

Subsistence

McDOWELL,

ET AL

4-1-85

Hello Vic:

Per our conversation, please find enclosed (3) documents I believe every Legislature should receive marked up with yellow pencil to make sure they read, as I'm convinced they don't really understand the problems Governor Sheffield's proposed legislation will cause.

Note: Lyons case finding of facts, and page (4) King Salmon allocation (now 4200) whereby they need not count any other species, and Kings only represents 0.2%. !!! (What about the other salmon species 99.80%)

Note: Coob Inlet Management 1972 subsistence report, where it clearly spells out hook + line subsistence fishing, however special interest attys wrote us out in 10 point system. !!! See page #4 Madison case for suggestion. !!!

Honest people with cool heads can solve these problems, however Governor Sheffield's proposal will split this state like never before !!!

Vic, I do my best to furnish facts to assist our Legislators !!!

Your assistance will truly be appreciated.

Have a good day
Sam Maxwell
Concerned
Alaskan

Suggested
Solution

Upper Cook Inlet

95% of all salmon harvested is between July 1st and August 15, however Sheffield's Board targeted subsistence harvest on the 5% before July 1st and after August 15th!!!

#(1) I suggest no commercial fishermen could receive subsistence permit, must take salmon from catch for personal consumptive use.

#(2) all net fishing will be restricted to the dates between July 1st and August 15th when 95% of salmon are available.

* Commercial fishing Monday + Friday like present regulations!

* Personal use nets on Saturday for all people who are not commercial or hook and line personal use fishermen.

* No person who signs up for personal use fishery between July 1st and August 15th can hook + line personal use fish in upper Cook Inlet for salmon species.

* Hook and line personal use fishermen will support this proposal, provided the professional fisheries managers make sure enough fish is allowed to escape into river!!!! (I'll bet the commercial fishermen won't)



G. Cook

AS

RECEIVED

MAY 1980

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

NATIVE VILLAGE OF TYONEK, et al.,)
Plaintiffs,)
vs.)
ALASKA BOARD OF FISHERIES, et al.,)
Defendants.)

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT
MAY 23 1980
Clerk of the Trial Courts
By [Signature] Deputy

CIVIL ACTION NO. 3AN-80-1073

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' motion for a preliminary injunction in the above-entitled action having come on for hearing on the 22d day of May 1980, all parties having been heard and plaintiffs' motion having been granted, the Court hereby enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The village of Tyonek is an Athabascan Indian village of approximately 300 people and 80 households located on the west side of Cook Inlet. Tyonek has been inhabited for generations by the Tanaina group of Athabascans who succeeded the Eskimo population which originally settled in the area in prehistoric times. Today, the village still retains its ethnic identity and has the same characteristics of a rural Alaska Native community as those of Native villages in other areas of the state.

**
noted by [Signature]

2. The Susitna River king salmon stock enters upper Cook Inlet and ~~is the~~ only stock of king salmon to pass by the village of Tyonek. The Susitna River stock enters Cook Inlet the beginning of May, and begins to pass by the village of Tyonek in mid-May.

NORMAN A. COHEN
ATTORNEY AT LAW

(1) See pages * 1 + 4

7. In 1978, the Alaska State Legislature enacted ch 151 SLA 1978 (A.S. 16.05.251(b)) which requires that whenever it is necessary to restrict the taking of the Susitna River ^{fish stocks} king salmon stock to assure the maintenance of such stock on a sustained-yield basis or to assure the continuation of subsistence uses of such king salmon stock, subsistence use of such stock shall be the priority use over sport and commercial uses.

8. A.S. 16.05.251(b) ^{also} requires defendant ALASKA BOARD OF FISHERIES to adopt subsistence fishing regulations for Susitna River king salmon stocks, which implement the priority for subsistence uses referred to in paragraph 7, unless it determines that adoption of such regulations will jeopardize or interfere with the maintenance of Susitna River king salmon stocks on a sustained-yield basis.

9. Prior to the ^{December 1979} March 1980 meeting of defendant ALASKA BOARD OF FISHERIES, said defendant, on behalf of plaintiff NATIVE VILLAGE OF TYONEK, published ^{summary of the proposed} regulations pursuant to the Administrative Procedures Act to open a subsistence king salmon fishery for the residents of the village of Tyonek, between May 15 and June 15.

10. On March 26, 1980, defendant ALASKA BOARD OF FISHERIES held a public hearing and received testimony on the proposed regulations from the Alaska Department of Fish and Game, residents of the village of Tyonek and other members of the public.

11. Testimony presented at the public hearing indicated that the residents of the village of Tyonek ^{have} customarily and traditionally harvested king salmon for subsistence uses between May 15 and June 15 ^{per the administrative}.

12. Though evidence was presented that restrictions on taking by all user groups of the Susitna River king salmon stock were necessary, no evidence was presented at the hearing by the Alaska Department of Fish and Game ^{that} adoption of the proposed

cc
5/1/81

Alaska

For
people's
conclusion

Norman A. Cohen
Attorney at Law

regulations would jeopardize or interfere with the maintenance of the Susitna River king salmon stock on a sustained-yield basis and the defendant ALASKA BOARD OF FISHERIES made no finding to that effect. *11. Board continued to express concern over the impact of the fishermen who are not allowed to harvest king salmon.*

13. The defendant ALASKA BOARD OF FISHERIES rejected the plaintiffs' proposal¹ but adopted proposals authorizing the harvest of 13,100 Susitna River king salmon, by sports fishermen *for subsistence fishing in Cook Inlet area. See Inverness, AK.*

14. As a result of the failure of the defendant ALASKA BOARD OF FISHERIES to adopt proposed regulations opening a king salmon season for the residents of the village of Tyonek, the plaintiffs are threatened with irreparable harm in that plaintiffs' customary and traditional use of the Susitna River king salmon stock will be denied to them. Consequently, residents of the village of Tyonek will lose access to a valuable subsistence resource and the customary and traditional way of life of the village will be disrupted.

*list 10
list 12*
* 15. No other species of salmon available to the residents of the village of Tyonek can replace the Susitna River king salmon stock *rejected by Alaska Board June 15, 1980* as a subsistence resource or substitute for the role of the Susitna River king salmon stock in the customary and traditional way of life of the village.

16. Defendants will be adequately protected if the residents of the village of Tyonek are permitted to harvest 3,000 king salmon from the Susitna River king salmon stock between May 23 and June 15, 1980.

17. Plaintiffs have raised serious and substantial questions. The failure of defendant ALASKA BOARD OF FISHERIES to adopt the proposals submitted on behalf of plaintiff NATIVE VILLAGE OF TYONEK and the adoption of proposals authorizing the harvest of 13,100 Susitna River king salmon by sports fishermen is a violation of A.S. 16.05.291(b) in that whenever it is necessary to restrict

ROTHMAN A. COHEN
ATTORNEY AT LAW

the taking of Susitna River king salmon to assure the maintenance of that fish stock on a sustained-yield basis, or to assure the continuation of subsistence uses of such resource, subsistence use shall be the priority use.

CONCLUSIONS OF LAW

1. Unless the preliminary relief requested by plaintiffs is granted plaintiffs will suffer irreparable harm in that plaintiffs customary and traditional use of the Susitna River king salmon stock will be denied to them. Consequently, residents of the village of Tyonek will lose access to a valuable subsistence resource and the customary and traditional way of life of the village will be disrupted.

2. Defendants and the resource will be adequately protected if the residents of the village are permitted to harvest 3,000 king salmon from the Susitna River king salmon stock between May 23 and June 15, 1980.

3. Plaintiffs have raised serious and substantial questions in that:

a. Whenever it is necessary to restrict the taking of a fish stock to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use of such stock.

b. The residents of the village of Tyonek have a customary and traditional use of the Susitna River king salmon stock between May 15 and June 15.

c. Adoption by defendant ALASKA BOARD OF FISHERIES of regulations which allow for the sport fishing of Susitna River king salmon without first adopting regulations which provide for the customary and traditional use of such stock by the residents of the village of Tyonek is a violation of the subsistence priority set forth in A.S. 16.05.251(b).

HENRY A. COHEN
ATTORNEY AT LAW

4. No bond is required of the plaintiffs prior to the issuance of the preliminary injunction.

DATED this 23rd day of May, 1950.

John D. Carlson
JUDGE OF THE SUPERIOR COURT

I certify that on 5-30-50
a copy of this document was sent to:

Attorney(s) of Record, or

Other: _____

at address of record.

D. O. E. _____

cf
Clerk of Court

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

NATIVE VILLAGE OF TYONEK, ^{et al.})
Plaintiffs,)
vs.)
ALASKA BOARD OF FISHERIES, ^{et al.})
Defendants.)

CIVIL ACTION NO. JAN-30-3073

AGREEMENT OF SETTLEMENT

WHEREAS, a civil action has been brought by the Native village of Tyonek and several residents of the village of Tyonek, in which plaintiffs allege inter alia that the decision of the Alaska Board of Fisheries rejecting proposed regulations for king salmon fishing for subsistence uses in the upper Cook Inlet between May 15 and June 15 by residents of the village of Tyonek was a violation of A.S. 16.05.251(b) and request declaratory and injunctive relief; and

WHEREAS, on May 22, 1980, this Court granted plaintiffs' motion for a preliminary injunction and on May 23, 1980, entered findings of fact and conclusions of law restraining defendants from enforcing regulations which prohibit residents of the village of Tyonek from subsistence fishing for king salmon in the ^{vicinity of} ~~Cook Inlet~~ ^{Tyonek} between May 23, and June 15, 1980, and requiring defendants to adopt emergency order regulations to authorize the residents of the village of Tyonek to harvest king salmon ~~in the~~ ^{in the vicinity of Tyonek} for subsistence uses between May 23, 1980 and June 15, 1980, with a limit of 50 king salmon per household not to exceed a total of 3,000 king salmon

and regulated to minimize the impact on any one stream.

WHEREAS, the parties in order to avoid the uncertainty of further litigation, wish to resolve this matter by means of settlement;

NOW, THEREFORE, the parties, through their attorneys and subject to the approval and order of this Court, hereby agree as follows:

STATEMENT OF FACTS

1. Plaintiff NATIVE VILLAGE OF TYONEK is a nonprofit corporation organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., to provide for the general health, safety, and well-being of the Athabascan Indian residents of the village of Tyonek, a substantial number of whom customarily and traditionally harvested king salmon in the vicinity of Tyonek during May and June for subsistence uses prior to the closure of the Tyonek king salmon subsistence fishery by Alaska Board of Fish and Game in 1964, and would harvest king salmon in the vicinity of Tyonek for subsistence uses in 1980 but for the fact that defendant ALASKA BOARD OF FISHERIES did not adopt proposed regulations for subsistence king salmon fishing in the vicinity of Tyonek by residents of the village of Tyonek between May 15 and June 15.

2. Plaintiffs NELLIE CHICKALUSION, FEDOPA CONSTANTINE, PETER CONSTANTINE, and SAVA STEPHAN are Athabascan Indian residents of the village of Tyonek who customarily and traditionally fished at Tyonek for king salmon for subsistence uses in May and June prior to the closure of the Tyonek king salmon subsistence fishery by the Alaska Board of Fish and Game in 1964, and who (with the exception of plaintiff PETER CONSTANTINE) would harvest king salmon in the vicinity of Tyonek in May and June for

subsistence uses in 1930 if defendant ALASKA BOARD OF FISHERIES had adopted proposed regulations for subsistence king salmon fishing in the vicinity of Tyonek by residents of the village of Tyonek. Health problems would prevent plaintiff PETER CONSTANTINE from harvesting king salmon in the vicinity of Tyonek for subsistence uses in 1930, but residents of the village of Tyonek would share their king salmon subsistence harvest with plaintiff PETER CONSTANTINE as is the customary and traditional practice of the residents of the village of Tyonek with respect to the distribution of subsistence resources to the elders of the village.

3. Defendant ALASKA BOARD OF FISHERIES is established by A.S. 16.05.221 for the purposes of the conservation and development of the fishery resources of the state. The board is required by A.S. 16.05.251(b) to adopt regulations permitting the taking of king salmon in the vicinity of Tyonek for subsistence uses.

4. Defendant RONALD O. SKOOG is the Commissioner of the Alaska Department of Fish and Game and is required by A.S. 16.05.020 to manage the fish resources of the state in the interest of the economy and general well-being of the state. These fish resources include king salmon in the vicinity of Tyonek. Defendant RONALD O. SKOOG is the ex officio secretary of defendant ALASKA BOARD OF FISHERIES and has authority pursuant to A.S. 16.05.060 to open and close seasons and periods on fish.

5. Defendant WILLIAM R. NIX is the Commissioner and principal executive officer of the Alaska Department of Public Safety. Pursuant to A.S. 44.41.020 the Alaska Department of Public Safety is charged with responsibility for the administrative functions relative to the protection of life and property including enforcement of fishing regulations adopted by defendant ALASKA BOARD OF FISHERIES.

6. Tyonek, a community on the west side of Cook Inlet, is an Athabascan Indian village of approximately 350 people, over 95% of whom are Athabascan Indians. Tyonek has been inhabited for generations by the Tanaina group of Athabascans who succeeded the Eskimo population which originally settled the area in pre-historic times. The present residents of the village are the descendants of the Tanaina group. Today, the village still retains its ethnic Athabascan identity, is a rural Alaska Native village and has not abandoned its customary and traditional use of king salmon.

