

SUBSISTENCE

Miscellaneous

(FILE 3)

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 3-2000
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July 8, 1985

The Honorable Jack Fuller
Chairman
House Interim Committee on Subsistence
P. O. Box 689
Nome, AK 99762

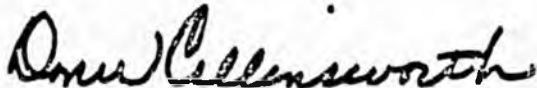
Dear Representative Fuller:

Enclosed is a packet of background materials regarding recent actions by the Board of Game to bring hunting regulations in conformity to court decisions in Madison and Eluska. These materials include:

- Item A- summarizing the actions taken by the Board of Game during its June emergency meeting;
- Item B- a list of the hunts open for non-state residents and those hunts which have been closed to non-state residents;
- Item C- the draft regulations for implementing the three Tier II criteria and the associated point system for evaluating applications for Tier II hunts;
- Item D- draft Tier II permit application and instructions;
- Item E- additional background on the need for emergency actions by the Boards of Game and Fisheries.

I hope this information will be helpful. Please free to call if you need additional information.

Sincerely,



Don W. Collinsworth
Commissioner

Enclosure

Replacement for A & B

PERMIT HUNTS 1985 EMERGENCY MEETING — ALASKA BOARD OF GAME

Meeting between June 10 and 21, the Alaska Board of Game rewrote approximately 450 of the state's hunting regulations to comply with two recent court decisions. To comply with *State v. Eluska*, the board created separate subsistence hunting regulations. To comply with *Madison v. ADF&G*, the board established three basic regulatory situations:

TIER I and GENERAL HUNT - This situation exists when the game resource is abundant enough that all who wish to hunt may participate in the harvest.

If the board finds that subsistence uses are not substantially impaired:

- nonsubsistence uses may still be accommodated
- residents and nonresidents will be able to hunt
- the hunting regulations will appear in both the subsistence and general hunting booklets

TIER I - ^{only} This situation exists when harvest opportunity must be limited to Alaska residents. Under the Madison decision all Alaska resident hunters may qualify as subsistence hunters.

If the board finds that subsistence uses are substantially impaired:

- nonsubsistence uses must be eliminated
- other regulatory changes may be made to alleviate the impairment

If the board then finds that such changes alleviate the impairment:

- the hunt remains open to all Alaska residents but is closed to nonresidents

TIER II - This situation exists when not all resident hunters can participate and still maintain the sustained yield of the game population.

If the board finds that after making the above changes, subsistence uses are still substantially impaired:

- hunter participation must be limited based on 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.

Alaskans who wish to participate in Tier II hunts will have to complete a questionnaire that measures these three criteria for each Tier II hunt they are interested in.

The Tier II hunts, by and large, represent some of the most popular hunts in the state. In most cases, these hunts were previously conducted through random permit drawings or first-come/first-served registrations. This change will affect many Alaskans who may already have applied for a permit or had planned to register.

These changes affect approximately 60 different hunts. Perhaps the most difficult decisions were those affecting species that are not commonly thought of in terms of subsistence uses (bison, sheep, goats and brown bears). The current statute does not allow the board to treat these animals differently from caribou, moose or deer.

Every effort will be made to conduct hunts at the times authorized by the board. Administrative difficulties with changing the way permit hunts are conducted may force the department to delay some of the earliest hunting seasons.

The emergency regulations which the board adopted will be in effect for 120 days. The regulations will be circulated for public comment and may be made permanent so that there will be no lapse in regulation prior to the fall Game Board meeting. In November and January, the board will hold public hearings in Anchorage so that the advisory committees, regional councils, and others can provide additional comments.

HUNTS AVAILABLE TO ALL HUNTERS

A recent decision by the Alaska Supreme Court prompted major revisions in the allocation of big game resources in Alaska. The system of registration and drawing permit hunts previously used to decide who could harvest which animals was largely set aside in favor of a ranking system that gives priority to subsistence use by residents. This means that non-residents must be eliminated from some popular hunts. Those hunts which still allow both resident and non-resident hunters to harvest animals are listed below.

Species	Game Management Unit/Hunt No.	Comments
Black Bear	1-3, 5-7, 9, 11-26	General season—no changes
Brown Bear	1-7 8 All hunts 8 Hunts 201-226 9C Hunt 251 9D Portion 10, Hunt 235 11-21, 22A 22B & 22E, Hunt 280 23, Hunt 281 24 & 26A, Hunt 282 25, Hunt 292-294 26A & 26C, Hunts 285, 287 26B, Hunt 286	General season Nonresident with registered guide by registration permit Drawing permit for nonresident accompanied by resident within the second degree of kindred General season by registration permit General season Registration permit General season Drawing permit Drawing permit Registration permit Drawing permit Drawing permit Registration permit
Bison		No nonresident hunting
Caribou	9, 16, 17, 19C & 18 North of Yukon 10, Hunt 550 12 & 20D North of Alaska Hwy. and 20E 19A, 19B, 19C, 19D 20A, portion 20B, 21, 22A, 22B, 23, 24, 25C, 26A, 26B 20F 25A, 25B, 25D, excluding west fork of Dall River, and 26C	General season Registration permit Nonresidents limited to early season and bag limit of one Nonresidents limited to early season and bag limit of one General season, part of Unit is closed General season Nonresidents limited to early season Bag limit reduced
Deer		General season—no changes

Species	Game Management Unit/Hunt No.	Comments
Moose	1A and portion of 1B	General season
	1B, Thomas Bay	Registration permit
	1C, except Berner's Bay	Registration permit
	5A, Nunatak Bench	Registration permit
	5B & 6B	Registration permit
	6A, 6D, 7 (excluding River), 9A, 9B, 9C, 9E, 11, 12, 14B and 13A portion west of Lake Louise Rd.	General season
	14A, 14C (remainder) & 15A Kenai NWR	Nonresidents limited to one bull
	15A (remainder), 15C, 16A, & 15B remainder	General season
	14A, 14C (portion), 15A Kenai NWR west	Nonresidents limited to one bull
	16B Kalgin Island	Registration permit
16B (remainder), 17B (remainder), 17C, 18 (remainder)	Nonresidents limited to early season	
17B Mulchatna River, 19A, 19B, 19C, 20A, 20B (portion), 20C, & 20D	General season	
20F, 21A, 24	Nonresidents limited to early season	
21B, 21C, 21D, 21E, 23, 25A, 25B, 25C, 25D (except 25D west), 26	General season	
22B, 22C, 22D, 22E	General season for one bull—registration permit for antlerless	
Elk	8, Hunts 702, 751	Registration permit
Mountain Goat	1-5, Hunts 801-817	Registration permit
	8, Hunts 871, 873, 874, 876	Registration permit
	6, Hunt 879	Registration permit
	7, Hunts 830, 833, 836, 839, 840, 842, 844, 845, 846, 847, 852	Registration permit
	11, 14, 15B, Hunt 854	Registration permit
15C	Registration permit	
Muskoxen		No nonresident hunting

Sheep

NOTICE

This summary of the status of hunts for 1985 is extracted from regulations of the Board of Game. It may not be complete. It does not contain many of the regulations which apply to these hunts. Please refer to Alaska Game Regulations, permit hunt supplements or an office of the Department of Fish & Game for further specific information relating to permit conditions, seasons and bag limits, and other appropriate regulations.

PERMIT HUNTS — 1985

Species	Unit	Hunt No.	Permit Hunt Type	Subsistence	General	Further Information
Bison	11	406	Tier II	X		Chitina
	11	450	Registration	X		Copper River
	19	451	Tier II	X		Farewell
	20D	403&404	Tier II	X		Delta bulls, cows
Brown Bear	8	201-226	Drawing	.	X	Kodiak
	8	UNKNOWN	Registration	.	X	Nonresidents with guides S. Kodiak Island
	8	250	Registration	X	X	N. Kodiak Island
	8	250	Registration	X	X	Afognak Island remainder Unit 8
	8	NEW	Registration	X		April 1-15, special subsistence regulations apply, Kodiak
	9C	251 F&S ^b	Registration	X	X	Naknek River
	9D	252 F&S	Registration	X	X	Cold Bay
	10	235 F&S	Registration	X	X	Unimak Island
	22	280 F&S	Drawing	NPR	X	Units 22B, 22C, 22D, 22E
	23	281 F&S	Drawing	NPR	X	Western Brooks Range
	24	282 F&S	Registration	X	X	Unit 24 North
	24, 26A	290	Registration	X	X	Gates of the Arctic
	25A	292 F&S	Drawing	NPR	X	Unit 25A East
	25A	293 F&S	Drawing	NPR	X	Unit 25A Central
	25A	294 F&S	Drawing	NPR	X	Unit 25A West
	26A	284 F&S	Registration	X		Unit 26A East
	26A	285 F&S	Drawing	NPR	X	Unit 26A West
	26B	286 F&S	Registration	X	X	Central North Slope
	26C	287 F&S	Drawing	NPR	X	Arctic NWR, North Slope
Caribou	7	501	Tier II	X		Kenai Mountain Herd
	10	550	Registration	X	X	Adak Herd
	11	510	Tier II	X		Mentasta Herd
	13, 14B	515, 562	Tier II	X		Nolchina
	20A	570	Tier II	X		Central Western 20A
	20D	530	Tier II	X		Macomb
Deer	4	630	Registration	X	X	Angoon Area Jan. 1-31
Elk	8	702	Registration	X		Raspberry Island
	8	750	Registration	X	X	Afognak, part of
	8	751	Registration	X		Southwest Afognak
Goat	1A, 1B	801	Registration	X	X	Southern Southeast Mainland
	1C	802	Registration	X	X	Antler-Eagle River
	1C	803	Registration	X	X	Remainder of 1C
	1D	805	Registration	X	X	Haines Area
	1D	806	Registration	X	X	Remainder of 1D
	4	815	Registration	X	X	Baranof
	5A, 5B	817	Registration	X	X	Yakutat
	6D	830	Registration	X		Tiger Glacier
	6	879	Registration	X	X	Cordova
	6D, 7, 15B	839, 840, 842, 844-847, 852, 854, 857-865	Registration	X	X	Kenai West, Prince William Sound
	7, 15B	831, 834, 835, 843, 855	Tier II	X		Selected areas, Kenai
	8	872	Tier II	X		Kodiak, Crown Mountain
	8	871, 873, 874, 876	Registration	X	X	Kodiak
	11	880	Registration	X	X	Copper River-Wrangell Mountains
	14	866-870	Registration	X	X	Anchorage Area

KEY—Hunt No. = as hunt number appears in current hunt supplement
 NPR = no permit required.

F = fall hunt S = spring hunt

* = subsistence opportunity provided in new April 1-15 hunt.

PERMIT HUNTS — 1985

Species	Unit	Hunt No.	Permit Hunt Type	Subsistence	General	Further Information
Moose	1B	955	Registration	X	X	Thomas Bay
	1C	901	Tier II	X		Berner's Bay
	1C	956	Registration	X	X	1 C except Berner's Bay
	1D	959	Tier II	X		Haines
	5A	960	Registration	X	X	Nunatak Bench
	5A	961	Tier II	X		Yakutat Forelands
	5B	962	Registration	X	X	Malaspina Forelands
	6B	966	Registration	X	X	Martin Bay
	6C	967, 968	Tier II	X		West Copper River Delta
	7, 14C	910, 911	Tier II	X		Placer River, Twenty-mile
	9C	972	Registration	X		Naknek River Drainage
	13	913	Tier II	X		Any size bull moose, Nelchina
	14A	919,920	Tier II	X		Matanuska Valley, East and West
	14C	923	Tier II	X		Ft. Richardson, late hunt
	14C	924	Hunt cancelled			
	14C	978	Tier II	X		Anchorage M.A.
	14C	974	Tier II	X		Eagle River
	14C	975	Tier II	X		Eklutna
	14C	925, 927, 928	Tier II	X		Knik River, Ship Creek, Peters Creek
	15A	929	Tier II	X		Unit 15A West, cow hunt
	15B	930-939	Tier II	X		Unit 15 B West, "five areas, ten hunts"
	16B	980	Registration	X	X	Kalgin Island
	16B	981	Tier II	X		Beluga River North
	16B	982	Tier II	X		Beluga River South
	17B, 17C	983	Registration	X		Early bulls, upper Mulchatna
	20B	985	Tier II	X		Minto Management Area
	21D	988	Registration	X		Galena Area late season
	22B	992	Registration	X	X	Eastern Seward Peninsula cows
	22D	991	Registration	X	X	Central Seward Peninsula cows
	22E	990	Registration	X	X	Western Seward Peninsula cows
25D	994	Tier II	X		Unit 25D West	
Muskoxen	18	1001F	Drawing	X		Nunivak bulls
	18	1003S	Drawing	X		Nunivak bulls
	18	1060F	Registration	X		Nunivak cows
	18	1061S	Registration	X		Nunivak cows
	18	1070	Registration	X		Nelson Island
	26	1007	Registration	X		26C ANWR
Sheep	12, 13, 20	1102	Tier II	X		Tok Management Area
	12, 13, 20	1150	Hunt Cancelled			TMA ewes
	13, 20	1103, 1104	Tier II	X		Delta Controlled Use Area
	14A	1110	Tier II	X		Matanuska Valley ewes
	14C	1130-1135	Tier II	X		Chugach State Park, early
	14C	1160	Registration	X	X	Chugach State Park, late
	20D, 20E	1106-1108	Tier II	X		20D North, 20E except Glacier Mountain
	23	1185	Registration	X		Either sex, Noatak area
	24, 26A, 26B	1191	Registration	X	X	Gates of the Arctic
	25A, 26C	1190	Registration	X		Arctic NWR, late season

NOTICE

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**Season Dates and Number of Permits
for Tier II Hunts**

Area	Season Dates	No of Permits
MOOSE		
Berner's Bay	Sept. 21-Oct. 21	15
Haines 1(D)	Sept. 21-Oct. 6	45
5(A) except Nunatak Bench	Oct. 15-Nov. 15	200
6(C)	Sept. 21-Oct. 21	20 Male 20 Antlerless
Placer R./20-Mile	Sept. 21-Oct. 10	40 Male 20 Antlerless
13 except part of 13A	Sept. 21-Sept. 30	200
14(A) Cows	Sept. 21-Sept. 30	400
Ft. Richardson	Dec. 1-Feb. 28	50
Anch. Mgmt. Area	Nov. 1-March 31	up to 30
Eagle R. & Eklutna Mgmt Area	Sept. 21-Oct. 17	up to 200
Remainder 14(C)	Sept. 21-Oct. 17	50
15(A) Cows	NO SEASON	up to 100
15(B)	Sept. 26-Oct. 17	50
16(B) South	Dec. 1-Jan. 31	up to 75
16(B) North	Dec. 1-Jan. 31	up to 75
20(D) Minto	Sept. 21-Oct. 5 Jan. 10-Feb. 28	60
25(D) West	Sept. 21-Oct. 10 Dec. 1-Dec. 10 Feb. 18-Feb. 28	60
CARIBOU		
Nelchina	Sept. 21-Sept. 30 Jan. 1-Feb. 28	up to 1,800
Mentasta	Sept. 21-Sept. 30	up to 350
Kenai Mts.	Sept. 21-Nov. 15	up to 200
20(A)	Sept. 21-Dec. 31	200
20(D) South	Sept. 21-Sept. 30	140
BISON		
Chitina	Sept. 21-Nov. 30	12
Fairwell	Sept. 21-Oct. 31	40
Delta	Oct. 7-March 31	15 Bulls 40 Cows

GOATS

Crown Mt.—Kodiak	Oct. 1-Oct. 31	20
7 & 15	Oct. 1-Oct. 31	16—five areas

SHEEP

14(A) Ewes	Aug. 20-Sept. 27	10
14(C) Chugach State Park	Aug. 25-Sept. 20	120
Tok Mgmt. Area	Aug. 20-Sept. 27	120
Delta Mgmt. Area	Aug. 20-Sept. 27	150
20E & D	Aug. 20-Sept. 27	12—3 areas

Schedule of Events—Tier II Hunts

Sheep

Hunt supplement ready for printing	July 5
5,000 supplements (4 pages each) ready for mailing	July 10
Mail/deliver to all F&G offices and selected vendors	July 20
Available to public—9 days	post mark deadline July 29
Deadline for receipt by ADF&G of applications	August 5
Time to score applications	August 6
Select winners	August 7-8
List of permit winners sent to Fairbanks, Tok, Glennallen, Delta, Palmer, Soldotna	August 8
Send permits	August 9
Hunters receive permits	August 12-19

Season opens -August 20

All Other Species

Tier II and I newspaper and applications ready for printing	July 9
50,000 papers, 110,000 applications ready for mailing	July 15
Mail/deliver to all vendors and F&G offices	July 24
Available to public—10 days	post mark deadline August 5
Deadline for our receipt	August 12
Time to score applications	August 22
Select winners	August 26
Send permits	Sept. 5
Hunters receive permits	Sept. 15

Season open no earlier than - Sept. 21

DRAFT REGULATIONS FOR TIER II

06/12/85

5 AAC 92.XXX. PRIORITY FOR SUBSISTENCE HUNTING. (a) After nonsubsistence uses of game have been eliminated, and the board finds it necessary to restrict further the taking of game to assure that a game population and its sustained yield are maintained, or to assure the continuation of subsistence uses of a game population, permits will be allocated to individuals scoring highest according to the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood, as indicated by past participation and degree of dependency;

(2) local residency, as indicated by the location of one's domicile and distance to the hunting area; and

(3) availability of alternative resources, as indicated by the presence of other fish and game resources authorized and available for harvest in the hunting area, or in other areas reasonably accessible to the individual, and financial circumstance.

(b) The board will establish a point system for ranking hunting permit applicants for each criterion set out in (a) of this section. Permits will be issued to the highest ranked applicants up to the maximum level of participation the board authorizes for each hunt. Applicants with equal scores shall be selected by random drawing.

5 AAC 92.XXX. POINT SYSTEM FOR CUSTOMARY AND DIRECT DEPENDENCE. A maximum of 30 points will be given an applicant for past participation in a hunt and degree of dependence based on the following schedule:

(1) 1 point for each year the applicant harvested an animal from the population. A maximum of 10 points will be given.

(2) Up to 20 points for degree of direct dependence on the noncommercial harvest of the population for the principal means of support (primary food source) of the applicant:

- (A) great dependence, 20 points;
- (B) moderate dependence, 15 points;
- (C) slight dependence, 10 points;
- (D) no dependence, 0 points.

5 AAC 92.XXX. POINT SYSTEM FOR LOCAL RESIDENCY.

(a) A maximum of 30 points will be given based on an applicant's domicile according to the following schedule:

- (1) zone 1: 30 points;
- (2) zone 2: 20 points;
- (3) zone 3: 10 points;
- (4) zone 4: 0 points.

(b) Except as provided in (c) of this section:

- (1) zone 1 means the hunting area;
- (2) zone 2 means outside the hunting area, but within the GMU(s) containing the hunting area;
- (3) zone 3 means in GMUs adjacent to the GMU(s) containing the hunting area;
- (4) zone 4 means in other GMUs.

(c) When the board determines that the zones set out in (b) would treat a specific concentration of similarly located individuals differently, or would be inappropriate due to the range and distribution of the resource, the board will, by regulation, modify the boundaries of the zones.

5 AAC 92.XXX POINT SYSTEM FOR AVAILABILITY OF ALTERNATIVE RESOURCES. A maximum of 30 points will be given to an applicant for availability of alternative resources based on the following schedule:

(1) Availability of fish and game resources in the applicant's hunting area, or other reasonably accessible area:

(A) greatly available: 0 points;

(B) moderately available: 5 points;

(C) slightly available: 10 points;

(D) not available: 15 points.

(2) 15 points will be given if the applicant's financial circumstance is not adequate to purchase non-wild resources as a reasonable alternative to taking the game.

PERMIT APPLICATION FOR TIER II HUNTS
[A SEPARATE FORM MUST BE FILLED OUT FOR EACH TIER II HUNT]

1. NAME: _____
Last First Middle Initial

2. MAILING ADDRESS: _____
P.O. Box/Street

_____ City/Town State Zip

3. ADDRESS WHERE YOU LIVE (Primary Residence/Domicile*)

_____ Street or Property Description

_____ City/Town or Closest Community

(* See 5 AAC _____) NOTE TO SUE -- put definition in instructions

4. LIST THE HUNT NUMBER FROM THE EMERGENCY SUBSISTENCE PERMIT HUNT SUPPLEMENT FOR THE HUNT YOU WISH TO APPLY FOR: [LIST ONLY ONE] HUNT NUMBER: _____

OR

5. IF YOU ARE UNABLE TO PROVIDE THE HUNT NUMBER, PLEASE LIST THE TYPE OF ANIMAL YOU WISH TO HUNT (caribou, moose, etc.) & THE GAME MANAGEMENT UNIT, SUBUNIT, OR AREA DESCRIBED IN THE CURRENT GAME REGULATIONS:

Animal _____ Game Management Unit, Subunit, or Area _____

6. WHICH OF THE FOLLOWING DESCRIBES WHERE YOUR PRIMARY RESIDENCE/DOMICILE IS LOCATED? [CHECK ONLY ONE]

- a. I live within the hunt area (see instructions).
- b. I live within the same game management unit(s) as the hunt for which I am applying, but do not live within the hunt area.
- c. I live in a game management unit immediately adjacent to the game management unit in which the hunt is held.
- d. I live in an area not described in a, b, or c.

7. You may be given one point for each year you legally killed an animal(s) in this hunt (same species of animal in the same area as the hunt you are now applying for). A maximum of 10 points may be claimed.

PLEASE LIST THE YEARS IN WHICH YOU LEGALLY KILLED AN ANIMAL(S) IN THIS HUNT.

19__ 19__ 19__ 19__ 19__ 19__ 19__ 19__ 19__ 19__

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INSTRUCTIONS FOR SUBSISTENCE HUNTING
PERMIT (TIER II) APPLICATION AND CERTIFICATION

This form is both an application and a certification regarding how you meet the three criteria for participating in a Tier II subsistence hunt. The Tier II hunts are listed in a special Subsistence Hunting Permit newspaper, available through Department of Fish and Game offices.

Conditions

- ° Submit a separate application and affidavit for each species and area you want to hunt.
- ° Only one member of your household may apply for each hunt, except for caribou. For caribou, two members of your household may apply for the same hunt.
- ° Only those applications which are complete, accurate, and signed will be considered.
- ° A \$5.00 fee is charged for each hunt application for species other than bison and muskox. A \$10.00 application fee is required for bison and muskox.

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Questions 1, 2, and 3: give your full name, mailing address, and place of domicile, which is the location of your primary residence. Evidence of domicile includes, but is not limited to, such factors as where you have claimed your place of residence for other government purposes, where you are registered to vote, where you own, rent, or lease residences or businesses, and which governments you pay taxes to. If your home does not have a street address, please give enough information to help locate it, such as name of road, milepost, etc.

Question 4: Enter the hunt number. Hunt numbers are described in the new Subsistence Hunting Permit newspaper. If you do not know the hunt number, you can answer Question 5 which asks you to name the species and location that you want to hunt.

Question 6: Check the box which describes where your primary residence (domicile) is in relation to the location of the hunt for which you are applying. Please refer to the Subsistence Permit newspaper for a list of the relevant Game Management Units.

Question 7: List the years in which you or another member of your household previously killed an animal of the same species in the same area as the hunt for which you are applying.

Question 8: Rate how dependent for food your household is on taking the animal for which you are applying. There are four

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categories of dependence. You should use the following guidelines in answering this question: (1) category a, if your household is greatly dependent on this animal as a principal means of support; (2) category b, if your household is moderately dependent on this animal; (3) category c, if your household is slightly dependent on this animal; and (4) category d, not dependent, if your household does not normally consume meat from animals from this population.

Question 9: Check the box which indicates the degree of availability to you of alternative sources of wild animal meat. Alternatives include other game species or fish which are at least as accessible to you as the Tier II animal for which you are applying, and which could reasonably substitute for it. A reasonable substitute means that your household has access to and could legally harvest an equivalent amount of meat from one or more of the alternatives. Use the following guidelines in answering this question: (1) category a, not available, if none of the animal meat which this animal represents could be substituted; (2) category b, slightly available, (3) category c, moderately available, and (4) category d, greatly available, if other game or fish in areas accessible to you are abundant and can be legally taken.

Question 10: Indicate whether or not your household's income is enough to purchase substitutes for the animal you want to hunt.

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Substitutes include alternative foods from domestic animals as well as alternative sources for other animal products which are necessary for your household's well being.

