until May 20, 1985, during a telephone conversation with opposing counsel.

<sup>4/</sup> This Court granted the State's request for an extension of time until June 10 to file its petition.

July 31, 1985, this Court granted the State's petition for hearing and set a schedule for filing formal briefs. <sup>5/</sup>

SUMMARY OF ARGUMENT

This case involves issues central to the enforceability and vitality of fisheries and wildlife conservation and management regulations. The Court of Appeals' creation, out of whole cloth, of a new "subsistence" defense to criminal fish and game charges, casts serious doubt on the State's ability to prosecute a wide array of fish and game offenses. This novel defense, premised on the court's assumption that AS 16.05.255(b) requires separate or "specific" subsistence regulations, flatly ignores the prohibition established in AS 16.05.920(a) that no hunting is allowed unless properly authorized by AS 16.05 -- AS 16.40 or by regulation.

Moreover, by shifting the burden of proof to the State, the Court of Appeals' decision misapplies well-established burden of proof principles set out in United States v. Boyd, 491 F.2d 1163 (9th Cir. 1973); Union Oil Co. v. State, Department of Natural Resources, 574 P.2d 1266 (Alaska 1978), and other cases cited infra at 17.

---

5/ This Court's July 31 order was evidently mailed to the Attorney General's Office on August 1, 1985, but this office did not receive the order until August 7, 1985. Although this fact reduced the State's time to prepare this brief, the State did not seek an extension, since time is of the essence in resolving the issues in this case. A motion for expedited review of this case  
(Footnote continued)

In creating this new defense (which had not been the subject of briefing by the parties), the court ignored the fact that the defendant had made no effort to exhaust his administrative remedies, which should have been a prerequisite to raising the defense.

The court also read Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985) overbroadly to mean that "subsistence uses," as defined in AS 16.05.940(23), include the take of game by any resident for food, fuel, clothing, etc., and that all non-subsistence (which, as the court suggests, means all non-resident) uses must be completely eliminated before any restrictions may be imposed on "subsistence" users. 698 P.2d at 178, n.6.

Alternatively, if this Court upholds the new "subsistence" defense, this Court should modify the decision to clarify that the defense applies prospectively only, in accordance with State v. Glass, 596 P.2d 10 (Alaska 1979).

Most importantly, however, the Court of Appeals' treatment of the subsistence issue raised in Eluska, including the Court's creation of a new criminal defense, and its criticism of the Board of Game for, in the court's view, failing to do its duty under the state subsistence law, does violence to the overall framework and unique characteristics of natural resources

---

(Footnote continued)  
will be forthcoming.

conservation measures. The Court of Appeals' decision gives no recognition at all to the special importance that wildlife and fisheries resources have to Alaska, and the unique considerations which apply to wildlife and fisheries enforcement. See, e.g., Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191, 1194 (Alaska 1981); F/V American Eagle v. State, 620 P.2d 657, 672 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 102 S.Ct. 985 (1982); Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979).

Fisheries and wildlife violations often occur in remote areas, and are difficult to detect. Prosecutions often occur in small communities scattered throughout the state. See generally, Alaska Judicial Council, Alaska Fish and Game Sentences: 1980--81 (April 1983), pp. 17, 37, passim. State prosecutors rarely have the time, expertise, or data available to prove, as a routine precondition to prosecuting misdemeanor citations, that the record supporting the underlying regulations shows "adequate" consideration of "subsistence uses." <sup>6/</sup> Yet that is precisely the result of the court's decision, since it shifts the burden of justifying the regulations onto the State whenever a defendant files a self-serving subsistence affidavit. Particularly in the area of subsistence hunting and fishing, which involves complex,

---

6/ The record supporting most game and fisheries board decisions consists of tapes of board proceedings, on file in Juneau. Because of the hundreds of proposals considered at each board meeting, the boards are unable to provide written findings for each of their decisions.

subjective decisions regarding social and biological evidence, the presumption of validity should be a strong one; it should not lightly become the province of the judiciary -- or the jury -- to second guess those rulemakers who have special expertise in this area.

#### ARGUMENT

##### I.

#### This Court Should Apply The "Substitution of Judgment" Standard of Review.

The Court of Appeals' decision in this case was based upon that court's interpretation of law; accordingly, this Court should apply the "substitution of judgment" standard of review in deciding this case. State v. Fairbanks North Star Borough School District, 621 P.2d 1329, 1331 n.5 (Alaska 1981); Osness v. Dimond Estates, Inc., 615 P.2d 605, 610 (Alaska 1980); State, Commercial Fisheries Entry Commission v. Templeton, 598 P.2d 77, 80 (Alaska 1979); Guin v. Ha, 591 P.2d 1281, 1283 n.6 (Alaska 1979). This Court should independently consider the lower court's ruling and adopt the rule of law that is most appropriate in light of precedent, reason, and policy. Id.

##### II.

#### The New Judicially-Created "Subsistence" Defense Contradicts the Clear Legislative Mandate of AS 16.05.920(a).

The Court of Appeals' creation of a criminal defense to illegal hunting stems from the court's assumption, discussed infra, that AS 16.05.255(b) requires the Board of Game to adopt

separate or "specific" subsistence regulations, and that the Board has not done so. The "subsistence" defense, which sanctions hunting not otherwise authorized by law or by regulation, ignores the clear legislative mandate of AS 16.05.920(a), and undermines the viability of hunting laws, as discussed below.