7. For the purposes of this Agreement of Settlement, "fish" means the Susitna River king salmon which enter Cook Inlet waters the beginning of May and begin to pass by the village of Tyonek in mid-May and spawn primarily in streams located in the Susitna River drainage.

8. Susitna River king salmon peak at the village at the end of May or in early June and are usually completely past the village by the end of June.

9. The mid-May to mid-June king salmon fishery is a customary and traditional subsistence use by residents domiciled in the village of Tyonek of the Susitna River king salmon in that this fishery has been in existence for generations, that the harvest of the king salmon at this time is a customary and traditional component of the cultural life of the village, that the art of cutting large king salmon has been handed down through generations, that the early king salmon are the first significant subsistence fresh salmon of the spring, that Susitna River king salmon are oilier than other species of salmon found in Cook Inlet in the vicinity of Tyonek and therefore better suited for drying and preserving for winter use and less susceptible to damage while

drying from insects and seabirds, and that drying takes approximately three weeks and is usually completed by the end of June.

10. The residents of the village of Tyonek harvest king salmon with set nets from the beach in front of their fish camps immediately south of the village.

11. Since 1964, the residents of the village of Tyonek have been prevented from participating in their customary and traditional mid-May to mid-June king salmon subsistence fishery by regulations adopted by defendants and their predecessors. These regulations were initially adopted due to poor escapement of the Susitna River king salmon.

12. Prior to the December 1979 and March 1980 meetings of defendant ALASKA BOARD OF FISHERIES, said defendant, on request of plaintiff NATIVE VILLAGE OF TYONEK, published summaries of regulations proposed by said plaintiffs pursuant to the Administrative Procedure Act to open a subsistence king salmon fishery for the residents of the village of Tyonek, between May 15 and June 15.

13. On March 26, 1980, defendant ALASKA BOARD OF FISHERIES held a public hearing and received testimony on the proposed regulations from the Alaska Department of Fish and Game, residents of the village of Tyonek and other members of the public. Public testimony was also received at the December 19, 1979 meeting of defendant ALASKA BOARD OF FISHERIES.

14. Testimony presented at the public hearings indicated that the residents of the village of Tyonek customarily and traditionally harvested king salmon for subsistence uses between May 15 and June 15 prior to the closure in 1964.

15. Though evidence was presented to defendant ALASKA BOARD OF FISHERIES that restrictions on taking by all user groups of Susitna River king salmon in Cook Inlet were necessary, no

evidence was presented stating that adoption of the proposed subsistence regulations would jeopardize or interfere with the maintenance of Susitna River king salmon on a sustained-yield basis and the defendant ALASKA BOARD OF FISHERIES made no finding at the March meeting to that effect.

16. The defendant ALASKA BOARD OF FISHERIES rejected the plaintiffs' proposals for subsistence fishing in Cook Inlet but adopted proposals which resulted in authorizing the sport harvest of up to 13,100 Susitna River king salmon pursuant to 5 AAC 60 .030(a).

17. A failure of the defendant ALASKA BOARD OF FISHERIES to adopt regulations opening a king salmon season for the residents of the village of Tyonek, between May 15 and June 15 of each year, threaten plaintiffs with irreparable harm in that plaintiffs' customary and traditional use of Susitna River king salmon from May 15 to June 15 will be unnecessarily denied to them. Access to a significant customary and traditional subsistence resource in accordance with A.S. 16.05.251(b) will be lost and the customary and traditional cultural life of the village will be disrupted.

18. No other species of salmon available to the residents of the village of Tyonek can fully replace Susitna River king salmon harvested between May 15 and June 15 as a subsistence resource or substitute for the role of Susitna River king salmon in the customary and traditional cultural life of the village.

CONSENT DECREE

1. Under A.S. 16.05.940(6) and (26), subsistence uses of fish are the customary and traditional uses in Alaska of such fish for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of such fish

evidence was presented stating that adoption of the proposed subsistence regulations would jeopardize or interfere with the maintenance of Susitna River king salmon on a sustained-yield basis and the defendant ALASKA BOARD OF FISHERIES made no finding at the March meeting to that effect.

16. The defendant ALASKA BOARD OF FISHERIES rejected the plaintiffs' proposals for subsistence fishing in Cook Inlet but adopted proposals which resulted in authorizing the sport harvest of up to 13,100 Susitna River king salmon pursuant to 5 AAC 60 .030(a).

17. A failure of the defendant ALASKA BOARD OF FISHERIES to adopt regulations opening a king salmon season for the residents of the village of Tyonek, between May 15 and June 15 of each year, threaten plaintiffs with irreparable harm in that plaintiffs' customary and traditional use of Susitna River king salmon from May 15 to June 15 will be unnecessarily denied to them. Access to a significant customary and traditional subsistence resource in accordance with A.S. 16.05.251(b) will be lost and the customary and traditional cultural life of the village will be disrupted.

18. No other species of salmon available to the residents of the village of Tyonek can fully replace Susitna River king salmon harvested between May 15 and June 15 as a subsistence resource or substitute for the role of Susitna River king salmon in the customary and traditional cultural life of the village.

CONSENT DECREE

1. Under A.S. 16.05.240(a) and (b), subsistence uses which are the customary and traditional uses in Alaska of such fish for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of such fish

taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption.

2. The residents of the village of Tyonek have a customary and traditional subsistence use of Susitna River king salmon between May 15 and June 15 for all of the reasons set forth in paragraph 9 of the Statement of Agreed Facts. The role of the harvest of Susitna River king salmon in the cultural life of Tyonek and the handing down of information about the harvest, preparation, and use of such fish from generation to generation are significant factors in determining whether use of such fish for personal or family consumption is a "customary and traditional" subsistence use of such fish.

3. Defendant ALASKA BOARD OF FISHERIES is required to adopt regulations which authorize the subsistence fishing of Susitna River king salmon by residents of the village of Tyonek in the upper Cook Inlet in the vicinity of the village of Tyonek between May 15 and June 15 each year, unless such defendant determines, in accordance with the Administrative Procedure Act, that any subsistence fishing for Susitna River king salmon by the residents of the village of Tyonek will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis.

4. The parties agree and the Court approves, for the purposes of achieving an agreement to this litigation, that whenever defendant ALASKA BOARD OF FISHERIES makes a finding that any subsistence fishing for Susitna River king salmon by residents of the village of Tyonek will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis, such finding shall be made on the record and shall detail the biological information which forms the basis of such finding. The finding (including the biological information) shall be reduced to writing.

5. Regulations setting bag limits, gear types, and open

fishing periods for the subsistence fishing of Susitna River king salmon by residents of the village of Tyonek shall cause the least adverse impact upon such residents, and shall be consistent, insofar as practicable, with sound fishery conservation practices, such as minimizing the impact on the return of such fish to any one stream.

6. Whenever it is necessary to restrict the taking of Susitna River king salmon to assure the maintenance of such fish on a sustained-yield basis, or to assure the continuation of subsistence uses of such fish, customary and traditional subsistence use by the residents of the village of Tyonek shall be the priority use under A.S. 16.05.251(b). The defendant ALASKA BOARD OF FISHERIES shall not adopt regulations which allow for the commercial (between May 15 and June 15) and sport fishing of Susitna River king salmon, without first adopting regulations which provide for this subsistence priority over such commercial and sport use unless the Board has made a finding, as required by A.S. 16.05.251(b), that any subsistence fishing for Susitna River king salmon by the residents of the village of Tyonek will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis.

7. Defendants ALASKA BOARD OF FISHERIES, RONALD O. SKOOG, and WILLIAM R. NIX and their successors in office are hereby permanently restrained from enforcing regulations which prohibit residents of the village of Tyonek from subsistence fishing for Susitna River king salmon in the upper Cook Inlet in the vicinity of the village of Tyonek between May 15 and June 15 of each year without defendant ALASKA BOARD OF FISHERIES first finding, in accordance with the Administrative Procedure Act, that such subsistence fishing will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis.

8. Counts I, II and IV of plaintiffs' complaint are dismissed with prejudice.

9. This Court shall retain jurisdiction over this civil action until July 1, 1931.

DATED: _____

DATED: _____

Larri Spengler

Norman A. Conen

DATED: _____

DATED: _____

John Gissberg

Donald C. Mitchell

Attorneys for Defendants

Attorneys for Plaintiffs

ORDER

The above Agreement of Settlement and Consent Decree are approved.

DATED: _____

Victor Carlson
Superior Court Judge

COOK INLET MANAGEMENT AREA SUBSISTENCE
FISHERY REPORT 1972

A. General Information

1. Description of Area: The Cook Inlet area includes all waters of Alaska in Cook Inlet and Resurrection Bay north of Cape Douglas and west of Cape Fairfield, including the Barren Islands. (Figure 1)
2. Species Utilized: All five species of pacific salmon are utilized in the Cook Inlet area. Since 1952 cohos have made up 65 percent of the subsistence catch, reds 20 percent, pinks 8%, chums 5%, and kins 0.2 percent. (Table 1) King crab, tanner crab, dungeness crab, shrimp, smelt, herring, bottom fish, and clams are also utilized for subsistence purposes. However, few records are available on degree of utilization. In actuality it is hard to define what constitutes "sport fishing" and what constitutes "subsistence fishing" for the above listed species.
3. Economic Conditions: No figures are available on the average income of those applying for subsistence permits in the Cook Inlet area. It is the personal opinion of the area management biologist that less than five

* See pages # 3, 6, 7, 9, 10, 17.

FIGURE I

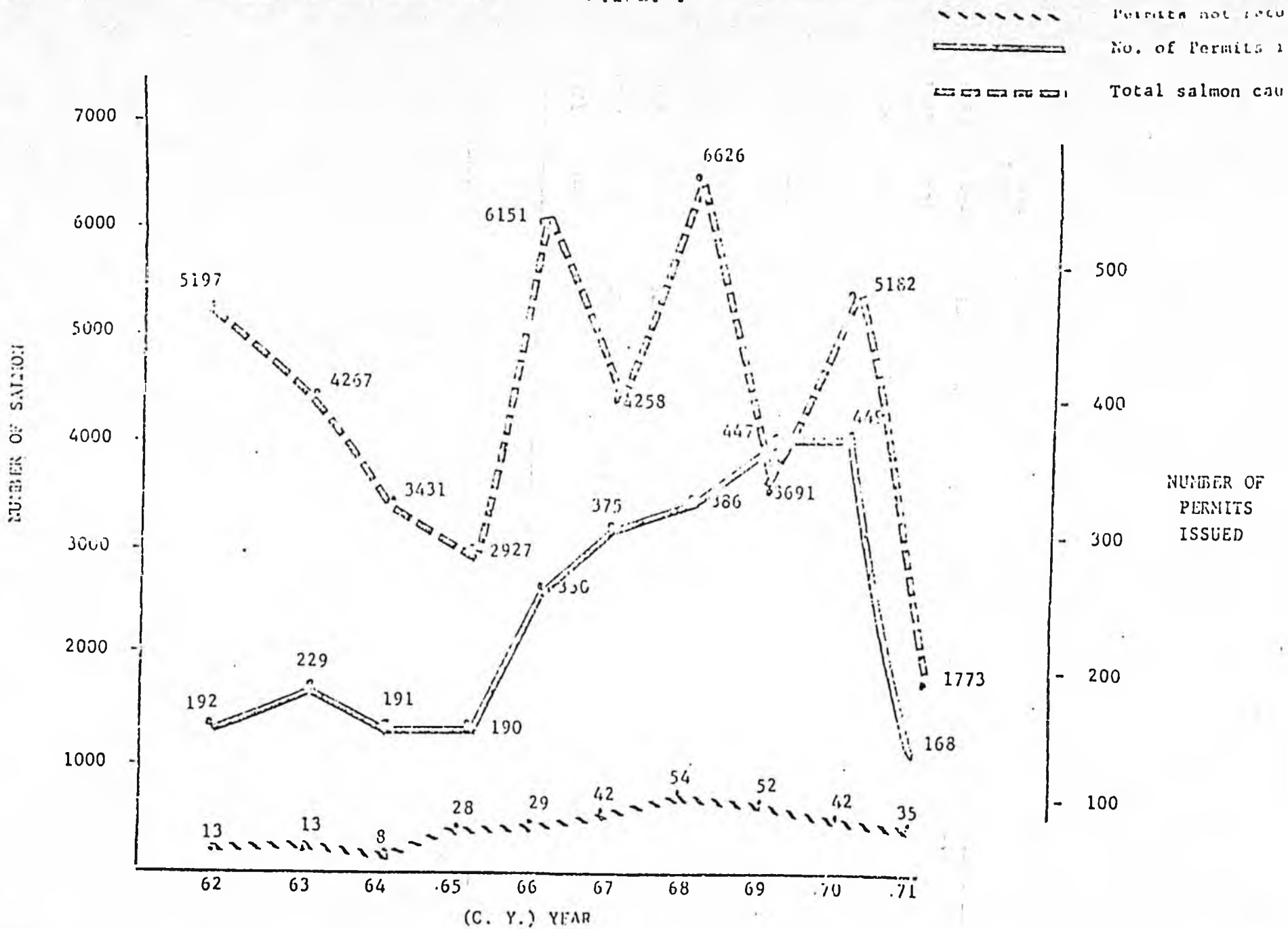


Figure 1. Cook Inlet area location map.