Question 11: asks if you are at least 12 years old and qualify for a resident Alaska hunting license. You must have resided within the State of Alaska for at least one year to qualify. If you cannot answer yes to this question, you should not submit your application because it will not be considered.

Question 12: asks to verify that you are the only member of your household to apply for a permit for this species, except if the species is caribou. For caribou, two members of your household may apply.

Checklist

- Have you enclosed your application fee?
- Have you filled in the correct hunt number?
- Have you responded accurately to all questions?
- Have you signed and dated the certification?

* * * * * Mailing Instructions * * * * *

(yet to be determined)

Don V. Collinworth, Commissioner

ITEM E

Public Communications
Box 3 - 2000
Juneau, Alaska 99802
(907) 465-4113



Alaska Department of Fish & Game

NEWS

FOR IMMEDIATE RELEASE

MAY 29, 1985

GAME BOARD SCHEDULES EMERGENCY MEETING

JUNEAU--The Alaska Board of Game will convene in Juneau for an emergency session beginning June 10, 1985, to adopt emergency regulations providing for subsistence hunting. Without such regulations, Chief Prosecutor Daniel Hickey has concluded that his staff would be unable to prosecute some hunting violations successfully.

In a May 22, 1985, memorandum, the chief prosecutor advised the department that emergency regulations are needed in order to ensure enforceability of all game regulations, some of which cannot be enforced currently. The Department of Law further explained that the board must take these actions because of recent decisions in Madison v. Department of Fish and Game, ___ P.2d ___, Op. No. 2911 (Alaska February 22, 1985) and State v. Eluska, ___ P.2d ___, Op. No. 210 (Alaska App. April 12, 1985). Because the Legislature has not yet enacted corrective legislation, the Department of Law has noted that the board must now provide subsistence hunting regulations for every game population which has been hunted by Alaska residents for food.

-MORE-

The combined effect of both cases will eventually require the board to change current harvest management extensively. Perhaps the most significant problem the board must address at this meeting will be permit and registration hunts. Although the current random drawing and first-come/first-served type distribution methods for harvest opportunity are no longer legally acceptable, the board will have a great deal of difficulty finding an appropriate feasible alternative. Any alternative must be consistent with the three criteria contained in the current statute and discussed by the Supreme Court in Madison: 1) customary and direct dependence upon the resource as the mainstay of one's livelihood; 2) local residency; and 3) availability of alternative resources.

The meeting will begin at 8:30 a.m. in the Conference Room at the ADF&G headquarters office at 1255 West 8th Street, Juneau. The meeting is open to the public, but, due to the emergency nature of the meeting, public testimony will not be taken. The emergency regulations will be effective for 120 days, and if they are later considered for submission as permanent regulatory changes, public comment will be solicited.

####

Don W. Collinsworth, Commissioner

Public Communications
Box 3 - 2000
Juneau, Alaska 99802
(907) 465-4113



Alaska Department of Fish & Game

NEWS

FOR IMMEDIATE RELEASE

MAY 23, 1985

EMERGENCY SUBSISTENCE SALMON REGULATION TO BE ISSUED

JUNEAU--In response to a memorandum from the Department of Law, the Department of Fish and Game has begun issuing emergency regulations to provide subsistence fishing permits for locations not open under current regulations.

Chief Prosecutor Dan Hickey has advised the ADF&G that emergency regulations are necessary because of recent judicial decisions in Madison v. ADF&G and State v. Eluska and because the Legislature has not yet enacted corrective legislation. Without such regulations, the Chief Prosecutor has concluded that his staff would be unable to prosecute successfully some subsistence fishing violations.

The emergency regulations, which will incorporate the requirements specified by the Department of Law, will ensure full enforceability of all fishing regulations in Cook Inlet and throughout the state.

Under these emergency regulations, permits will be issued to Alaska residents for subsistence salmon net fishing in Cook Inlet, if that fishing had previously been authorized by state subsistence regulations and the depart-

-MORE-

ment's records indicate that such fishing actually occurred. The permits will indicate locations and times when subsistence fishing will be allowed, gear specifications, and bag limits.

Rod and reel fishing is defined in Alaska statutes as sport fishing and thus no subsistence permits will be issued for fishing with rod and reel gear.

No Cook Inlet subsistence salmon permits will be issued for fishing during May, since no state regulations have ever allowed subsistence fishing during that month.

Violators of sport, commercial, personal use, or subsistence regulations will be cited by ADF&G personnel and by officers of the Fish and Wildlife Protection Division, Department of Public Safety.

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STATE OF ALASKA
DEPARTMENT OF FISH AND GAME
PUBLIC COMMUNICATIONS SECTION
P.O. BOX 3-2000
JUNEAU, ALASKA 99802-2000

Don W. Collinsworth, Commissioner

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Alaska Department of Fish & Game

NEWS

FOR IMMEDIATE RELEASE

May 16, 1985

Hunting Regulations Delay Announced

JUNEAU--The Alaska Department of Fish and Game has announced that the hunting and trapping regulations books normally issued by July 1 each year will not be available until late in the summer.

The recent Madison and Eluska court decisions have forced an unanticipated session of the Alaska Board of Game to consider emergency regulations designed to bring the state into compliance. The board will begin its emergency session on June 10 in the Conference Room of the Fish and Game Building, 1255 W. 8th St., in Juneau.

Although the meeting is open to the public, no public testimony or comments will be taken. Once the board has drafted emergency regulations, they will be circulated for public review and written comment.

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Alaska Board of Game
#85-38-GB

Findings on Madison Requirements

April 4, 1985

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

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

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

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

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

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

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

April 4, 1985

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

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

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

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

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

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

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

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

Brenda Johnson, Chairman
Alaska Board of Game

Adopted 04/04/85
Anchorage, Alaska

ALASKA JOINT BOARD OF FISHERIES AND GAME
RESOLUTION #85-14-JB

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

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

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

1. The commercial gill net fishery which is an important component of the Prince William Sound economy may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to accommodate both the historic commercial fishery and other users.
2. Sport fishing for king and other species of salmon on the Kenai and Naknek rivers and in the Susitna drainage may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to prevent that result.
3. Non-subsistence hunting, including commercial guiding activities may be significantly restricted and, in many cases, eliminated. Prior to the Madison decision the Board of Game had adequate regulatory flexibility to accommodate these users reasonably.

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

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

WHEREAS, the Alaska Board of Fisheries and Board of Game strongly believe that the potential restrictions, closures, reallocations and loss of funding described above are not in the best interest of the fish and wildlife resources and the people of Alaska;

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

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

Ron Jolin, Chairman
Alaska Board of Fisheries and Game

Adopted March 26, 1985
Anchorage, Alaska
VOTE: 13/1

ALASKA BOARD OF FISHERIES FINDINGS
SUBSISTENCE REGULATIONS FOR THE 1985 FISHING SEASON
#85-111-FB

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

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

The spring Kasilof River salmon gill net fishery, the Kasilof and Kenai River, China Poot, and Bear Creek sockeye salmon dipnet fisheries, and the shellfish, herring, and smelt fisheries

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

- 3) Change the Kenai River fall coho set gill net personal use fishery by emergency regulation to a subsistence fishery, as required by Madison, and manage it under the regulations used during the 1981 season, except the current reporting requirements will apply. Any Alaska resident may participate in this fishery.

- 4) Change the Kachemak Bay coho salmon set gill net personal use fishery, by emergency regulation, to a subsistence fishery, as required by Madison, and manage it under the regulations developed for the court ordered fishery. Any Alaska resident may participate in this fishery.
- 5) Allow, by emergency regulation, access by all Alaska residents to the Iliamna/Lake Clark, Naknek River, and Angoon subsistence salmon fisheries. The bag and possession, time, area, gear, and overall harvest guidelines of each of these fisheries shall remain as described in the existing regulations. The board finds that such regulations are necessary to conduct an orderly fishery and to provide a reasonable opportunity for subsistence needs. Modification of these regulations at this time is not in the best interest of the public given the inadequate opportunity for public comment. During 1985, continue the Naknek River personal use fishery.
- 6) By emergency regulation, combine the Copper River subsistence and personal use salmon fisheries into a subsistence fishery. Retaining the existing regulations as to bag and possession limits, time, area, gear, and overall harvest guidelines, with regulations that now apply to the personal use fishery applying to the dip net fishery, and those that now apply to the subsistence fishery applying to the fishwheel fishery. The board finds these regulations to be necessary to conduct an orderly fishery and to provide a reasonable opportunity for subsistence needs. Further, the overall harvest guidelines, bag limits, and areas represent the different historical harvest patterns for each gear type. The dip net portion of this guideline represents a total harvest which was not taken during the 1984 season. The harvest lid is necessary to manage the downriver commercial salmon drift gill net fishery to ensure escapement for reproductive needs and the upriver subsistence fishery. The bag and possession limits, while different for dipnetters and fishwheel fishermen, were developed by the board after extensive public testimony and information demonstrating that the differing bag limits reflected historical use by each group. Any Alaska resident may participate in either the fishwheel or the dipnet fishery.

The board hereby calls for proposals from the public on all subsistence and personal use regulations to be considered at the 1985 fall/winter finfish meeting. Any petitions concerning subsistence, personal use, or associated sport and commercial fisheries will be accepted and scheduled for the 1985 fall/winter board meeting. The board will consider all

March 27, 1985

proposals to establish, eliminate or modify any or all subsistence or personal use regulations and any changes in commercial or sport fishery regulations required by such regulations.

Ron Jolin, Chairman
Alaska Board of Fisheries

Adopted March 26, 1985
Anchorage, Alaska

VOTE: 4/0

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history reports. — For
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attorney general. — For
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Effect of amendments. — The 1983 gauge subsection (a) and added subsection amendment rewrote the existing language (b). of this section and designated that lan-

Sec. 16.05.255. Regulations of the Board of Game. (a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

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

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

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

(6) investigating and determining the extent and effect of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designating game management units or parts of game management units in which bounties for predatory animals shall be paid;

(7) engaging in biological research, watershed and habitat improve- ment, and game management, protection, propagation and stocking;

(8) entering into cooperative agreements with educational institu- tions and state, federal, or other agencies to promote game research, management, education, and information and to train persons for game management;

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

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

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

- (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- (2) local residency; and
- (3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

Cross references. — For validity of regulations of former Board of Fish and Game, see sec. 41, ch. 206, SLA 1975 in the Temporary and Special Acts.

Editor's notes. — For legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Special Acts and Resolves.

Legislative history reports. — For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

Opinions of attorney general. — Neither the Board of Game nor the Department of Fish and Game has jurisdiction

over domestic animals. August 29, 1979, Op. Att'y Gen.

Permitting authority over live game, that is, nondomestic animals, rests with the Board of Game as implemented by the Department of Fish and Game. August 29, 1979, Op. Att'y Gen.

For discussion of compatibility of state subsistence-use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3115 et seq.), see 1991 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

Establishment of quotas must be in accordance with the Administrative Procedure Act (AS 44.62). *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Applied in *Gottardi v. State*, Sup. Ct. Op. No. 2154 (File No. 4436), 615 P.2d 626 (1980).

Sec. 16.05.256. Nonresident and nonresident alien permits. Whenever it is necessary to restrict the taking of big game so that the opportunity for Alaska residents to take big game can be reasonably satisfied in accordance with sustained yield principles, the Board of Game may, through a permit system, limit the taking of big game by nonresidents and nonresident aliens to accomplish that purpose. (§ 3 ch 74 SLA 1982)

Sec. 16.05.257. Subsistence hunting regulations. (a) The Board of Game, at its regularly scheduled annual meeting and other meetings held under authority of AS 16.05.300(a), shall consider and may adopt regulations providing for subsistence hunting in a game management unit or subunit or a portion of a unit or subunit upon

- (1) recommendation of the department, based on biological evidence;
- (2) the recommendation of the active local advisory committees for that game management unit or subunit or a portion of a unit or subunit;
- (3) the written petition of not less than 100 interested residents of that game management unit or subunit; or
- (4) the written petition of not less than 25 interested residents of an area which is requested for establishment as a subsistence area within a game management unit or subunit.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

May 22, 1985

REPLY TO:

OFFICE OF THE CHIEF PROSECUTOR
POUCH KC
JUNEAU, ALASKA 99811
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

M E M O R A N D U M

TO: Robert Sundberg Don W. Collinsworth
Commissioner Commissioner
Department of Public Safety Department of Fish & Game

All Criminal Division Offices
Department of Law

FROM: Daniel W. Hickey DW91
Chief Prosecutor

SUBJECT: Subsistence Defense for Fish and Game Violations -
Enforcement Criteria in Light of State v. Eluska

The purpose of this memorandum is to provide enforcement personnel and prosecuting attorneys with a set of guidelines that will have to be followed in fish and game prosecutions in light of the subsistence defense created by the Alaska Court of Appeals in State v. Eluska, ___ P.2d ___, Op. No. 210 (Alaska App. April 12, 1985).

A. The Court Decision

In Eluska, the court of appeals ruled that the Board of Game had failed to comply with the legislative mandate set out in AS 16.05.255(b) that specific regulations be adopted providing for subsistence uses and a subsistence priority for the taking of game. As a result, the court established a "subsistence defense" meaning that in areas where specific subsistence regulations have not been adopted conduct that would otherwise involve the illegal taking or possession of game is justified as a "subsistence use" if: (1) the person believed that he or she was taking the game in question for subsistence uses; and (2) the person was not aware of and did not consciously disregard a substantial and unjustifiable risk that his or her taking was not a subsistence use of the game taken.

Because of the Board's failure to adopt regulations, the court was unwilling to make the defense an affirmative defense which would put the burden of proving it on the

defendant. Instead, the court held that once the defense is raised (and that it may be raised prior to trial), the state has the burden of proving beyond a reasonable doubt that the taking or possession was not a subsistence use. Given the fact that neither the board nor the legislature has come up with a workable definition of subsistence, this will be virtually an impossible burden to meet. What this means in effect is that a resident of the state who asserts that his or her taking or possession involves a subsistence use cannot be convicted unless the state can prove beyond a reasonable doubt that either (1) the regulation allegedly violated did not restrict the taking of game, or (2) any such restriction placed an absolute priority on subsistence uses and was necessary to protect sustained yield.

Prior to the court of appeals decision in Eluska, the Alaska Supreme Court in Madison v. Department of Fish and Game, ___ P.2d ___, Op. NO. 2911 (Alaska February 22, 1985), struck down a regulatory scheme designed to identify eligibility for subsistence fishing in Cook Inlet and to allocate fish resources among subsistence, commercial, personal use and sport fishermen. The court held that under AS 16.05.940(23), which defines "subsistence uses," all Alaskans were initially eligible for all subsistence hunting and fishing. The court additionally held that AS 16.05.251(b) establishes a priority for subsistence use over all others. In other words, to the extent that an insufficient number of fish exist to accommodate all potential users, subsistence use is to be allowed at the expense of sport, personal or commercial use. Governor Sheffield introduced a bill in response to the Madison decision that would have clarified and restricted subsistence taking. That bill was passed by the House of Representatives but not by the Senate and remains pending before the legislature.

AS 16.05.251(b), pertaining to fish, and AS 16.05.255(b), pertaining to game, are parallel provisions. Considering Eluska and Madison together, the conclusion to be drawn is that a "subsistence use" defense is now available for many hunting and subsistence fishing violations committed by Alaska residents.

Any Alaska resident, whether from a rural or urban area, can potentially and successfully assert a "subsistence defense" if the State has not adopted specific subsistence regulations consistent with Madison and Eluska and if the person reasonably believed he took the fish or game for "customary" or "traditional" uses. Unless and until remedial regulatory or legislative action is taken, a serious enforcement problem exists, and it is likely that there will be a significant increase in fish and game harvests, particularly around urban areas.

The Madison and Eluska decisions have had a serious effect on the State's ability to enforce fish and game violations under circumstances where someone can assert a subsistence use defense. The State has filed a Petition for Rehearing in Eluska seeking to have the court's opinion modified. That petition has recently been denied and we are now preparing a petition to the Supreme Court. However, unless the court reverses the decision or until the situation is addressed by the boards or the legislature, the guidelines described below are required.

B. Fisheries Violations

Throughout most of the state, the Board of Fisheries has already authorized subsistence fishing by regulation. The Department of Law has advised the Commissioner of Fish and Game to exercise his authority under 5 AAC 01.015 and the authority delegated to him by the Board of Fisheries to issue subsistence permits for taking salmon in areas where subsistence harvests have been historically authorized and conducted. If that is done and announced publicly, Fish and Wildlife officers and prosecutors will enforce all fishing regulations relating to taking or possessing salmon and other species.

Until that announcement is made, enforcement of fishing regulations relating to taking or possessing salmon will be limited to sport fishing violations, violations committed in subsistence fisheries currently authorized in regulations and commercial fishing violations.

C. Game Violations

Until regulations are adopted which comply with Eluska, the following guidelines will apply to all game violations:

1. Violations Occurring in National Parks and Monuments

All game violations occurring in national parks and monuments should be referred to appropriate federal authorities (U.S. Fish and Wildlife Service and the United States Attorney's

1/ It is important to note that "sport fishing" is defined in AS 16.05.940(21) as fishing primarily by rod and reel for personal use, while "subsistence fishing" is defined in AS 16.05.940(22) as fishing primarily by nets and other efficient methods. It is subsistence fishing that is given special protection in AS 16.05.251(b).

Office). We have been advised that the Division of Fish and Wildlife Protection in the Department of Public Safety have worked out arrangements with federal authorities to refer such cases and to act as special federal enforcement agents.

2. Violations Occurring on All Other Lands

(a) Violations involving the following offenses are to be handled in accordance with normal procedures with respect to the issuance of citations and the seizure of appropriation evidence:

(1) All game violations committed by nonresidents or commercial operators;

(2) All non-possessory game violations, such as "wanton waste" and "hunting same day airborne";

(3) Any violations involving the illegal taking or possession of game when the taking occurred in an area totally closed year round or closed by an emergency order containing specific findings that the resource would be jeopardized by any further harvest including subsistence taking;

(4) Any violations involving the illegal taking or possession of game when the taking occurs in an area totally closed to the particular species in question or in an area totally closed to the taking of a particular sex of a species or closed to any harvest during a particular critical period such as the calving season; or

(5) Any violation involving illegal taking or possession when the taking is clearly not for personal use such as wolves.

(b) Violations involving the taking or possession of game taken for consumption are to be investigated, documented and referred to local district attorney offices at the discretion of enforcement personnel. No citations are to be issued, no evidence seized and no search warrants obtained, except at the direction of the district attorney, whenever the following circumstances are present:

(1) the game has been taken in an area open during any part of the year to the taking of that species, unless the animal taken is of a sex specifically prohibited from being taken;

(2) the game has been taken by a resident
who asserts that his or her taking is for personal
use; and

(3) the game has been taken in a game
management area which is not covered by existing
regulations that specifically provide for subsistence
hunting.

Whenever a subsistence use defense is asserted in any
case that has been filed, Assistant Attorneys General Larri
Spengler (Juneau) or Liza McCracken (Anchorage) should be
contacted for advice and assistance in preparing the state's
response and handling any evidentiary hearing that may become
necessary.

DWH/gb-10

cc: Larri Spengler
Assistant Attorney General
Juneau AGO

Liza McCracken
Assistant Attorney General
Anchorage AGO

MEMORANDUM

State of Alaska

COMMISSIONER'S OFFICE

RECEIVED
MAY 30 1985

TO: Hon. Don W. Collinsworth,
Commissioner
Department of Fish and Game

DATE: May 23, 1985

FILE NO: 322-375-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Requirements of
Madison and Eluska

By: Larri Irene Spengler
Assistant Attorney General
Department of Law

DEPARTMENT OF FISH & GAME

You have asked for an assessment of the requirements of Madison v. Alaska Department of Fish and Game, P.2d _____, Op. No. 2911 (Alaska Feb. 22, 1985) and State v. Eluska, P.2d _____, Op. No. 210 (Alaska App. April 12, 1985), and how those requirements should be met for the approaching fishing and hunting seasons. In brief, there is nothing the Department or the Boards of Fish and Game can do to alter the statutory interpretation in Madison which mandates some allocation shifts away from sport and commercial uses and to subsistence uses -- a category much broader after Madison.

Madison in combination with Eluska requires generally that for this season unless subsistence fishing permits are issued for areas where subsistence fishing had been authorized and conducted in the past, no effective enforcement can occur against subsistence fishing in those areas, unless all fishing on the particular stock is closed. Eluska requires generally that the Board of Game adopt, consistent with Madison, subsistence hunting regulations separate from the general hunting regulations. If that is not done, a number of hunting regulations cannot be enforced effectively. (See the May 22, 1985, memorandum from Daniel Hickey, Chief Prosecutor, to Commissioner Sundberg, Department of Public Safety, Commissioner Collinsworth, Department of Fish and Game, and all Criminal Division offices of the Department of Law.)

The Cases

In Madison, the supreme court overturned the interpretation of the boards in 5 AAC 99.010 of "subsistence uses" as being the customary and traditional uses of fish and game by rural Alaska residents, identifiable by eight criteria. The court examined the definition in AS 16.05.940(23) and the legislative history, and determined that the boards had no authority to identify subsistence uses either as rural, or in terms of the uses by a community or area. Further, the court said that the boards had no authority to identify subsistence uses initially in terms of individuals.

Thus, any fish stock subject to subsistence fishing in the past, and any game population hunted in the past for food by Alaska residents must be opened to subsistence fishing */ or hunting. All Alaskans are initially eligible to participate in the harvest, and although subsistence fishing and hunting may be regulated as to bag limits, etc, it cannot be restricted or closed until all non-subsistence uses are eliminated.

Eluska created a "subsistence defense" and held that it is available only when subsistence hunting regulations have been adopted. In those instances, an individual can assert that he was engaging in subsistence hunting and that there are no applicable regulations. Then the state would have the burden to show that the existing regulations do not substantially impair subsistence uses, or are necessary to protect sustained yield. The same principles apply to subsistence fishing that the Board of Fisheries will have to authorize under Madison, but which has not yet been done, such as in Cook Inlet at certain times and in certain places. Thus, in some respects, the court in Eluska waived the exhaustion of remedies principle, which would normally have required people to ask the boards to authorize harvests before they could legally fish or hunt.

As a consequence of these cases, the department and the boards will need to take some action with regard to both fish and game in order to ensure maximum effective enforcement.

Fish

Under the department's authority in 5 AAC 01.015 and the authority delegated by the Board of Fisheries, subsistence fishing permits must be issued in 1985 for Alaska residents to take fish stocks in areas where fishing with nets has been established historically. The legal requirements for 1985 will be satisfied if permit decisions are based upon the following criteria:

*/ Sport fishing is not subsistence fishing. They have different definitions in statute; "sport fishing" is fishing by rod and reel. AS 16.05.940(21). "Subsistence fishing" is fishing by net and other efficient gear types. AS 16.05.940(22). The subsistence statute mandates that subsistence fishing be authorized, unless the sustained yield of the resource is likely to be hurt, not that sport fishing must be authorized. AS 16.05.251(b).

1. No permit will be issued if it is likely to result in conservation problems; however other uses must not be allowed if subsistence uses are not allowed.
2. Applications for permits will be considered only for stocks and areas which had been authorized under regulations since statehood.
3. Permits will be issued only for stocks and specific areas which actually had been fished under the regulations to which criterion 2 refers; this can be documented by department records, including simply whether permits had been issued in the past.
4. The Department of Fish and Game must make management adjustments as necessary to provide reasonable opportunity to harvest fish for the uses meeting criteria 1-3. In making these adjustments, the department will employ measures which have the following characteristics in the priority order listed below:
 - a. Most effectively protects sustained yield of the resource and provides for other management requirements such as catch data reporting, field monitoring, and orderly harvesting.
 - b. Maintains enforceability of the regulations;
 - c. Results in the least total harvest opportunity foregone by sport and commercial uses.

The Department of Fish and Game must apply these criteria even though sport and commercial fisheries may be affected.

5. If an application for a permit is received too late to allow orderly management adjustments in accordance with criterion 4, no permit will be issued this season. In such circumstances, the department should attempt to direct the applicant to other comparable areas and stocks for subsistence fishing.
6. The department must set permit conditions (including harvest limits) which provide

reasonable opportunity to fish for subsistence uses. This does not mean guaranteed harvest. When reasonable catch limits previously have been set for subsistence fisheries in the same area or nearby areas, the 1985 permits should reflect these limits. In the absence of previously established limits, permit conditions should provide opportunities comparable to those applicable in similar fisheries. If no meaningful comparison is available, reasonable limits should be set in the department's discretion based upon available data on past harvests.

7. All applicable statewide regulations and other subsistence regulations continue to apply to permits issued under these guidelines.
8. Permit conditions must be enforced as in any other fishery.