The Court of Appeals' new criminal defense of "subsistence taking" is without precedent in natural resources law, and no such defense was adopted or mandated by the Alaska legislature. Had the legislature intended to create a "subsistence" defense, it would presumably have done so. Compare, for example, AS 16.30.017, which expressly establishes a criminal defense to wanton waste of big game animals, otherwise prohibited by AS 16.30.010. See also Jordan v. State, 681 P.2d 346 (Alaska Ct. App. 1984), holding that the Board of Game's affirmative defense of taking in defense of life or property "establishes the only circumstances under which a defense of necessity can be interposed to a claim that game was illegally taken." Id. at 348 (emphasis supplied.) <sup>7/</sup> This defense is not premised on any requirement of the Alaska or United States

---

<sup>7/</sup> The affirmative defense of dire emergency, 5 AAC 92.400, should also have been included by the court.

constitutions, and violates fundamental principles of natural resource conservation and management. <sup>8/</sup>

The need for viable, enforceable hunting and fishing rules flows from the mandates in Article VIII of the Alaska Constitution, which provides special directives for managing Alaska's natural resources on a sustained yield basis. Alaska Const. art. VIII, §§ 1-4. In fulfillment of these responsibilities, the legislature created the Boards of Fisheries and Game (AS 16.05.221), delegated to them broad regulatory authority (including the duty to adopt subsistence regulations under AS 16.05.251(b) and AS 16.05.255(b)), and adopted the fundamental law that no taking of the state's fish and wildlife resources may occur outside laws enacted by the legislature or regulations adopted by the respective Boards. <sup>9/</sup> AS 16.05.920(a) provides:

Unless permitted by AS 16.05 - AS 16.40 or by regulation adopted under AS 16.05-16.40, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game.

---

<sup>8/</sup> Cf. Frank v. State, 604 P.2d 1068 (Alaska 1979), holding hunting laws that violate first amendment rights to be unenforceable.

<sup>9/</sup> The legislature has adopted other laws specifically limiting the board of game's authority to allow hunting. For example, AS 16.05.780 prohibits adoption of any season for cow (antlerless) moose unless the season is affirmatively approved by vote of the local advisory committees.

It follows that unless a hunting season has been properly authorized by state law or by the Board of Game (whether for subsistence or not), the legislature has dictated in AS 16.05.920(a) that no hunting may occur. If a court determines that the game board has adopted a regulation which fails to comply with the subsistence law, then under AS 16.05.920(a) no hunting should be authorized until the game board acts to open a valid hunting season. The result mandated by the Eluska decision -- creation of a "subsistence" hunting defense to prosecution for hunting not expressly authorized by statute or game board regulation -- flatly contradicts the legislative mandate of AS 16.05.920(a).

To allow an individual to take game management law into his own hands by "declaring" an open season based on the hunter's belief that he is entitled to the animal for his own subsistence goes against fundamental principles of fish and game conservation and management. Season restrictions, for example, serve many purposes, such as protecting game during critical periods. <sup>10/</sup> Game managers also require information regarding numbers of hunters and animals, which necessitates, as a practical matter, establishment of seasons, bag limits, and related reporting.

---

<sup>10/</sup> Moses decreed, for example, that "thou shalt not take the dam with the young ..." Deuteronomy 22:6. Season and sex restrictions have been law in the United States since colonial days. See T. Lund, American Wildlife Law (1980), p.66.

requirements. See generally, T. Lund, American Wildlife Law, (1980), p.66, passim. Continuous hunting throughout the year without opportunity to gather data, would hinder the managers' ability to assess population levels, and could lead to hunting in excess of sustained yield levels. See generally, A. Leopold, Principles of Wildlife Management (1933), p. 208, passim; see also A. Geis, "Population and Harvest Surveys," in A Manual Of Wildlife Conservation (R. Teague, ed. 1971), p.67. As discussed more fully below, the new judicially created "subsistence" defense is based on the court's erroneous assumption that the Board of Game must adopt separate or "specific" subsistence regulations, and is wrong as a matter of law and policy. The decision should be reversed, and this case remanded for trial.

### III.

#### The Eluska Decision Provides An Overly Broad Interpretation of this Court's Madison Opinion.

The Eluska decision holds that AS 16.05.255(b) requires the Board of Game to adopt "specific" regulations permitting the taking of game for subsistence uses, and that "[n]o such regulations were adopted governing Game Unit 8 [Kodiak Island]." 698 P.2d 178. The court notes that "[w]hile the statute does not specifically state whether the regulations must be separate and clearly distinguishable from the regulations adopted pursuant to AS 16.05.255(a), it does require that provision for subsistence hunting must be made somewhere in the regulations." 698 P.2d at 178 (referencing Madison, 696 P.2d 168.)

The Eluska court's interpretation of AS 16.05.255(b) and of Madison is overly broad, and undermines the approach, discussed above at p.4, taken by the Board of Game, whereby the board incorporated management mechanisms into general game, hunting seasons and bag limits so as to ensure a reasonable opportunity for the continuation of subsistence uses, and to give subsistence uses a priority where restrictions apply. The Court of Appeals erroneously concludes as a matter of law that the Board of Game has failed to act to implement the requirements of Ch. 151, SLA 1978. (See 698 P.2d at 179). This assumption provides the major policy reason for the Court's creation of the "subsistence" defense. (See 698 P.2d at 181 n.9) Nothing in the record supports the court's conclusion; the issue was not directly briefed below, and in fact, a review of hunting regulations, and justifications for them evident from tapes of board proceedings, would show a considerable effort by the board to comply with the law, and substantial success in crafting regulations throughout the state that do comply with the law. Neither Madison nor AS 16.05.255(b) require the Board of Game to adopt "specific" subsistence regulations, so long as subsistence uses by all Alaska residents are protected, and given the requisite priority where necessary. 11/ The Court of Appeals'

---

11/ See e.g., H.R. Rep. No. 96-97, Part 2, 96th Cong., 1st Sess. 191 (1980), quoted in n.5 of the Eluska opinion.

decision should be reversed, or modified to clarify that separate subsistence regulations are not required, and that so long as a reasonable opportunity exists for subsistence hunting by all Alaska residents, non-subsistence uses need not be completely eliminated.

#### IV.

The "Subsistence" Defense Created By the Court of Appeals Deviates From The Burden of Proof Standard For Challenging Administrative Regulations.

Not only does the subsistence defense do violence to AS 16.05.920(a), but it is inconsistent with well established burden of proof standards for challenging administrative regulations.