TABLE 1

COOK INLET SUBSISTENCE CATCH OF SALMON, 1962-1971

YEAR	NO. PERMITS	DID NOT REPLY	KINGS	REDS	COHO	CHUM	PINK	TOTAL
1962	192	13	45	770	3574	391	417	5197
1963	229	13	29	859	2510	424	447	4269
1964	191	8	--	393	2463	207	368	3431
1965	190	28	--	484	2109	285	49	2927
1966	330	29	8	1656	3523	356	598	6151
1967	375	42	4	863	3105	213	73	4258
1968	386	54	10	1009	4201	236	1170	6626
1969	447	52	--	1518	2011	94	68	3691
1970	449	42	3	1218	3371	152	438	5182
1971	168	35	2	23	1697	7	44	1773
TOTALS	2,957	316	101	8,793	28,574	2,365	3,672	43,505
PERCENT	100.0	10.7	0.2	20.2	65.7	5.4	8.4	100.0



or ten percent of the subsistence fishing in the area is carried out by persons in such financial positions that they actually have a legitimate need of the resource harvested in order to subsist. The type of subsistence fishing found in the Cook Inlet area could more appropriately be classified as recreational or supplemental fishing. Many people regard it as a form of sport fishing in which they not only derive recreational benefits but at the same time supplement their food stocks. Some people in the Cook Inlet area, natives and whites alike, because of either need or personal preference, are trying to maintain a "live-off-the-land" life style. To these few, "subsistence" fishing may fall into a need category and may play an important part in their means of existing.

B. History of Fishery

1. Methods of Fishing: A variety of subsistence fishing methods are used in the Cook Inlet area, as it is a multi-species utilization area.
 - a. Salmon: Set nets, seines and drift nets are currently used with set nets accounting for about 95 percent of the effort. Since statehood, all subsistence salmon fishing has been in conformance

with commercial regulations and, therefore, areas open and methods used have been identical to those in commercial fishing. Prior to statehood, much of the subsistence fishing took place in salmon spawning streams with gear ranging from hook and line to gill nets. Snagging was one of the more popular methods.

- b. Shellfish: King crab, tanner crab, dungeness crab and shrimp are taken with various forms of pots. Most fishing takes place at or near the small boat harbors of Homer and Seward. Clams for subsistence are taken by use of a clam shovel. The methods currently used for taking shellfish species for subsistence purposes do not differ appreciably from those used prior to statehood.
- c. Smelt: Both bill nets and dip nets have been used in the Cook Inlet area for taking smelt, however, in 1972 dip nets became illegal gear for taking smelt in the waters of the Kenai Peninsula. A limited amount of hook and line snagging for smelt also exists.

d. Freshwater species: The gear most commonly utilized for freshwater species is small mesh gill nets and seines. In the past, fish-wheels and dip nets have also been used in freshwater.

2. Catches and Fishing Effort

a. Salmon: Salmon fishing is the only subsistence fishing for which reliable catch and effort data exists and this data covers from 1962 to 1971 only. During these years, a total of 2,957 subsistence permits were issued and all but 316 were returned.

The total reported salmon catch from 1962 to 1971

* is as follows: 101 kings, 8,793 reds, 28,574 cohos, 2,365 chums, 3,672 pinks, for a total of 43,505 salmon.

The number of permits issued and the total catch by species appears in Table 1 and is depicted in graphic form in Figure 2.

b. Smelt: Catch data on smelt is only available for the past two seasons. In 1971, there were 1,387 smelt reported taken and in 1972, the reported catch was 8,542. Most effort has taken place along the western shoreline of the Kenai Peninsula and around Turnagin Arm.

The number of permits issued by year since 1969 appear below:

<u>Year</u>	<u>Salt Water</u>	<u>Kenai River</u>	<u>Total</u>
1969	150	194	344
1970	157	393	550
1971	92	*	92
1972	160	*	160

*Smelt permits not required for Kenai River.

- c. Shellfish: No permits are required for taking shellfish and, therefore, no records are available on effort or catch. Most effort occurs in Kachemak and Resurrection Bays.
- d. Freshwater species: Relatively few permits have been requested for taking freshwater species and most of these have been for Lake Louise and Tyone Lakes. Whitefish comprise about 90 percent of the catch.

3. Management Regulations: The following is a history of subsistence regulations in Cook Inlet from 1943 to 1972.

1942 through 1950

No mention made in Cook Inlet section of commercial fisheries regulations.

1951

First mention in commercial regulations. Required notification of intention to take salmon for personal use, with statement of type of gear to be used, area, time, number of fish to be taken and intended disposition of fish take.

Fish, Ship, and Campbell and Cottonwood Creeks closed to subsistence fishing.

1952

No intent to take notification required. More streams closed, including all tributaries to Knik Arm, Willow Creek (tributary to Susitna), Campbell Creek, and all streams and lakes of Kenai Peninsula that are tributary to Cook Inlet: Provided this
* shall not apply to fishing with rod, hook and line
for personal use.

(Apparently this was the first time many Cook Inlet streams were closed to use of nets for personal use of fish.)

1953

Above regulations same, plus added stipulation that no personal use fishing allowed within 300 feet of weirs and ladders. Snagging was prohibited for the first time.

Also, personal use fishing prohibited within 500 yards of all other streams or lakes except with hand rod, hook and line. Bay limit two (2) per day per person.

And subject to laws regulating commercial fishing 48 hours before and continuing 48 hours after each fishing period. Except for fall season and/or place greater than 25 miles from waters open to commercial fishing. . .

* And in Knik Arm where 15 fathom set nets, 100 yards apart, shall be operated prior to August 6, only during hours open to commercial fishing in the Northern district.

1954

Same as 1953 with additional sections that. . . Commercial gear may be used for personal fishing during any fall season. . .

Fishing allowed in Turnagain Arm east of a line between Hope and Indian, and. . .

Fishing allowed more than 5 miles upstream from tidewater on all streams and lakes of Cook Inlet drainage South and West of the Susitna river or South of town of Homer.

1955

General regulations and .

Cook Inlet regulations same as 1954.

1956

Same as 1955 with added restrictions. . .

Closed Kenai & Russian Rivers within 300 yards of their confluence (this to 'Sportsmen').

Rod and line. . . limited take to two (2) salmon over 16 inches, per person per day.

1957

General regulations same as 1956.

Cook inlet about same except for limit on take by rod and line fishermen ('. .not to exceed 10 inches'. . per person per day by hook and line, and not more than two (2) may exceed 16 inches').

1958

General same as 1957 plus. .

A series of regulations devised to try to curb snagging. . including limiting size hooks and making it illegal to use weights with multiple hooks.

Cook Inlet same as 1957.

1959

General same as 1958.

Cook Inlet--added restrictions that . . . personal use fishing be allowed in the main stem of the Susitna River above the town of Alexander. . . with nets less than 30 feet and more than 100 yards from any other set net and from tributary streams-- and identified with name and address of owner.

And personal use fishing must be done in conformance with commercial regulations (This closed Knik Arm and Turnagain Arm).

Many Kenai Peninsula streams closed above ~~markers~~ placed from 3 to 5 miles up from mouth (Anchor, Deep Creek, Stariski and many others).

Added closure of Cooper Creek, Little Willow Creek and Montana Creek. . . And . . . allowed 30 yards of set nets for use in Knik Arm after August 9, also Fish Creek closed July 21 (snaggers harrassing red run).

1960

General same as 1959.

Cook Inlet--personal use fishing to be allowed on Northwest shore Knik Arm. . . with nets 90 feet or less and more than 500 yards from terminus of any salmon stream. . . and conform to commercial open periods in Northern district. . . and identified with name and address of owner.

1961

General same as 1960.

Cook Inlet added open fishing season on clams, crabs, and bottomfish. . all in conformance with commercial regulations.

Salmon for subsistence was broken into districts. . . apparently this did away with fishing in main stem of Susitna River above Alexander (see subsistence regulations for Northern district 1961).

1962

General regulations added restrictions--personal use fishing must be done by permit only, issued by commissioner. . . limited subsistence catch to individual regional regulations.

Cook Inlet---same as 1961.

1963

General regulations--new regulation--fish other than salmon may be taken at any time in any area of state by any method except by use of explosives or chemicals, except as hereinafter provided or as provided in the Sport Fishing Regulations of the Department.

Cook Inlet--same as 1962.

1964

General same as 1963.

Cook Inlet--new regulation--must have permit for salmon and all catches by species, location and date of catch must be reported. Freshwater species except for trout, grayling, and char may be taken for subsistence purposes via permit and these permits be issued by commissioner or his representative when deemed warranted.

Also not more than 50 salmon be taken per permit and subsistence fishing is prohibited in any area closed to commercial fishing except for parts of Knik Arm.

And all districts with exception of Outer district, must have name and address of owner on fishing gear. The Outer district regulations were amended to conform with commercial regulations.

Another Cook Inlet regulation was amended-- sports fishing licenses required for clams and/or bottom fish and crab pot floats will contain the name of owner. No sex or size limitations on crab.

1965 through 1969

Outside of minor amendments and a few changes in regulations in the different fishing districts, personal use fishing regulations are about the same for that period from 1965 to 1969.

1969

Cook Inlet--new regulations--

Restrictions:

(a) Subsistence fishermen taking herring and smelt in the Kenai River must be physically present at all times said net is being fished.

(b) A sports fishing license is required when bottom fish are taken with fishing rod and line.

(c) A sports fishing license is required for the digging of razor clams.

Size Limits: There are no size or sex limitations on crab.

1970

Cook Inlet--new regulations--

Salmon - The subsistence fishery on the Northwest of Knik Arm was deleted.

Smelt - In the Kenai River the length of gill nets may not exceed 20 feet in length.

Smelt may be taken in that portion of the Kenai River from its mouth upstream to the Soldotna bridge from April 1 through May 31.

1972

Cook Inlet--new regulations--Smelt - Dip nets may not be used for taking smelt in the waters of the Kenai Peninsula.

6. Problem Areas

1. Northwest Shore Knik Arm: This area is no longer a problem as it was closed to subsistence fishing in 1971. The number of permits issued for this area had increased during the mid-60's to a level of 290 during the last two years of the fishery. (1969 and 1970) The reported catch during this period averaged 3,300 salmon (Table 2). The main justification for closing this area was the declining red salmon escapements into Fish Creek which reached a low of 6,233 in 1969.
2. Mud Bay: The problem here appears to be over-utilization of available fishing space rather than over-utilization of the resource. Commercial fishing, sports fishing, and subsistence fishing all take place in this rather confined area of Kachemak Bay along the Northeast side of the Homer Spit. Peak utilization occurs in mid to late August when approximately 10 seine fishermen, 50 subsistence fishermen and several hundred sports fishermen fish

TABLE 2

COOK INLET SUBSISTENCE SALMON FISHERY
Permits Issued and Total Salmon Catch By District, 1967 - 1972

YEAR	NORTHERN ^{1/}		NORTH and SOUTH CENTRAL		SOUTHERN		EASTERN	
	Permits	Total Catch	Permits	Total Catch	Permits	Total Catch	Permits	Total Catch
1967	218	2,947	13	119	51	942	91	262
1968	276	5,395	30	303	79	953	--	--
1969	290	1,563	40	400	85	1,067	32	929
1970	290	3,448	45	206	78	1,386	36	181
1971	9	10	28	138	112	1,618	19	7
1972	9	<u>2/</u>	5	<u>2/</u>	151	<u>2/</u>	5	<u>2/</u>

^{1/} Northern district represents Northwest shore at Knik Arm

^{2/} Catch data not available for 1972.

this area. The main species being sought are silver salmon and the subsistence catch has averaged about 1,000 since 1967. The commercial catch in the Southern district has averaged 2,800 silvers since 1967 and an estimated 50 percent of these have been taken from Mud Bay proper. Sports harvest figures are not available, however, the average catch since 1967 would probably not exceed 500 fish. Commercial and subsistence harvest figures indicate no decline in abundance of silver stocks in Mud Bay. A tagging study in 1970 indicated the silver stocks of Mud Bay were mostly local stocks bound for upper Kachemak Bay and escapement indices in this area have been consistent in recent years.

Although there is no biological justification for closing Mud Bay, the time has perhaps come for closing a portion of Mud Bay to commercial and subsistence fishing because of user-group conflicts.

For the last several years proposals have been submitted to the Board of Fish and Game asking for either complete or partial closures of Mud Bay. The commercial fish staff has always opposed these closures on the basis that no biological justification exists.

Because of the increasing sports fish utilization there will be a public proposal submitted to the Board of Fish and Game at the November meeting by a Homer commercial fisherman which will ask for a partial closure of the Mud Bay area. The commercial staff intends to support this proposal.

3. Shellfish: Another potential problem is the crab and shrimp pot fisheries which have developed tremendously in the last few years. A considerable volume of gear is being fished in the immediate vicinity of the Homer small boat harbor and again, rather than over-utilization of the resource, the main problem is over-utilization of area. Gear is so concentrated in this one area that navigation has been hindered. A regulation may be necessary in the near future to close a section of the bay in the immediate vicinity of the small boat harbor entrance.