The fact that permits in particular areas and at particular times may be issued for this season by the department under these guidelines does not bind the Board of Fisheries to authorize subsistence fishing in the future for those areas and at those times. The board should -- as it already has announced that it will -- accept proposals regarding subsistence fishing statewide, and at the fall 1985 meeting evaluate whether the fisheries requested have been authorized and conducted in the past, and whether they should be authorized under Madison. One reason the board will not be bound by what occurs this summer is that the department may need to rely upon the fact that permits have been issued in the past as a basis for issuing them this summer, perhaps without knowing whether the permits had actually been fished. As always, the board should evaluate all information available to it presented by the department, the advisory system, and the public, when acting on proposals.

Game

The Board of Game must meet and adopt subsistence hunting regulations separate from the general hunting regulations, in order to ensure that all the hunting regulations are enforceable, instead of only some existing regulations. (See the Hickey memorandum.) The board already has scheduled a session beginning on June 10 to accomplish that task.

Under Madison, if a game population has been hunted for food in the past by Alaska residents, subsistence hunting must be authorized by subsistence hunting regulations unless sustained

yield of the resource is likely to be harmed.

If all hunters cannot be given the same legal opportunity to hunt while maintaining sustained yield, or if subsistence hunting by Alaskans must be restricted -- significantly impaired, as Eluska defined the term -- non-subsistence hunting opportunities must be reduced or, if necessary, precluded. This would include hunting by non-state residents as well as sport hunting and commercial hunting by both residents and non-state residents.

If non-subsistence uses have been eliminated, and subsistence hunting by Alaska residents is still significantly impaired, either through short seasons or by permit drawing hunts, for example, the subsistence hunting regulations must be based upon the "tier 2" criteria in determining how subsistence hunting opportunities are distributed. Those criteria are found in AS 16.05.255(b), and are

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

In situations where all Alaskans cannot be allowed to hunt, enforcement of the regulations will be vulnerable under Eluska if the board has not at least taken all feasible steps to apply the three criteria. I shall be available to work with the board at its June meeting to assist in identifying appropriate steps as necessary under "tier 2". The subsistence defense created by Eluska after the Game Board adjourned in April has dramatically altered the consequences of not applying the three "tier 2" criteria.

Conclusion

In summary, in order to ensure that all - rather than just some - fishing and hunting regulations are enforceable under Madison and Eluska subsistence fishing permits must be issued for this summer in areas and at times where subsistence fishing was authorized and conducted in the past. Further, subsistence hunting regulations consistent with Madison, and the "tier 2" criteria where appropriate, must be adopted.

If you have any questions, please contact me.

LIS:rn

Hon. Don Collinsworth, Commissioner
Department of Fish and Game
File No. 366-375-85

May 23, 1985
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cc: Steve Pennoyer
Dennis Kelso
Jim Ayers
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Beth Stewart
Dick Logan
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ADF&G

Norman Gorsuch
Ron Lorensen
Dan Hickey
Liza McCracken
Department of Law

HOUSE COMMITTEE ON SUBSISTENCE

July 2, 1985

The following people were present at the meeting in Juneau:

Denny Kelso	Department of Fish and Game
Larri Spengler	Department of Law
Beth Stewart	Department of Fish and Game
Jim Ayers	Department of Fish and Game
Norm House	Forest Service
Deborah Greenberg	Rep. Herrmann's office
Linda Wild	Rep. Fuller's office
Rodger Painter	Rep. Goll's office
Helen Fisher	Rep. Thompson's office
Paula Scavera	Sen. Ray's office
Mary Halloran	Speaker Grussendorf's office
McKie Campbell	Sen. Sturgulewski's office
Sandra Borbridge	Office of the Governor
Roland Shanks	Department of Fish and Game

The following were on line from other sites in the state:

Rep. Jack Fuller	Nome
Rep. John Sund	Wrangell
Howard Wayne	Wrangell, aide to Rep. Sund
LouAnn Cutler	Anchorage, for Rep. Adams
Lou Walker	Anchorage, National Park Service
Bartz Englishoe	Anchorage, AFN
June Baker	Anchorage, for Rep. Wallis
Henry Mitchell	Anchorage, Bering Sea Fish. Assoc.
Rep. Johne Binkley	Bethel
Bob Charles	Bethel, for Rep. Binkley
Rep. Katir Hurley	Wasilla
Rep. Peter Goll	Haines
Tom Panamaroff	Kodiak, aide to Sen. Zharoff
Dick Rohrer	Kodiak
Deborah Niedermeyer	Fairbanks, Aide to Rep. Koponen

Comments have been transcribed verbatim except where indicated by brackets []. Material in brackets has been summarized.

Rep. Fuller - Good morning everyone. This teleconference is a meeting of the House Interim Committee on Subsistence. I've asked Denny Kelso and Beth Stewart from the Department of Fish & Game, Larri Spengler, Attorney General's Office, and Jim Ayer if they could give us a briefing on the recent meeting of the Game Board.

The Board needed to do two things--promulgate subsistence game regulations separate from general regulations to comply with the Eluska decision, and to make those regulations consistent with the Madison decision.

[Polls teleconference sites again to see who's on the line.]

Thank you Marty. I would like Denny and Beth and Larri and Jim to outline for us just what was the Board's task and what the process, (garbled) [was necessary] to accomplish that task. Some specific examples how hunts around the state were treated would be useful, particularly where the Board had to go to a Tier II situation. I would like to know, too, what the public's reaction has been so far on the new regulations. Finally, what is the next step for the Board? What is planned for the fall meeting? Once the presentations are finished I will open it up to legislators and staffers for questions.

[Stressed that this was not a public hearing. Public can testify during open subsistence hearings at a later date. Minutes of this meeting will be sent to members in a few days.]

Mr. Ayers - Thanks Jack. This is Jim Ayers. We really appreciate the opportunity to continue to work with you during the interim. The issue has not gone away and we don't see that it's going to go very quickly and that the issue seems to be getting more and more difficult as well as complex and, I might add, costly, as you will hear when we talk about the Game Board meeting.

Now what we had in mind for this morning was about 30 seconds of Madison and Eluska, since that seems to be the threshold of tolerability at this point for discussing those cases. Then Larri Spengler will talk a little bit about how we got to the Game Board meeting, what Eluska actually required and mention the 3 criteria again, then actually discuss--Beth and Larri will discuss--the Game Board meeting, and Denny will try and pull all that together in a summary about what we intend to do next and then the continued need for legislation.....

Ms. Spengler - In February the Supreme Court, the state Supreme Court, issued the Madison decision and in April the state Court of Appeals issued the Eluska decision. What the Madison decision did was determine that the Board had been implementing the state subsistence law incorrectly since it had been enacted in 1978, that the approach of the Board in identifying subsistence as rural, as rural uses based on (inaudible). . . criteria was not correct. This is the first time the state Supreme Court had had the opportunity to look at the subsistence law since it was passed.

The Madison decision held various things, and the nutshell of those is that all Alaskans who hunt . . . (inaudible). . . are subsistence hunting, and all Alaskans who hunt with subsistence gear--net, fishing [methods described in the subsistence statutes] as subsistence fishing, and that subsistence hunting and fishing cannot be restricted until other uses, non-subsistence uses, are eliminated.

In fishing that means you cannot restrict subsistence fishing until sport fishing and commercial fishing are eliminated. And in hunting it means that hunting by Alaskans for food cannot be restricted until uses by non state residents (which are virtually the only non-subsistence uses since there's no real commercial, nobody hunts to sell the product)

have been eliminated.

Now to say that the subsistence uses of fish and the subsistence uses of game cannot be restricted does not mean they cannot be regulated. The court in Madison and the court in Eluska made it quite clear that the Board can regulate as long as the regulations do not significantly impair subsistence uses. So that was one facet of Madison that was elaborated on in Eluska. Eluska confirmed that interpretation of the Madison decision. The Eluska decision did one other thing, which was determine that the approach the Board of Game had taken, which was not to have separate subsistence hunting regulations but rather just have one general set of regulations, was not correct, was not consistent with statute; that the statute required as the Fish Board now has one set of subsistence fishing regulations and one set of sport fishing regulations and one of commercial fishing regulations, that had been the case (inaudible) because it's basically been in the past gear type distinctions--sport fishing was rod and reel, subsistence fishing was net, commercial fishing was anything but you got money for it. In hunting there was no similar gear type distinction so all hunting was authorized just in the general regs. The court in Eluska said you cannot, people can go out and hunt out of season and assert what the court called the subsistence defense, unless the Board of Game had adopted separate subsistence hunting regulations that accomodated subsistence as defined by Madison, which means hunting by all Alaskans for food.

So, therefore, the Board of Game had a rather magnificent task set out for them. They had to look at the entire state and separate the regulations into subsistence regulations, which were regulations for hunting for Alaskan residents, and general regulations, which were for non state residents basically.

Because of the definition of subsistence in Madison that everybody qualifies, a facet of the state statute which had not ever really been triggered before became a very common thing that the Board of Game had to deal with. The way the state subsistence statute is set out, first it requires that if subsistence uses exist they have to be allowed, as long as it won't hurt the resource. This is different from non-subsistence uses which are up to the Board's discretion. The next step is that if there's a problem, if it's necessary to cut back, then subsistence uses cannot be restricted until other uses are eliminated. That's the subsistence priority kicking in.

But what if you've eliminated all subsistence uses, all non-subsistence uses? You've eliminated non state residents from hunting and you still don't have enough game compared to the amount of people who want to go hunting to allow people to hunt without there being significant impairment. Well in that case the statute sets out 3 criteria that explain how the Board is to decide who gets to go hunting among those eligible for subsistence hunting in those cases. If everybody can't go hunting, formerly what we had was random permit drawing. People put their names in the computer hat and were drawn out

at random. Say 2000 people applied, but only 50 can go hunting, they put the names in then draw out 50 and those people are the ones who go hunting. No longer is that acceptable, because now we're at what the court called Tier II, and the Board had to decide who of all the people who wanted to go hunting could go, based in situations where you couldn't let everyone go, based on local residency, availability of alternative resources and direct dependence on the resource as a mainstay of one's livelihood. These were the 3 criteria that were set out in the statute--direct dependence on the resource as a mainstay of one's livelihood, local residency, and availability of alternative resources.

The Board had not really used these 3 criteria ever before because the pool of people who were eligible for subsistence before was so much smaller--it was rural communities and areas. And now what Madison did was expand that to include all Alaskans. And so suddenly the Board was faced with a number of Tier II situations. The Board therefore had a meeting in June in order to do basically the job set out by Eluska--separate out the regulations so there were separate subsistence hunting regulations so that violations could be enforced and that poaching would not just sort of be allowed and be unenforceable--and to make those subsistence regulations consistent with Madison, which was a very different job than they would have had if Madison had not occurred, because they still would have had to separate out subsistence hunting regulations, but it would have been a much more limited task because there would be so much smaller amount of hunting that would qualify as subsistence hunting. So maybe Beth can describe how the meeting shaped up.

Rep. Fuller - Larri, could you take half a second and review Tier II for everybody that's in the listening audience please?

Ms. Spengler - Tier I and Tier II are terms that were used by the Supreme Court in the Madison decision. Tier I is a situation where all Alaskans can go hunting--let's just use hunting since this is about the Game Board, but it would also apply to fishing. Tier I is a situation where all Alaskans can go subsistence hunting, and you may have non state residents or you may have eliminated them, but in any event all Alaskans can go hunting. Therefore the regulations for subsistence hunting would simply provide reasonable opportunity for all Alaskans.

However, sometimes there is not enough game available for harvest of a particular game population for all the people that want to go hunting on that game population. In that case you have a Tier II situation. Now people are not either Tier I or Tier II, it's the situation that is either Tier I or Tier II.

In a Tier II situation you cannot let everyone, all Alaskans, who want to go hunting on a particular population of game go hunting. You have to only let some people go hunting. Or it may be a situation where you can let all Alaskans go hunting but they can't have the same opportunity. Some of them may have a much more restricted opportunity.

For example you might have a fall season where everybody can go hunting and a winter season on the same population where you can't let everyone go hunting and that additional opportunity is basically the Tier II. You have people with different legal opportunities to go hunting and that's the Tier II situation.

In deciding which Alaskans get to go hunting in a Tier II situation the Board had to at this Board meeting use the 3 criteria that are set out in the statute. Those criteria are direct dependence, local residency, and available alternatives. What the Board had to do then was figure out factors that correlated to those 3 criteria so they could basically score everyone in a somewhat crude fashion at this first meeting, and then people would be ranked. And if you could only let, and Beth can go into this in more detail how it actually will be working, but if you could only let 150 people go hunting and you have 3000 people wanting to hunt, they would all be ranked as to how they fell with regard to the 3 criteria and the top 150 people in the scoring would get to go hunting.

Now if you had 100 people who had a score of 20, so they came out with the highest score and they got to go, and then you had let's say 75 people who are 19, but 50 more people could go hunting, at that point where you had people tied on a score and you had less permits available than people on that score, then you could have a drawing of those people because they had the same score with regard to the 3 criteria. But basically what the 3 criteria do is change the way hunting opportunity is distributed when everybody can't go, and instead of just letting everyone have the same chance by having their name put in a hat, you evaluate, the Board evaluates people based on the 3 criteria and decides who gets to go. This might become more clear as we get into the specifics of how the Board developed factors to correlate to the 3 criteria and how they followed them.

Jim Ayers - [Does anyone have any questions about Tier II?]

Rep. Sund - I don't have the statutes . . . are the 3 criteria in the statute books or are they something the court trumped up in the Madison case?

Mr. Kelso - I think it's important to point out that the 3 criteria appear in both state and federal law. The Supreme Court specifically talked about the 3 criteria in the Madison case, but they have their origin in both state and federal law.

Rep. Goll - I've got some specific questions that have come out of the complication of these criteria in Haines. Are you going to be elaborating on exactly how the criteria are going to be handled in terms of the point system in which case I'll defer those questions?

Mr. Kelso - Yes we are. In fact Beth is ready to go with that right now. I might just summarize that what we told the Board was that under the court cases and the statute and the advice we got from the

Department of Law, basically Tier I is the situation where any Alaska resident subsistence hunter could participate, and the status of non resident hunting was in a separate part of that Tier I question. But at Tier I any Alaskan who wanted to hunt for food or the other purposes listed in the statute could participate. At Tier II we had not enough animals available so that everybody could hunt and we were having to make decisions among the subsistence users on an individual basis. So maybe I can let Beth pick up exactly how the Board had to deal with that when they began looking hunt by hunt through all 450 regulations that they addressed.

Rep. Goll - [My question are specifically about the point system. Please let me know when the proper time is to ask them.]

Ms. Stewart - As Larri and Denny have pointed out, the Board members had to deal with approximately 450 different regulations with probably coming to that meeting with the same amount of information that you have now. It was a very difficult meeting. . . . They did very well given the situation.

The Board approached each regulation by deciding first whether subsistence uses were substantially impaired. If the Board could say that they were not, then they just duplicated what was in the regulations that you know as the general regulations in the subsistence regulations. An example of that would be western arctic caribou where the season is 10 months long and the bag limit is in the subsistence regulations now 5 caribou per day, so that's a fairly liberal season and the Board was able to say that subsistence uses were not impaired. Unfortunately, there were not very many of those situations and so the meeting took about 12 days, the Board members working about 11 to 12 hours a day.

If the Board could not say that subsistence uses were not substantially impaired, then the Board had to look at the impairments. The permit system and the first come, first served registration drawings were the most obvious cases there. But there were other cases where the seasons were either very short, a device the Board had used in the past to insure that overharvest did not occur, or when the seasons were placed in the time of year that make hunting very difficult, or whether the bag limits were very restrictive. And those cases were very difficult for the Board.

If the Board found that subsistence uses were substantially impaired, then automatically the Board had to eliminate non-resident uses. Sometimes this caused problems because the Board members had difficulty understanding why they had to eliminate non-resident uses even if non-resident uses had not been a factor in the impairment of subsistence uses. However, that is an automatic step and eventually they came to understand that and went ahead and eliminated non-resident uses.

If eliminating non-resident uses didn't alleviate the impairment,

then the Board had to look at other regulatory changes. And in those cases where other regulatory changes that would still allow all Alaska residents to hunt were not possible, then the Board did, as Larri described, go to Tier II.

Before the Board started examining each of the hunts, it did examine the Tier II criteria which are found in 16.05.255 and for the Board of Fish identically in 251. Those 3 criteria are customary and direct dependence on the resource for the mainstay of one's livelihood, local residency, and availability of alternative resources. This is a very difficult situation to deal with and the Board will be dealing with it again in joint session with the Board of Fisheries in November. However, for now the Board has adopted....(interrupted)

Mr. Kelso - Beth, maybe I should point out one thing. The reason the Board dealt with the impairment of subsistence uses is because that language "significant impairment" was used by the Court of Appeals in the Eluska case, so they were applying language specifically out of the case and the Department of Law helped them articulate just how to do that. The other thing which I know you're on the verge of pointing out here is that the Board took those 3 criteria that you've just read and established standards for the scoring system that Rep. Goll mentioned earlier. What I wanted to point out was that those 3 criteria now track directly into what we've been calling Tier II. When we get to Tier II it means we're automatically talking about those 3 criteria and the scoring system that was based on them.

Ms. Stewart - The Board had to find a way to measure each one of those criteria and they did it by developing a series of questions that are going to be used on the Tier II permit hunt applications. The Board had a great deal of difficulty with this and realizes that this approach will probably be modified somewhat in November. However, for now if someone finds himself interested in a Tier II hunt then he must fill out an application which will be available we hope fairly soon, probably by the first of August, and the questions on that application include basically the questions that deal with those Tier II criteria.

[She went on to describe questions which will appear on the applications and the number of points assigned to the possible responses. See attached material for this information.]

Those are basically the questions that people will be answering when they fill out these applications. Those questions will all be scored then and as Larri described, based on the number of permits that are available for the hunt, people with the highest scores will be allowed to go hunting.

Mr. Kelso - Perhaps we should turn to Rep. Goll's questions about the scoring system for a moment and then I think it might be useful for us to talk about which hunts are using this particular system.

Rep. Goll - Thank you very much. [Asked for clarification of some of the questions and the number of points which would be assigned for the various answers.]

Ms. Stewart - [Clarified the breakdown of the 30 points which are possible for each of the 3 criteria. See information packet.]

Mr. Kelso - [A packet of all the materials under discussion will be available within a day or so.]

Ms. Stewart - Perhaps then we can go through some of the Tier II hunts so you can get some idea of the kinds of hunting situations that resulted in assigning of Tier II. I'll preface that by saying that the Board took a fairly conservative approach this time around. They did not have of course public hearings, and so there were many cases where they had no way of documenting or verifying whether or not subsistence uses were substantially impaired. In cases where they felt they didn't know that, they did not make the finding that they were. After a public hearing, however, when people come in and talk about whether or not those regulations substantially impaired subsistence uses, we may see additional changes in the regulations that result in a few more Tier II situations.

[Here Ms. Stewart summarized which hunts were affected, where the Tier II situation existed and thus the hunting had to be restricted. This list can be found in the attached material.]

The regulations, before we get into more specific questions, are being prepared right now in my office to be sent to Lt. Governor and adopted as emergency regulations. As soon as that is completed we will circulate the regulations for written public comment. We have put an August 1 comment deadline on those regulations. After the Department has reviewed the comments that come in, the Commissioner has been delegated the authority to adopt those as permanent regulations. This was necessary because emergency regulations only last 120 days. The Board will not meet again until about mid November and we did not want to have a situation where we once again had no regulations that could be enforced.

For the mid November meeting we will, instead of calling for proposals, format the new regulations in the proposal format and circulate those to get public comment for advisory committee meetings, for regional council meetings, we will draft a fairly explicit "dear reviewer" letter so that people have some idea of what's going on with these regulations. Tier I and Tier II are fairly alien ideas to people. There's a lot of confusion about. . . We're getting probably throughout the department 100 phone calls a day about what's going on with these hunts. Some of the phone calls are from down south, from Field and Stream magazine and other magazines like that, some of them are from people who want to know if they can still go hunting as they had planned to this year. We're putting together a public information packet that will go out I hope by the end of this week or the first part of next

week. All in all, I think it's a fairly difficult thing for people to understand and it's going to take quite a bit of time for people to even begin to know how to analyze those regulations. The Board's going to have to meet for about 2 weeks in November and about 2 weeks in January, which is very unusual for the Game Board, to get public comment on the regulations they have developed.

Mr. Kelso - One of the things we are trying to do now is to get the regulations in final form as quickly as possible and then publish a new handbook of hunting regulations for Alaskans to use during this coming season. We've shortened the turn around time as much as we possibly can on that and we anticipate handing them out in time to have them usable in the field, assuming that there are no printing delays. But it's still going to be a very tight fit.

There are some other administrative details that have actual effects on people that are probably worth bearing in mind. One of them is that in order to use the questionnaire and to score it in the way that the Board directed we're going to need a certain amount of time. First of all that time is used up in getting information out, and having the regulations finalized is the first step in that.

The next part of it, though, is getting the applications filled out and returned. We'll be distributing applications to all the normal vendor outlets as well as all the department offices. They'll be available to people there and of course by mail if any of those outlets are not convenient. And then our staff will be available to help people fill them out. We're of course preparing a set of instructions to help with that, but I think it's going to be very important for people to have access to department staff to have assistance in making sure they're filled out, because unless they're filled out correctly and completely they automatically fall out of the pool of possible hunters.

Initially we are, there are very few permit drawing hunts that have remained untouched. Most of them have either gone to registration hunts, which we've been calling Tier I hunts, or have gone to the Tier II hunts as Beth just described. Now the registration hunts outnumber the Tier II hunts. It's simply that the Tier II hunts probably have a greater impact on Alaskans. However, in the short run what that means is we are returning virtually all the applications for permit drawing hunts that had been accepted so far and we have received over 40,000 of those. So we're basically returning all applications and application fees for any hunt that no longer is to be conducted the way it had been planned in March. That means we're returning about \$275,000 to Alaskans and in excess of 40,000 pieces of application.

The next step then would be for us to get the information out so people can determine whether there are registration hunts, or what we've been calling general hunts open to any participant, and if there are then of course people are free to participate in those. If there are not, then Tier II hunts will require a separate application for each hunt the individual wishes to participate in. And there will be a five

dollar application fee for all the hunts that are Tier II except bison and musk oxen and there the fee is ten dollars and those fees are set by statute.

Once we receive the completed application we'll have staff working overtime to get them scored as quickly as possible. The scoring will probably be done manually by a template because that is likely to be faster than data entry and running on computer. Now if we're doing this next year we'll have it all computerized. But the time required to get it set up, key punched and run is actually greater than what we take to do them as they come in using the manual template.

Then we need to give people a reasonable amount of time to pick up the application materials, fill out the form and get it back to us. And then once that happens we will score them and mail out the permit information as quickly as we can. The problem of course is that we have to get all the permits [applications] back in order to score any of them. We can score the ones we get first, but in order to compare them to other applications and the scoring for those other applications, we have to have them all in hand. So we are somewhat limited in how quickly we can get the scoring done and send out permits. What we're trying to do, though, is expedite the earliest hunts so that there are minimum delays. There are August hunts that will require attention first, but again we can't do that until we actually receive the entire set of applications back.

Now the danger in that, in our view, is that it is possible that some hunts may be delayed, and the Board recognized that by providing a specific delegation authority to the Commissioner in case that becomes necessary. We will not open hunts for which we have not processed the applications and if we have not gotten the regulation materials out to the public so that they know what the rules are. But we will do everything we can to expedite that.

What that means in terms of impact in addition to the administrative disruption to the department is that it will cost between a hundred and fifty and two hundred thousand dollars to implement this system and there are some potentials for additional costs, depending on if there are problems that actually develop. This is as we have scheduled it now. In addition, there may be fiscal impacts to the Fish and Game fund depending on the percent of impact on non-resident hunters and on resident hunters who would otherwise pay fees for taking trophy animals. In this instance we are calculating what we estimate that to be and there has been requests for us to provide information on just what that fiscal impact is. We've been working on it. It's somewhat difficult because we have not only the Tier II hunt impacts but also the registration hunt impacts, and it's difficult to estimate. We will have that information as quickly as we can put it together.

Beth, are there any other administrative details that affect people that you think we ought to mention?

We see the potential for disruption because of delays as significant, but the directive we've given the staff is we want to find any way we can to shorten the time so that Alaskans have the opportunities to hunt that the Board envisioned. So far, we discovered a couple of ways to change our planned procedure so that we could cut a few days off of the scoring for sheep hunts which are some of the earliest hunts beginning in August. So we'll continue to try to do that, although the primary limitation is the time required for people to have the permit applications in their hands and to get them back to us. They just need some time to figure out how to do that.