The procedure for raising and establishing the defense, as articulated at 698 P.2d at 180-82, is, at best, subject to differing interpretations. It appears that if a defendant files an affidavit or presents some other minimal evidence indicating he believed in good faith that his hunting was for "subsistence" (as defined broadly in AS 16.05.940(23)), then the State has the burden of proving that the applicable hunting regulations did not in fact restrict subsistence uses, or were necessary for maintenance of the wildlife resource on a sustained yield basis. Whether the State's burden of proof at this point is "beyond a reasonable doubt," or by a "preponderance of evidence," is unclear. In any event, if the court decides that the State has not met its burden of showing that the relevant hunting regulation "adequately" provides for subsistence in accordance

with the subsistence law, but concludes that reasonable minds could differ regarding the defendant's sincerity in believing he took the game for subsistence purposes, that issue would go to the jury, and the State would have to show, beyond a reasonable doubt, that the defendant did not take the game with a good faith belief that it was for subsistence. Regardless of how one interprets the opinion, it cannot be reconciled with well established law regarding burden of proof.

Where a statute (such as AS 16.05.255) specifically delegates to an administrative agency the power to make rules, those rules are entitled to a presumption of procedural and substantive validity. AS 44.62.100; Alaska International Industries, Inc. v. Musarra, 602 P.2d 1245 (Alaska 1979). The burden of rebutting this presumption, whether in a civil or a criminal context, is on the person challenging the rule. Alaska International Industries, Inc. v. Musarra, 602 P.2d 1245 (Alaska 1979); Pacific States Box and Basket Co. v. White, 296 U.S. 176, 185 (1935); United States v. Boyd, 491 F.2d 1163, 1167 (9th Cir. 1973); Union Oil Co. v. State, Department of Natural Resources, 574 P.2d 1266 (Alaska 1978); Langesater v. State, 668 P.2d 1359, 1361 (Alaska Ct. App. 1983). The Boyd case is particularly instructive, since it arose in the context of a criminal prosecution of a vessel captain for failure to provide notice of an oil spill, under the 1970 Water Quality and Improvement Act, 33 U.S.C. § 1161. The court noted that the presumption of

validity of a regulation is a strong one, and does not require special findings by the administrative agency:

Where a statute specifically delegates to an administrative agency the power to make rules, courts recognize a presumption that such rules, when duly noticed, are valid .... The presumed validity of a general regulation, in contrast to that of an individual adjudication, does not require special findings .... This presumption is rebuttable, particularly where the governing statute is penal, upon a showing that the challenged regulation is an unreasonable exercise of the delegated power - i.e. inconsistent with the statute .... The burden placed on Captain Boyd is thus a heavy one for he must show that the sheen test determination of harmfulness cannot be considered a reasonable expression of the Congressional will, even though Congress has given the Executive broad authority to make that determination. [Citations and footnotes omitted, emphasis added.]

Id. at 1167.

The Eluska opinion, in establishing a criminal defense by judicial fiat, impermissibly shifts the burden of proof of establishing the validity of a game regulation onto the State upon the mere presentation of a self serving affidavit. <sup>12/</sup> The decision requires the State to show affirmatively (either by a preponderance of the evidence or beyond a reasonable doubt, depending on how you read the opinion), that the hunting regulation either does not restrict subsistence uses, or that any

---

<sup>12/</sup> Had the Court of Appeals construed the "subsistence" defense as an affirmative defense (defined in AS 11.81.900(b)(1)), the result would have been more in line with established case law. The Court of Appeals' policy reasons for rejecting this approach are set out at 698 P.2d at 181, n.9.

restriction placed on subsistence uses is necessary for sustained yield management of the resource. Requiring State prosecutors to prove these complex, subjective issues for the hundreds of fisheries and wildlife regulations in 5 AAC in virtually any poaching case imposes an overwhelming burden on the State. It is for good reason that under well established law, the burden of demonstrating illegality rests on the challenger of a regulation. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 161 (Alaska 1982); Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 906 (Alaska 1981); Kingery v. Chapple, 504 P.2d 831, 835 (Alaska 1971). <sup>13/</sup>

When an administrative regulation has been adopted in accordance with the procedural requirement of the Alaska Administrative Procedures Act, AS 44.62, and the legislature intended to commit to the agency discretion over the subject matter of the regulation, a court looks only at whether the regulation is consistent with and reasonably necessary to carry out the statutory authority, and whether the regulation is

---

13/ The Court of Appeals in Langesater v. State, 668 P.2d 1359, 1361 (Alaska Ct. App. 1983) specifically noted that unlike challenges of public protection regulations discussed in Kingery v. Chapple, 504 P.2d at 836, which require the State to come forward with "at least prima facie evidence that a reasonable relation to purpose exists before the burden shifts to the complainant," fish and game regulations can be successfully challenged only if the complainant meets the burden of showing lack of a rational basis between the regulation and public policy. The Langesater and Eluska decisions are irreconcilable.

reasonable and not arbitrary. Chevron U.S.A., Inc. v. Le Resche, 663 P.2d 923 (Alaska 1983); Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 161 (Alaska 1982); Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 906 (Alaska 1981); Kingery v. Chapple, 504 P.2d 831, 835 (Alaska 1971); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). A reviewing court need not agree with the particular wisdom of the regulation, so long as it is satisfied that the regulation is not arbitrary and capricious. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

It is particularly important not to deviate from the above burden of proof allocation in the context of natural resources conservation and management regulations. This Court has in the past consistently recognized that regulation of hunting and fishing activities involves important public policy concerns in which the State has a strong interest. Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191 (Alaska 1981); Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979). This Court has also recognized that the State's authority to adopt regulations controlling fishing and hunting should be broadly construed. Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897 (Alaska 1981); Herscher v. State, Department of Commerce, 568 P.2d 996 (Alaska 1977).