D. Recommendations:

It is the personal opinion of the area biologist that a need exists for subsistence fishing in Cook Inlet and that it should be continued perhaps with some modifications.

The 5 or 10 percent of the people who actually have a legitimate need to subsistence fish should not be denied this right just because the fishery has become recreationally oriented.

Perhaps a fee could be placed on a subsistence permit or license. This might tend to eliminate some of those who are participating more for recreation than need and yet keep the regulation constitutional. For those who could show need, through an application for a waiver on the license fee, a special free permit would be granted. A maximum income level would be established similar to that used in the Food Stamp Program and those falling below the established level would be eligible for the free permit. These measures would probably reduce subsistence fishing by 75 percent in the Cook Inlet area and subsistence fishing would again conform with the true meaning of subsistence.

APPENDIX

1. A copy of the Cook Inlet Subsistence Fishery Instructions of 1972.

COOK INLET SUBSISTENCE SALMON FISHERY, 1972

Salmon may be taken for subsistence purposes under authority of a permit which may be obtained from the local representative of the department.

Each subsistence fisherman taking salmon shall keep accurate records of the catch involved, by species, location caught, date of catch, and other such information as the department may require

Salmon may be taken for subsistence purposes only by residents.

Identification of fishing gear shall consist of the name and address of the owner and the number of his subsistence permit.

Not more than 50 salmon may be taken under the authority of a subsistence permit.

Only one salmon subsistence permit will be issued to each person during a year.

A set gill net shall not be longer than 35 fathoms in length and 45 meshes in depth.

The operation of each set gill net shall be performed or assisted by the fisherman in whose name it is registered.

No part of a set gill net may be placed or operated within 600 feet of any part of another set gill net.

FISHING SEASONS:

NORTHERN DISTRICT: from 6:00 a.m. July 21 until 6:00 a.m. September 20 during open commercial fishing periods in conformance with all commercial regulations.

NORTH & SOUTH CENTRAL DISTRICTS: from 6:00 a.m. August 18 during open commercial fishing periods in conformance with all commercial regulations.

SOUTHERN DISTRICT: from 6:00 a.m. August 18 during open commercial fishing periods in conformance with all commercial regulations EXCEPT that set gill nets may be used in any beach area open to commercial salmon fishing.

OUTER DISTRICT: in conformance with commercial regulations.

EASTERN DISTRICT: from June 1 through June 30 during open commercial fishing periods in conformance with all commercial regulations EXCEPT that set gill nets may be used in any beach area open to commercial salmon fishing.



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

THE SUPREME COURT OF THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN MCGAHAN,
SR., ANDY JOHNSON, MARGIE KIVI, J. W.
WARE, DICK FRANCIS, DON GROLESKE, KEN
JORDON and SHIRLEY DEVAULT,

File Nos. 6824/
7181

Appellants,

v.

O P I N I O N

ALASKA DEPARTMENT OF FISH AND GAME,
and ALASKA BOARD OF FISHERIES,

Appellees,

and

THE ALASKA FEDERATION OF NATIVES,

Intervenor.

ALASKA DEPARTMENT OF FISH AND GAME,
RONALD SKOOG, ALASKA BOARD OF FISHERIES,

File No. 7410

Appellants,

v.

LOUIS GJOSUND, DORA MULCH, and KACHEMAK
BAY SUBSISTENCY GROUP, INC.,

[No. 2911 - February 22, 19

Cross-Appellees.

Re: Pages 4, 8, 12, 16, 19, 20, 22, 23, 24, 25, 27

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

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

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

MOORE, Justice.

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

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

Ass'n v. State, 628 P.2d 397 (Alaska 1981). Although the policy did not specifically refer to subsistence uses of salmon in Cook Inlet, it had a substantial impact on subsistence fishing. Commercial fishermen, accustomed to taking subsistence salmon from their commercial catch, instead obtained subsistence salmon fishing permits in order to fish for their personal and family use after the commercial season was over.

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

2. Section 4, ch. 131 SLA 1960:

"subsistence fishing": the taking, fishing for or possession of fish, shellfish, or other fishery resources for personal use and not for sale or barter, with gill net, seine, fish wheel, long line, or other means as defined by the Board. (*Hand rod hook + line*) ???

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

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

(Footnote Continued)

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

(Footnote Continued)

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

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

(2) local residency; and

(3) availability of alternative resources.

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

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

(Footnote Continued.)

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

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

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

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

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

(Footnote Continued)

and procedures associated with the utilization of fish in the Cock Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

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

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

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

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

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

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

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

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

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

The House Special Committee on Subsistence drafted a letter of intent for House Bill 960¹¹ that supports our interpretation. With respect to AS 16.05.251(b) (which was § 6 of House Bill 960),¹² the letter of intent made clear the priority to be given subsistence uses in general over sport and commercial uses and explained the two-tier system among subsistence users.

Sections six and seven: These two sections, which are virtually identical for the Boards of Fisheries and the Board of Game, are intended to statutorily set out the priority given to subsistence use of fish and game resources. . . . Further, these sections set forth a priority of users if restrictions are needed because of the unavailability of resources. The priority list is an attempt to insure that those with the most dependence upon the fish and game resources are the last to be restricted.

If there is a need to restrict the taking of fish or game in order to avoid damaging the fish stocks or game populations, or in order to assure that subsistence users may continue to take fish or game, it is the intent of the Committee that sports or commercial use be restricted before

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

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

The board based its restrictive regulation, 5 AAC 01.597, on the words "customary and traditional." The legislature did not define these words in the 1978 subsistence law. In such a case, reference to legislative history may provide an insight into the legislature's intent and a statute's meaning. North Slope Borough v. Sohio Petroleum Corp., 583 P.2d 534, 540 (Alaska 1978). In the House floor debate on House Bill 960, Representative Cotton introduced an amendment to delete the words "customary and traditional" from the statute. The floor manager of the bill, Representative Anderson, opposed the amendment in the following speech:

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

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

(Emphasis added).

* In the House debate, Anderson attempted to assure Parr that residents of urban Fairbanks could be considered priority subsistence users. Contrary to the board's interpretation of the subsistence statutes, there is no indication that legislators understood the 1973 subsistence law to restrict subsistence use to either a rural or a community context. In fact, the House debate indicates that the 1978 subsistence law was necessary to protect subsistence uses as a priority use of Alaska's fish and game resources. This intent is clearly expressed by the preamble to the subsistence law:

[I]t is in the public interest to clearly establish subsistence use as a priority use or 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

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

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

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

(Footnote Continued)

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

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

15. The board stipulated in 1982 that it violated

(Footnote Continued)

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

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

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

16. See 5 AAC 01.397 set out in n. 8 above.

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

(Footnote Continued)

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With the recent Supreme Court decision, the State now has the direction and opportunity to assure to All Alaskans the equal consideration to take fish and game for their own personal consumptive use. This decision supports the Constitution's provision that "Wherever occurring in their natural state fish, wildlife and waters are reserved to the people for common use." The court stressed that common 'use' and not priority 'users' was the main intent and should be the effect of the subsistence regulations. They found that all consumptive users, and not just rural residents, are eligible priority subsistence users.

Government and its laws should apply even handedly to All Alaskans and make sure that whatever criteria is used is not unjustly discriminatory in intent or effect. The Constitution does not on a whole and should not have severe restrictive provisions. This same need should be observed by any legislation and should be used to make sure that its clear intent is to protect and insure the equal and just consideration of All Alaskans.

But the same politics that supported the illegal discriminatory subsistence regulations are at work to speedily fix their court failure. Their main weapon, now as in the past, is their threats aimed at the majority of Alaskans. One such threat is that the over 200,000 sportfishermen will be severely impacted by the Supreme Court decision. The court, in fact, said that all personal consumptive users were to be given equal consideration. As most so-called sport fishermen eat the fish that they catch, any priority subsistence use must include them. And those 'pure sport fishermen' who catch and release are not harvesters of the resource, therefore have a negligible impact. With an annual harvest of well over 100,000,000 salmon, All Alaskans should be entitled to the equal opportunity to take fish for their own dinner table.

Another political threat used is that the federal government will deny our State the right to manage our fish and game unless the subsistence priority is based on rural residency. When the Feds mandate that the resource must be managed as they say, the State has in fact already lost the right of management authority. This restriction resulted from State politics that requested and supports such residency discrimination. When Ron Sommerville, Alaska's representative during early d-2 / ANILCA, opposed this federal mandated discrimination he was removed from his Washington D.C. post. Governor Hammond admitted in a public meeting of the Boards of Fish and Game that Sommerville was removed because of Native pressure. His replacement, John Katz, has compromised the Alaskan public's constitutional rights on this and many other issues. For the State not to politically and judicially oppose this discriminatory action, which specifically denies equality to all residents of Anchorage, Fairbanks, Juneau and Ketchikan, shows a planned sell out of our rights. This plan includes the continued lobbying action of Larry Spengler, Attorney General office, supporting a priority subsistence use of Alaska's fish and game to be as discriminatory and restrictive as has been politically motivated. Alaska would be better served if our Attorney General would be motivated by a responsibility to assure that all residents are not discriminatorily restricted in their rights.

The history of Governor Sheffield's stern actions has been a well known threat to any state employee who would question these unconstitutional subsistence regulations. He fired Fish and Game Commissioner Ron Skoog and Game Division Chief Ron Sommerville because of their private personal stands against these regulations. And he then requested the resignations of all Board of Fish and Game members when they began questioning the blatant directions ordered by Larry Spengler. It is time that All Alaskans are again equal under the law, no matter where they reside, and that such equality is promoted by our State and is not necessitated by continued court challenges by its residents.

Dale Bondurant

Dale Bondurant
SR 1 Box 2516
Chugiak, Alaska 99567

MAR 25 1985

Letter to the Editor:

I'm delighted to see at least one lawmaker, Senate President Don Bennett, publicly say the Governor's urgent measure to circumvent the Supreme Court's recent ruling on subsistence salmon fishing isn't likely to make it through the legislature this year. Bravo! That statement triggered off all sorts of comical, dire threats from the Board and Department of Fish and Game, which are both strongly pro-commercial-fishing.

Commissioner Collinworth is now desperately trying to incite the sports fishermen with false alarms of closures to gain their support to pressure the legislature into quick action on the Governor's proposal to restore the status-quo. But they won't get away with it for long, because the Kenai Peninsula plaintiffs in the lawsuit are equally determined to get equal fishing rights guaranteed by our State Constitution.

Article VIII Section 3 states "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use", and Section 15 says "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State". An example of how prejudiced our local court system has been in this matter was shown when judge Hornaday in 1981 wouldn't even allow me to read this Section 3 to a jury, in my defense of salmon fishing with a gillnet in an unauthorized area. This was on the nearby commercial setnetter's "sacred" Kalifonsky Beach during an open day for personal-use-gillnetting and closed to commercial fishing. The only area on the Kenai Peninsula designated by state officials was around remote Boulder Point near Nikiski. Then to top it off, the dishonorable judge even prohibited me from telling the jury my testimony was being restricted, which really clinched my conviction. Great!

This Supreme Court ruling simply means to me that all Alaska residents (that's you and me) now have first priority to catch all the salmon we need to eat as quickly and easily as possible. This decision will certainly not necessarily disrupt the commercial or sports fishery, as the Governor and state officials would like you to believe, but could only force the commercial fishermen in Cook Inlet to share a small part of their annual take with the rest of us, who voted them their limited-entry bonanza in 1972.

According to a recent five year average count of the total salmon harvest from Cook Inlet by local Fish and Game officials, 94.3 percent was commercial, 5.4 percent was sports, and 0.3 percent was subsistence/personal use. So even if the latter increased 10 times, it would only decrease the commercial catch by 3 percent. So what's all the fuss about that?

Charlie Parker

And if our esteemed ex-governor Hammond and all his white and native neighbors at Lake Clark are allowed to catch unlimited numbers of salmon in front of their homes with gillnets in the lake, then we, too, should have the same privilege in comparable Tustumena Lake; where even hook and line fishing for red salmon is prohibited, and where an over-escapement during ^{each of} the past several years has been from 30 to 100,000 salmon. Even the local fishery biologists say they couldn't care less what happens to the remaining fish after their maximum escapement quota of 150,000 is safely in the lake.

Well, one logical, easy solution for Cook Inlet, where nearly all the dissension is, is simply to issue family punch-card allocations to every resident Alaskan who wants one, to fish with gillnets on all commercial beaches every Saturday and Sunday thru-out the fishing season, when commercial fishing is usually closed. That would spread the fishing pressure out in time and space, enable Fish and Game agents to watch the operation, and spare ^{most} ~~some~~ of the fall silvers for the sports fishermen; and should work to everyone's satisfaction if the setnetters could only get over the false notion that they own the beaches during the commercial fishing season. Cheers.

Rising to the bait

A certain amount of natural dumbfoundedness is encountered in the course of following human events. This may be the case more in Alaska than elsewhere. The current brouhaha over the Supreme Court's subsistence ruling is a case in point.

If the court had merely acted and then the state had responded with plans to follow its ruling, the rest of us would mostly sit and watch to see how the next fishing season goes. If it didn't work out — Do such questions here ever work out? — then attempts at legislative remedy would be expected.

Instead, Alaskans today find their governor caught up in a political battle called at his own signal over whether the Supreme Court's ruling should be circumvented with new legislation. Such action may not be without precedent, but it is certainly unusual.