Maybe, I have a few things to summarize, but before I do maybe I could ask is there are any questions on this scoring system, or the administration of it, or what the Board intended us to do in handling this material.

Ms. Greenberg - I have a couple of questions. It seems to me that for the Tier II hunts in particular that the people that are most likely to qualify for that may also be people that are the least acquainted with the system in terms of filling out forms. They may never have done that before for any kind of hunt that they've participated in. Is there any kind of administrative way of, I don't know, hooking up with other agencies or the number of available state people that may be bilingual in areas to help out with that? What kind of effort is going on?

Mr. Kelso - We're trying to get the word out to the public in a couple of ways. First, we've put together, we're in the process of putting together, a public information program--not simply press releases, but public service announcements, newspaper advertisements, the hunt supplement, the newspaper insert that we publish listing what the hunts are, and we'll have to of course do one specific to these hunts now that the Board has taken action. We'll be attempting to get information on statewide media networks including Learn Alaska Network, so we are going to try to do an integrated approach to really get the word out. We'll also have codaphones for people to call in and get a brief run down on what hunts are affected in particular areas and we have them now in Juneau but there'll be one in Anchorage as well. And we haven't discussed yet the details of which offices need to have that kind of capacity. Maybe Beth would want to comment more on how we're trying to get the word out.

But the second part of that is in areas where there may be bilingual requirements we may have some difficulty getting correctly filled out applications because people aren't familiar with the materials or don't have access to assistance in quite the same way that you would if you were in Anchorage or Juneau or Fairbanks. What we're going to try to do is either work with non profit organizations or to have our own staff help people in communities where we know Tier II hunts are going to be needed, and in particular I've asked the subsistence division to put together a plan for how they can target some effort on those communities that we think are going to be filling out Tier II application forms, and just how that thing fits with our

advisory committees which is not simple at this time of year. Many people are extremely busy with commercial fishing right now and so we're not positive that that's going to really work, but it's one other way we have of trying to do it. We're also fairly well assured that rural radio stations and media will help us quite a bit in trying to get that message across. So I think basically the answer is no, there isn't going to be any late application period, there isn't going to be any appeal process, there just really isn't any way to do that. Unlike the Commercial Fisheries Entry Commission where a person was given an opportunity, a use privilege that lasted for that person's lifetime, this hunt opportunity thing is something you have to go through every year. It isn't like the entry permit in that way. It can't be sold, it can't be transferred. It's for that hunt, for that season and then it must be all done again.

Ms. Fisher - . . . This application for a Tier II hunt, does this entitle me to just the actual hunting, or may I hunt until I have the animal? What decides that?

Ms. Stewart - It means that you can participate in the hunt during the time that that hunt is legally authorized. It does not mean that you are guaranteed a moose. If you get a Tier II moose permit for the Anchorage area, you have the same opportunity as other people who have those permits to go out and hunt, but you cannot hunt until you are successful. You can only hunt until the period is closed.

Ms. Halloran - Jack, this is Mary. Maybe one of the things the committee members might want to consider is making available the help of the legislative information offices in getting some of this information out in the villages. We do have a good network there. See what you think about that.

Rep. Fuller - I think that's a good idea, and also I have notes here for Linda . . . for maybe cutting some tapes that we run on the rural broadcasting throughout all the different villages.

Rep. Sund - I didn't even know the Board of Game had been meeting, so you've got a big chore ahead of you there. But I have two questions. One is that if somehow by late application this year you were unable to participate in a hunt and you have to reapply next year, I assume next year's permit is going to give points for having prior participation. Is that person somehow going to be able to just slowly fall out of the system because he was late to get his first application in and therefore has less points for the next year and then following years? What's the prognosis on that issue? And then I have one more question.

Ms. Stewart - There's a possible ten points, ten points that a person can accumulate for having actually harvested the animal in the past. And you're correct in that those people who are able to successfully hunt every year will continue accumulating those points. I don't know that any of us can predict how far apart the point spread is

going to be on getting a permit or not getting a permit. I don't know that it's going to come down to you know, somebody having 60 points and somebody have 59 and the separation being right there. Also, I'm not sure that that exact point system will be what's in place permanently. I think it's important to understand that the Board adopted a point system they thought could be used this year without doing a lot of research or having a lot of information available to them at the time. So I'm not positive that that's you know, that's something that's going to have a long term effect. But yes, if something like that 10 point total is available on the applications in the future, not only your not going hunting but your being unsuccessful in your hunting would cause you to not be able to accumulate those points.

Rep. Sund - Thanks a lot. I have one more question, probably to Larri. Did somebody trace the legal ramifications of prohibiting out of state hunters from hunting game on federal land? I'm sure the issue's going to come up from some out of state people saying that's federal land, they're federal animals, and why is one state prohibiting us from traveling across state lines to hunt in another state. What are the state statutes and then the federal statutes that allow us to do that?

Ms. Spengler - Are you referring to a situation where we have a Tier II situation on federal lands? Is that what your question's directed at?

Rep. Sund - The question goes to the first step you do in looking at an area that's substantially impaired, if the subsistence hunting is substantially impaired, the first thing you do is eliminate non resident uses regardless of whether they're a cause of the impairment or not, if I understood the prior testimony. My question is what is the legal basis for doing that, either in federal statute and then where does it show up in the state statute that gives us the right to first toss non residents out regardless of whether they're a cause of the impairment or not?

Ms. Spengler - That's not in the statute itself. Even before this all happened, and even separate entirely from the subsistence law, in at least one hunt in the state the Board had decided that non state residents were a different kind of beneficial use than state residents when they were hunting, because the Board determined that Alaskans were generally hunting the Nelchina caribou for food, while out of state residents were more generally hunting it for trophies and/or recreation rather than food. Therefore, even before any of this happened the Board had quite a while ago eliminated non state residents from the Nelchina caribou hunt even when the Board did not consider the Nelchina caribou hunt to be a subsistence hunt. The basis I suppose would be in the state constitution that allows the Legislature and boards of the delegation to treat beneficial uses differently, and the Board determined that in that case, for example, the beneficial use that was participated in by Alaskans was paramount and that the other use could fall to the side. I think that those same principles would apply for the rest of it, whether we're at Tier II or Tier I with the non state

residents being eliminated. Case law allows states to treat non state residents differently than Fish and Game, particularly in non commercial kinds of situations which the game would be, with some justification. And the justification here is would be uses by different kinds of groups.

Rep. Sund - . . . [instead of] just throwing them out, why don't we just put them within the same point system as everybody else is, therefore they're being treated the same. Just because they can't accumulate the same amount of points or an adequate amount of points isn't our problem. But it seems to me that the arbitrariness of just eliminating, of making the determination that . . . (inaudible) . . . the subsistence use of that hunter will be substantially impaired because there's too many hunters, and our first arbitrary action is to eliminate non resident users, I don't understand the logic in that. Why don't we just toss them into the point system and let them make application like everybody else?

Ms. Spengler - I see your point, and there is some basis in statute for this part of it. The definition of subsistence hunting in the state statute is hunting for subsistence uses by Alaska residents, so that's the first piece . . . (inaudible) . . . and the way Madison and Eluska interpreted the framework of the subsistence statute does provide for what seems . [an] irrational and unnecessary step. If the Board looks at subsistence uses and determines that they are significantly impaired, the first step, no matter whether the non state residents are the cause or not, is to eliminate non state resident hunting. And then to go along and divide up, if there's still significant impairment, to apply Tier II if that's the appropriate step. The language in Madison and Eluska don't really leave any options on that, and because of the definition of subsistence hunting in the statute to be restricted, to be limited to state residents, the Board didn't have any way to allow, either to allow non state residents to keep hunting or to put them into the Tier II pot. That was just part of guidelines that were surrounding how they had to behave.

Mr. Kelso - Representative Sund had a question which triggered another question in my mind for which we do not yet have an answer, and that is whether there may be effects on federal funding, Pittman Robertson funding if non-residents are significantly restricted from participating in hunts in Alaska. We've actually posed that question to the federal aide coordinator with U.S. Fish and Wildlife Service, and we actually don't have an answer yet. But we are quite concerned about that possibility, and the funding from Pittman Robertson is a substantial amount. It's been less in recent years but it's still very significant. It's figured on a formula basis and we certainly would still meet the formula. The question is whether we would in some way have failed to qualify because of some guideline and we don't know the answer to that. Of course we would argue that we should still receive the funding and we intend to do that if the question arises.

Rep. Sund - I'd like to follow that up, because it seems to me that the real driving force behind the subsistence issue we're in is the

the federal law itself, and I can't see the rationality of us having to do this to comply with the federal law, and by complying with the federal law get kicked out of another federal program. It seems to me our posture should be one of trying to find the grass roots in the federal statutes for the rational of what we're doing now.

Ms. Spengler - John, this last board meeting had nothing to do with federal law. In fact, it probably took us farther away from complying with federal law. What it had to do with was complying with what Madison and Eluska said state law required. In federal law, if you're at a Tier II situation, if we were in a Tier II situation, the 3 criteria and the way that we've been interpreting the state law before Madison, the 3 criteria would have been used to decide which rural residents got to go hunting. And the federal law would never, to have a system where people from anywhere in the state can put their names into the Tier II calculation from anywhere in the state, and possibly depending on how they scored on the different criteria, override or rank higher than someone from a rural area, it's just I mean that certainly is a theoretical possibility that someone from Anchorage could have very little alternative resources, be poor, have hunted in the past, those other criteria--they might score low on local residency but high on everything else--and beat out someone from the local area. So this system has nothing to do whatsoever with complying with federal law.

Rep. Sund - I guess, Larri, the same issue I was looking at there was that we wouldn't probably have a subsistence law on the books at all if it wasn't for the federal law to start with.

Ms. Cutler - There was an article in the paper up in Anchorage a few days ago that seemed to indicate that the Feds were still threatening to take over. . . (inaudible).

Mr. Kelso - The information we have is that the Department of the Interior is prepared to indicate what their position is, but that they are awaiting response to an earlier letter which we will be responding to as rapidly as we can. We wanted to wait until after the Game Board had completed it's work so that we could advise the Interior on what they had done. We had, as a matter of record we're not prepared to concede that the state is out of compliance, although that isn't ours to determine. So we want to communicate in writing with them carefully. But we thought that now that the Game Board has concluded it's work we can correspond with them, and we expect that they will then respond to us by telling us what their intentions are over the next few months.

Ms. Cutler - Okay, okay. I guess what you're really saying is that it's basically the same.

Mr. Kelso - We have reason to believe that they actually have formulated a position so that it isn't the same as Bill Horn's original letter to the state. We expect, we don't know exactly what the content of that position is, but we are aware that the federal agencies have been asked to prepare contingency plans.

Mr. Painter - I'd like to follow that up with another question. I believe that the federal government is looking at this from two separate angles--from enforceability of state Fish and Game laws and from compliance with ANILCA. Is that correct?

Mr. Kelso - That's correct. There was some initial concern that the Eluska case might make enforcement difficult on federal lands and especially the interest there was in parks and refuges. I think we, through our communications directly with those game managers, we indicated that actions were being taken and that the state regulations were going to be enforceable. I think that is understood now, and of course we're, since we're putting out these emergency regulations we expect that they will be enforced and that prosecution can be brought if necessary. But that was one point of their concern. And the second point of their concern was whether under the Madison case we are now in compliance with Section 805 and 804 of ANILCA. So I guess that's the point that we'd like to know exactly what they intend.

Ms. Cutler - I've got one more question. If I could change the subject just for a minute, can you guys talk a little bit about what's going on with fish, I guess both in terms of are there any areas that are being . . . people are being adversely affected. Also, what plans does the Fish Board have, does the same process have to be gone through for fish? . . .

Ms. Stewart - The Board of Fisheries does not have to go through quite the same process in that they already have subsistence regulations. Many of those regulations are probably fine just the way they are. Those that are not, the Board took some initial steps in March to correct. After Eluska came out, though, the Board did have to delegate authority to the Commissioner to do something that they hadn't planned on and that was to issue permits for subsistence fisheries that had existed at some time since statehood. Statehood is not the automatic answer to the question of how far back you have to go, but it was one that was agreed upon so that the D.A.'s office . . . protection, would prosecute violations for this summer. I don't know that anything bad is happening right now. It's a little early in most fisheries for the species that people are interested in to even be fished right now.

We do have some new things happening right now. We have the Taku River gillnet fishery, which is new. We have some new fisheries in Cook Inlet that will be taking place basically on cohoes and then later in the year, so as far as fishing goes right now, we don't know of any instances where subsistence fishing has dramatically changed the way we prosecute either sport fisheries or commercial fisheries. There is a case near Klawock on the Klawock River with the sockeye salmon that has caused us to issue an emergency order closing the sport fishery on sockeye. And that's being done this week. And that's as far as I know. We did receive a request to open the Chitina dip net fishery. Actually, it was a letter to the Governor that came to our office just last week from the Chitina Dip Netters Association asking that the fishery be conducted according to the 1978 regulation in the belief, apparently,

that those regulations allowed seven day a week fishing. That's not the case. Those regulations did not allow seven day a week fishing. Apparently the other belief was that the fishery had no limits at that time. That's also incorrect. In fact, the regulation that was in effect in 1978 allowed the Commissioner to "set limits from time to time", and that's a quote. That kind of regulation wouldn't be tolerated any longer, but at the time the Board frequently did things like that. So as it turns out, no situation has arisen because that fishery is actually going on seven day a week fishing anyway. The dip netters have not taken their weekly quotas since the fishery opened, and so the Department opened the fishery to seven day a week fishing. I guess the Department that since they're so far behind in their weekly catch quotas, it's unlikely that they will catch up. It's probably also unlikely that they'll take the 60,000 fish that have been identified for the dip net fishery for this season. It seems pretty clear that the Board's going to have a tough time deciding how to deal with those tasks on the subsistence fisheries. The Board will have to insure that they've provided reasonable opportunities for subsistence fishermen. We believe they can still use guideline harvest levels as long as those guideline harvest levels realistically reflect the kind of participation the Board believes will occur in that fishery. In the case of fishing we need some kind of harvest level to shoot for so that you can prosecute other fisheries that occur ahead of subsistence fishing. But that's kind of a long and involved argument.

Mr. Kelso - I might note that we've always believed that the changes in the fisheries would be over a longer period. It takes people time to get geared up, to figure out where they might want to set a net if they want to participate in the expanded subsistence fishery after Madison, and we've never expected that that would happen all at once. Certainly a potentially difficult problem in the future will be that allocation between the Chitina dip net fishery and (inaudible) the Copper River Flats. But in terms of the conflict related to the Kenai Peninsula, we would expect developments in those subsistence fisheries to take some time. There is an August fishery which has some potential for being a difficult situation. 13,000 coho have been allocated for the subsistence fishery there for this year, and assuming that that's sufficient, that people don't demand more than that, it probably will be relatively straight forward. If the 13,000 are taken, however, it's our understanding from the Department of Law that we have no alternative but to close the other fisheries, which would include the sport fishery, in order to allow for the subsistence fishery to progress. So there's a potential danger spot. And there are other potential hot spots scattered throughout the Kenai Peninsula, but we don't expect that there'll be a major, instant conflict. It's a much slower process, with fish, just because there are so many more fish and so many more kinds of uses of those fish than there are in the hunting context.

Ms. Cutler - (inaudible)... asking about the Kenai fishery, and of course since it's not really something that's of concern to a rural legislator. I did just pass the inquiry on to one of the legislators that represents that area. But this person was under the impression that,

when he heard you talking earlier about another Board meeting in November, that in November there would be discussion of whether or not there would need to be changes made to regulations for subsistence fishing. And that's what prompted the question and I guess what you're really saying is that you just sort of have to take . . . (inaudible) . . . and see what develops, and make changes as they're needed.

Ms. Stewart - Good advice, LouAnn, we could probably put you on duty.

Mr. Kelso - I think our first responsibility, of course, is to the resource. And so as we try to implement the rules announced by the two courts we're trying to take it as specifically step by step as we can, and although there are some problem areas, in the longer run, some potential for real conflict in those fisheries, right now we don't have anything right now on the east side beaches, for example, that is a major conflict. We have had a request, we had a request earlier to open the east side beaches to king salmon fishing north of a certain point, and we did not open them at that point in time because we had not permitted that kind of (inaudible) during prior regulation since statehood. But we have opened the requested areas as of June 22, so yes there is some potential, but I don't want to overstate what the conflicts are at this point. I think the longer range conflict is very much greater than the short term conflict.

Mr. Painter - I'd just like to add that the Special Committee on Fisheries will be sending out an update on the subsistence situation on the fisheries side in the near future. I might also ask Denny or Beth or Larri or whoever's the appropriate person to update people on the lawsuit that was brought to make hook and line subsistence fishing, and the implications of that lawsuit in terms of disruption to the (inaudible).

Ms. Spengler - The lawsuit was filed in Homer by an individual representing himself. The pleadings are not drawn in the traditional style of pleadings, but it appears that he is requesting that all rod and reel fisheries be declared subsistence fisheries. The status of the suit is we have not yet filed our response. The (inaudible) . . . so we have not yet answered. He has not requested any sort of preliminary relief, so at the moment it's on hold. The pleadings were drawn in such a way that it's not entirely clear what his arguments are going to be so it's a little harder for me to predict what the implications will be at this time.

Rep. Goll - [Wants to review the point system.] As Roger pointed out, the Special Committee on Fisheries will be doing continuing updates on the situation. We're getting an awful lot of questions from people here in Haines now that the moose are in season. As they said, it's a Tier II subsistence hunt. I'm a little bit concerned and I think my reasons will be clear. We are questioned here locally as I'm sure you would if by doing it this way the local folks will get a sense of . . . (inaudible). We're getting a kind of a backlash. For example, working

people are worried that someone who is collecting public assistance will essentially be getting a double advantage, with the working person feeling that he is subsidizing the income of the non working person plus deferring his ability to hunt. The second concern has to do with the fact that a lot of the people in the area do not (inaudible) [believe] that the moose is in fact a critical means of support for anybody. This is being alleged based on the number of moose that have been taken and basically what a moose can do for a family and this of course will be subject to challenge by the people who would disagree, but this is what I'm hearing. Another issue is whether limited entry like situation which was developed that one person qualifies one year and (. . . inaudible. . .). And these are the kinds of concerns. Another is how much the dependence factor is going to weigh. Here in Haines, for example, dependence on the moose is not a major issue or (inaudible) maybe, but in some place--let's say up in the arctic--we might find that residents, that is being right in the unit or the hunting area, . . . (inaudible). Because of issues like this I'm trying to get a clear handle on exactly what the point system is.

[Rep. Goll and Ms. Stewart review the points and scoring on the permit application. See attached material.]

[If there's a lot a fish available in the area, would that be counted as available alternative resources, or would it only be game to game comparison?]

Ms. Stewart - The Board decided to include big game and/or fish, and so in those cases where there are a lot of fish available then people should view that as a reasonable substitute. Some of the problems with these things, of course, is that we don't have quantifiable information for what's available in each community at this point. So we're relying somewhat on people's subjective views of that question.

Rep. Goll - Okay. Do you feel that the point system as it will be applied around the state will be.... How will you deal, now getting back to the issue that brought me to ask you this, how will you deal with the circumstance where dependence in one area maybe more important than residents' dependence in another area, less important, are you basically going to try to use the same point system with the same kind of guidelines statewide, or do you expect to do any local tailoring? And if so, what will be the procedure in that regard?

Ms. Stewart - In the short term, the only local tailoring that has gone on the Board has already determined, and that is in defining those residency zones. Certainly over time I would expect that the standards used to weigh those three criteria will be modified and I believe probably met for each hunt. You may see some special modifications after the Board has been able to get public testimony and additional information from the department. As you know, the division of subsistence is always engaging in subsistence research and is coming up with new information for both boards on a fairly regular basis. So

while for now we have this single application with very few exceptions, I would expect that in the future those things will be modified.

Rep. Goll - Okay, thank you. Just a final question, what will you do about the income issues? When you say income sufficient to purchase alternatives, if someone's on public assistance, do they have income sufficient to purchase alternatives or do they not?

Ms. Stewart - That certainly was a difficult one for the Board. The way the question is worded now, the answer is just subjective. We are not asking for any kind of proof of income at this time, so it's a subjective question. Someone is going to decide for themselves whether or not they have adequate income to purchase other items as alternatives.

Rep. Goll - Don't you see that's kind of a problem? Obviously one person may think he does and another person might think he doesn't, and they might have the same income. A person could even say it's going to be difficult to purchase any equivalent to a moose. Therefore, even though I make a hundred thousand dollars a year I could never do it. How are you going to deal with people who come back to you later and say well, I could have answered it one way but I didn't? And this person lied or in my opinion misrepresented the facts and he qualified. These kinds of issues are being raised to me roughly five and six times a day over the past week, and I want to bring them to the attention of the group. And I'm really concerned about getting some consistency here.

Ms. Spengler - The Board, when they determined what language to use to correlate to the 3 criteria, realized that they in some regard would have to rely at this stage, because of having this other crude set of factors that can't be a very sophisticated system, on people's assessment and honesty. Some of the factors that they used are verifiable, and those can be verified and cross-checked and will be on a spot check basis. Some are not verifiable, but the Board felt that people would to the best of their ability sort themselves out and assess themselves. At this stage, having to do this on fairly short notice and without a lot of knowledge about how this is going to work and with such a short time frame before the hunt, that was the best that they felt could be done at this time. If this system has to be in place for next year, I'm fairly certain that the Board will refine the regs which set out the factors and try to work in more verifiable, more objective rather than subjective questions. At this time, the best they could do, though, was a mix of those.

Rep. Goll - Okay, well then just to get off the air but to put on the record that I'm already getting some concerns about the income issue. A lot of people allege that income is not a valid factor and alternatives are not available whatever your income. And on the issue of years of participation I've got several people concerned as Rep. Sund was about creating something of a limited entry subsistence proof based upon participation which you know, since there's a ten year limit, may or may not be [an all-important thing].

Ms. Stewart - The joint boards will be adopting, we believe, the standards for measuring those 3 criteria together come November. That meeting will be in Anchorage. This, the set that the Game Board adopted, is what will go out for public comment and we certainly plan to work very closely with the advisory committee so that their comments then can help the boards build a better system than the one that the Game Board was able to come up with at this time. The Game Board certainly has no pride of authorship in the set of regulations that they have right now in terms of defining those criteria. They did the best they could with the kind of information and time they had, but they certainly realize that there are problems with these questions. They spent about four of the twelve days they were in session working on ways to measure those 3 statutory criteria, and as you say there are certainly problems with a great many of those. Local residency is probably the least problematical, but availability of alternative resources and customary and direct dependence on the resource are two very difficult criteria to measure. So encourage people to get their comments in to us as soon as we get the regulations out.

Rep. Goll - Thank you very much. That's exactly what I'm going to do. I would make one comment and pose the question to Rep. Fuller if I could. Specifically, what has brought me to be concerned about this, and I'm pretty new to the game issues--it's mostly fisheries that I have some familiarity with--when I found out that this was coming down people started coming up to me and making comments like "we would rather see the season closed for a couple of years and let the stocks rebuild than to cut 90% of the participants out of the hunt." Our areas here in this particular moose hunt is fairly different from the areas up north. The circumstance is that there is a great mixture of (inaudible) participation and an awful lot of local people reading the criteria believe they're going to be excluded and they say "well, I'd rather go spend a day in the woods and get a crack at it" in this particular community where we allege or they allege that there is no real dependence upon the moose here for subsistence, irregardless of how it may be defined legally. A lot of people are saying, they take a look at this, they say before I go through the bother of filling this out I'm going to poach, or they say before you make everyone do this you ought to just close the season for a year, and I was rather surprised by that response as you can imagine. I'll pose my question to you, Jack, a bit later, but it has to do with the issue of residence and how far the people in your region have to go in order to get the subsistence gathering done. Again, thank you for your time.

Mr. Kelso - I might summarize very quickly and then turn it back to Rep. Fuller, but I'd like to emphasize again that under no circumstances will the Boards actions or the Department's actions abrogate the responsibility to maintain the resources on a sustained yield level. We're going to continue doing that, we're going to protect the resources. And the reason for the Board's action was to enable us to do that by having enforceable regulations. The Board . . . are implementing what are mandatory directives of the courts and neither the Board nor the Department had the authority to do otherwise than what the

Board has done at this point. The effects on Alaskans will be impacts on hunting opportunity, the permit drawing hunts in which every Alaskan had an equal chance of being drawn have been greatly reduced, and of course the registration hunts have been changed as well. This means there will be impacts not only on Alaska residents but on Alaskans who are involved in the guiding industry. And even if Alaskans are able to hunt in hunts that are of interest to them, there may be potential delays associated with getting this new system on the line.