In summary, the Eluska opinion constitutes a radical departure from the appropriate standard of proof for challenges to regulations adopted by an agency vested with discretionary

authority and expertise. The subsistence defense has particularly significant ramifications because it affects the wild, renewable resources of the State, which are subject to special considerations both in our constitution and in state law. This Court should accordingly reverse the Court of Appeals' decision, or modify it to specify that the defendant has the burden of proving illegality of a hunting regulation, and then only if he has first exhausted his administrative remedies, discussed below.

V.

The Court of Appeals Erred In Creating A  
Subsistence Defense Absent A Showing  
That A Defendant Has Exhausted His  
Administrative Remedies.

The Eluska "subsistence" defense is, by its terms, available to any defendant without any showing that he has first requested the game or fisheries board to amend the challenged regulation. This result, in the context of subsistence regulations, deviates from principles supporting exhaustion of administrative remedies, and is inconsistent with the public process established by the legislature for identifying and authorizing subsistence hunting. Although in most criminal contexts there are sound policy reasons for allowing a defendant to argue that the law or regulation with which he is charged is invalid, without proving exhaustion of administrative remedies, this principle does not apply universally, and should not apply

to subsistence hunting and fishing regulations, for the reasons discussed below.

It is well established that the doctrine of exhaustion of administrative remedies may apply in the criminal arena, particularly when strong governmental interests are involved. Moore v. City of East Cleveland, 431 U.S. 494, 521-529, 97 S. Ct. 1932, 1946--50 (1977) (Burger dissenting), McGee v. United States, 402 U.S. 479, 91 S. Ct. 1565 (1971); McKart v. United States, 395 U.S. 185, 197-199, 89 S.Ct. 1657, 1664--65 (1969). In cases where exhaustion of administrative remedies is not statutorily mandated, its application is in the discretion of the courts. Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496, 500 (9th Cir. 1980), citing Eluska v. Andrus, 587 F.2d 996, 999 (9th Cir. 1978).

In a plurality decision in Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977), the Court noted that the doctrine should not apply to bar a criminal defendant from asserting constitutional invalidity of the statute under which he is charged (which is not the issue in the instant case), but recognized that the doctrine may be applied in criminal cases, particularly where a statute implicitly or explicitly requires exhaustion of administrative remedies. Id. 431 U.S. at 497 n.5, 97 S. Ct. at 1934 n.5.

In deciding whether to apply the doctrine, the courts weigh the litigant's need for judicial resolution against the agency's interests in creating a record, exercising its

discretion without threat of litigious interruption, discouraging frequent flouting of the administrative process, and correcting mistakes. Aleknagik Natives, Ltd., 648 F.2d at 500. As noted above, courts have required exhaustion of administrative remedies as a prerequisite to raising defenses in a number of criminal and civil penalty contexts. See cases cited in Chief Justice Burger's dissent in Moore v. City of East Cleveland, 431 U.S. at 529--530, 97 S. Ct. at 1951, and cases cited in McKart v. United States, 395 U.S. 197, 89 S. Ct. 1657, passim. See also McGee v. United States, 402 U.S. 479, 91 S. Ct. 1565 (1971) (selective service); Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3rd Cir. 1982) (EPA standards); Hawthorne Oil & Gas Corp. v. Department of Energy, 647 F.2d 1107 (Temp.Em.Ct.App. 1981) (petroleum price regulations); Sanders v. McCrady, 537 F.2d 1199 (4th Cir.1976) (expulsion from National Guard); Donaldson v. United States, 264 F.2d 804 (6th Cir. 1959) (civil penalty for overproduction of wheat); Continental Research Corp. v. Train, 426 F.Supp. 713 (D. Mo. 1976) (civil penalty for unmarked pesticides); United States v. La Froscia, 354 F. Supp. 1338 (D.N.Y. 1973) (marijuana prosecution).

In United States v. LaFroscia, 354 F.Supp. at 1341, the court recognized that use of the exhaustion doctrine in criminal cases should not be used absent a strong governmental interest, but noted that such an interest exists "where the function of the administrative agency involves 'The exercise of discretionary

powers granted the agency by Congress, or requiring the application of special expertise.'" (Citing McKart). Id. The same reasoning applies to the Board of Game.

In People v. Calvar Corp., 36 N.E. 2d 644 (N.Y. 1941) the New York court refused to allow defendants, convicted of violating a zoning ordinance, to argue that the ordinance was an unconstitutional taking of property, absent a showing that they had first sought a zoning variance. See also Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582 (1931), where the Court, in dicta, reiterated the principle that if a statute, valid on its face, requires issuance of a license, the doctrine of exhaustion of administrative remedies applies to a person who fails to obtain a permit. Id. at 562, 51 S.Ct. at 585. See also ICC v. Appleyard, 513 F.2d 575 (4th Cir. 1975) (requiring exhaustion of permit application procedure before raising permit statute defense).

Eluska presents a situation where the doctrine of exhaustion should be applied, because the State's interest in resource management outweighs the minimal burden on a defendant to first seek regulatory adjustment before flouting the law, and because the statutes and regulations implementing the subsistence law provide for ample administrative review and relief, and impliedly, if not expressly, require application to the appropriate agency for review before violating the law.

The legislature, in enacting the subsistence law, created a comprehensive structure designed to channel information about subsistence uses to the Boards of Fisheries and Game, so

that they can adopt regulations recognizing those uses. The legislature created a new division of subsistence within the Department of Fish and Game, and charged that division with gathering data on subsistence uses and making recommendations to the boards for regulations recognizing those uses. Sec. 3 Ch. 151, SLA 1978, codified at AS 16.05.094. That division's ability to gather data and information depends in large part on public cooperation. The legislature also had, before 1978, authorized creation of local fish and game advisory committees (Sec. I Ch. 94, SLA 1959; am Sec. 4 Ch. 206, SLA 1975, codified at AS 16.05.260), which now number approximately 74; in addition, the joint-Board of Fisheries and Game adopted regulations (required for compliance with title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA") P.L. 96-487, 94 Stat. 2371, codified in pertinent part at 16 U.S.C. § 3115), establishing regional advisory councils, providing staff assistance to the councils and committees, and specifying that the Boards of Fisheries and Game may not reject a subsistence regulation proposal from a council except under certain limited circumstances. 5 AAC 96.250; 5 AAC 96.610(e); 16 U.S.C. § 3115(c). 14/

---

14/ Sec. 807 of ANILCA, 16 U.S.C. §3117, for example, requires exhaustion of state administrative remedies before a person may file an action in U.S. District Court to enforce the subsistence provisions of title VIII of ANILCA.