In the first place, the Supreme Court ruling in the Madison case was supposedly won by the fishermen, whose attorney, Chuck Robinson of Soldotna, is now mystified at the actions taken by Gov. Bill Sheffield and his Department of Law.

The governor, in effect, has asked the Legislature to adopt new legislation to restore fish and game matters — ala subsistence, sports and commercial categories — to the way things were before the Supreme Court said that the way things were was wrong.

One of the governor's appointees, Bix Bonney of the Board of Fish, has been prominent in crying that the sky will fall on the fishermen if the governor's will is not enacted. And the governor's attorneys general are helping with this hue and cry by exclaiming, in effect, that they don't understand what Robinson is talking about.

These matters get confusing anyway, and never more so than when the question of subsistence is involved. It is not pretended that the ultimate truth between these quarreling points of view is to be found in this space. It is suggested, however, that the swiftness of the governor's action in introducing legislation hints that he anticipated the court and that he decided beforehand to make a power play.

What is not clear is why the power play is on. If Robinson and his fishing interests are right — and many have long believed they are — then Alaskans fishing for subsistence get first call on the resource only when there's a shortage of fish (or game).

As it is understood here, the Supreme Court said, in part, that subsistence is open to all Alaskans. But that does not mean that all subsist nor that all who do must be allowed to fill their freezers before anyone else can hook or land a salmon.

The appropriate state response would be to manage fish and game resources along the lines understood to be required and indeed suggested by Robinson and those who won the Supreme Court's nod. If someone then finds that approach unreasonable, they can take the matter back to the court and see what happens.

What is strange is that the chief of the state's government is instead responding to the court's action with legislation that anticipates the sky is falling before knowing if it will.

So long as there are plenty of fish to go around, the governor's bill is meaningless. And, if a shortage comes, the Supreme Court says subsistence users get first preference.

Our saving grace is that the escape from this maze, at least for now, is expected to come from a Legislature that has other things on its mind and will let the governor bolt without spawning.

Very Good.

Richard Morgan/Publisher
John Marrs Editor
Wayne Dunworth General manager

Opinion

MAR 25 1985

4231 Tahoe Drive
Anchorage, Ak. 99515
March 21, 1985

Senator Arliss Sturgulewski
Alaska State Senate
Pouch V
Juneau, Ak. 99811

Dear Senator Sturgulewski:

I am writing to express my opposition to the governor's proposed amendments to the state's subsistence law.

In my opinion, there should be preferences for local use of fish and game resources in some parts of Alaska. Those preferences can be provided for by regulations of the Fish and Game Boards. Such preferences have been in place for years, and are mostly found in portions of fish and game regulations dealing with methods and means, controlled use and management areas, gear and boat size, where permits are issued (e.g. local remote communities), etc. I do not believe that merely living in rural Alaska (wherever that is) entitles anyone to an automatic priority to publicly owned resources found on mostly publicly owned land. If my understanding of the Alaska constitution is correct, the governor's amendment is illegal because of the equal protection clause.

Another option to letting the Boards give preference through regulation is to base subsistence on need - probably income level. This may be another form of welfare, but it does make some sense.

Fish and game and their management have become pawns of native special interest groups and their lawyers, IRA sovereignty moves, and other agendas for politicians and special interests. "Deep sixing" the governor's amendments will be the first step in reversing this situation, and would be a clear message to Congress that Title 8 of ANILCA, the Marine Mammal Protection Act and the Endangered Species Act need change.

The legislature should be clear in their intent for who gets subsistence preferences where, and leave little for AG interpretation. The AG is responsible for the Madison Decision because he advised the Boards that the former law really meant rural; the Supreme Court unanimously disagreed. Another AG opinion which the Game Board routinely works from is that restrictions to protect the resource do not mean seasons, bag limits, methods and means, closed areas, etc. Only when a restricted number of permits are issued is there a restriction!

The present subsistence law as made by the Supreme Court can be administered by the Boards of Fish and Game in the Tier I level of user demand and resource status. Tier II cannot be rationally administered and will continually be based on AG opinions, law suits and more court decisions. This will be true with or without a rural priority.

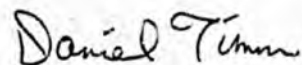
It seems to me that if the Board of Fisheries made a regulation that hook and line was a traditional subsistence method, sport fishermen would be mostly placated. Not knowing exactly how commercial fishermen would be affected (rhetoric abounds from AGs and political appointees, but nothing from biologists), I am unable to make a rational recommendation.

Emotionalism about the "hordes from urban Alaska" decimating our fish and game resources if the law stands is just that, hot air. There is a matter of the subsistence law and a rural preference affecting the ability of managers to efficiently manage and protect resources, and I can provide my thoughts on that if you wish.

The federal government "takeover" is, I believe, mostly rhetoric. The Park Service has already taken over and the annual report to Congress on state compliance with Title 8 should dictate - unless native groups sue Interior - how the FWS "takes over". The second paragraph of this letter explains how read subsistence needs and preferences can and have been easily provided by respective Board action. I believe that the FWS will do everything possible to keep from "taking over".

This issue is one of the most complicated of any in Alaska and I thank you for considering my point of view.

Sincerely,



Daniel Timm

P.S. I hope you decide to run for governor.

TO: ALL SENATORS
ALL REPRESENTATIVES

FROM: BOB BURKE, BOX 1032, PETERSBURG 99833, 772-3641

RE: SUBSISTENCE

THE SUBSISTENCE ISSUE IS VERY BAD FOR THE PEOPLE OF ALASKA AND FOR FISH AND WILDLIFE. THIS ISSUE WILL PUT PEOPLE AGAINST EACH OTHER AND MAKE FISH AND WILDLIFE MANAGEMENT DIFFICULT OR IMPOSSIBLE. PUT PRESSURE ON THE FEDS TO REPEAL THE SUBSISTENCE PORTION OF INILCA. DO NOT PASS ANY STATE SUBSISTENCE LAWS EITHER.

* DELIVER TO: JPOM

* ORIGINAL

* SENT: 03/21/85 TIME: 09:59

* FROM: LIOA

* SUBJECT: POM

* PRINT DATE: 03/21/85 TIME: 09:59

TO: ALL LEGISLATORS

FROM: SAM E. MCDOWELL
CONCERNED ALASKAN
336 E 23RD AVE
ANCHORAGE, AK. 99503
PHONE 272-6605 HM

I'M OF THE OPINION, UNITED FISHERMEN OF ALASKA RECENT ENDORSEMENT OF GOVERNOR SHEFFIELD'S PROPOSED ANTI-URBAN, PRO RURAL SUBSISTENCE LAW MAY PROVE TO BE A VERY SERIOUS MISTAKE AND NOT IN THE BEST INTERESTS OF ALASKA'S VALUABLE COMMERCIAL FISHERIES. IS IT TRUE UNITED FISHERMAN OF ALASKA SUPPORTS DISCRIMINATION?

.....
TO: ALL LEGISLATORS

FROM: SAM E. MC DONALD
A CONCERNED ALASKAN
336 EAST 23 AVE.
ANCHORAGE, AK. 99503 PHONE: 272-6605

RE: MEMBER OF BOARD OF FISHERIES

PLEASE BE ADVISED, I REQUESTED MR. BIX BONNEY TO BE IMMEDIATELY TERMINATED FROM THE BOARD OF FISHERIES. THE BOARDS RECENT DECISIONS TRYING TO MAKE END RUNS AROUND THE MADISON DECISION IS A DISGRACE. IMPACTS OF MADISON DECISION CAN BE WORKED OUT, HOWEVER NOT BY GOVERNOR SHEFFIELDS PROPOSE DISCRIMINATORY PRESSURE POLITICS. HAVE A GOOD DAY.

TO: ALL LEGISLATORS

FROM: SAM E. MCDOWELL
336 E 23RD AVE.
ANCHORAGE, AK. 99503
PHONE 248-1923 HM

PLEASE BE ADVISED PLANS CALL FOR ME TO ARRIVE IN
JUNEAU MARCH 27TH TO SPEAK OUT AGAINST GOVERNOR
SHEFFIELD'S PROPOSED ANTI-URBAN, PRO-BUSH SUBSISTENCE
LEGISLATION.

I REQUEST PERMISSION TO MEET WITH YOU LEGISLATORS TO
PROVE ALASKA SUBSISTENCE LAW HAS BEEN USED TO
DISCRIMINATE AGAINST URBAN ALASKANS.

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* DELIVER TO: JPOM *
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* ORIGINAL *
* SENT: 03/26/85 TIME: 13:36 *
* FROM: LIOA *
* SUBJECT: POM *
* PRINT DATE: 03/26/85 TIME: 13:37 *
* *

TO: ALL LEGISLATORS

FROM: SAM E. MCDOWELL
336 E 23RD AVE.
ANCHORAGE, AK. 99503
PHONE 248-1923 HM

THE WEBSTERS DICTIONARY DEFINES SUBSISTENCE AS A MEANS
OF SUPPORT. THEREFORE, I'M OF THE OPINION GOVERNOR
SHEFFIELD'S PAST ACTIONS PROVES GOVERNOR SHEFFIELD IS A
PRIORITY SUBSISTENCE USER OF NORTH SLOPE RESOURCES.
CAMPAIGN RECORDS CLEARLY SHOWS GOVERNOR SHEFFIELD
RECEIVED CONSIDERABLE NORTH SLOPE FINANCIAL RESOURCES.

TO: ALL LEGISLATORS

FROM: SAM MCDOWELL
CONCERNED ALASKAN
336 E 23RD AVE
ANCHORAGE, AK. 99503
PHONE 272-6605 HM

I'M OF THE OPINION, PROPOSED FISHERIES LEGISLATION
SB 35 AND HB 235 WOULD CLOSE ALASKA PERSONAL USE
FISHERIES.
FOR EXAMPLE, IF COMMERCIAL FISHERIES CANNOT BE
RESTRICTED DUE TO ECONOMIC LOSS, WE CAN SAY GOODBYE TO
CHITNA DIP NET FISHERY, PLUS ALL OTHER IN RIVER
PERSONAL USE FISHERIES.

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* DELIVER TO: JFOM
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* ORIGINAL
* SENT: 03/21/85 TIME: 10:21
* FROM: LIOSOL
* SUBJECT: P.O.M.
* PRINT DATE: 03/21/85 TIME: 10:22
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P.O.M.

TO: ALL SENATORS
AND
ALL REPRESENTATIVES

FROM: KENAITZE INDIAN TRIBE
PO BOX 988 KENAI 99611
283-3633

MESSAGE: REGARDING: HB 288 & SB 231-SUBSISTENCE
THE KENAITZE TRIBE GOES ON RECORD AS OPPOSING HB 288 AND SB 231.
THE KENAITZE TRIBE URGES ALL SENATORS AND REPRESENTATIVES TO
CAREFULLY REVIEW THE LEGALITY OF HB288 AND SB231 BEFORE MAKING
THIS VERY IMPORTANT DECISION. WE WOULD APPRECIATE YOUR SUPPORT

E.O.M.

TO: ALL LEGISLATORS

FROM: SAM E. MCDOWELL
CONCERNED ALASKAN
336 E 23RD AVE
ANCHORAGE, AK. 99503
PHONE 272-6605 HM

I'M OF THE OPINION, ALL ALASKA LEGISLATORS WHO PUSH
THEIR VOTING BUTTON FOR GOVERNOR SHEFFIELD'S PROPOSED
ANTI-URBAN, PRO-BUSH SUBSISTENCE LAW SHOULD ONCE AGAIN
READ PRESIDENT ABRAHAM LINCOLN'S GETTYSBURG ADDRESS.
YES, I SUPPORT GOVERNMENT OF THE PEOPLE, BY THE PEOPLE,
FOR THE PEOPLE. DO YOU? STOP DISCRIMINATION.

*
* DELIVER TO: JPOM
*
* ORIGINAL
* SENT: 03/28/85 TIME: 14:19
* FROM: HARRY MANDREGAN
* SUBJECT: FOM
* PRINT DATE: 03/28/85 TIME: 14:19
*

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TO: ANCHORAGE DELEGATION; SENATORS ABOOD, DEVRIES, FAIKS, VIC FISCHER, HALFORD, JOSEPHSON, KELLY, KERTTULA, RODEY, STURGULEWSKI AND REPRESENTATIVES BOUCHER, CLOCKSIN, COLLINS, COTTEN, FURNACE, GRUENBERG, HANLEY, JENKINS, MARTIN, PEARCE, PETTYJOHN, PHILLIPS, PIGNALBERI, POURCHOT, RIEGER, SZYMANSKI AND UEHLING

FROM: ROBERTA BOOHER
4006 ARKANSAS DRIVE
ANCHORAGE, ALASKA 99503
HOME NO.: 243-7906
WORK NO.: 544-9185

RE: ADMINISTRATION SUBSISTANCE BILL

I OPPOSE THE ADMINISTRATION SUBSISTANCE BILL. SUBSISTANCE USE PRIORITIES SHOULD BE DEFENDED ON ECONOMIC NEED NOT ON AN UNDEFINED TERM SUCH AS RURAL.