I mentioned the fiscal impacts, and out of pocket costs are between 150 and 200 thousand dollars, as well as potential revenue effects to the Fish and Game fund as a result of, a possible result of fewer tag fees being paid in.

What I thought might be most useful is for us to go ahead and put together the information packet that we've been talking about, we'll get that out to you as rapidly as we can, and then this is going to obviously be a continuing concern because people, as people get more familiar with it they're going to have more questions. So we'd like to be on call to all the legislators. If you need to talk with us about it please feel free to call us directly. If you'd like to get together for a meeting we're happy to be available to you and please just treat us as available for the balance of this year. If you have suggestions on how we can be more effective with this and we can work with you to get word out to your constituents we'd very much like to do that. I'll turn this back to Rep. Fuller.

Rep. Fuller - Thank you very much. I really appreciate this update and I'm sure that everyone that's listening in does. [Thank you all for your information. Linda will be sending out minutes of the meeting.]

[Rep. Sund asked if there would be upcoming meetings of the House Interim Committee on Subsistence. Rep. Fuller answered that he didn't anticipate any, but if it was necessary they would give everyone as much advance notice as possible. Rep. Goll asked a question about clarifying what is meant by principal means of support. Ms. Stewart had left the room and would answer him by phone later.]

Rep. Binkley - Just a quick question. . . . Was he referring strictly to Tier I hunts when he says registration hunts and that's just something that you have to register for in those Tier I hunts?

Mr. Kelso - You are correct that when we talk about Tier II hunts we're talking about those hunts where those 3 criteria have to be applied and that's what that questionnaire was all about, that application form. Registration hunts are what we've been calling Tier I hunts, although some registration hunts may be occurring in situations where no other hunting is allowed, for example, non resident hunting may already have been eliminated. But the registration hunts are those hunts where, because they're, the resource is not so numerous that we can simply allow an open ended season and bag limit, let me rephrase that, an open ended participation with set seasons and bag limits, we

have to register people so we can sort of keep track of the level of participation. But that is less restrictive than in the Tier II situation.

So the most general hunting opportunity would be what we've been calling general hunts, which do not require registration. An example might be the western arctic caribou herd. The next most restrictive kind of participation would be a registration hunt, and that's what we've been calling Tier I, in which people have to sign up. They don't have to be drawn out of a hat, they don't have to be pre-selected, but they have to register when they arrive in the area where they want to go hunting. Then the most restrictive, which is what we've been calling Tier II, is where we use the application form and the 3 criteria--customary and direct dependence, local residency, and availability of alternatives. Does that respond to your question John?

Rep. Binkley - So there's actually 3 different levels and that registration hunt is the middle level.

Mr. Kelso - Yes. We really are, in dealing with subsistence hunting, we have sort of 3 levels at which people can participate and the most general one is the one in which non subsistence hunters can also participate. That's what we've been calling the general hunt. Then when we get down to Tier I, we may be in a situation where the non subsistence hunting has been eliminated and it is within Tier I that registration hunts could occur. Now a registration hunt is not the only kind of hunt you might have in Tier I, but it's a good example.

. . . . [Jim Ayers asks legislators to call their offices]. . . .

JUL 09 1985

NOTICE OF ADOPTION
OF EMERGENCY REGULATIONS

As required by AS 44.62.250, notice is given that, under authority vested by AS 16.05.255, AS 16.05.340, AS 16.05.346, AS 16.05.780, AS 16.05.920, and AS 16.05.930, the Alaska Board of Game adopted on this date, as emergency regulations, 5 AAC 78,001 - 5 AAC 78.600, 5 AAC 80.001 - 5 AAC 80.600, 5 AAC 82.001 - 5 AAC 82.600, 5 AAC 86.001 - 5 AAC 86.910, 5 AAC 88.001 - 5 AAC 88.910, 5 AAC 92.001 - 5 AAC 92.990, relating to the use or taking of game.

Regulations adopted as emergency regulations and emergency orders of repeal are as follows:

CHAPTER 78. SOUTHEAST ALASKA

- 5 AAC 78.001. DESCRIPTION OF SOUTHEAST ALASKA
- 5 AAC 78.002. APPLICATION OF REGULATIONS
- 5 AAC 78.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 78.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 78.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 78.030. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 78.040. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 78.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 78.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 78.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 78.070. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 78.115. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 78.120. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 78.130. GENERAL HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 78.140. GENERAL HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 78.145. GENERAL HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 78.160. GENERAL HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 78.165. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 78.170. GENERAL HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME

- 5 AAC 78.210. PERMITS, PERMIT PROCEDURES, AND PERMIT CONDITIONS
- 5 AAC 78.300. AREAS CLOSED TO HUNTING
- 5 AAC 78.600. CLOSURES AND RESTRICTIONS ON STATE GAME REFUGES

CHAPTER 80. SOUTHCENTRAL ALASKA

- 5 AAC 80.001. DESCRIPTION OF SOUTHCENTRAL ALASKA
- 5 AAC 80.002. APPLICATION OF REGULATIONS
- 5 AAC 80.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 80.010. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BISON
- 5 AAC 80.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 80.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 80.025. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 80.030. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 80.040. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 80.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 80.055. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 80.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 80.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 80.070. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 80.115. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 80.120. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 80.125. GENERAL HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 80.130. GENERAL HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 80.140. GENERAL HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 80.145. GENERAL HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 80.155. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 80.160. GENERAL HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 80.165. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 80.170. GENERAL HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME

- 5 AAC 80.210. PERMITS, PERMIT PROCEDURES, AND PERMIT CONDITIONS
- 5 AAC 80.300. AREAS CLOSED TO HUNTING
- 5 AAC 80.400. CONTROLLED USE AREAS
- 5 AAC 80.500. MANAGEMENT AREAS
- 5 AAC 80.600. CLOSURES AND RESTRICTIONS ON STATE GAME REFUGES

CHAPTER 81. HUNTING

- 5 AAC 81.010 is repealed
- 5 AAC 81.013 is repealed
- 5 AAC 81.020 is repealed
- 5 AAC 81.021 is repealed
- 5 AAC 81.022 is repealed
- 5 AAC 81.030 is repealed
- 5 AAC 81.040 is repealed
- 5 AAC 81.055 is repealed
- 5 AAC 81.056 is repealed
- 5 AAC 81.057 is repealed
- 5 AAC 81.060 is repealed
- 5 AAC 81.072 is repealed
- 5 AAC 81.075 is repealed
- 5 AAC 81.080 is repealed
- 5 AAC 81.090 is repealed
- 5 AAC 81.110 is repealed
- 5 AAC 81.115 is repealed
- 5 AAC 81.125 is repealed
- 5 AAC 81.126 is repealed
- 5 AAC 81.130 is repealed
- 5 AAC 81.140 is repealed
- 5 AAC 81.145 is repealed
- 5 AAC 81.160 is repealed
- 5 AAC 81.170 is repealed
- 5 AAC 81.175 is repealed
- 5 AAC 81.180 is repealed
- 5 AAC 81.185 is repealed
- 5 AAC 81.200 is repealed
- 5 AAC 81.210 is repealed
- 5 AAC 81.215 is repealed
- 5 AAC 81.216 is repealed
- 5 AAC 81.218 is repealed
- 5 AAC 81.237 is repealed
- 5 AAC 81.238 is repealed
- 5 AAC 81.239 is repealed
- 5 AAC 81.240 is repealed
- 5 AAC 81.250 is repealed
- 5 AAC 81.260 is repealed
- 5 AAC 81.270 is repealed
- 5 AAC 81.280 is repealed
- 5 AAC 81.290 is repealed
- 5 AAC 81.300 is repealed
- 5 AAC 81.310 is repealed
- 5 AAC 81.320 is repealed
- 5 AAC 81.330 is repealed

- 5 AAC 81.340 is repealed
- 5 AAC 81.350 is repealed
- 5 AAC 81.360 is repealed
- 5 AAC 81.400 is repealed
- 5 AAC 81.900 is repealed
- 5 AAC 81.910 is repealed
- 5 AAC 81.920 is repealed
- 5 AAC 81.930 is repealed

CHAPTER 82. SOUTHWEST ALASKA

- 5 AAC 82.001. DESCRIPTION OF SOUTHWEST ALASKA
- 5 AAC 82.002. APPLICATION OF REGULATIONS
- 5 AAC 82.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 82.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 82.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 82.025. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 82.030. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 82.035. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR ELK
- 5 AAC 82.040. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 82.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 82.055. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 82.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 82.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 82.070. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 82.115. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 82.120. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 82.125. GENERAL HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 82.130. GENERAL HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 82.135. GENERAL HUNTING SEASONS AND BAG LIMITS FOR ELK
- 5 AAC 82.140. GENERAL HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 82.145. GENERAL HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 82.155. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 82.160. GENERAL HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS

- 5 AAC 82.165. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 82.170. GENERAL HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 82.210. PERMITS, PERMIT PROCEDURES, AND PERMIT CONDITIONS
- 5 AAC 82.230. SPECIAL PROVISIONS FOR GENERAL PERMIT HUNTS
- 5 AAC 82.240. PERMIT FOR ACCESS TO MCNEIL RIVER STATE GAME SANCTUARY
- 5 AAC 82.250. PERMIT FOR ACCESS TO WALRUS ISLANDS STATE GAME SANCTUARY
- 5 AAC 82.300. AREAS CLOSED TO HUNTING
- 5 AAC 82.400. CONTROLLED USE AREAS
- 5 AAC 82.600. CLOSURES AND RESTRICTIONS ON STATE GAME REFUGES

CHAPTER 84. TRAPPING

- 5 AAC 84.010 is repealed
- 5 AAC 84.020 is repealed
- 5 AAC 84.030 is repealed
- 5 AAC 84.040 is repealed
- 5 AAC 84.050 is repealed
- 5 AAC 84.060 is repealed
- 5 AAC 84.080 is repealed
- 5 AAC 84.110 is repealed
- 5 AAC 84.115 is repealed
- 5 AAC 84.120 is repealed
- 5 AAC 84.160 is repealed
- 5 AAC 84.170 is repealed
- 5 AAC 84.175 is repealed
- 5 AAC 84.280 is repealed
- 5 AAC 84.285 is repealed
- 5 AAC 84.300 is repealed

CHAPTER 86. WESTERN AND ARCTIC ALASKA

- 5 AAC 86.001. DESCRIPTION OF WESTERN AND ARCTIC ALASKA
- 5 AAC 86.002. APPLICATION OF REGULATIONS
- 5 AAC 86.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 86.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 86.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 86.025. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 86.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 86.050. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MUSK OXEN
- 5 AAC 86.055. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 86.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 86.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME

MEMORANDUM

State of Alaska

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

DATE: March 15, 1985

FILE NO:

TELEPHONE NO: 465-4100

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

SUBJECT: Management Issues
Arising From the
Madison Decision

INITIAL ASSESSMENT

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

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

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

COOK INLET/KENAI RIVER/SUSITNA RIVER SALMON

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

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

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

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

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

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

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

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

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

NAKNEK RIVER SALMON

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

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

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

COPPER RIVER/PRINCE WILLIAM SOUND SALMON

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

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

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

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

MEMORANDUM


State of Alaska

TO: Honorable Bill Sheffield
Governor

DATE: March 6, 1985

Thru: John Shively
Chief of Staff

FILE NO: 366-375-85

FROM: 
Norman C. Gorsuch
Attorney General

TELEPHONE NO: 465-3600

SUBJECT: Briefing memorandum:
subsistence

I. Suggested Attendees

- A. Governor Sheffield and appropriate staff
- B. Department of Fish and Game
 - 1. Don W. Collinsworth, Commissioner
 - 2. Dennis D. Kelso, Deputy Commissioner
 - 3. Steven R. Behake, Director, Division of Subsistence
- C. Department of Law
 - 1. Norman Gorsuch, Attorney General
 - 2. Larri Irene Spengler, Assistant Attorney General

II. Issue Summary

- For several years, the Boards of Fisheries and Game have implemented the state subsistence law in a way which protected fishing and hunting by rural Alaskans.
- At the same time, the boards provided reasonably for other uses, such as personal use net fishing by non-rural Alaskans, sport fishing, and commercial fishing.
- This exercise of regulatory authority had been certified as complying with the federal subsistence law, ANILCA.

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

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

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

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

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

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III. Necessity for Governor's Briefing

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

IV. Background

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

1. The legislature in 1978 intended to protect fishing and hunting by individuals who reside in rural areas and communities in which the taking of fish stocks and game populations for personal and family consumption is a significant part of the local economy.
2. The eight criteria developed by the joint boards correctly identified subsistence uses in rural areas and communities.
3. Fishing by net for personal use by people from other areas of the state could be accommodated through the personal use fishing category established by the Board of Fisheries in regulation.
4. Personal use fishing did not have a priority over sport fishing and commercial fishing.

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

1. The legislature in 1978 did not intend that subsistence uses were to be limited to hunting and fishing by rural Alaska residents.
2. The legislature in 1978 did not intend subsistence uses to be identified in terms of the uses of an area or community.
3. Conversely, the legislature in 1978 did not intend a "grandfather" rights, limited entry-type system to control eligibility for subsistence.
4. The legislature in 1978 intended that subsistence uses could be restricted only if it is necessary for sustained yield purposes and if non-subsistence uses -- sport and commercial fishing, and by analogy, non-state-resident and trophy hunting, and big game guiding -- have already been eliminated.
5. If a situation requires restriction of subsistence uses, distinctions among subsistence users will be based on the three criteria contained in the statute: customary and direct dependence on the resource, local residency, and availability of alternative resources.

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V. Relevant Laws

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

B. Federal law:

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

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

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

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

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Governor
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VI. Alternatives

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

1. All hunting and all net fishing for personal use by all Alaskans is now defined as "subsistence uses," which must be authorized unless the resource will be harmed, and which must be given a priority over sport and commercial uses.
2. As participation increases in a subsistence fishery, sport and commercial fishing must be closed before subsistence fishing can be restricted. (For example, theoretically the Prince William Sound commercial fishery could be closed because of an increase in "subsistence fishing" in the Copper River.)
3. Similarly, all commercial big game guiding and all non-state-resident and trophy hunting would have to be eliminated before subsistence hunting by Alaska residents could be restricted.
4. Subsistence fishing would probably have to be authorized any place in the state where it had been authorized in the past, unless the resource would be harmed. (For example, Madison could require areas in Cook Inlet closed to subsistence fishing for years to reopen, possibly affecting the Kenai River and Susitna drainage sport fisheries.)

Honorable Bill Sheffield
Governor
Thru: John Shively, Chief of Staff
366-375-85

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5. Assuming non-compliance with ANILCA, the following could result:
 - a. Federal management of some kind on all federal lands and possibly all navigable waters of the state could be asserted by the Department of Interior, or sought through judicial action.
 - b. One million dollars in matching federal funds authorized by ANILCA would be lost to the state.
 6. It would not be possible for the state to resume marine mammal management.
- B. Amend the current statutes to return the regulatory authority that the boards exercised before Madison.
Consequences:
1. By inserting the words "rural Alaska residents" into the definition of subsistence uses, the scope of uses qualifying for the protection and priority of the subsistence law would be narrowed.
 2. By inserting the words "rural Alaska residents" into the definition of subsistence uses, compliance with ANILCA could be assured.
 3. By establishing the personal use fishing category in statute, harvest opportunities for people who do not qualify for subsistence uses could be protected, without giving those uses a priority over sport and commercial fishing.

MEMORANDUM

State of Alaska

TO: Don Collinsworth, Commissioner
Department of Fish and Game

DATE: March 8, 1983

FILE NO: 166-423-83

TELEPHONE NO:

FROM: Norman C. Gorsuch
Attorney General

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

By: Larri I. Spengler
Assistant Attorney General
Natural Resources-Anchorage

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

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

4. Critical Shortage*	Total closure necessary	No uses may be allowed
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* Shortage means relative resource shortage, when restrictions on non-subsistence uses must be imposed because harvest competition among user groups or decline in numbers of fish or game would jeopardize sustained yield of the resource or subsistence uses of the resource.

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

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

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

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

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

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

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

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

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

If increase in competition or decrease in harvestable surplus result in a relative resource shortage, restriction of some harvest opportunities may be necessary, and, if so, the priority for subsistence uses comes into play. The boards can use any of the many management options available to them in imposing the needed restrictions on non-subsistence uses and in continuing to regulate subsistence uses in a way that protects the opportunity for subsistence harvests. For example, seasons could be altered, or the use of aircraft prohibited. Of course, in extreme cases the option of precluding non-subsistence harvests remains available.

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

If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

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

Don Collinsworth, Commissioner,
Department of Fish and Game
166-423-83

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

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

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

LIS/jmo

DEPARTMENT OF LAW

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

OFFICE OF THE ATTORNEY GENERAL

March 3, 1985

M E M O R A N D U M

TO: Honorable Bill Sheffield
Governor

FROM: Norman C. Gorsuch
Attorney General

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

Attached is a bill regarding the taking of fish and game for subsistence and personal use. It was requested in order to return to the Boards of Fisheries and Game the regulatory authority they had exercised before Madison v. Alaska Department of Fish and Game, Supreme Court Opin. No. 2911 (Alaska, February 22, 1985).

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

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

NCG:LIS:d1m

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

D R A F T

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

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

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

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

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

conserve fish stocks for the maximum benefit of all Alaskans.

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

Sincerely,

Bill Sheffield
Governor

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

377-176-85

referred in house = resources and judiciary

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2

SENATE BILL NO. 231 (House bill 233)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

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

9

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

10

* Section 1. FINDINGS. The legislature finds that

11

(1) the taking of fish stocks and game populations for

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personal and family consumption and related uses is essential to the

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health, safety, and general welfare of Alaskans domiciled in rural

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communities or rural areas in which the taking of fish and game for

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such uses is a significant part of the economy of the community or

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area; and

17

(2) the taking of fish stocks and game populations for

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personal, sport, and commercial uses is also of economic and recre-

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ational importance to Alaskans who reside anywhere in the state.

20

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

21

(a) The Board of Fisheries may adopt regulations it considers

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advisable in accordance with the Administrative Procedure Act (AS 44.-

23

62) for

24

(1) setting apart fish reserve areas, refuges and sanctu-

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aries in the waters of the state over which it has jurisdiction,

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subject to the approval of the legislature;

27

(2) establishing open and closed seasons and areas for the

28

taking of fish;

29

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

- 1 size limitations on the taking of fish;
- 2 (4) establishing the means and methods employed in the
3 pursuit, capture and transport of fish;
- 4 (5) establishing marking and identification requirements
5 for means used in pursuit, capture and transport of fish;
- 6 (6) classifying as commercial fish, sport fish, personal
7 use fish, or predators or other categories essential for regulatory
8 purposes;
- 9 (7) watershed and habitat improvement, and management,
10 conservation, protection, use, disposal, propagation and stocking of
11 fish;
- 12 (8) investigating and determining the extent and effect of
13 disease, predation, and competition among fish in the state, exercis-
14 ing control measures considered necessary to the resources of the
15 state;
- 16 (9) prohibiting and regulating the live capture, posses-
17 sion, transport, or release of native or exotic fish or their eggs;
- 18 (10) establishing seasons, areas, quotas and methods of
19 harvest for aquatic plants;
- 20 (11) establishing the times and dates during which the
21 issuance of fishing licenses, permits and registrations and the trans-
22 fer of permits and registrations between registration areas is al-
23 lowed; however, this paragraph does not apply to permits issued or
24 transferred under AS 16.43;
- 25 (12) personal use fishing.

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

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

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

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

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

14 * Sec. 5. This Act takes effect immediately in accordance with AS 01.-
15 10.070(c).

16

Sec. 16.05.250. Regulations. [Repealed, § 40 ch 206 SLA 1975.]

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

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

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

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

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

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

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

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

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

(11) establishing seasons, areas, 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.

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

- (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- (2) local residency; and
- (3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980)

Cross references. — For restriction on maximum area of land that may be closed to multiple uses without an act of the state legislature, see AS 38.05.300(a).

For validity of regulations of former Board of Fish and Game, see sec. 41, ch. 206, SLA 1975 in the Temporary and Special Acts.

Effect of amendments. — The 1980 amendment inserted "disease" near the middle of paragraph (8) of subsection (a), and inserted "and regulating" near the beginning of paragraph (10) of subsection (a).

Editor's notes. — As to legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Special Acts and Resolves.

Legislative history reports. — For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

Opinions of attorney general. — For discussion of compatibility of state subsistence-use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3115 et seq.), see 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Differential treatment not prohibited. — While Alaska Const., art. VIII, § 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Establishment of use priorities. — While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 — 44.62.650. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Cited in Reynolds v. State, Ct. App. Op. No. 182 (File No. 6432), 655 P.2d 1313 (1982).

Sec. 16.05.253. Operation of stationary fishing gear. (a) The Board of Fisheries may require a person who holds a limited entry permit or an interim-use permit under AS 16.43 to be physically present at a beach or riparian fishing site during the operation of net gear or other stationary fishing gear at the site, except when the permit holder is at or traveling to or from the location of

- (1) a sale of fish caught in the gear; or
- (2) other stationary gear of the permit holder.

(b) For purposes of this section, "fishing site" means fishing site as defined by the Board of Fisheries and includes any structure used for providing shelter in support of the operation of the net gear or other stationary fishing gear. (§ 1 ch 94 SLA 1982; am § 1 ch 19 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote the existing language of this section and designated that lan- guage subsection (a) and added subsection (b).

Sec. 16.05.255. Regulations of the Board of Game. (a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

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

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

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

(6) investigating and determining the extent and effect of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designating game management units or parts of game management units in which bounties for predatory animals shall be paid;

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

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

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

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

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

- (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- (2) local residency; and
- (3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

Cross references. — For validity of regulations of former Board of Fish and Game, see sec. 41, ch. 206, SLA 1975 in the Temporary and Special Acts.

Editor's notes. — For legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Special Acts and Resolves.

Legislative history reports. — For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

Opinions of attorney general. — Neither the Board of Game nor the Department of Fish and Game has jurisdiction

over domestic animals. August 29, 1979, Op. Att'y Gen.

Permitting authority over live game, that is, nondomestic animals, rests with the Board of Game as implemented by the Department of Fish and Game. August 29, 1979, Op. Att'y Gen.

For discussion of compatibility of state subsistence-use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3115 et seq.), see 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

Establishment of quotas must be in accordance with the Administrative Procedure Act (AS 44.62). *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Applied in *Gottardi v. State*, Sup. Ct. Op. No. 2154 (File No. 4436), 615 P.2d 626 (1980).

Sec. 16.05.256. Nonresident and nonresident alien permits. Whenever it is necessary to restrict the taking of big game so that the opportunity for Alaska residents to take big game can be reasonably satisfied in accordance with sustained yield principles, the Board of Game may, through a permit system, limit the taking of big game by nonresidents and nonresident aliens to accomplish that purpose. (§ 3 ch 74 SLA 1982)

Sec. 16.05.257. Subsistence hunting regulations. (a) The Board of Game, at its regularly scheduled annual meeting and other meetings held under authority of AS 16.05.300(a), shall consider and may adopt regulations providing for subsistence hunting in a game management unit or subunit or a portion of a unit or subunit upon

- (1) recommendation of the department, based on biological evidence;
- (2) the recommendation of the active local advisory committees for that game management unit or subunit or a portion of a unit or subunit;
- (3) the written petition of not less than 100 interested residents of that game management unit or subunit; or
- (4) the written petition of not less than 25 interested residents of an area which is requested for establishment as a subsistence area within a game management unit or subunit.

(b) The regulations may include but are not limited to the following:

(1) the establishment of subsistence hunting areas;

(2) the regulation of transportation methods and means to protect subsistence hunting within subsistence hunting areas, including the prohibition or limitation of pack animals, mechanized vehicles and aircraft, other than watercraft or wheeled vehicles operating on a road maintained by public funds;

(3) the establishment of open and closed seasons and areas to protect subsistence hunting;

(4) the limitation of hunting to only one sex of the animal.

(c) Regulations may not be adopted by the Board of Game under (a), (b) or (f) of this section unless, in addition to the requirements of AS 44.62.180 — 44.62.290, the department

(1) holds public hearings, after reasonable notice, at least 30 days before the meeting at which the regulation is to be adopted, with at least one of the hearings being held in close proximity to the area potentially affected;

(2) presents at the hearings the information provided for in (e) of this section;

(3) makes the information provided for in (e) of this section available to the appropriate advisory committees and to petitioners if consideration of adoption of regulations was prompted by petitions under (a)(3) or (4) of this section; comments shall be received by the board until 10 days before any adoption of regulations.