The State is committed to ensuring that the mechanisms for public input, described above, function effectively. The division of subsistence and the division of boards' fiscal year 1985 budgets, for example, included approximately \$3.1 million for the subsistence division and \$1.3 million for the division of boards, including funding for those agencies' expenditures for information gathering, research, local meetings, and administrative support for local committees and regional councils. <sup>15/</sup> The procedures by which the boards gather and analyze data on subsistence are set out at 5 AAC 99.010 and 5 AAC 96.610.

In short, the legislature created a statewide network by which subsistence users could give the boards information regarding subsistence uses, so that the boards could provide for those uses. As a matter of public policy, the actions of the legislature and the boards should be viewed as vesting potential subsistence users (and other hunters) with the duty to first seek a permit, or other regulatory change, before engaging in otherwise illegal hunting. <sup>16/</sup>

---

<sup>15/</sup> Data provided by Steve Behnke, Director, Division of Subsistence, Department of Fish and Game. The Court may take judicial notice of this as a public record under Alaska Rule of Evidence 201.

<sup>16/</sup> In addition, AS 44.62.220 provides the opportunity to petition the board even outside the normal regulatory meeting time.

To allow a person to ignore the readily available opportunity to request regulatory amendments, and simply to kill animals at will and then claim a "subsistence" defense, is totally incompatible with the carefully craft regulatory process established by the legislature, and with sound resource conservation. Requiring exhaustion of administrative remedies may be the only way to insure that the boards will be made aware of all subsistence uses, and is the best way to provide an adequate record of the boards' decisions.

In deciding whether to apply the doctrine of exhaustion of administrative remedies to challenges to subsistence hunting and fishing violations, this Court should consider the particular facts and administrative system involved in regulating subsistence hunting and fishing described above. See Stratman v. Watt, 656 F.2d 1321 (9th Cir. 1980). In this regard, the Illinois Supreme Court's reasoning in County of Lake v. MacNeal, 181 N.E. 2d 85, 89-98 (Ill. 1962) is useful; although that court rejected application of the doctrine of exhaustion of administrative remedies under the particular facts before it, it did acknowledge that the doctrine of exhaustion of remedies may be applied in the criminal arena. In that case, a municipality had filed a zoning violation complaint, and the court reasoned that the mere filing of a complaint indicated the city's prejudgment that the zoning ordinance in question, as applied to the property concerned, was valid and did not create a hardship. Therefore, it would have been a "patently useless step" to require the

property owner to first seek administrative relief. Id. at 90.

Unlike the zoning situation in MacNeal, the absence of specific subsistence hunting regulations in a particular area does not reflect a prejudgment by the Board of Game that subsistence provisions are adequate, but rather indicates a lack of complete information about what subsistence uses are and where they exist. Only through the administrative process can the board have an opportunity to correct any deficiency. See, e.g., Provo City v. Claudin, 63 P.2d 570, 574-75 (Utah 1936). The Eluska decision makes no provision for exhaustion of administrative remedies, and on that basis should be reversed. 17/

---

17/ Although the exhaustion of remedies issue was not specifically covered in the state's Court of Appeals brief, the issue was briefed in the district court (R. 31), was raised in the State's points on appeal (R. 89), and was discussed at oral argument in the Court of Appeals. 698 P.2d at 175. This court may, and should, consider and rule upon this important issue. See Ratcliff v. Security National Bank, 670 P.2d 1139, 1141--42, n.4 (Alaska 1983); see also Northern Corp. v. Chugach Electric Ass'n, 523 P.2d 1243, 1245, n.4 (Alaska 1974). Not only has the State not intended to waive the argument, but because the subsistence defense as articulated by the Court of Appeals was not contemplated by the parties or specifically briefed, the parties should be allowed to raise pertinent arguments even if not addressed previously. Exhaustion of administrative remedies should have been an integral part of the Court of Appeals' newly-fashioned defense.

VI.

The Eluska Decision Should Not Apply Retroactively.

The Court of Appeals' decision failed to address the critical issue of retroactivity of its novel "subsistence" defense. Although the State's position is that the judicial creation of a subsistence defense to criminal charges is fundamentally flawed, if this Court should, arguendo, decline to reverse the appellate court, at the very least this Court must limit the Eluska defense to prospective cases only.

This Court, in State v. Glass, 596 P.2d 10 (Alaska 1979) and Judd v. State, 482 P.2d 273 (Alaska 1971), articulated criteria to be used in determining whether to retroactively apply a new rule of law announced by the judiciary. These criteria include: (1) whether the purpose of the new rule of law is primarily related to the integrity of the verdict (which would favor retroactive application) or whether the purpose is to further other ends (such as deterring unconstitutional police conduct, which would favor prospective application); (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. State v. Glass, 596 P.2d at 13, 14.

The three guidelines for deciding retroactivity set out in Glass dictate that the new subsistence defense be applied only in a prospective fashion. First, the Court of Appeals' purpose

in establishing the "subsistence" defense was to ensure that the Board of Game would comply with what the Court of Appeals believed AS 16.05.255(b) required (i.e., adoption of "specific" subsistence regulations); the purpose was not related to "minimizing arbitrary fact finding." Id. at 13. Second, state enforcement officials have uniformly relied on "previous standards," i.e. on the validity of previously existing hunting regulations. Third, if the defense were applied retroactively, it would have a grave effect on the administration of justice, requiring review of all cases in which a conviction may arguably have involved "subsistence" uses. The principle of non-retroactivity is particularly important in the context of subsistence regulations, because this Court's recent ruling in Madison has necessitated some changes in the criteria used to identify subsistence uses of fish and game. It will take some time to ensure that all fisheries and game regulations statewide comply with Madison.