1983
73,934,21-12456

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

SAM E. McDOWELL and)
DALE E. BONDURANT,)
)
 Plaintiffs,)
)
 vs.)
)
 DON W. COLLINSWORTH, COMMIS-)
 SIONER OF FISH & GAME; BOARD)
 OF FISHERIES; BOARD OF GAME;)
 and STATE OF ALASKA,)
)
 Defendants.)

No. 3AN 83-1592 CIV

SECOND AMENDED COMPLAINT

COMES NOW the plaintiffs, by and through their attorney, DAVID B. RUSKIN, and for cause of action against defendants, allege and complain as follows:

FIRST CAUSE OF ACTION

I.

Plaintiffs Sam E. McDowell and Dale E. Bordurant have been residents of Alaska since 1948 and 1951, respectively, and have been, since statehood, and now are citizens of the State of Alaska and are otherwise entitled to maintain this action.

II.

That prior to the time of statehood, and every year since statehood, plaintiffs have purchased licenses for fishing and hunting game.

III.

Plaintiffs have not taken fish or game for any purposes other than consumptive uses.

IV.

Plaintiffs McDowell and Bondurant reside within the Municipality of Anchorage, Third Judicial District.

LAW OFFICES
DAVID B. RUSKIN
A PROFESSIONAL CORPORATION
420 L STREET, SUITE 502
ANCHORAGE, ALASKA 99501
(907) 338-6494

1 V.

2 Defendant Collinsworth is the present Commissioner
3 of Fish & Game charged with the duties set out in AS 16.05.050.

4 VI.

5 The defendant State of Alaska is a sovereign
6 legal entity and one of the United States.

7 VII.

8 The Board of Fisheries and Board of Game are
9 regulatory agencies of the State of Alaska with the powers
10 and duties set out in AS 16.05.221 - .320.

11 VIII.

12 That in 1978, the Alaska State Legislature enacted
13 § 4 ch 151 SLA 1978, later codified as AS 16.05.251(b),
14 which reads as follows:

15 (b) The Board of Fisheries shall adopt
16 regulations in accordance with the Administrative
17 Procedure Act (AS 44.62.010 -
18 44.62.650) permitting the taking of fish
19 for subsistence uses unless the board
20 determines, in accordance with the Administrative
21 Procedure Act, that adoption of
22 such regulations will jeopardize or interfere
23 with the maintenance of fish stocks
24 on a sustained-yield basis. Whenever
25 it is necessary to restrict the taking
26 of fish to assure the maintenance of fish
27 stocks on a sustained-yield basis, or
28 to assure the continuation of subsistence
29 uses to such resources, subsistence use
30 shall be the priority use. If further
31 restriction is necessary, the board shall
32 establish restrictions for these consumptive
uses on the basis of the following criteria:

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

36 IX.

37 That the Alaska State Legislature enacted §5,
38 ch 151 SLA 1978, later codified as AS 16.05.255(b) which

1 is identical to the language contained in AS 16.05.251(b),
2 except that the word "game" is substituted for the word
3 "fish" in the last sentence of the section.

4 X.

5 The foregoing statutes (AS 16.05.251(b) and
6 .255(b)) attempt to create a special class of persons
7 entitled to take fish and game on a preferential basis;
8 namely, those persons entitled to take fish and game for
9 subsistence uses.

10 XI.

11 The plaintiffs have fished the Cook Inlet area
12 each year since before statehood.

13 XII.

14 Pursuant to the authority granted in AS 16.05.251(b)
15 the Board of Fisheries has adopted subsistence regulations
16 for the Cook Inlet area at 5 AAC 01.550 - .597.

17 XIII.

18 The subsistence regulations for the Cook Inlet
19 area provide that only persons domiciled in Tyonek, Port
20 Graham or English Bay (5 AAC 01.580) are entitled to subsis-
21 tence fish. Each household in these villages is entitled
22 to a permit because the communities have received a subsistence
23 priority. If either of the plaintiffs were domiciled
24 in one of the three villages they would be entitled to
25 a subsistence permit for their household.

26 XIV.

27 The fish caught by the class of people who qualify
28 for subsistence fishing and from which the plaintiffs
29 are excluded are fish to which the plaintiffs no longer
30 have the opportunity to catch. The Board of Fisheries
31 regulations restrict a harvest opportunity otherwise avail-
32

1 able to the plaintiffs. The diminished availability of
2 fish and the opportunity to fish for them constitutes
3 an injury-in-fact to the plaintiffs.

4 XV.

5 The subsistence fishing regulations for the
6 Cook Inlet area are not founded on a compelling state
7 interest nor even on a rational basis since any domiciliary
8 of the chosen villages may qualify for a subsistence permit
9 irrespective of their individual economic status. Under
10 present regulation the only criteria for allocation of
11 subsistence permits in Cook Inlet is geographical residency.

12 SECOND CAUSE OF ACTION

13 XVI.

14 Plaintiffs incorporate all allegations contained
15 in paragraphs I through XV of their First Cause of Action
16 as though fully set forth herein.

17 XVII.

18 Pursuant to the authority granted in AS 16.05.255(b)
19 the Board of Game has adopted 5 AAC 81.010-.395 which
20 include subsistence hunting regulations for the State
21 of Alaska.

22 XVIII.

23 On previous occasions plaintiffs have hunted
24 in the Nelchina Caribou hunt which is controlled by regulat-
25 ion 5 AAC 81.320 (also referred to as hunts numbered 515
26 and 516W in the Alaska Department of Fish and Game paper
27 titled: Alaska 1983-34, Permit Drawing Hunts).

28 XIX.

29 The Nelchina hunt provides for up to 450 subsis-
30 tence permits to be issued to residents of Game Management
31 Units 11, 13 or 12 before the remaining 1300 permits will
32

1 be made available to Alaska residents as a whole. The
2 only criteria to determine priority subsistence use is
3 the requirement that the applicant: 1) reside in Game
4 Management Units 11, 13 or 12 along the Nabesna Road;
5 2) be over 12 years of age; and 3) attest that at least
6 half of the meat and fish of the applicant's diet consist
7 of fish and game which has not been purchased.

8 XX.

9 The subsistence hunting regulations for the
10 Nelchina Caribou Hunt in Game Management Units 13 and
11 14 are not founded on a compelling state interest nor
12 even on a rational basis since any resident of those units
13 may secure a subsistence permit regardless of their indi-
14 vidual economic status.

15 XXI.

16 The caribou killed by the class of people who
17 qualify for a subsistence permit and from which the plain-
18 tiffs are excluded diminish the plaintiffs' chances of
19 securing a permit to shoot one of the 1750 caribou the
20 Board of Game has determined may be harvested. Either
21 of the plaintiffs would qualify for a subsistence permit
22 if the regulation were not based on geographical residence.
23 The Board of Game regulation restricts a harvest opportunity
24 otherwise available to the plaintiffs. The plaintiffs'
25 right to hunt the Nelchina caribou is diminished solely
26 because they reside in Anchorage and not Game Management
27 Units 11, 12 and 13. The diminution of right and restricted
28 opportunity is an injury-in-fact to the plaintiffs.

29 THIRD CAUSE OF ACTION

30 XXII.

1 Plaintiff incorporates the allegations contained
2 in paragraphs I through XV of the First Cause of Action
3 as though fully set forth herein.

4 XXIII.

5 That the Board of Fisheries has promulgated
6 regulations for the taking of subsistence fish within
7 the Bristol Bay area (5 AAC 01.300-01.345).

8 XXIV.

9 There are no criteria for the issuance of subsis-
10 tence fishing permits in the Bristol Bay area except as
11 set forth in 5 AAC 01.330(d) which provides in part that
12 subsistence salmon permits for the Naknek River drainage
13 will be issued only to those persons domiciled in the
14 Naknek and Kwichak River drainages.

15 XXV.

16 The fish caught by the class of people who qualify
17 for subsistence fishing and from which the plaintiffs
18 are excluded are fish to which the plaintiffs no longer
19 have the opportunity to catch. The Board of Fisheries
20 regulations restrict a harvest opportunity otherwise avail-
21 able to the plaintiffs. The diminished availability of
22 fish and the opportunity to fish for them constitutes
23 an injury-in-fact to the plaintiffs.

24 XXVI.

25 The subsistence fishing regulations for the
26 Naknek and Kwichak River drainages are not founded on
27 a compelling state interest nor even on a rational basis
28 since any domiciliary of the area may qualify for a subsis-
29 tence permit irrespective of their individual economic
30 status. Under present regulation the only criteria for
31 allocation of subsistence permits in Naknek and Kwichak
32

1 River drainage area is geographical residency.

2 FOURTH CAUSE OF ACTION

3 XXVII.

4 Plaintiffs incorporate the allegations contained
5 in paragraphs I through XV of the First Cause of Action
6 as though fully set forth herein.

7 XXVIII.

8 That the Board of Fisheries has promulgated
9 regulations for the taking of subsistence fish within
10 the Illiamna-Lake Clark drainage area (5 AAC 01.300-01.345),
11 a subdistrict of Bristol Bay.

12 XXIX.

13 There are no criteria for the issuance of subsis-
14 tence fishing permits in the Illiamna-Lake Clark area
15 except as set forth in 5 AAC 01.330(e) which provides
16 in part that subsistence salmon permits for the Illiamna-Lake
17 Clark drainage area will be issued only to those persons
18 domiciled in the Illiamna-Lake Clark drainages.

19 XXX.

20 The fish caught by the class of people who qualify
21 for subsistence fishing and from which the plaintiffs
22 are excluded are fish to which the plaintiffs no longer
23 have the opportunity to catch. The Board of Fisheries
24 regulations restrict a harvest opportunity otherwise avail-
25 able to the plaintiffs. The diminished availability of
26 fish and the opportunity to fish for them constitutes
27 an injury-in-fact to the plaintiffs.

28 XXXI.

29 The subsistence fishing regulations for the
30 Illiamna-Lake Clark drainages are not founded on a compelling
31 stat. interest or even on a rational basis since any domiciliary
32

1 of the area may qualify for a subsistence permit irrespective
2 of their individual economic status. Under present regu-
3 lation the only criteria for allocation of a subsistence
4 permit in the Illiamna-Lake Clark drainage area is geograph-
5 ical residence.

6 ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

7 The regulations referred to in Causes of Action
8 One through Four which discriminate against plaintiffs
9 on the basis of geographical residence and the attempt
10 to justify such discrimination under the guise of subsistence
11 use violates plaintiffs' constitutional rights in the
12 following respects:

13 A. The regulations violate plaintiffs' rights
14 to due process of law and equal protection under the 14th
15 Amendment to the Constitution of the United States. *eq pro/due process*

16 B. The regulations violate plaintiffs' rights
17 to due process under Section 7, Article I to the Constitution
18 of the State of Alaska. *due process*

19 C. The regulations violate Section 2 of Article VIII
20 of the Constitution of the State of Alaska. *max benefit*

21 D. The regulations violate Section 3, Article VIII
22 of the Constitution of the State of Alaska. *common use*

23 E. The regulations violate Section 15, Article
24 VIII of the Constitution of the State of Alaska. *ex right*

25 F. The regulations violate Section 17, Article
26 VIII of the Constitution of the State of Alaska. *eq pro*

27 G. The regulations violate Section 19, Article
28 II of the Constitution of the State of Alaska. *local/special*

29 The result of which has caused injury and damage
30 to plaintiffs.

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WHEREFORE, plaintiffs pray as follows:

1. That the court declare that the residency regulations referred to in Causes of Action One through Four be declared in violation of the Constitution of the United States and the State of Alaska and that this court issue appropriate orders.

2. That the court restrain defendants from conducting the Nelchina Caribou Hunt described in the Second Cause of Action until such time as the Board of Game promulgates appropriate regulations consistent with the Constitution of the State of Alaska.

3. That plaintiffs be awarded their costs for maintaining this action including a reasonable attorney's fee.

4. For such other and further relief as the court deems proper.

DATED this 27th day of July, 1983.

DAVID B. RUSKIN
Attorney for Plaintiffs

By David B. Ruskin
David B. Ruskin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of July, 1983, a true and correct copy of the foregoing was served by mail on the following attorneys:

Larri Spengler and Don Mitchell

By David B. Ruskin

LAW OFFICES
DAVID B. RUSKIN
A PROFESSIONAL CORPORATION
420 L STREET, SUITE 502
ANCHORAGE, ALASKA 99501
(907) 338-6794

COOK INLET MANAGEMENT AREA SUBSISTENCE
FISHERY REPORT 1972

A. General Information

1. Description of Area: The Cook Inlet area includes all waters of Alaska in Cook Inlet and Resurrection Bay north of Cape Douglas and west of Cape Fairfield, including the Barren Islands. (Figure 1)
2. Species Utilized: All five species of pacific salmon are utilized in the Cook Inlet area. Since 1962 cohos have made up 66 percent of the subsistence catch, reds 20 percent, pinks 8%, chums 5%, and kings 0.2 percent. (Table 1) King crab, tanner crab, dungeness crab, shrimp, smelt, herring, bottom fish, and clams are also utilized for subsistence purposes. However, few records are available on degree of utilization. In actuality it is hard to define what constitutes "sport fishing" and what constitutes "subsistence fishing" for the above listed species.
3. Economic Conditions: No figures are available on the average income of those applying for subsistence permits in the Cook Inlet area. It is the personal opinion of the area management biologist that less than five

* See pages # 3, 6, 7, 9, + 17.