(d) A petition submitted under (a)(3) — (4) of this section shall contain a complete description of the area requested as a subsistence area and a specification of the species within the area considered necessary for subsistence use. A petition or recommendation made under (a)(2), (3) or (4) of this section must be filed with the department at least 75 days before the meeting of the board at which the petition or recommendation is to be considered.

(e) The department shall investigate, by collecting existing data, and, when necessary, conducting new studies, every petition or recommendation made under (a)(2), (3) or (4) of this section to the extent practicable within the time available and provide the following information:

(1) the concentration of the species to be affected and carrying capacity of the area to be affected;

(2) the current hunting practices in the area, including numbers of animals taken and by what methods and means and whether the take is subsistence or recreational;

(3) the dependence of persons in the area for subsistence use of a species;

(4) the population trends of the affected fish and game in the area;

(5) whether the affected fish and game population is able to support a nonsubsistence harvest; and

(6) other information considered necessary by the section of subsistence hunting and fishing.

(f) The Board of Game at any time may review and change the boundaries of a subsistence area upon

(1) the recommendation of the department, based on biological evidence;

(2) the written petition of not less than 25 interested residents of that area; or

(3) the majority vote of the active local advisory committees for that area.

(g) The department shall submit a report to the legislature during the first 10 days of each legislative session beginning after January 1, 1977. The report shall include, but is not limited to, a listing of the specific subsistence areas established or modified during the preceding year and the species subject to subsistence use within those areas.

(h) In this section

(1) "subsistence hunting" means the taking of game animals by a state resident for subsistence uses by means defined by the Board of Game;

(2) "subsistence hunting area" means an area in which only subsistence hunting of the affected species is permitted and which is managed for maximum food potential.

(i) The Board of Game may not make a decision denying, creating or changing a subsistence hunting area unless the decision is based on specific written findings of fact regarding all the information provided in accordance with (e) of this section. (§ 1 ch 199 SLA 1975; am § 2 ch 269 SLA 1976; am §§ 6-12 ch 151 SLA 1978)

Editor's notes. — As to the section of subsistence hunting and fishing, referred to in (e)(6) of this section, see the editor's note to AS 16.05.090.

For legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Spe-

cial Acts and Resolves.

Legislative history reports. — For report on ch. 199, SLA 1975 (SCS HB 369 am S), see 1975 House Journal, p. 733.

For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

NOTES TO DECISIONS

Regulations adopted under this section must be in accordance with the Administrative Procedure Act (AS 44.62). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

While this section, which authorizes the Board of Game to adopt regulations providing for subsistence hunting, does not specifically refer to the Administrative Procedure Act (AS 44.62), it appears clear that it merely sets forth an additional purpose for which regulations may be promulgated. State v. Tanana Valley

Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Issuance of permits based on verbal instructions to agents held improper. — The issuance of permits for the killing of caribou in certain specified areas of the state based on verbal instructions to the permit agents as to the need of individual applicants does not conform to requirements of the Administrative Procedure Act (AS 44.62). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

(b) A person may not knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this title except AS 16.51 and AS 16.52, or a poster or notice to the public concerning the provisions of this title except AS 16.51 and AS 16.52, or a regulation adopted under this title except AS 16.51 and AS 16.52, or a marker indicating the boundary of an area closed to hunting, trapping, fishing or other special use under this title except AS 16.51 and AS 16.52. A person may not knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this title except AS 16.51 and AS 16.52 or a regulation adopted under this title except AS 16.51 and AS 16.52.

(c) A person may not import, possess, transport or release in the state live venomous reptiles, live venomous reptile eggs, live venomous insects, or live venomous insect eggs, except in accordance with the terms of a permit issued under (d) of this section. This prohibition does not apply to bees as defined in AS 03.47.040. A person who violates this subsection is guilty of a misdemeanor and may be cited as set out in AS 16.05.165.

(d) A permit required under (c) of this section may be granted only if, in the determination of the commissioner, the applicant demonstrates a valid educational purpose for seeking the permit. A valid educational purpose includes display in educational institutions and in zoos. (§ 28 art I ch 94 SLA 1959; am § 3 ch 110 SLA 1970; am §§ 20, 21 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment, effective July 3, 1984, substituted "AS 16.05 — AS 16.40" for "this chapter" in two places in subsection (a) and "this title except AS 16.51 and AS 16.52" for "this chapter" throughout sub-

section (b) and added subsections (c) and (d). The amendment also made a minor punctuation insertion in subsection (a) and a minor word insertion in the first sentence of subsection (b).

NOTES TO DECISIONS

Cited in *Guidry v. State*, Sup. Ct. Op. No. 2741 (File No. 6362), P.2d (1983).

Sec. 16.05.925. Penalty for violations. A person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor. However, a person who violates a regulation adopted under this chapter for the regulation of commercial fisheries is subject to the penalties set out in AS 16.05.720. (§ 22 ch 132 SLA 1984)

Effective dates. — Section 30, ch. 132, July 3, 1984, in accordance with AS SLA 1984, makes this section effective 01.10.010(c).

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the Department of Fish and Game examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes. (§ 28 art I ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment, effective July 3, 1984, in subsection (c), made a word correction in the first sentence and added the second sentence.

Sec. 16.05.940. Definitions. In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

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

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

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(10) "fish derby" means a contest in which prizes are awarded for catching fish;

(11) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(12) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means

having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

(13) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(14) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40;

(15) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(16) "nonresident" means a person who is not a resident of the state;

(17) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(18) "operator" means the individual by law made responsible for the operation of the vessel;

(19) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(20) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(21) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(22) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence

uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

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

(24) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(25) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(26) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(27) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft. (§ 2 art I ch 95 SLA 1959; am §§ 1 — 4 ch 131 SLA 1960; am § 1 ch 21 SLA 1961; am §§ 1, 2 ch 102 SLA 1961; § 9 art III ch 94 SLA 1959; am § 23 ch 131 SLA 1960; am § 1 ch 160 SLA 1962; am §§ 13, 14 ch 31 SLA 1963; am § 2 ch 32 SLA 1968; am § 3 ch 73 SLA 1970; am § 1 ch 91 SLA 1970; am § 4 ch 110 SLA 1970; am § 1 ch 90 SLA 1972; am § 5 ch 82 SLA 1974; am §§ 26, 82 ch 127 SLA 1974; am §§ 18 — 20 ch 206 SLA 1975; am § 12 ch 105 SLA 1977; am §§ 14, 15 ch 151 SLA 1978; am § 1 ch 78 SLA 1979; am § 1 ch 24 SLA 1980; § 4 ch 74 SLA 1982; am § 24 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment, effective July 3, 1984, substituted "AS 16.05 — AS 16.40" for "this chapter" in the introductory language and paragraphs (14), (15) and (20); in paragraph (9), substituted "invertebrate, or amphibian" for "invertebrates and amphibians" and "its" for "their" preceding "life cycle" and added the language beginning "and includes any part of such aquatic finfish"; reworded the con-

tents of paragraph (13); inserted "reptile" near the beginning of paragraph (14); substituted "those chapters" for "it" in paragraph (15); substituted "this paragraph" for "this chapter" in three places in paragraph (19); inserted "of" following "taking" in paragraph (22); deleted "for the purposes of this chapter" preceding "does not include aircraft" in paragraph (27); and repealed paragraph (28), defining "visitor."

managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans; and

(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

6 USC 3111.

Sec. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

16 USC 1601
et.

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

POLICY

6 USC 3112.

Sec. 802. It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized

scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

Ante, p. 2377.

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

DEFINITIONS

Sec. 803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term—

16 USC 3113.

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses—

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

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

PREFERENCE FOR SUBSISTENCE USES

Sec. 804. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

16 USC 3114.

Priority criteria.

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

SEC. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

- (1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;
- (2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(X)(iv) of this subsection; and
- (3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

- (A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;
- (B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;
- (C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;
- (D) the preparation of an annual report to the Secretary which shall contain—

Annual report to Secretary.

- (i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;
- (ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;
- (iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and
- (iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported

by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

Implementation.

(e)(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

Reimbursement to States.

(2) Total payments to the State under this subsection shall not exceed the sum of \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

Report to Congress.

FEDERAL MONITORING

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as

Report to congressional committees. 16 USC 3116.

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

SEC. 807. (a) Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Hearing.

(b) A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

(c) This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

6 USC 3118.

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or

Subsistence
hunting pro-
gram.

investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

Program and
recommendation
implementation.

COOPERATIVE AGREEMENTS

SEC. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.

16 USC 3119.

SUBSISTENCE AND LAND USE DECISIONS

SEC. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

16 USC 3120.

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

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

Hearing.

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Notice and hearing.

2 USC 4332.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

8 USC note rec. 21.

1 USC 1601

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

1 USC 3121.

SEC. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

USC 3122.

SEC. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

Submission to Speaker of House and President of Senate. USC 3123.

SEC. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

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

Publication in Federal Register.

REGULATIONS

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

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

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

16 USC 3125.

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 663dd-ji), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (86 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 317; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

3126.

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

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

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

SUBMERGED LANDS STATUTE OF LIMITATION

1601

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

subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action.

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

43 USC 1601
note.

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

Costs and
attorney fees.

43 USC 1601
note.

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

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

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

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

Agreements or
reconveyances
with State.

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

48 USC note
prec. 21.

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

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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.,

Cross-Appellees.

[No. 2911 - February 22, 1985

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

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

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

MOORE, Justice.

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

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

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

I. SUMMARY OF FACTS

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

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

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

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

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

2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

(Footnote Continued)

the Board of Fisheries.

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

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

5. AS 16.05.251(b) states:

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

(Footnote Continued)

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

(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, to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

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

(2) local residency; and

(3) availability of alternative resources.

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

6. AS 16.05.251(a) states:

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

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

(Footnote Continued)

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

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

(Footnote Continued)

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

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

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

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

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

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

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

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

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

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

CHARACTERISTICS OF SUBSISTENCE FISHERIES.

(a) The Board of Fisheries finds that certain customary and traditional practices

(Footnote Continued)

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

(Footnote Continued)

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

(Footnote Continued)

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

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

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

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

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

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

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

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

On appeal, Madison and Gjosund seek reversal of the two trial court decisions. They claim that the board did not act within the legislative authority granted by AS 16.05.251(b) and AS 16.05.940(22) and (23) when it adopted the ten characteristics ultimately codified as 5 AAC 01.597.¹⁰

II. STANDARD OF REVIEW

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

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

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

In Kelly v. Zamarello, 486 P.2d 906, 917 (Alaska 1971), we stated that the "reasonable basis approach should be used for the most part in cases concerning administrative expertise as to either complex subject matter or fundamental policy formulations." However, the issues in this case concern statutory interpretation of the words "customary and traditional" and the question whether the board has acted within the scope of its statutory authority. Such issues "fall into the realm of special competency of the courts." Alaska Public Utility Commission v. Municipality of Anchorage, 555 P.2d 262, 266 (Alaska 1975). See also State, Commercial Fisheries Entry Commission v. Templeton, 598 P.2d 77, 80 (Alaska 1979).

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

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

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

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

III. LEGISLATIVE HISTORY OF THE 1978 SUBSISTENCE LAW

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

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

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

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

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

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

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

The House Special Committee on Subsistence drafted a letter of intent for House Bill 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.

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

(Emphasis added).

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

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

15. The board stipulated in 1982 that it violated

(Footnote Continued)

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

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

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

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

(Footnote Continued)

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

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

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

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

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

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Board of Directors
Territorial Sportsmen, Inc.
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9335 View Drive
Juneau, Alaska 99801

April 23, 1985

TO THE BOARD OF DIRECTORS;

You have asked this office for a legal opinion regarding HB 288, "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date." The analysis and opinion which follow responds to your request.

I must caution you that since the time for preparation of this material was quite short, further research could produce different, or contrary, conclusions. The political volatility of allocation of fishery and wildlife resources in Alaska should not serve as an excuse for facile reasoning, and the analysis presented herein has been limited by the time available for its preparation.

INTRODUCTION

HB 288 has been introduced at the request of Governor Sheffield for the primary purpose of inserting the qualifying adjective "rural" into the portion of the Alaska Fish and Game Code (AS 16) dealing with subsistence. (SEE Memorandum of March 6, 1985 from Attorney General Gorsuch to Governor Sheffield.) The purpose of this proposed change has been stated to be to legislatively override the relevant portion of the recent Alaska Supreme Court decision in Madison v ADF&G, Op. No. 2911 (Alaska, Supreme Court, February 22, 1985.)

Concerns have been expressed over the validity of the approach taken by HB 288 in light of the Alaska and United States Constitutions. Additional concerns have been raised over the alternative possibility of inaction on this topic by the Fourteenth Alaska Legislature, and the effect such inaction may have on non-subsistence uses.

It is the purpose of this letter to respond to these matters, albeit within the time constraints noted above.

SHORT ANSWER

HB 288 raises serious, unanswered questions regarding the constitutionality of discriminating between "rural" and "non-rural" Alaskans.

If passed, HB 288 will require definition of the term "rural," either by the Boards of Fisheries and Game adopting a regulatory definition, or through operational application, i.e., through a case-by-case application of the "rural" standard as the Boards adopt harvest regulations.

Because of the brief time available before the onset of the summer fisheries, combined with the time frames required by the Alaska Administrative Procedure Act's notice and comment provisions, the definition of "rural" for the 1985 summer fishing season will, in either event, be decided without thorough public review or opportunity for public comment.

The impact on non-subsistence uses of failure to pass HB 288, or similar legislation, is far too speculative to predict accurately at this time. A legal basis exists for closure of non-subsistence uses in order to protect subsistence uses under HB 288 as well as under the current legal regime.

GENERAL DISCUSSION

I. CONSTITUTIONALITY OF HB 288

A. EQUAL PROTECTION

1. Introduction

Equal protection under the laws is guaranteed by the U.S. Constitution and the Alaska Constitution. Under our federalist approach to government, the Alaska Constitution's test for equal protection has been interpreted somewhat differently from the federal test. Thus, these two standards must be discussed separately.

2. Equal Protection under the United States Constitution

The United States Supreme Court has applied two standards to equal protection challenges: the "strict scrutiny" standard and the "rational basis" standard. A "compelling state interest" must be shown to justify classifications that are "inherently suspect" or classifications that affect "fundamental rights." The strict scrutiny test is used in such cases, and applies where a statute operates to the peculiar disadvantage of a "suspect class," e.g., a racial group, a particular national origin, or

alienage, or impacts a "fundamental right," e.g., freedom of speech. SEE GENERALLY CFEC v Apokedak, 606 P. 2d 1255, 1266 (Alaska, 1980).

HB 288 is racially neutral, it does not involve a classification that is inherently suspect, and it does not involve fundamental rights. Thus, strict scrutiny will not apply.

HB 288 may implicate the constitutionally protected right to intrastate travel. Generally, this right is only implicated where the government creates distinctions between residents based upon the duration of their residency. Gilman v Martin, 662 P. 2d 120, 125 (Alaska, 1983). Since HB 288 does not contain a durational residency requirement, the right to intrastate travel will not be discussed here. A complete review of the validity of HB 288 should probably examine this issue.

Where non-fundamental interests are concerned, and the purpose of the statute is within the realm of legitimate state interests, the "rational basis" test is the proper standard. Baldwin v Fish and Game Commission of Montana, 436 US 371, 390 (1978). In other words, does the statute (in this case, HB 288) have a rational relation to a legitimate state interest, is the classification reasonable, and does the measure treat all within the class alike? CFEC v Apokedak, 606 P 2d 1255, 1266 (Alaska, 1980).

The "rational basis" test is the proper test to apply to HB 288 under federal equal protection analysis. Zobel v Williams, 457 U.S. 55, 59-61 (1982).

The purposes of HB 288 are conservation, allocation, and enforcement. These are legitimate state interests. (SEE GENERALLY, cases cited in Maeda v Amimaya, 594 P. 2d 136, 142 (Hawaii, 1979).) Thus, the proper inquiry under federal equal protection analysis becomes whether or not HB 288 bears a rational relation to achieving those purposes, whether or not the classification is reasonable, and whether or not it treats class members equally.

Whether or not HB 288 passes muster under this test will depend in large measure on what sort of legislative findings of fact accompany the bill. At the present time, those legislative findings of fact are absent. This author is unfamiliar with the nascent legislative history of HB 288. Thus, in many ways, it may be premature to attempt to assess HB 288 from an equal protection standpoint. Nonetheless, the record as it now exists permits some tentative conclusions to be drawn as to the arbitrariness or reasonableness of HB 288.

The classification of a particular group of individuals, such as HB 288's creation of a class of "rural" residents entitled to priority use of fish and game, must be reasonable in relation to the purpose of the legislation. If not, the classification is arbitrary, and cannot withstand equal protection review.

A reasonable classification has been described as one "which includes all (and only those) persons who are similarly situated with respect to the purpose of the law." Tussman and TenBroeck, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341, 346 (1949), cited in Leege v Martin, 379 P. 2d 447, 452, fn 18, (Alaska, 1963), and in Washington Kelpers' Association v State, 502 P. 2d 1170, 1176 (Washington, 1972) (en banc).

Does the "rural" classification of HB 288 include all persons, and only those persons, who are similarly situated with respect to the conservation, allocation, and enforcement purposes of HB 288?

There are a good many non-rural Alaskans for whom subsistence has great importance. The plaintiffs in Madison provide examples of such individuals. Other examples could include the members of the Kachemak Bay Subsistence Group, the members of the Copper River Subsistence Fishermen's Association, or Alaskans whose permanent residence may be in Anchorage, Fairbanks, or Juneau, but who annually spend time on a trapline, at a fish camp, or in other typical Alaskan activities wherein subsistence use of fish and game inheres.

It is my opinion that the "rural" classification of HB 288, by excluding such individuals from the benefits of the subsistence priority, fails to include all the people who are similarly situated with respect to the conservation, allocation, and enforcement purposes of HB 288. There does not appear to be a reasonable relation between categorizing the uses of rural residents as subsistence uses, yet categorizing the identical use by a non-rural resident as something else. Thus, the "rural" category appears to violate equal protection standards.

One of the critical defects discussed in Madison by the Alaska Supreme Court regarding the Board of Fisheries' Cook Inlet subsistence criteria was the fact that an individual would not qualify for a recognized subsistence use unless he were part of an identifiable community or group. (Madison v ADF&G, Opinion No. 2911, (Alaska, February 22, 1985).) Under the Board's Cook Inlet regulation, many individual users who have historically depended on subsistence fishing were eliminated from subsistence use at the outset by the Board of Fisheries' regulation.

Inserting the adjective "rural" to limit the new category of "personal use fishing" sought to be created by HB 288 would seem to have an effect similar to the regulation invalidated in Madison: eliminating, at the outset, many individual users who have historically depended on subsistence uses of fisheries and wildlife resources. The difference under HB 288 is that this elimination is performed by the Legislature rather than by either Board. Such a difference does not appear legally significant.

These defects in HB 288 may not be fatal.

"a statutory classification impinging upon no fundamental interest...need not be drawn so as to fit with precision the legitimate purposes animating it. That (Alaska) might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

Baldwin v Fish and Game Commission of Montana, 436 US 371, 390 (1978), citing Hughes v Alexandria Scrap Corp., 426 US 794, 813 (1976). See also: New Orleans v Dukes, 427 U.S. 297, 303 (1976). But c.f. Burger, concurring opinion in Baldwin, supra.

The measure of latitude which courts will allow underinclusive or overinclusive statutes is not easily described. Existing case law does not admit of predictability in this regard. (SEE L. Tribe, American Constitutional Law, Sec. 16-4, (1978).) In general, though, it is underinclusiveness, rather than overinclusiveness, that poses dangers to the constitutionality of legislation.

"nothing opens the door to arbitrary action so effectively as to allow...officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency, Inc. v New York, 336 U.S. 106, 112-113 (1949).

In conclusion, it can be said with certainty that the "rural" classification of HB 288 is open to substantial attack on equal protection grounds. Since the record is not yet fully developed, it is too early to speak with much assurance as to the validity of such a classification. At the present time, however, the "rural/non-rural" dichotomy does not appear to be a reasonable means for discriminating among Alaskan users of fish and wildlife.

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

THE COURT OF APPEALS OF THE STATE OF ALASKA

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

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

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

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

SINGLETON, Judge.

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

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

(Footnote Continued)

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

(Footnote 1 Continued)

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

2. 5 AAC 81.140(a) provides:

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

3. Alaska Statute 44.62.030 provides:

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

Alaska Statute 11.81.220 provides:

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

. . . .

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

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

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

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

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

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

(2) local residency; and

(3) availability of alternative resources.⁴

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

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

meet "subsistence uses" before he could prevail on his motion to dismiss.⁵ Since there is nothing in the record indicating that there were insufficient deer in Game Unit 8 to meet all needs, including both sport hunting and subsistence uses, the state contends it was unnecessary for the Board to adopt any specific subsistence regulations, and therefore the trial court erred in finding that prosecution of Eluska under 5 AAC 81.320(6) and 5 AAC 81.140(a) was inconsistent with the enabling statute.

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

5. The state finds support for its position in a series of attorney general opinions and in the legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) P.L. 96-'87, 94 Stat. 2371 (1980), particularly in section 804 (codified at 16 U.S.C. § 3114 (1982)). The state points out that the federal statute was intentionally patterned after Alaska's subsistence law and provides virtually identical language to that found at AS 16.05.255(b). H.R. Rep. No. 96-97, Part 2, 96th Cong., 1st Sess. 191 (1980). The legislative history of section 804 specifies that:

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

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

and 5 AAC 81.140(a) are on their face necessarily inconsistent statutory requirements of subsection (a), since, as the state pair is at least conceivable that sufficient deer existed on Kodiak Island to meet all subsistence needs despite the bag limits, seasons and other restrictions set by the regulations. But cf. Madison v. Alaska Department of Fish and Game, ___ P.2d ___, ___ n.9, Op. No. 2911 at 12 n.9 (Alaska, February 22, 1985) (holding Board of Fisheries regulations defining subsistence fisheries inconsistent with AS 16.05.940(22), (23), and 16.05.251(b), which define "subsistence fishing" and "subsistence uses," and require the Board to adopt regulations permitting subsistence fishing).

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

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

(Footnote Continued)

see page 16
"restriction" means "an
sufficient impairment
of subsistence uses
i 7f

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

(Footnote 6 Continued)

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

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

Finally, we do not read the supreme court's discussion of the legislative history regarding the use of the term "customary and traditional" as constituting an implicit finding that the statute is somehow void as a discrimination against outsiders and newcomers. See Madison, ___ P.2d at ___, Op. No. 2911 at 20-21. We assume that the Board will be able to adopt regulations adequately answering the questions left open by this case and Madison without violating state and federal equal protection guarantees. See Zobel v. Williams, 457 U.S. 55, 60-61, 102 S. Ct. 2309, 2312-13, 72 L.Ed.2d 672, 677-78 (1982) (when a state distributes benefits unequally between past residents and newcomers the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment); cf. Alaska Constitution art. VIII (establishing limitations on state regulation of hunting and fishing).

I. Legislative Mandate

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

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

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

(Footnote Continued)

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

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Sections six and seven: These two sections, [AS 16.05.251(b) and .255(b)] which are virtually identical for the Boards of Fisheries and the Board of Game, are intended to statutorily set out the priority given to subsistence use of fish and game resources. While there are presently regulations for subsistence fishing, there is no mechanism for the promulgation of subsistence hunting regulations except with the creation of subsistence hunting areas pursuant to A.S. 16.05.257. Section seven would allow for these regulations so that subsistence hunting could be distinguished by separate regulations from sports hunting. Further, these sections set forth a priority of users if restrictions are needed because of the unavailability of resources. The priority list is an attempt to insure that those with the most dependence upon the fish and game resources are the last to be restricted.

If there is a need to restrict the taking of fish or game in order to avoid damaging the fish stocks or game populations, or in order to assure that subsistence users may continue to take fish or game, it is the intent of the Committee that sports or commercial use be restricted before subsistence use. If these restrictions are inadequate, restriction of subsistence use as well is authorized based upon the dependence on the resource, the local residence of the subsistence users, and the availability of alternate resources. It is the intent of the Committee that decisions and determinations by the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act.