#### VII.

##### This Case Is Not Moot.

This case has not become moot by virtue of the Board of Game's June, 1985, emergency action in which it adopted separate subsistence seasons and established subsistence and "tier II" subsistence permit hunts. Although the Court of Appeals indicates that "[i]f the State has enacted regulations making adequate provision for subsistence hunting then the defense we have recognized would not exist[,]" (698 P.2d at 181-182) the

determination of what is "adequate" remains a subjective one, to be decided within the context of the criminal defense to the challenged regulation. Thus, the mere adoption of separate subsistence regulations does not extinguish the defense. The State will still have the burden of proving, routinely, the subjective "adequacy" of the subsistence regulations.

Moreover, the Boards of Fisheries and Game still need this Court's guidance on how to adopt permanent regulations that comply with state law in light of both the Eluska and Madison rulings. As discussed above, the issues in this case are not moot, but even if, arguendo, they were held to be technically moot, this case falls within the public interest exception to the mootness doctrine. In Rutter v. State, 668 P.2d 1343 (Alaska 1983), this court applied the public interest exception to the mootness doctrine in the context of commercial fisheries regulations, where a decision of the Court would aid the agency in formulating new regulations and applying the old, and where non-parties were interested in the outcome of the suit. Id. at 1346. That is patently the case here.

#### VIII.

#### CONCLUSION

For the reasons articulated above, the State respectfully requests this Court to reverse the decision of the Court of Appeals, or, in the alternative, to modify and limit the decision to specify that a person charged with illegal hunting may not challenge the hunting regulations without first having

exhausted administrative remedies, and must bear the burden of proving any alleged illegality of the regulations.

DATED at Anchorage, Alaska this 4<sup>th</sup> day of September, 1985.

HAROLD M. BROWN  
ATTORNEY GENERAL

By: *Sarah Elizabeth McCracken*  
Sarah Elizabeth McCracken  
Assistant Attorney General

# MEMORANDUM

State of Alaska

10813

TO: Daniel W. Hickey  
Chief Prosecutor  
Juneau

DATE: April 26, 1985

FILE NO

TELEPHONE NO. 277-8622

FROM: Victor C. Krumm *VCK*  
District Attorney  
Anchorage

SUBJECT: Dept. of Fish and Game  
Subsistence Hunting/Fishing  
Regulation Legislation

Madison v. Department  
of Fish & Game and  
State v. Eluska

At your request, a number of department lawyers and fish and wildlife officers met on April 24 to discuss enforcement ramifications of the two recent appellate rulings involving subsistence rights.

On February 22, 1985, the supreme court struck down a regulation designed to identify eligibility for subsistence fishing in Cook Inlet. Madison v. Department of Fish & Game, \_\_\_\_\_ P.2d \_\_\_\_\_ (Alaska, No. 2911).

The Board of Fish attempted to allocate fish resources among three user groups: sports, commercial, and subsistence fishermen. This allocation was done after a substantial number of hearings. Madison and other persons challenged the allocation regulation on the basis that it exceeded the scope of the state's subsistence law, AS 16.05.251(b).

Two superior court judges ruled that the allocation had a rational basis and denied the challenge. The supreme court reversed, holding that the issue was merely one of statutory construction and that the proper test was "substitution of judgment," not "rational basis."

The high court concluded that section .251(b) establishes priority for subsistence users over all others. If inadequate fish exist to accommodate all potential users, subsistence claimants are to be allowed use at the expense of others.

In response, on April 4, 1985, the Board adopted a resolution (attached), recommending passage of SB 231 and HB 288, i.e., the Governor's subsistence bills.

Shortly after the resolution was passed, the Court of Appeals issued its opinion in State v. Eluska, \_\_\_\_\_ P.2d \_\_\_\_\_, (Ct. App. No 456, April 12, 1985).

Eluska had been charged with possessing game taken illegally out of season. He challenged the charge, arguing that

Daniel W. Hickey  
April 26, 1985  
Re: Dept. of Fish & Game  
Subsistence Hunting/Fishing  
Regulation Legislation  
page 2

he was a subsistence hunter and that game regulations failed to adequately provide for subsistence hunting. Judge Roy Madsen agreed with Eluska, ruling that AS 16.05.0255(b) required the adoption of adequate subsistence regulations, and held that the Board of Game had not done this.

The Court of Appeals affirmed the dismissal, holding that AS 16.05.255(b) mandated specific subsistence game regulations. Because there are no such regulations, the appellate court announced a judicially created "subsistence use" defense.

Though Eluska addressed only a subsistence defense to game violations, and construed only AS 16.05.255(b), it appears that the same judicially-created subsistence use defense will now surface in the face of a challenge to AS 16.05.251(b).

These two provisions, i.e., .251(b) [fish] and .255(b) [game], are parallel provisions.

Considering Eluska and Madison together, the conclusion to be drawn is that a "subsistence use" defense is now available for all noncommercial fish or game violations residents.

Noncommercial, resident fish or game violators trigger the defense by filing an affidavit asserting that the fish or game was taken in a good faith belief that it was for a "subsistence use." If this preliminary showing is made, the state has the opportunity to establish, if possible, that (1) the regulation allegedly violated did not restrict the taking of game, or (2) that the restriction was necessary to protect sustained yield.

These court decisions, in the face of the present regulatory scheme, seem to make enforcement of poaching laws impossible. It will be impossible to show that there is no restriction of resident subsistence taking as long as nonresidents or commercial fishing or hunting activities are allowed. In addition, we can never show that the restriction is necessary to protect sustained yield.

FISH

There are a number of alternations to the problems in the fisheries.

Daniel W. Hickey  
April 26, 1985  
Re: Dept. of Fish & Game  
Subsistence Hunting/Fishing  
Regulation Legislation  
page 3

1. Repeal AS 16.05.255(b). This is the most rational and sensible approach, but maybe the least desirable politically. Repealing this provision overturns Madison and moots Eluska, at least for fish violations, and allows rational allocation of fish resources among different user groups.