FIGURE I

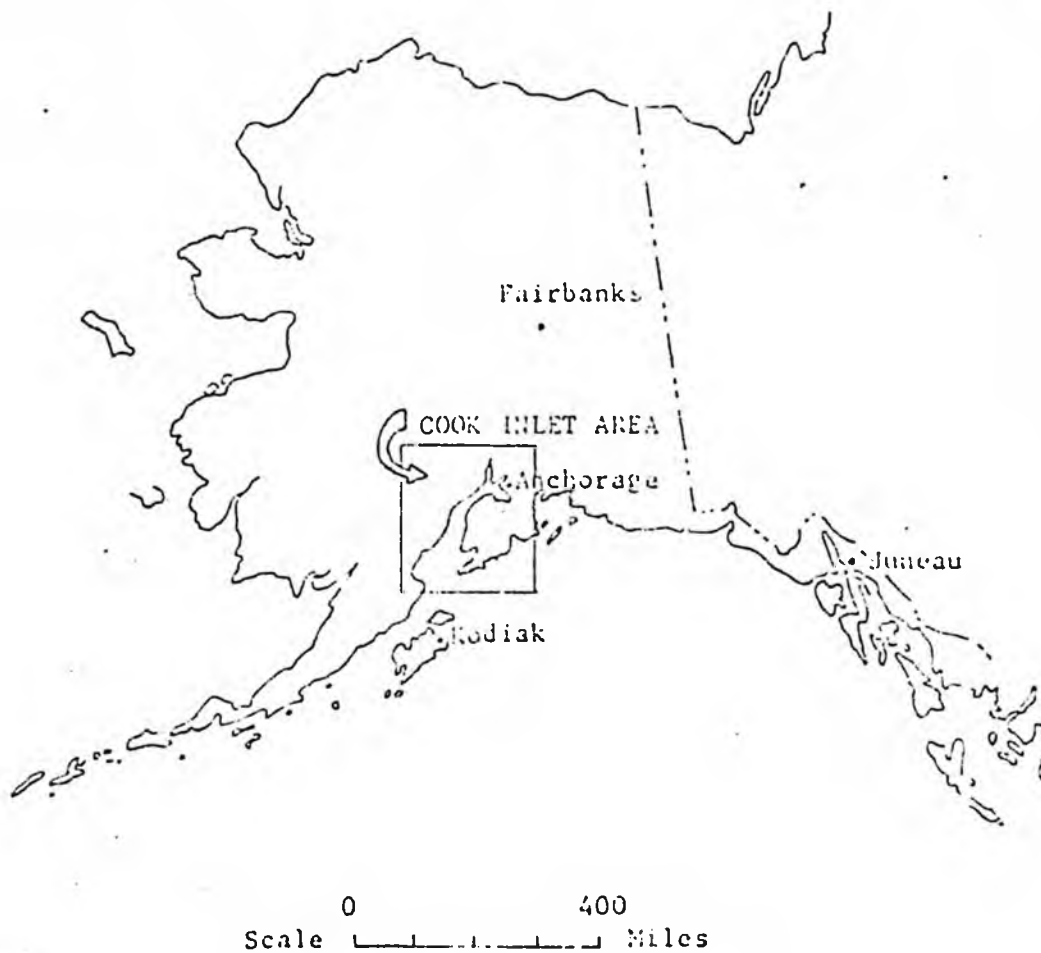
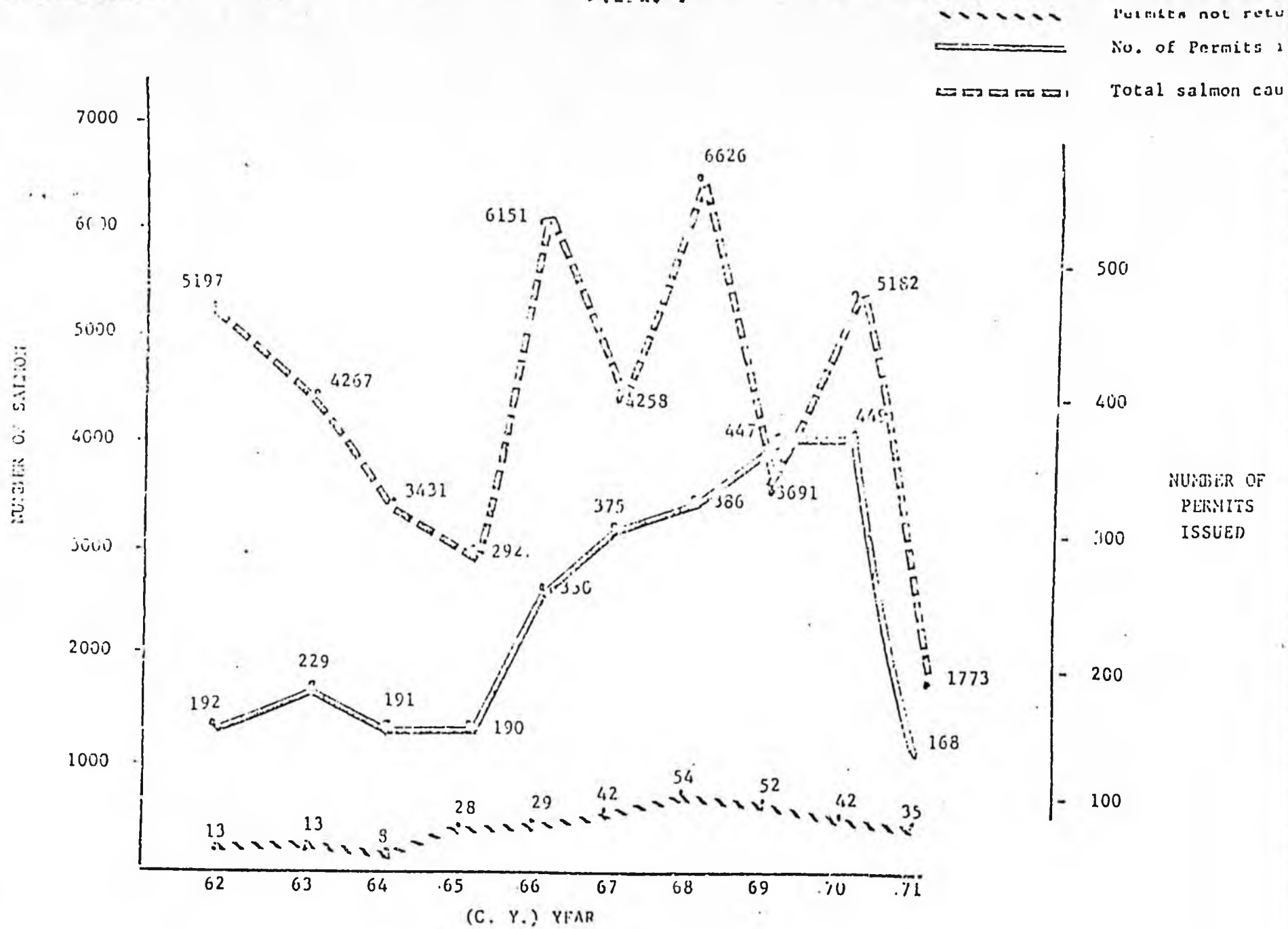


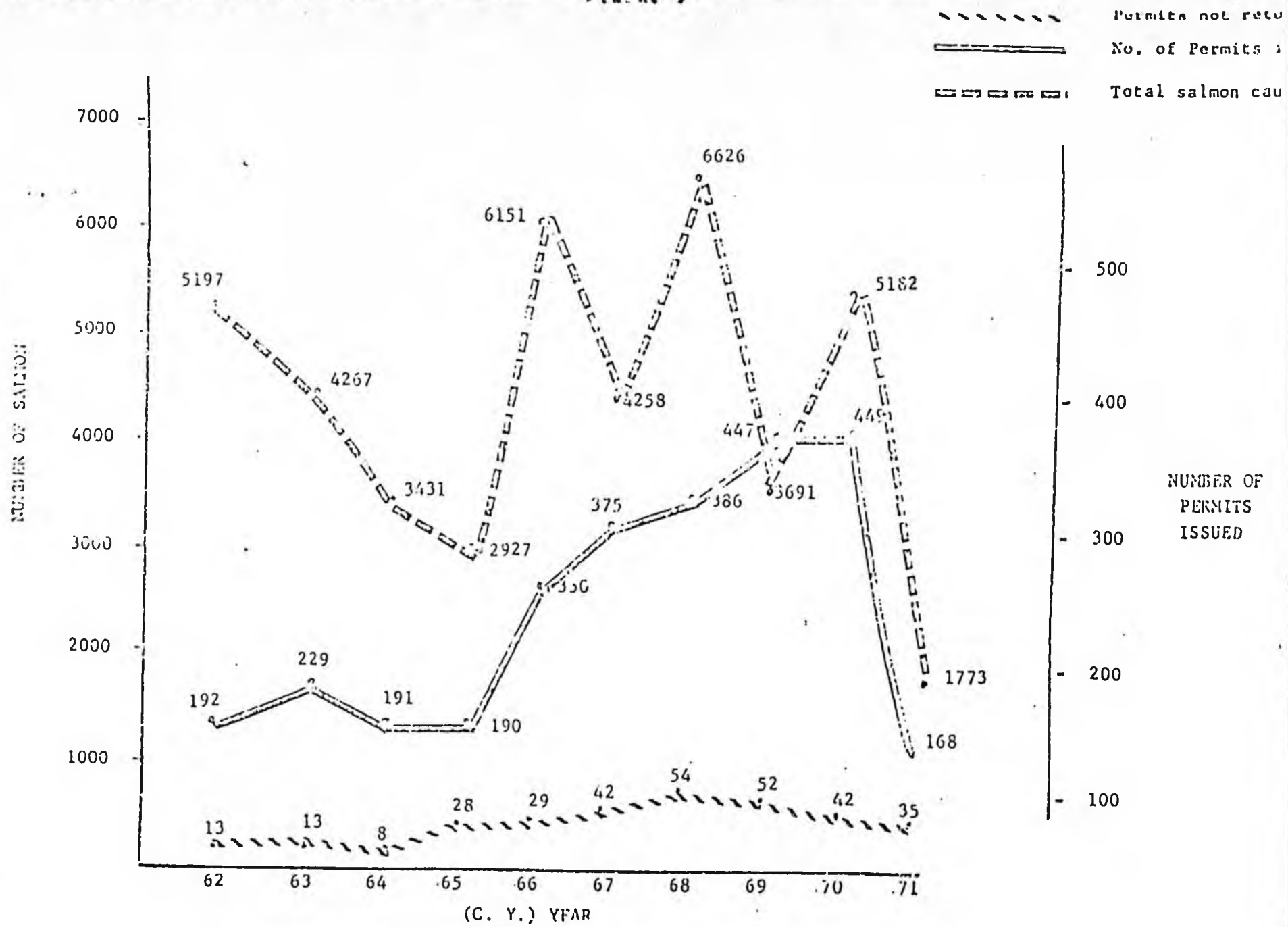
Figure 1. Cook Inlet area location map.

TABLE 1

COOK INLET SUBSISTENCE CATCH OF SALMON, 1962-1971

YEAR	NO. PERMITS	DID NOT REPLY	KINGS	REDS	COHO	CHUM	PIGG	TOTAL
1962	192	13	45	770	3574	391	417	5197
1963	229	13	29	859	2510	424	447	4269
1964	191	8	--	393	2463	207	368	3431
1965	190	28	--	484	2109	285	49	2927
1966	330	29	8	1656	3533	356	598	6151
1967	375	42	4	863	3105	213	73	4258
1968	386	54	10	1009	4201	236	1170	6626
1969	447	52	--	1518	2011	94	68	3691
1970	449	42	3	1218	3371	152	438	5182
1971	168	35	2	23	1697	7	44	1773
TOTALS	2,957	316	101	8,793	28,574	2,365	3,672	43,505
PERCENT	100.0	10.7	0.2	20.2	65.7	5.4	8.4	100.0





or ten percent of the subsistence fishing in the area is carried out by persons in such financial positions that they actually have a legitimate need of the resource harvested in order to subsist. The type of subsistence fishing found in the Cook Inlet area could more appropriately be classified as recreational or supplemental fishing. Many people regard it as a form of sport fishing in which they not only derive recreational benefits but at the same time supplement their food stocks. Some people in the Cook Inlet area, natives and whites alike, because of either need or personal preference, are trying to maintain a "live-off-the-land" life style. To these few, "subsistence" fishing may fall into a need category and may play an important part in their means of existing.

B. History of Fishery

1. Methods of Fishing: A variety of subsistence fishing methods are used in the Cook Inlet area, as it is a multi-species utilization area.
 - a. Salmon: Set nets, seines and drift nets are currently used with set nets accounting for about 95 percent of the effort. Since statehood, all subsistence salmon fishing has been in conformance

with commercial regulations and, therefore, areas open and methods used have been identical to those in commercial fishing. Prior to statehood, much of the subsistence fishing took place in salmon spawning streams with gear ranging from hook and line to gill nets. Snagging was one of the more popular methods.