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

(Footnote 7 Continued)

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

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

II. Board's Inaction

The Board of Game has not promulgated a specific regulation governing subsistence hunting in Game Unit 8, nor has it made specific provisions for a subsistence defense or exception to prosecutions under regulations adopted pursuant to AS 16.05.255(a). The time that has elapsed from 1973 to the present has provided more than adequate opportunity for the Board to carry out its statutory responsibility. Consequently, we conclude that the Board has failed to carry out its responsibilities and, under the authority of United States Smelting, 469 P.2d at 141-42, dismissal of Eluska's prosecution might have been justified. We believe the supreme court's comments regarding the Local Boundary Commission in United States Smelting are particularly appropriate to this situation:

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

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

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

III. "Subsistence" Defense

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

In the absence of appropriate regulations,⁸ we believe that the best way to accommodate Eluska's statutory right to subsistence hunting and the state's right to reasonably protect the state's game resources is to judicially recognize a defense for subsistence hunting. We therefore hold that when the trial court concludes, as a matter of law, that hunting occurs in an area in which the state has not adopted regulations pursuant to AS 16.05.255(b) providing for subsistence uses and recognizing the subsistence priority, conduct which would otherwise be a violation of a regulation adopted pursuant to AS 16.05.255(a) restricting hunting is justified as a "subsistence use" if the person whose conduct is alleged to have constituted hunting in violation of the regulation believed he or she was taking the game for subsistence uses (see AS 16.05.940(23)) and was not aware of and did not consciously disregard a substantial and unjustifiable risk that his or her taking was not a subsistence use of the game taken. (See AS 11.31.900(a)(3) defining the mental state "recklessly.") We use the term "defense" as it is defined in the revised criminal code, AS 11.81.900(b)(15):

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

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

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

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

In order to permit a pretrial dismissal of charges where appropriate⁹ and avoid delay in presenting such a defense, we will require a

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

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

(Footnote Continued)

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

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

(Footnote 9 Continued)

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

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

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

"Customary" and "traditional" are not further defined in the statute and therefore must be given their common meanings. AS 01.10.040. "Customary" means according to custom, the usual way of doing something. See Oxford American Dictionary 156 (1930). "Traditional" means according to tradition, a custom handed down from generation to generation

(Footnote Continued)

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

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

(Footnote 10 Continued)

especially without writing, a long established custom or method of procedure. Id. at 728. But see Madison, ___ P.2d at ___, Op. No. 2911 at 20: "customary and traditional" should be defined in accordance with legislative history. The words "customary and traditional" serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans. In addition, subsistence use is not strictly limited to rural communities.

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

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

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

11. See note 10 supra.

12. "Reckless." See note 9 supra.

13. See note 9 supra.

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

3. Equal Protection under Alaska's Constitution

Under Alaskan equal protection analysis, the legal inquiry revolves around Article I, Sec. 1, and Article VIII, Sec. 17 of the Alaska Constitution. Each of these provisions guarantees Alaskans equal protection under the law.

As noted above, the threshold determination has already been made by this author that the classification of "rural" is not inherently suspect and that subsistence use of fish and wildlife does not involve a fundamental right. Thus, the strict scrutiny test will not be reviewed in this analysis. "Middle level" scrutiny, likewise, does not appear appropriate. (SEE Craig v Boren, 429 U.S. 190 (1976).) Instead, it is the "rational basis" test that appears to be germane to review of HB 288.

Equality under the law under Article I, Sec. 1, of the Alaska Constitution has been explained in the following fashion:

"The guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group, when considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same."

Leege v Martin, supra, at 452.

Another formulation of the test has focused on the nature of the scrutiny to be used by courts.

...in order for a classification to survive judicial scrutiny, the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Isakson v Rickey, 550 P. 2d 359, 362 (Alaska, 1976).

Under this test,

Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.

Id.

Discrimination against non-rural Alaskans can be justified only if there is some reasonable basis for placing them in a different class from those living in rural areas. The reasonableness of the classification depends, in part, upon whether the class includes all persons who are similarly situated with respect to the purpose of the law, and none who are not so situated.

Based on the nature of the right involved,

a greater or lesser burden is placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective.

Apokedak, supra, at 1264.

The analysis presented herein with respect to equal protection under the U. S. Constitution, is applicable to a large extent in assessing HB 288's reasonableness under the Alaska Constitution. If a statute fails to pass muster under the federal rational basis test, it will also tend to fail the more exacting standards of the Alaska Constitution.

It appears that the "rural" classification of HB 288 excludes a large number of Alaskans from the subsistence priority, despite the lack of a conservation or enforcement need to do so. Those excluded are the non-rural residents whose uses of fish and game do not differ substantially from the uses of rural Alaskans.

Although use of fish and game is often characterized as a mere economic interest deserving only minimal scrutiny, State v Ostrosky, 667 P. 2d 1184, 1193-1194 (Alaska, 1983), the magnitude of the importance of fish and wildlife to certain individuals may justify more intensive judicial review. That issue remains undecided at this time, however, so this analysis will proceed under the assumption that the "rational basis" test is applicable.

Viewed in allocative terms, discrimination on the basis of where individual Alaskans may be domiciled does not appear to have a rational basis. The customary and traditional uses of fish and game are often so similar as between rural and non-rural Alaskans, that there does not appear to be a reasonable basis for granting priority rights only to rural Alaskans. (As noted above, the Alaska Supreme Court has already given explicit recognition to the validity of urban subsistence uses in Madison.)

Thus, the "rural" classification scheme of HB 288 appears to be subject to substantial attack under Article I, Sec. 1, of the Alaska Constitution. Unless and until further reasons are adduced by the Legislature to support the "rural" classification, it appears to be arbitrary and a violation of the Alaska Constitutional guarantee of equal protection.

A separate equal protection provision appears in Alaska's Constitution in the Natural Resources Article, Article VIII, Sec. 17. This constitutional provision may require a more stringent review of actions that are challenged as violating equal protection. Gilman v Martin, 662 P. 2d 120, 126 (Alaska, 1983).

The Commentary by the Committee on Natural Resources, which drafted that part of Alaska's Constitution, wrote "This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state."

The intent of the delegates to Alaska's Constitutional Convention in drafting this provision was "simply based on the Fourteenth Amendment" to the U. S. Constitution. The precise wording of Section 17 was deliberately lifted wholesale from a 1936 State of Washington decision. (SEE Proceedings of the Constitutional Convention p. 2452.)

State v Huse, 59 P. 2d 1101 (Wash., 1936) is the case from which Section 17 derives. The regulation at issue therein sought to exclude from eligibility from fishing all individuals except those who had been licensed in 1932 or 1933. The regulation was overturned because it was founded on "mere fortuitous circumstances." Huse, at 1104.

The following passages from Huse are, perhaps, illustrative of how an Alaskan court would apply Section 17 to HB 288.

...such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state."

Huse, supra, at 1105.

The "rural" classification approach of HB 288 does not appear to run afoul of this rule. Any Alaskan could presumably become "rural" by changing his or her place of abode, thereby attaining eligibility for the subsistence priority.

Other language from Huse is also instructive.

A classification, to be legal and valid, must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act in respect to which the classification is made. The distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law and may not rest upon a mere fortuitous characteristic or quality of person, or upon personal designation. In short, the classification cannot be an arbitrary selection. Id.

This aspect of the equal protection rule of Article VIII, Sec. 17, appears to be violated by HB 288. In my opinion, the "rural" classification of HB 288 has not yet been adequately explained as bearing a rational relation to the purposes of the bill in order to allow HB 288 to pass muster under the equal protection analysis of Article VIII, Sec. 17.

It is possible that legislative history yet to be created may provide adequate justification to sustain the "rural" classification scheme of HB 288. The Alaska Legislature must address the factors noted in this analysis if it is to provide an adequate record for a court to uphold HB 288 as a valid exercise of legislative power.

For the reasons adduced above, it is doubtful if any amount of legislative history could immunize HB 288 from constitutional attack on equal protection grounds. The questionable nature of the "rural" classification, combined with the political volatility of fish and wildlife allocation, provide ample reason to anticipate a constitutional challenge if HB 288 is adopted in its present form.

B. Common Use

Article VIII, Sec. 3, of the Alaska Constitution reserves fish and wildlife to the people for common use. The history of Alaska's Constitution reveals that this section was primarily intended to recognize the role of the "public trust," or jus publicum, in Alaska. Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 914 (Alaska, 1961); Glenovich v Norenberg, 364 F. Supp. 1286, 1291 (D. Alaska, 1972).

The Commentary pertinent to the "common use" section of Article VIII and written by the drafters' Natural Resources Committee states simply:

These resources are subject to a private right only when they have been acquired or utilized as provided by law. For example, a private person has no right to buy and sell wild animals in their natural state, but once an animal is taken in compliance with law, it becomes the property of the taker, subject to use or disposition within the law."

The common use provision of the Alaska Constitution does not appear to preclude passage of HB 288. The bill in its current form does not convey any property rights in fish or wildlife that are ferae naturae. Thus, since HB 288 does not alienate any fish or wildlife, the common use provision of Alaska's Constitution does not appear to be violated.

C. No Exclusive Right of Fishery

Martin Friedman and Arthur "Chuck" Robinson, the prevailing attorneys in the Madison case, raised the issue of whether or not a "rural" classification system would run afoul of Article VIII, Sec. 15 of the Alaska Constitution. (p. 13, Memorandum of April 1, 1985 from Robinson and Friedman to the Alaska Legislature.) It is my opinion that their analysis of the law on this point is erroneous.

Article VIII, Sec. 15, of the Alaska Constitution forbids the creation of an exclusive right or privilege of fishery. This Alaska Constitutional provision derives from the (federal) White Act, 48 USC 222. (SEE Hynes v Grimes Packing Co., 165 F. 2d 323 (9th Cir. 1947).)

The meaning of the phrase "exclusive right of fishery" is that classes of use may not be created for which some individuals can never qualify. Id. Since, at least theoretically, any person could move from a non-rural area to a rural area in Alaska, this constitutional provision would not forbid use of the term "rural" as it is used in HB 288. An individual could qualify for the priority allocation of HB 288 simply by moving from an urban center to a rural area; nobody is permanently excluded from the class of persons to whom HB 288's priority would apply.

II. IMPACT ON NON-SUBSISTENCE USES

ADF&G Commissioner Collinsworth has raised the spectre of closing certain sport and commercial fisheries if the Madison decision is not superceded by legislative action. At the same time, Commissioner Collinsworth also recognizes that these fears may be entirely chimerical. (SEE pp. 1-2, Memorandum of March 15, 1985 from Commr. Collinsworth to Ron Jolin, Chrmn., Jt. Bds.)

Because ADF&G, Subsistence Division, has failed to adequately identify subsistence needs in Alaska (AS 16.05.094), and because of prior regulatory restraints and inadequate harvest report data, it is impossible to predict what level of subsistence demand for fishery and game resources exists in Alaska today. For identical reasons, it is impossible to predict the level of subsistence demand likely to emerge in 1985, whether the users are rural or non-rural.

Fears of commercial or sport closures required to comply with the subsistence priority are entirely speculative. It would appear irresponsible to give undue weight to such a scenario without more positive data on which to base a likelihood of its occurrence. The most responsible position appears to be that while such closures are a theoretical and legal possibility, there are no data at this time on which to base an estimate of the probability that such a "parade of horrors" will actually take place in 1985.

It appears true that the Madison decision has the potential to strongly impact non-subsistence uses. The Alaska Supreme Court has written in Madison that subsistence is not limited to "rural" Alaskans, and is not limited to Native Alaskans. Slip Op. at pp. 21, 23. Thus, apparently any Alaskan may qualify and come under the aegis of the subsistence priority. Slip Op. at p. 23-24, fn 13. Also, "customary and traditional" use was not intended to be restrictive, but rather was intended to be a recognition of the fact that individuals in Alaska have historically used wild resources for subsistence uses.

It is undeniable that the subsistence law accords a "priority" for subsistence uses. A priority is defined as "legal precedence over rights in the same subject matter." (Webster's Ninth New Collegiate Dictionary.) Alaska's Supreme Court has interpreted the subsistence priority so that the Board of Fisheries and the Board of Game may not restrict subsistence at all in an area in which sport or commercial uses are permitted. Madison, Slip Op. at 15-17. SEE ALSO State v Eluska, Alaska Court of Appeals Op. No. 456 (April 12, 1985), Slip Op. at pp. 7-8, fn. 6. This fact of the mechanics of priority allocation systems will not be altered by passage or defeat of HB 288.

The Board of Fisheries possesses regulatory authority to define the methods and means of harvest for subsistence fishing. There does not appear to be any obstacle to including within those methods and means the hook and line commonly used by many fishermen in Alaska to provide for "direct personal or family consumption" of fish. Indeed, it may be that most "sport" uses already qualify as "subsistence" uses. (SEE State v Eluska, supra.)

If "sport" fishermen are brought within the rubric of "subsistence" fishing by operation of existing law, or by a change in existing definitions, the Board of Fisheries will possess only limited discretion to allocate the resource among these subsistence users. If stocks are inadequate, the three, more specific, criteria of the "second tier" come into play, and the legal difficulties of the "rural" categorization are mitigated by the leavening presence of the "dependency" and "alternative resources" requirements of existing law. AS 16.05.251 (b). (Where hunting is concerned, the methods and means used by all hunters are already identical, so no change of this ilk would appear meaningful. AS 16.05.255 (b).)

Conflicts with the groups now denominated as "sport" users of wildlife and fish could be partially avoided if sport and subsistence uses were lumped under the same heading. It is foolish, however, to think that definitional legerdemain, either in statute or in regulation, will alter the fundamental fact that Alaska today has an insufficient supply of many wildlife and fishery resources to satisfy the constantly increasing number of people who seek to use those resources. This fundamental fact will not change, regardless of the passage or demise of HB 288.

Commercial uses of fish cannot be redefined to benefit from the subsistence priority in the same way as recreational fishing and hunting. HB 288 begs the issue on this fundamental policy question. Even if HB 288 passes, allocation conflicts between commercial and non-commercial interests will remain, and will intensify, in Cook Inlet, Prince William Sound, Bristol Bay, and other parts of Alaska. HB 288 is not a magic panacea, and its swift passage will neither resolve nor prevent continued allocative competition.

It is inescapable that as long as an absolute "priority" for any beneficial use of fish or game is present in Alaskan law, there will be some risk of diminution, or closure, of commercial uses in order to fully provide for the priority use. This risk will remain whether or not the priority use is qualified by the term "rural." SEE Madison, supra.

This basic policy decision, i.e., whether or not to accord any beneficial use of fish and game in Alaska a priority, rests with the Alaska Legislature and the U. S. Congress.

III. PROBLEMS RAISED BY INSERTING "RURAL"

A. The Problem of Defining "rural" in a Timely Fashion

HB 288 provides for the immediate effectiveness of that Act in accordance with AS 01.10.070 (c). Assuming, arguendo, that HB 288 is passed by the Legislature and signed by the Governor by May 1, 1985, the Board of Game and the Board of Fisheries will not have time to adopt regulations implementing or making specific how the change to a "rural" priority is to be implemented until several months have elapsed.

The Alaska Administrative Procedure Act (AS 44.62.180-.290), as well as regulations adopted by the Joint Boards of Fisheries and Game, (5 AAC 96) require time for public notice and comment, including local Fish and Game Advisory Committee and Regional Council participation, plus review by the Department of Law, before a regulation becomes effective.

Only by defining "rural" in emergency regulations can the delays necessitated by the APA's notice and comment provisions be circumvented.

It is highly questionable whether adoption of a regulatory definition of "rural" would be appropriate for emergency regulatory action by either Board. AS 44.62.250,.270.

Assuming, arguendo, that it would be proper to define "rural" by means of an emergency regulation, it should be noted that there are substantial drawbacks to such an approach from the standpoint of sound administrative practice and public policy.

The APA procedures of public notice and comment are designed to inform government agencies as well as provide the public with a "fair shake" in government decisions. (SEE NLRB v Wyman Gordon Co., 394 US 759, 764((1969).) Emergency regulations deprive the government of the chance to hear the full range of public opinion. At the same time, emergency regulations also deprive the public of an opportunity to comment on the laws by which they will be governed. It would seem to be sound public policy to allow for a full discussion, in public, of the benefits and detriments of the course charted by HB 288.

B. The problem of properly defining "rural"

Courts generally give substantial deference to regulations that involve complex subject matters, fundamental policy formulations, or administrative expertise. Kelly v Zamarello, 486 P. 2d 906, 917 (Alaska, 1971). However, when the Board of Game and the Board of Fisheries seek to define "rural", they will be dealing in statutory interpretation, a matter in which courts, not the Boards, have special competency. Commercial Fisheries Entry Commission v Templeton, 598 P. 2d 77, 80 (Alaska, 1979).

Thus, assuming HB 288 is passed into law, courts will apply the "substitution of judgment" standard about the meaning of "rural" which the Boards employ, even if the Boards' interpretation has a reasonable basis in law. Earth Resources Co. v Department of Revenue, 665 P. 2d 960, 965 (Alaska, 1983).

The hurried tempo of legislative consideration for HB 288 is likely to provide a paucity of legislative history for reviewing courts that will pass on the adequacy of the Boards' definition of "rural." In the absence of adequate legislative history for HB 288, it becomes more likely that this critical facet of the fish and game management process will be handed over, by default, to the courts.

IV. CONCLUSION

A. Constitutionality

HB 288 invites attack on grounds of being violative of the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution, Article 1, Sec. 1 of the Alaska Constitution, and Article VIII, Sec. 17 of the Alaska Constitution. As legislative history of HB 288 becomes more fully developed, it may be possible to explain the defects in the bill discussed above, thereby "curing" its perceived legal deficiencies.

HB 288 does not appear to pose any problems of constitutional dimension under Article VIII, Sec. 3, or Article VIII, Sec. 15, of the Alaska Constitution.

B. Impacts on Non-Subsistence Uses

The impacts of HB 288 on non-subsistence users are remote and highly speculative. Passage of HB 288 will not eliminate the allocative priority which subsistence uses presently enjoy over other uses; it merely seeks to limit the class of persons for whom that priority operates. Regardless of the passage or defeat of HB 288, it will be necessary to reduce (or in extreme cases, to eliminate) non-subsistence uses before applying restrictions to subsistence take. AS 16.05.251 (b); AS 16.05.255 (b); Madison, supra, pp. 7, 16-17; Eluska, supra, pp. 7-8, fn. 6.

C. Caveat

Please let me reiterate the fact that the analysis and opinion presented herein should be regarded as introductory, and not as a final and definitive statement. The complexity of the legal issues raised by HB 288 could easily benefit from substantial additional study and analysis.

It is critically important that Alaska adopt an allocative system for fish and wildlife that is fair to all users, as well as being biologically sound. I hope that this analysis will be useful in moving towards that goal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory F. Cook', with a long horizontal flourish extending to the right.

Gregory F. Cook

Board of Game Meeting, 6/10/85

1A, 005 Mr. Collinworth - Good morning, and we welcome you all to Juneau on a lovely day. It's too bad we're not outside, rather than in here dealing with a series of difficult issues. I appreciate the fact that the Board members have been called to a special session to deal with the series of events that have led to a situation which required the coming together of the Board to take some remedial action to deal with the results of some recent court decisions. I think we're all aware and have no doubt read and contemplated the Madison and Eluska decisions, a Supreme Court and an Appellate Court decision, and the necessity to take some remedial, regulatory action by the Division or the Game Board. I have spend a considerable amount of time in the last few months discussing this issue with the Department of Law and the Department of Public Safety and folks in the Legislature before the session came to a close, trying to make some determinations of what kind of action would be required of the Board to provide us a legal regulatory framework, an enforceable framework, so that we can move through this summer and fall hunting seasons. I want to assure you that we retain and in discussion with the Department of Law we do retain and will use the Commissioner's authority, emergency order authority, to protect the resource. I am assured by the Department of Law that when it becomes, or if it does become necessary for us to issue an emergency closure closing all taking of animals, that the Department of Law will and the Department of Public Safety will vigorously enforce that action. There is, however, the need to undertake some regulatory action to provide a broader regulatory framework for this coming season. We have spent a great deal of time, the staff has spent a great deal of time trying to develop some alternatives that we might propose to you that will in fact develop a regulatory framework that is in reasonable compliance with the State laws as has been interpreted by the recent court decisions, and we'll be prepared to offer those to you and to work very closely with you over the course of the next several days to get that reasonable compliance so that we do have an enforceable framework.

It's an unfortunate situation that we're in, because what we're really talking about is a fairly short term solution to the subsistence issue. It seems likely that the regulations that we develop to come into reasonable compliance are going to be fairly short term because of two likely events, or one of two likely events. Either the Legislature when they come into session will take some action to change the statutory framework that we're dealing with, or if failing that, that the Federal Government will intervene and resume or assume management on Federal lands. So we have a difficult chore this week to see if we can bring our regulations into reasonable compliance so that we do have a regulatory framework that we can enforce against and manage against for this coming series of seasons. The Department of Law has spent a great deal of time both in their civil and criminal divisions looking at the court decisions, looking again at the state subsistence law, and then providing us some direction with regard to the actions that we need to take. We have needed to take some action both on the fisheries side and on the game side, and we have asked the Attorney General to join us this morning to provide you some additional comments on the issue, and of course Larri Spengler - we have been working closely with her over the last few months in trying to deal with the subsistence issue. So

unless you have any questions, I'd ask Norman to make any comments that he might have.

1A, 061, Attorney General Norman Gorsuch - Thank you Don. It's a privilege to be here with you this morning to discuss an issue which I think is of great importance to many Alaskans, and your regulatory responsibilities in the area of game management are, of course, extremely important and your actions here are, in my judgment, essential and necessary with respect to the adoption of subsistence regulations if we are to have meaningful enforcement of our game laws and game management decisions. Just to give you a little background, the key, there are two cases with which I'm sure you are all familiar and have received much publicity and discussion in the last few months. The first one was the Supreme Court decision Madison vs. the Alaska Department of Fish and Game, and basically what Madison says is that it expanded subsistence eligibility to include in that case fishing, but since the language is virtually identical in the statutes with respect to game, to include hunting by all Alaska residents of game population, which have been hunted for food in the past. Earlier, if you recall, there was a rural bias to the subsistence user definition. Madison said all Alaskans are eligible for subsistence fishing and hunting. So we had first of all a dramatic broadening of the category of those eligible to participate in a subsistence hunt or fishery, and then this was followed shortly thereafter by a case by our Court of Appeals, which is the intermediate court in the State of Alaska, and that court which handles appeals from criminal cases handled by the lower court. And in that case, the Court of Appeals was discussing the case of a man who took deer out of season in Kodiak and he argued that he was subsistence hunting, and therefore could not be convicted because there were no regulations for Kodiak authorizing subsistence hunting separate from the general hunting regulations. The Court agreed with him and created what for us is an extremely serious problem. They created what's called a subsistence defense, that can be used in similar cases. And basically, because there were no subsistence regulations promulgated for that particular game unit, what happened was the Court said there was an obligation to promulgate those regulations. It was therefore noncompliance by the executive branch of state government with what they interpreted to be the clear legislative intent, and this person could not be held to be guilty of a violation if in fact the state did not carry out its function in promulgating subsistence regulations.

So what we have here, is that between the two cases, Madison and Eluska, this means that all Alaskans, all Alaskans, can use a subsistence defense. As a result of these two decisions, the administration as a result of the Madison decision clearly, and as a result of the problems created by the Eluska case, the administration introduced a bill which was designed to recreate the status quo by making some minor changes in the existing subsistence statutes to create a personal use fishery and to limit subsistence hunting and fishing to rural residents. The Legislature did not pass that bill. It passed the House, but did not pass the Senate. Now what that bill would have done would have considerably narrowed the universe of the problem that we have and would have allowed the fish and game boards both to adjust

their regulations and to maintain essentially the system as we had known it heretofore.

We are thus faced, whether we like it or not, we are thus faced with two court decisions which compel us to advise you that there are certain things, therefore, that can and cannot be done under the existing system; that is, under the existing statutes as they now are, as interpreted by our Supreme Court and our Court of Appeals, we must take actions as best we can until such time as the Legislature might choose to address what we would like to see in the nature of amendments to those statutes. And basically, as a result of both of these decisions, both the civil division and criminal division of my department engaged in an extensive internal analysis and tried to determine what we thought could still be done under the existing statutory scheme, as interpreted by our courts, to maximize our continued ability to manage our fish and game resources to the maximum extent that we can, and preserve as much of the system as existed heretofore, absent statutory changes.

So, basically, we then set up kind of an internal task force made up of the members of my civil division and members of my criminal division for purposes of determining what we now have in the way of guidelines for the Department of Fish and Game and the Department of Public Safety in terms of game management and enforcement.