Repealing this provision will not prevent the Board of Fish from establishing subsistence regulations, but will reestablish the rationally based management allocation scheme that existed before Madison.

Failure to repeal may result in emergency closure of the fishing grounds to commercial interests and tourists.

I strongly recommend repeal, even if the legislature takes up the issue next session.

Repeal should not have any particular effect on the Alaska National Interest Lands Conservation Act (ANILCA) since the waters affected are all state navigable bodies.

Colonel Henderson will speak to the Commissioner who will speak to the Governor about this alternative.

2. Adopt Emergency Fish Regulations.

(a) Alternative 1: Adopt regulations that provide priority for subsistence users. This will satisfy Madison and Eluska, but may have the effect of closing commercial fisheries, at least in some areas (Cook Inlet, Prince William Sound), prohibiting commercial guiding (Kenai River), and prohibiting nonresident sport fishing.

(b) Alternative 2: Adopt regulations for specific areas having particular potential for human conflict and resource impact: Cook Inlet (including river drainages); Susitna and Copper drainages.

The regulations might establish subsistence regulations for king salmon that parallel presently established sport limits, seasons, and waters. Then, either declare certain species as secondary subsistence (reds, pinks) with much higher limits, or set aside subsistence limits for certain species in a number of different areas.

The theory would be to spread the taking of desirable species across a wide area of the state while allowing subsistence priority overall.

Daniel W. Hickey  
April 26, 1985  
Re: Dept. of Fish & Game  
Subsistence Hunting/Fishing  
Regulation Legislation  
page 4

I have requested that Liza McCracken draft two sets of alternative emergency regulations. The first would attempt to accommodate the different user groups along the lines set out above. The second would consist of contingent emergency regulations that would go into effect if a court were to enjoin the state from enforcing the first. The contingent regulations would immediately close all commercial and nonresident fishing, and establish subsistence rules. This will satisfy Madison and Eluska and permit enforcement.

The Fish Board will need to meet no later than mid to late may to consider these regulations.

3. Take No Legislative Or Regulatory Action

If no legislative or administrative action is taken, it will not be possible to enforce noncommercial poaching by residents. In this event, we are probably limited in our enforcement ability to prosecute wanton waste, gear violations, etc. It is not clear whether we could prevent people from using nets in rivers on the basis that netting is not traditional or customary. There will probably be no way to limit the number of fish taken, the hours or days of the taking, or establishing absolute priority of subsistence users.

4. Unless legislative, regulating, or judicial action overrules Eluska, we should:

- (a) Refer to federal authorities all game poaching activities occurring in national parks and monuments;
- (b) Enforce poaching cases on state land when
  - (1) the poaching occurs in an area totally closed to the taking of a particular species; or
  - (2) the taking of a particular sex is totally prohibited;
- (c) Continue to process all pending cases until an affidavit is filed claiming subsistence,
- (d) Neither cite violations, nor seize evidence, when the game is taken on state land, in an area opened part of the year to taking of the particular species or sex killed, when the taking is by a resident for his personal consumption;

Daniel W. Hickey  
April 26, 1985  
Re: Dept. of Fish & Game  
Subsistence Hunting/Fishing  
Regulation Legislation  
page 5

- (e) Enforce all game violations by nonresidents or commercial operators;

In every case considered for prosecution, information should be sent to Liza McCracken, who will act as a clearing house and assist in meeting "subsistence use" defenses.

Hunting pressure should be rather slack for a while, but after Eluska, it appears that there are presently no hunting seasons. This may result in depletion of moose stocks in certain areas that are peculiarly vulnerable, like the Matanuska Valley and Kenai Peninsula.

Attachment

VCK:bgh

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

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

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

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

ATT. 1.

2. Sport fishing for king and other species of salmon on the Kenai and Naknek rivers and in the Susitna drainage may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to prevent that result.
3. Non-subsistence hunting, including commercial guiding activities may be significantly restricted and, in many cases, eliminated. Prior to the Madison decision the Board of Game had adequate regulatory flexibility to accommodate these users reasonably.

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

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

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

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

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

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

Move to Adopt Bill - Amend John Ernie 2d fails  
2nd Sarah

for carries 13 against Sidney Huntington

9783

Alaska Board of Game  
#85-38-GB

Findings on Madison Requirements

April 4, 1985

The Board of Game has examined the legal principles set out by the Alaska Supreme Court in Madison v Alaska Department of Fish and Game, No. 7410. That decision requires substantial reallocation of game resources among Alaskans, in part because the board will no longer be able to use permit drawings to determine which Alaskans can hunt for food.

Before Madison, the board under the subsistence law had been providing reasonable opportunities for subsistence hunting by Alaskans living in rural areas or communities. The board was also providing hunting opportunities for other Alaskans and non-state residents, through general open hunts, registration hunts with unlimited permits, registration hunts with a specified number of permits, and permit drawing hunts.

After Madison, if a game population has been hunted by Alaskans for food, subsistence hunting must be allowed, unless the resource would be jeopardized. All Alaskans are eligible for subsistence hunting, and non-state residents may also be allowed to hunt. However, if the situation will not allow everyone to hunt with an equal legal opportunity, then non state residents may not participate.

Under Madison, the board at that point must determine which Alaskans have the opportunity to hunt based on three criteria contained in AS 16.05.255(b):

- (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 approximately 164 permit drawing hunts, which operate on chance, and the eleven registration permit hunts with a limited number of permits, which are distributed to applicants in the order in which they apply, do not distribute the opportunity to hunt based on the three criteria, and therefore must be restructured.