*

- b. Shellfish: King crab, tanner crab, dungeness crab and shrimp are taken with various forms of pots. Most fishing takes place at or near the small boat harbors of Homer and Seward. Clams for subsistence are taken by use of a clam shovel. The methods currently used for taking shellfish species for subsistence purposes do not differ appreciably from those used prior to statehood.
- c. Smelt: Both bill nets and dip nets have been used in the Cook Inlet area for taking smelt, however, in 1972 dip nets became illegal gear for taking smelt in the waters of the Kenai Peninsula. A limited amount of hook and line snagging for smelt also exists.

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d. Freshwater species: The gear most commonly utilized for freshwater species is small mesh gill nets and seines. In the past, fish-wheels and dip nets have also been used in freshwater.

2. Catches and Fishing Effort

a. Salmon: Salmon fishing is the only subsistence fishing for which reliable catch and effort data exists and this data covers from 1962 to 1971 only. During these years, a total of 2,957 subsistence permits were issued and all but 316 were returned. The total reported salmon catch from 1962 to 1971

* is as follows: 101 kings, 8,793 reds, 28,574 cohos, 2,365 chums, 3,672 pinks, for a total of 43,505 salmon.

The number of permits issued and the total catch by species appears in Table 1 and is depicted in graphic form in Figure 2.

b. Smelt: Catch data on smelt is only available for the past two seasons. In 1971, there were 1,387 smelt reported taken and in 1972, the reported catch was 8,542. Most effort has taken place along the western shoreline of the Kenai Peninsula and around Turnagin Arm.

The number of permits issued by year since 1969 appear below:

<u>Year</u>	<u>Salt Water</u>	<u>Kenai River</u>	<u>Total</u>
1969	150	194	344
1970	157	393	550
1971	92	*	92
1972	160	*	160

*Smelt permits not required for Kenai River.

- c. Shellfish: No permits are required for taking shellfish and, therefore, no records are available on effort or catch. Most effort occurs in Kachemak and Resurrection Bays.
 - d. Freshwater species: Relatively few permits have been requested for taking freshwater species and most of these have been for Lake Louise and Tyone Lakes. Whitefish comprise about 90 percent of the catch.
3. Management Regulations: The following is a history of subsistence regulations in Cook Inlet from 1943 to 1972.

1942 through 1950

No mention made in Cook Inlet section of commercial fisheries regulations.

1951

First mention in commercial regulations. Required notification of intention to take salmon for personal use, with statement of type of gear to be used, area, time, number of fish to be taken and intended disposition of fish taken.

Fish, Ship, and Campbell and Cottonwood Creeks closed to subsistence fishing.

1952

No intent to take notification required. More streams closed, including all tributaries to Knik Arm, Willow Creek (tributary to Susitna), Campbell Creek, and all streams and lakes of Kenai Peninsula that are tributary to Cook Inlet: Provided this shall not apply to fishing with rod, hook and line for personal use.

(Apparently this was the first time many Cook Inlet streams were closed to use of nets for personal use of fish.)

1953

Above regulations same, plus added stipulation that no personal use fishing allowed within 300 feet of weirs and ladders. Snagging was prohibited for the first time.

Also, personal use fishing prohibited within 500 yards of all other streams or lakes except with hand rod, hook and line. Day limit two (2) per day per person.

And subject to laws regulating commercial fishing 48 hours before and continuing 48 hours after each fishing period. Except for fall season and/or place greater than 25 miles from waters open to commercial fishing. . .

* And in Knik Arm where 15 fathom set nets, 100 yards apart, shall be operated prior to August 6, only during hours open to commercial fishing in the Northern district.

1954

Same as 1953 with additional sections that. . . Commercial gear may be used for personal fishing during any fall season. . .

Fishing allowed in Turnagain Arm east of a line between Hope and Indian, and. . .

Fishing allowed more than 5 miles upstream from tidewater on all streams and lakes of Cook Inlet drainage South and West of the Susitna River or South of town of Homer.

1955

General regulations and .

Cook Inlet regulations same as 1954.

1956

Same as 1955 with added restrictions. . .

Closed Kenai & Russian Rivers within 300 yards of their confluence (this to 'Sportsmen').

Rod and line. . . limited take to two (2) salmon over 16 inches, per person per day.

1957

General regulations same as 1956.

Cook Inlet about same except for limit on take by rod and line fishermen ('. . . not to exceed 10 inches'. . . per person per day by hook and line, and not more than two (2) may exceed 16 inches').

1958

General same as 1957 plus. .

A series of regulations devised to try to curb snagging. . including limiting size hooks and making it illegal to use weights with multiple hooks.

Cook Inlet same as 1957.

1959

General same as 1958.

Cook Inlet--added restrictions that. . .personal use fishing be allowed in the main stem of the Susitna River above the town of Alexander. . .with nets less than 30 feet and more than 100 yards from any other set net and from tributary streams-- and identified with name and address of owner.

And personal use fishing must be done in conformance with commercial regulations (This closed Knik Arm and Turnagain Arm).

Many Kenai Peninsula streams closed above ~~markers~~ placed from 3 to 5 miles up from mouth (Anchor, Deep Creek, Stariski and many others).

Added closure of Cooper Creek, Little Willow Creek and Montana Creek. . And. . allowed 30 yards of set nets for use in Knik Arm after August 9, also Fish Creek closed July 21 (snaggers harrassing red run).

1960

General same as 1959.

Cook Inlet--personal use fishing to be allowed on Northwest shore Knik Arm. . with nets 90 feet or less and more than 500 yards from terminus of any salmon stream. . and conform to commercial open periods in Northern district. . and identified with name and address of owner.

1961

General same as 1960.

Cook Inlet added open fishing season on clams, crabs, and bottomfish. . all in conformance with commercial regulations.

Salmon for subsistence was broken into districts. . . apparently this did away with fishing in main stem of Susitna River above Alexander (see subsistence regulations for Northern district 1961).

1962

General regulations added restrictions--personal use fishing must be done by permit only, issued by commissioner. . . limited subsistence catch to individual regional regulations.

Cook Inlet---same as 1961.

1963

General regulations--new regulation--fish other than salmon may be taken at any time in any area of state by any method except by use of explosives or chemicals, except as hereinafter provided or as provided in the Sport Fishing Regulations of the Department.

Cook Inlet--same as 1962.

1964

General same as 1963.

Cook Inlet--new regulation--must have permit for salmon and all catches by species, location and date of catch must be reported. Freshwater species except for trout, grayling, and char may be taken for subsistence purposes via permit and these permits be issued by commissioner or his representative when deemed warranted.

Also not more than 50 salmon be taken per permit and subsistence fishing is prohibited in any area closed to commercial fishing except for parts of Knik Arm.

And all districts with exception of Outer district, must have name and address of owner on fishing gear. The Outer district regulations were amended to conform with commercial regulations.

Another Cook Inlet regulation was amended-- sports fishing licenses required for clams and/or bottom fish and crab pot floats will contain the name of owner. No sex or size limitations on crab.

1965 through 1969

Outside of minor amendments and a few changes in regulations in the different fishing districts, personal use fishing regulations are about the same for that period from 1965 to 1969.

1969

Cook Inlet--new regulations--

Restrictions:

(a) Subsistence fishermen taking herring and smelt in the Kenai River must be physically present at all times said net is being fished.

(b) A sports fishing license is required when bottom fish are taken with fishing rod and line.

(c) A sports fishing license is required for the digging of razor clams.

Size Limits: There are no size or sex limitations on crab.

1970

Cook Inlet--new regulations--

Salmon - The subsistence fishery on the Northwest of Knik Arm was deleted.

Smelt - In the Kenai River the length of gill nets may not exceed 20 feet in length.

Smelt may be taken in that portion of the Kenai River from its mouth upstream to the Soldotna bridge from April 1 through May 31.

1972

Cook Inlet--new regulations--Smelt - Dip nets may not be used for taking smelt in the waters of the Kenai Peninsula.

4. Problem Areas

1. Northwest Shore Knik Arm: This area is no longer a problem as it was closed to subsistence fishing in 1971. The number of permits issued for this area had increased during the mid-60's to a level of 290 during the last two years of the fishery. (1969 and 1970) The reported catch during this period averaged 3,300 salmon (Table 2). The main justification for closing this area was the declining red salmon escapements into Fish Creek which reached a low of 6,233 in 1969.
2. Mud Bay: The problem here appears to be over-utilization of available fishing space rather than over-utilization of the resource. Commercial fishing, sports fishing, and subsistence fishing all take place in this rather confined area of Kachemak Bay along the Northeast side of the Homer Spit. Peak utilization occurs in mid to late August when approximately 10 seine fishermen, 50 subsistence fishermen and several hundred sports fishermen fish

TABLE 2

COOK INLET SUBSISTENCE SALMON FISHERY
Permits Issued and Total Salmon Catch By District, 1967 - 1972

YEAR	NORTHERN ^{1/}		NORTH and SOUTH CENTRAL		SOUTHERN		EASTERN	
	Permits	Total Catch	Permits	Total Catch	Permits	Total Catch	Permits	Total Catch
1967	218	2,947	13	119	51	942	91	262
1968	276	5,395	30	303	79	953	--	--
1969	290	1,563	40	400	85	1,067	32	929
1970	290	3,448	45	206	78	1,386	36	181
1971	9	10	28	138	112	1,618	19	7
1972	9	<u>2/</u>	5	<u>2/</u>	151	<u>2/</u>	5	<u>2/</u>

^{1/} Northern district represents Northwest shore at Knik Arm

^{2/} Catch data not available for 1972.

this area. The main species being sought are silver salmon and the subsistence catch has averaged about 1,000 since 1967. The commercial catch in the Southern district has averaged 2,800 silvers since 1967 and an estimated 50 percent of these have been taken from Mud Bay proper. Sports harvest figures are not available, however, the average catch since 1967 would probably not exceed 500 fish. Commercial and subsistence harvest figures indicate no decline in abundance of silver stocks in Mud Bay. A tagging study in 1970 indicated the silver stocks of Mud Bay were mostly local stocks bound for upper Kachemak Bay and escapement indices in this area have been consistent in recent years.

Although there is no biological justification for closing Mud Bay, the time has perhaps come for closing a portion of Mud Bay to commercial and subsistence fishing because of user-group conflicts.

For the last several years proposals have been submitted to the Board of Fish and Game asking for either complete or partial closures of Mud Bay. The commercial fish staff has always opposed these closures on the basis that no biological justification exists.

Because of the increasing sports fish utilization there will be a public proposal submitted to the Board of Fish and Game at the November meeting by a Homer commercial fisherman which will ask for a partial closure of the Mud Bay area. The commercial staff intends to support this proposal.

3. Shellfish: Another potential problem is the crab and shrimp pot fisheries which have developed tremendously in the last few years. A considerable volume of gear is being fished in the immediate vicinity of the Homer small boat harbor and again, rather than over-utilization of the resource, the main problem is over-utilization of area. Gear is so concentrated in this one area that navigation has been hindered. A regulation may be necessary in the near future to close a section of the bay in the immediate vicinity of the small boat harbor entrance.

D. Recommendations:

It is the personal opinion of the area biologist that a need exists for subsistence fishing in Cook Inlet and that it should be continued perhaps with some modifications. The 5 or 10 percent of the people who actually have a legitimate need to subsistence fish should not be denied this right just because the fishery has become recreationally oriented.

Perhaps a fee could be placed on a subsistence permit or license. This might tend to eliminate some of those who are participating more for recreation than need and yet keep the regulation constitutional. For those who could show need, through an application for a waiver on the license fee, a special free permit would be granted. A maximum income level would be established similar to that used in the Food Stamp Program and those falling below the established level would be eligible for the free permit. These measures would probably reduce subsistence fishing by 75 percent in the Cook Inlet area and subsistence fishing would again conform with the true meaning of subsistence.

APPENDIX

1. A copy of the Cook Inlet Subsistence Fishery Instructions of 1972.

COOK INLET SUBSISTENCE SALMON FISHERY, 1972

Salmon may be taken for subsistence purposes under authority of a permit which may be obtained from the local representative of the department.

Each subsistence fisherman taking salmon shall keep accurate records of the catch involved, by species, location caught, date of catch, and other such information as the department may require.

Salmon may be taken for subsistence purposes only by residents.

Identification of fishing gear shall consist of the name and address of the owner and the number of his subsistence permit.

Not more than 50 salmon may be taken under the authority of a subsistence permit.

Only one salmon subsistence permit will be issued to each person during a year.

A set gill net shall not be longer than 35 fathoms in length and 45 meshes in depth.

The operation of each set gill net shall be performed or assisted by the fisherman in whose name it is registered.

No part of a set gill net may be placed or operated within 600 feet of any part of another set gill net.

FISHING SEASONS:

NORTHERN DISTRICT: from 6:00 a.m. July 21 until 6:00 a.m. September 20 during open commercial fishing periods in conformance with all commercial regulations.

NORTH & SOUTH CENTRAL DISTRICTS: from 6:00 a.m. August 18 during open commercial fishing periods in conformance with all commercial regulations.

SOUTHERN DISTRICT: from 6:00 a.m. August 18 during open commercial fishing periods in conformance with all commercial regulations EXCEPT that set gill nets may be used in any beach area open to commercial salmon fishing.

OUTER DISTRICT: in conformance with commercial regulations.

EASTERN DISTRICT: from June 1 through June 30 during open commercial fishing periods in conformance with all commercial regulations EXCEPT that set gill nets may be used in any beach area open to commercial salmon fishing.