While the current random drawing or first-come, first-served system must be replaced by systems based on the three criteria,

10071  
April 4, 1985

the board must not act arbitrarily and must assess the significance of available information in order to act reasonably under the statute and the Madison mandates. At this time, the Department of Fish and Game, Division of Game, can supply information on the community of residence of people applying for drawing permits in the state, and the Division of Subsistence has a library of approximately 120 technical papers on the use of fish and game by people in various communities and areas in the state. However, the task of synthesizing those two bodies of data and of analyzing their significance in relation to the three criteria will be very expensive and time consuming; the department cannot adequately prepare such material within a few weeks for presentation to the board. Any decision on how to modify these hunts beyond April 7, 1985 will come too late to implement changes in time for the 1985 season. Specifically, it takes up to five days to create a "mock-up" of the two permit papers. At the printer, design and proofing take from 5 - 10 days. Printing and distributing supplements to the regional offices takes three days; distribution of supplements and applications to approximately 800 vendors and department field offices takes about five days to complete. One week must be allowed for mail delivery, thus requiring between 25 - 30 days before information is available to the public. It is expected that the permit applications will be available on or about April 30, 1985, with an application deadline of May 31, 1985 for the fall hunts. It requires up to 6 weeks (or until about July 13) to complete the computerized drawing and mail permits to those whose applications are drawn. The earliest permit seasons presently begin August 10 for some caribou and sheep seasons, thus presuming mailed permits may take at least a week to be delivered, permittees have only about 20 days to prepare for season openings.

Therefore the board finds that the following approach is the most reasonable way to address this problem.

The board requests that the Commissioner of Fish and Game take the first step required by Madison and by delegation to adopt regulations eliminating non-state residents from permit drawing hunts and registration hunts with a specified number of permits. This should not be done for brown bear, Dall sheep or mountain goats, however, since present information indicates that except for sheep in certain identified situations such as the Noatak area of GMU 23 and the north slope of the Arctic Wildlife Range (GMU's 25 and 26) these species are primarily pursued for trophy or recreational purposes.

Secondly, the board hereby calls for proposals from the public on all permit drawing hunts and registration permit

11 8/13

Hunts with a specified number of permits for the fall/winter 1985 board meeting. The board also calls for proposals to define the three criteria identified in the statute. During the intervening time, the department is requested to synthesize and analyze the available information, keeping in mind the three criteria which the statute specifies be used to distribute opportunities to hunt: dependency, local residency, and available alternative resources.

Public testimony on how those criteria could be used by the board will be taken at the meeting. The board encourages the advisory committees and regional councils to discuss this subject and to report on those discussions at the board meeting.

It is very important that it be understood that after Madison, if a game population is hunted primarily for food by Alaskans, and if everyone cannot be allowed the same legal opportunity to hunt primarily for food, random permit drawings are not authorized by the statute. Instead, the board must employ the three criteria, and must consider factors that correlate to them, such as miles between the user's residence and the game population, income levels, previous participation in harvest of resources and other less easily quantifiable data.

Before Madison, the uses which the board had provided for as subsistence were those of residents in rural areas and communities, a much smaller group than all Alaskans. Before Madison, other uses could be accommodated, as well, and the board relied heavily on drawing permit hunts to distribute opportunities for other Alaskans to hunt a particular game population. Now that regulatory tool is not available, and as a result many Alaskans who will have a low priority when evaluated under the three criteria will not even have a chance to participate in many hunts. Additionally, non-state residents must be eliminated from many hunts.

Brenda Johnson, Chairman  
Alaska Board of Game

Adopted 04/04/85  
Anchorage, Alaska

Alaska Board of Game  
#85-37-GB

Findings on Lime Village Management Area

The Board of Game finds, based upon public testimony and information provided by the Division of Subsistence, that the residents of the Upper Stony River Lime Village area are extremely dependent on moose and caribou in GMU 19(A). As reported in Kari, 1983, Land Use and Economy of Lime Village, the remoteness and isolation of this area, the extremely limited availability of cash earning opportunities, and the high costs of transportation and of food, make local residents highly reliant on local fish and wildlife. Moreover, use of wild game resources is historically customary in the area. The board further finds that the 40 residents of Lime Village are probably the most geographically isolated and subsistence dependent people in the state. Moose and caribou are particularly important because of the quality of the meat and the large size of the animals. They supply the highest proportion of the food eaten by residents of the area.

The board finds that residents of this area have customarily harvested moose and caribou on an opportunistic basis throughout the year. However, the usual hunting periods include fall (August and September), winter (November - February), and spring (March). Recent short seasons in November and February have not fully accommodated the opportunity for local residents to legally obtain the moose they need. The board finds that the lack of appropriate seasons has discouraged Lime Village residents from reporting their harvests.

Residents of the Lime Village area customarily harvest moose and caribou within a fairly well defined area around the village, including along the Stony River by boat and on foot in summer, and further away from the river by dogteam and snowmachines in the winter.

The board finds that information provided by the Game Division shows that moose populations in the Stony River area are at moderate density and are relatively stable. Caribou in this area are part of the Mulchatna caribou herd, which is at high levels and has been growing in recent years.

Therefore, the board concludes that the establishment of the Lime Village Management Area will provide a reasonable opportunity for the residents of Lime Village as well as all

other Alaskans to take moose by extending the lengths of the seasons. Restricting the transportation of moose out of the Lime Village Management Area except during September will reduce the potential new demand which might result from these longer seasons and ensure the conservation of the moose population. The board determines it is important that during September, which has been the period of time most used for hunting by all Alaskans and for guided hunting, bull moose can be transported out of the area.

The board further concludes that the establishment of this management area also allows an increase in the caribou bag limit in the area to five, which will provide a reasonable opportunity for customary levels of harvest for the residents of Lime Village as well as other Alaskans. Restrictions on the transport of caribou out of the area will reduce hunting pressure on local caribou and ensure their conservation and availability to residents of the area. The board again determines that it is important that uses by all Alaskans can be provided for by allowing one caribou to be transported out of the area from September to mid-October.

---

Brenda Johnson, Chairman  
Alaska Board of Game

Adopted April 04, 1985  
Anchorage, Alaska  
VOTE: 6/0