In order to have enforceable regulations this Board, we believe, must address all hunts participated in by Alaskans for food, including permit drawing hunts. I know you have copies of some of the memorandums which have been issued as a result of that internal task force, and as a practical matter the combination of those two cases means that no poaching cases can be prosecuted except where a season is closed year round or by emergency order for conservation reasons. I think that that in essence summarizes kind of where we are. I can tell you as a result of our analysis of those two decisions, we believe that there are things that can be done. First of all, we believe that it is essential that this board promulgate some separate subsistence hunting regulations, and the purpose of this meeting is of course to consider the adoption of emergency regulations consistent with this court decision, and after the Board does this, in our legal judgment, then all hunting regulations will be enforceable. Meanwhile, however, until such time as this Board does adopt some emergency subsistence regulations, enforcement in our judgment can continue and we will continue as usual against first, non-resident hunting violations; second, hunting violations by commercial operators; third, non-possessory hunting violations such as wanton waste and same day airborne, and any hunting or fishing when the season is entirely closed because any additional harvest, including subsistence, could jeopardize the resource. That in our judgment is the existing list of hunting violations which we believe can continue to be enforced under the current situation.

So the purpose of my appearing here today is to emphasize to you very strongly that many, many hours of internal staff time between the Departments of Public Safety, Fish and Game, and Law have gone into a careful and detailed analysis of where we think we are and what we think we have now in the way of an enforcement scheme based upon the facts as

we now have them. And it is our conclusion that it is very essential that this board work very carefully with the Department of Fish and Game and Larri Spengler and others of my department to come to grips with this problem and take the necessary steps to promulgate some emergency regulations consistent with these court decisions. So that's basically all I have done, and thank you for giving me the opportunity to talk to everybody.

. . . .

Dennis Kelso - Thank you Madam Chair. Perhaps I can give a general description of how we have proceeded and then I will, as soon as Larri gets here, I will turn it over to her.

During the past few weeks as both Commissioner Collinsworth and Attorney General Gorsuch mentioned, we've been working very closely with both divisions of the Department of Law to try to come up with a formulation that will provide enforceability throughout the season and will be consistent with the requirements of the Madison and the Eluska cases. What we have done is to start at the field level with both Game Division and Subsistence Division staffs. They put together a form, one for subsistence, one for game, which we basically exchanged between divisions so we knew that they would be addressing the same problems. And then the field level began filling out those forms with available information and submitted them to their regional supervisors and then eventually down here to headquarters. What you will have in front of you by the time you begin your deliberations will be not only your general board book, but also a three ring notebook containing summaries of data from Game Division and summaries of data from Subsistence Division. Now the Subsistence Division data has basically been reworked by Steve Behnke so that it is as specifically targeted as possible to the same questions you'll be facing and the Game Division data is broken out on a species basis. We can go into that in much more detail when we actually get to proposals.

What we have tried to do is find a framework that you can use to accomplish two things. First is adopting a set of regulations separate for subsistence. That is primarily directed to solving the Eluska problem. But the Eluska case recognizes that subsistence uses now must meet the standards set in the Madison decision, so in doing that we are having to come to grips with the underlying problem that we began to talk about in April. Of course we didn't expect that we would have to shorten the time frame. You had originally indicated that we would convene again in September to do the work that Madison required, but now it's necessary to do both.

So what we basically have is field data that came in from the Game Division, field data that came in from Subsistence Division. We won't go into great detail on that yet. The framework we have to work with is the one that is required by the courts, and that the Department of Law has actually developed, so I don't want to belabor this at this point. If either Steve Behnke or Bob Hinman has anything to add right now, please feel free to do so. Lou Pamplin will be joining us in about two hours and will be here for the balance of the meeting. Steve or Bob? Then, Madam Chair, with your permission I'll turn it over to Larri.

Brenda Johnson - Larri Spengler.

Larri Spengler - I have an attempt at condensing all this onto one page which I thought might be helpful maybe. It is of course incredibly overly simplified in order to make it fit on one page, but I thought as we go through the meeting and get disoriented as to why we're going through all this it would be helpful to have something to look at just to remember why we got here and where we're trying to get.

There are as has been mentioned already, two cases that bring us here. It's a combination of Madison and Eluska, and although chronologically Madison was decided first in February and Eluska was decided in April, I think it's more helpful to talk about Eluska first and then go back to Madison and see really what the extent of the problem is.

Now Eluska was not decided, had not been decided when you were meeting in April. It was issued very shortly after the Game Board adjourned. In this state we have a court system basically with three levels. There's the Trial Court level, and that's the District and Superior Courts where people who file suit against one another go in for trials, or people that get charged with criminal activity, Fish and Game violations, get tried. There's a jury there and a judge, and they present evidence and so forth. The second level court is the Court of Appeals, and this is a court that was created not very long ago in the state's history, a couple of years ago, because the Supreme Court which is the highest court in the state was getting totally overloaded with work, and so they created this midlevel court which is the court that handles all criminal appeals. If there's a crime charged in a trial court and either the state (which is very rare, only in certain circumstances) appeals, or the defendant appeals, then this Court of Appeals handles it first. And that's the last appeal they get of right. They can ask the Supreme Court to look at it, whoever after the Court of Appeals has finished with it, any one of the parties can ask that the Supreme Court review it. But they don't have a right to an appeal. You have a right to appeal to the Court of Appeals, but not to the Supreme Court.

If you have a civil case on the other hand, where crime isn't involved, like the Madison decision was, or any typical you know contract dispute, any kind of civil case that doesn't involve crime, the person has a right to appeal to the Supreme Court. So you always get

one right of appeal. It's just that the criminal cases go to the Court of Appeals and the civil cases go to the Supreme Court. The criminal cases can get to the Supreme Court if the Supreme Court agrees to hear them, and they only do that if there are extraordinary circumstances involved.

So the Eluska case is a Court of Appeals case. It's officially called State vs. Eluska, and it came as Norm mentioned out of Kodiak. A man, Mr. Eluska in fact, was convicted, or was charged rather, with taking deer out of season. And he argued that there were no subsistence hunting regulations adopted for Kodiak. And since there were no subsistence hunting regulations adopted for Kodiak, he, being a subsistence hunter as he asserted, had a right to go hunting and that he couldn't be charged with a crime. And the Trial Court bought his argument. So, all right, the state said you know, this is untenable. The Board of Game has always accommodated subsistence hunting in the general hunting regulations except in some specific cases. So we appealed it to the Court of Appeals. And this was handled out of the Anchorage office. The Court of Appeals was ready to issue this decision apparently just when the Supreme Court issued the Madison decision in February. And then the Court of Appeals jerked the decision back, didn't issue it and reassessed it and analyzed Madison, and rewrote their decision so it references Madison throughout. It is replete with footnotes to Madison, and in fact it's a footnote at the end that explains that it was ready to issue it. That's not some big secret. They pulled it back and then they issued it finally in April, and the Court of Appeals held that the Trial Court was right, that under the state subsistence law, the Board has an obligation to adopt separate subsistence hunting regulations, and that unless there are separate subsistence hunting regulations on a game, for a game population, if there are subsistence uses of that game population, then people can subsistence, can hunt out of season and can argue that they were subsistence hunting, there were no subsistence regs and therefore they should get off until the Board adopts subsistence regs.

Now this is called, the Eluska court called it the subsistence defense, and it's a specific defense just created now by the court. It's only available in cases where there are not subsistence hunting regulations called that, separated out from general hunting regulations, so there are a few cases where right now, putting aside the Madison problems, there are a couple of places where the Game Board does have separate subsistence hunting regulations on particular game populations. In those situations, putting the problem of Madison aside again, the subsistence defense cannot be raised. So, for example, in the Unit 13 moose, I think there's a separate subsistence moose hunt on the books, separate from the general moose hunt. Under the Court of Appeals decision, in that situation, putting again aside the Madison problem, the subsistence defense couldn't be raised, cause there's two sets of regulations. One is subsistence hunting and one is general hunting, or sport hunting, whatever we choose to call it.

So the Court of Appeals basically said people are supposed to follow the regulations, but the state is supposed to follow the law too, and the law requires separate subsistence hunting regulations. Now this hasn't been a problem particularly on the fish side, because fishing, since statehood there has been a statutory definition based on gear type of subsistence fishing and of sport fishing. So subsistence fishing has always been until the subsistence law passed, fishing by nets for personal use, and sport fishing is fishing by rod and reel for personal use. So always the Fish Board has had two sets of regulations, sport fishing regulations and subsistence regulations. So the Fish Board is not going to be faced with as much of a sweeping problem as the Game Board is on this.

The Game Board, on the other hand, has not historically done that because virtually everyone hunts with the same method, and there's no gear type distinction like that. So that's sort of the history of why there's more of a problem for the Game Board than the Fish Board.

Now the Eluska decision means, then, that if you don't--not you, but well it is you in fact--if one doesn't, if the Game Board doesn't have separate subsistence hunting regulations, there can be no enforcement on poaching unless there's a biological problem, and for that reason the resource is closed.

I'll come back after I talk about Madison to the Chief Prosecutor's memo and his assessment of the chances of prosecution and his decision that no prosecution will occur. So I'll get back to that in a moment. After I talk about Madison, then maybe we'll stop for some questions about the cases and then go on to his assessment and where we need to go from here.

Now, as I said I'm going out of chronological order. Eluska came out in April. Now if you think about where we stood before Madison came out, let's think back to pre-Madison, and subsistence uses were identified by the Board as customary, traditional uses by rural Alaska residents that were identified by the eight criteria set out in the regulations, what you would have had to do if Eluska, under Eluska, in a pre-Madison situation, was to go through the regulations and adopt subsistence hunting regulations for communities or areas where there were customary and traditional uses under those criteria. It would not have been a statewide requirement. So a number of hunts might not have even had to have two sets of regulations. The division of subsistence hunting regulations and general hunting regulations would have been much different. Now, as we're going to see, subsistence hunting is practically all the hunting in the state. Before Madison, subsistence hunting was this very narrow band.

What Madison held was that the Board could not identify subsistence hunting in terms of the uses of an area or community, could not require, could not use the rural definition, could not use residency as a

qualification for subsistence hunting in initially identifying subsistence hunting. Therefore, any Alaskan basically, under the court's direction, could qualify for subsistence hunting. Subsistence hunting is defined as hunting for subsistence uses, and subsistence uses is defined under IIa here, there are some of the catch words from the definition, subsistence uses of game for food, shelter, fuel, clothing, tools, transportation, customary trade, barter or sharing. Now, after Madison, subsistence hunting means hunting of a game population by any Alaskan, no matter where the Alaskan lives, for any of those purposes set out there. And the first step of the subsistence statute requires that unless sustained yield will be jeopardized, unless the resource will be harmed, subsistence hunting has to be authorized if the game population has been hunted in the past for food, shelter, fuel, clothing, tools, transportation, customary trade, barter or sharing.

OK, so if that has occurred in the past, then it has to be authorized again unless the resource will be hurt.

Now the second step of the subsistence law, of the statute, is that if subsistence uses must be restricted, I'm sorry, if hunting must be restricted, then subsistence gets the priority. And Eluska has said that restricted means significantly impaired. So if, the second step under Madison is that if subsistence hunting must be restricted, significantly impaired, to protect the resource, then non-subsistence uses have to be eliminated before subsistence uses can be restricted.

Now non-subsistence uses in hunting is a much different band again than it is in fishing. In fishing we have commercial fishing and sport fishing, both of which are categories widely participated in by Alaskans as well as non-Alaskans. In hunting, there's not a similar distinction. There is really no commercial hunting as such. Guiding is a commercial activity, but the meat is not harvested for sale, and you don't have control over guides anyway, you just have control over hunting. The only non-subsistence hunting that's easily identifiable or that you can point at is hunting by non state residents, because the definition of subsistence uses, subsistence hunting, specifically talks about hunting by Alaska residents.

So, if we're in a situation where subsistence hunting has to be restricted, significantly impaired, the first thing you have to do is cut out non state resident hunting. That's the second step of the law. That's the priority kicking in. If there's a problem, non-subsistence uses are the first to go. And now that subsistence uses after Madison mean all Alaskans, the only thing left to go is non Alaskans, so they go first.

Then if it's still necessary, if we're still in a situation where subsistence uses have to be significantly restricted, the statute sets out and Madison repeated three criteria that you are to use to decide who gets to go hunting, who gets which hunting opportunities among the

pool of subsistence users which is now all Alaskans. And those three criteria which I suspect we are all going to get very sick of before this meeting is over, are customary and direct dependence upon the resource as a mainstay of one's livelihood, local residency, and availability of alternative resources.

Now just to go back a step again and think about Eluska, the Court of Appeals decision, held that you have to have separate subsistence hunting regulations separate from the general hunting regulations or else poaching will not be able to be prosecuted. Now that's just off here by itself. Madison is what defines what is subsistence hunting now, and subsistence hunting, which must be authorized by regulation or else there can be no prosecution, is all hunting by Alaskans of game populations which have been hunted for food, shelter, fuel, clothing, tools, transportation, customary trade, barter or sharing. I will probably throughout this meeting just shorthand that to hunting for food, but we should all be aware that the definition is somewhat broader than that.

The Chief Prosecutor, well the Department of Law is divided into two divisions, and I think before we stop for questions I think I'll summarize what Dan Hickey's assessment was of the situation and then we can pause for questions. We have the Attorney General Norm Gorsuch who just left, who's on top of the Department of Law. Then we have two divisions--we have the criminal division and the civil division. I'm in the civil division. The civil division is generally called the Attorney General's Office, and it handles everything except criminal activity. The criminal division is headed by the Chief Prosecutor. His name is Dan Hickey, and he works for Norm Gorsuch. Norm is on top of the, of both divisions, but Dan is on top of the criminal division. Under him are all the district attorneys in the state, and the offices of special prosecutions which handles complicated white collar crime and sometimes Fish and Game crime, criminal cases.

Dan Hickey issued a memorandum which I believe you all have copies of in the Board book. Based on his assessment of the combination of Madison and Eluska, and Norm basically summarized that, that under his analysis which Norm concurs with, and which I'm afraid I think is probably right as well, until we adopt separate subsistence hunting regulations it will be virtually impossible to get a conviction on a poaching case unless the season is closed by emergency order because specifically because of sustained yield, or unless the season is closed year round to either that sex or that species. It would be virtually impossible to get a conviction. The burden of proof imposed by the Court of Appeals is very confusing and very heavy on the state. Consequently, Dan has determined that it's not possible to spend the time prosecuting it. It's not worthwhile. We're not going to get any convictions until we have separate regulations. And that, in a nutshell, is what his memorandum says. It also lists out all the things that will be prosecuted in the meantime--things that have nothing to do

with that such as non-resident hunting, guiding violations, wanton waste, the things that Norm mentioned.

As a consequence of that, if we want enforceable regulations and if we want the prosecutor's, the district attorneys' offices to start prosecuting fish and game cases again for all game regulations, we need to adopt subsistence hunting regulations that are consistent with Madison. And there is under III on this page a very, very capsulized synopsis of what we need to do. We'll be going over this in a lot more detail I suspect.

The first thing we have to do is to separate out subsistence regulations from general hunting regulations or sport hunting regulations, whatever we wind up calling what's left when we separate out subsistence. We have to look at the regulations that we've got to see if they either prohibit any Alaskan from subsistence hunting or if they fail to provide the same legal opportunity. Now that's an important distinction, the same legal opportunity for all Alaskans to hunt. For example, in some cases right now we have situations where people who live in certain game management units have a better chance, because of the structure of the hunt, at getting a permit. There's a special drawing for residents in that unit, or a special registration hunt for residents in that unit in some cases, in limited cases. So if that's the case, or if the current regulations simply otherwise in some fashion significantly impair subsistence uses (and that's going to be a judgment call for you to make and probably a hard one) it'll have to be based on examining a number of factors, and we'll get into that later.

If the current regulations do any of those things, if they don't allow all Alaskans to hunt, or if they allow some Alaskans a better legal chance to go hunting than others, or if they significantly impair subsistence uses in some other way, then the first thing you have to do is trigger the subsistence priority and eliminate non-subsistence uses, which are non state residents, from hunting. After you do that you then look over the remaining regulations to see if that takes enough pressure off that there's no longer a need for the significant restriction. If there is no longer a need for the significant restriction, that's fine. However, if that doesn't take enough pressure off the hunting and that leaves still significant restrictions on subsistence uses, then we need to apply the Tier II standards in some crude fashion because, simply because we probably don't have time at this meeting nor the ability to apply them in a sophisticated fashion.

This III is incredibly abbreviated for a very complicated analysis that we're going to have to be doing and that will be discussed further by either Beth or Steve Behnke, I'm not sure which of them will be talking about it.

I will be here probably for the whole meeting instead of bopping in and out, so I'm afraid I'll have to live through this with you, and if there are any questions I'll be happy to answer them.

Joel Bennett - This is not to be taken to be a statement that we don't need to develop things as you indicate, but I'm curious about your feeling on the poaching defense, whether are you saying that if a season is closed to one sex of an animal that essentially that person, an Alaskan, can assert that defense? Or are you saying that the season has to be closed to the taking of the species?

Larri Spengler - If the season is closed year round to one sex, then the Chief Prosecutor believes that we can enforce the taking of that sex. Like if the cow moose season is closed all year, then he sees no problem in enforcing. Or if it's been open and then suddenly has to be closed by emergency order because there's, we're clearly in a problem this year--it's not just something we forecast maybe there would be one--then that would probably be enforceable.

Joel Bennett - I guess I just don't concur with that. It seems to me that if we have a closed portion on a sex it has to do with the biological aspects of it and that in fact would then fall under, I mean we don't know really with such an open ended system it seems to me you could make a very good case that something could be put in jeopardy, and therefore it would fall under that.

Larri Spengler - Do you mean if the season were open for a few months for cow moose and then closed the rest of the time?

Joel Bennett - Yes.

Larri Spenger - I, it would seem you would be able to make a case, but normally those kind of things are in regulation, and there's no instant proof of it. And he's requiring a fairly, because under Eluska it's going to be so hard to convict anybody, that he's making this as narrow and as precise as possible.

I would like to clarify one point. When I was talking about significantly restricting subsistence uses as being the key that first triggers the priority, that means that non-subsistence uses have to be eliminated and then if it's still a significant restriction is necessary, I mean a restriction that significantly impairs subsistence uses triggering Tier II, that doesn't mean you can't regulate subsistence. Subsistence hunting can always be regulated. That's very clear in the footnote, I mean in the body of the opinion in Eluska, but those regulations have to be reasonable and have to adequately accomodate those subsistence uses. They can't contain provisions that cause a significant impairment until we follow these procedures. So we can always have bag limits and seasons and so forth, as long as they reasonably reflect what's necessary for the subsistence uses to be satisfied.

. . .Mr. Fleek, Dept. of Public Safety - volume too soft to hear his question. He basically asked can the Board prohibit non-residents from hunting on federal lands.

Larri Spengler - Yes, there is a U.S. Supreme Court decision that basically gives, in the noncommercial area, gives states a fair amount of leeway in treating non state residents differently, depending on the circumstances and the need of state residents, so probably there would not be a problem with doing that. Of course on federal land there is a sort of backwards situation to that, in parks and monuments and so forth ANILCA sets up certain guidelines by which those federal land managers decide who gets to come into their land to hunt, and those aren't changed. So even though Madison says all Alaskans are subsistence hunters, under the federal guidelines, the federal land managers can still decide under ANILCA standards who comes into their land to hunt. They hunt under the state regs, but who comes in is up to the federal land managers.

Mr. Hinman - Thank you Madam Chair. Larri, one thing that bothers me perhaps more than (garbled) you mentioned, as a biologist, is the continual reference in Madison and elsewhere too, unless sustained yield will be jeopardized or unless the population is jeopardized and so on, and it seems that that sort of puts us in the boat of having to prove we're innocent rather than somebody else guilty. That is, we have to prove that the biological situation is such that uses should be restricted before they can be restricted, and that is very difficult at times to have that kind of biological information. In addition, I guess the question is whether this gives the Board the latitude to follow a management plan that envisions increasing populations. For example, we all know that game populations are very rarely at their maximum or their ideal or at least not for very long, and the Board may well have a management plan in mind to increase that population considerably over the years. Does this restriction to not restricting unless sustained yield would be jeopardized, does that prohibit the Board from following a management plan that would envision taking less right now than could be taken in order to build the population up?

Larri Spengler - Probably not, because even before Eluska and even before the state subsistence law, the Board operated under sort of a tension in the constitutional provisions of providing to Alaskans, making game available to the maximum extent possible consistent with the public interest, managing on sustained yield principle and other similar provisions in the constitution. Under those provisions, the Board probably would be beyond its bounds in completely closing hunting if there was a need, if there was interest in hunting, and there was enough population to sustain a hunt and accommodated increase. If you completely, if you cut back hunting as far as possible to have the maximum increase would be one extreme, or the other extreme would be to have as much hunting as you could to just sort of barely maintain as much as you've got. A middle ground is probably where you'd usually be going anyway to allow some hunting, but not as much as could possibly be handled by the population so that there could be some increase. The

increase might not be as sharp as it would be if you cut back hunting as much as would be desirable if the goal, if the only goal were maximum increase in population. And I don't believe the subsistence law would change those requirements, because setting, determining whether an increase in the population would be in the public interest would still be within the Board's prerogative. Completely closing hunting to achieve that would probably not be, so some midground.

Sarah Scanlan - Bob, are you talking about doing something different than what we've been doing all along? Are you talking about closing hunting when we've allowed it all along?

Bob Hinman - Madam Chair, no I was not referring to that at all. I was thinking in terms of a situation like the Western Arctic like we had a few years ago where we, or still do, our policy is to allow that herd of caribou to grow, and we are until just recently, or the last few years, we restricted the take in order to allow it to grow. Now that meant that we were taking less than what could be taken annually from that herd at that level. My question really had to do with whether the Madison case forced us to look at populations as they existed at any one time, and say that is what we manage to. But if as Larri says we can modify the consideration of the allowable sustained yield by whatever our management plan for that particular herd is, that removes much of my concern.

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Beth Stewart - Madam Chairman, maybe, I think it's probably hard to come up with questions based on a kind of large amount of information you've gotten this morning. Maybe to make things a little easier to understand, one of the questions we've been asked since we announced that the Board would be meeting in an emergency session, is why isn't the Fish Board also meeting in emergency session, and maybe that will help clarify for you at least some of the different problems that you face.

First of all, the Board of Fisheries has had subsistence regulations even before the 1978 subsistence law was passed. Most of those regulations did not become adopted through the 8 point criteria that Madison voided. There were actually very few fisheries that did, so the Board of Fisheries does not have the Eluska problem that you have, and that they do have regulations, and for the most part their regulations already comply with Madison because they did not use those 8 criteria on very many of the fisheries. And at their March meeting they were able to make fairly adequate changes to most of those that did use the 8 criteria, and adjust them. Since the Eluska case came out, Board of Fisheries regulations came under scrutiny as did Game Board regulations in the Chief Prosecutor's office, and the Board was teleconferenced and told that we would have to start issuing subsistence fishing permits in areas where subsistence fishing has occurred since statehood, and where we had it authorized in the regulations. So they were able to take the emergency action they needed without meeting,

because they don't have the same kinds of problems that you do.

The other difference is that the Board of Fisheries is not looking at Tier II situations, and maybe to help you understand that a little better, because commercial fishing takes so many fish and there's also active sport fishing, the Board can allocate away from other uses to meet subsistence needs and subsistence uses where they occur in most cases. There are probably some cases where they will also be at Tier II, but those are pretty rare.

The Game Board, however, because you don't have the same kind of body of activity that allows you to allocate away from one group of users to another, except for the non-resident, is faced probably with Tier II situations in many, many instances. And so not only do you have to have subsistence regulations, but they have to comply with Madison and to some extent your compliance is more difficult because you're already at the situation where the Game Board would be, had they already eliminated commercial and subsistence uses. You don't have this pool of spare animals out there that you can take away from other users to put into the subsistence pool to allow for harvest. This expanded definition of what subsistence uses is creates a great deal more difficulty in the instant case for the Game Board than for the Fisheries Board.

So that's why you are meeting and they're not, at this point, and that's why your problems are significantly different. Both Boards would have to go through the same procedures for Tier II, just as both Boards adopted the 8 criteria initially when they thought they were dealing with the subsistence statute the way it should have been dealt with. Now that that's incorrect, I would assume that both Boards would continue to deal with those three standards and that statute in a similar manner, since the statute is as Larri pointed out identical for both Boards. But the similarity stops there. As unpleasant as it might be for commercial fishermen and sport fishermen, the Board can allocate necessary numbers of fish away from their use and keep providing for subsistence uses for a much longer period of time than the Board of Game can, just because there's so many more fish than there are moose or caribou or other kinds of animals.

If that picture is clear, if the Board understands why Tier II is a focal point for the Game Board and not at this time a focal point for the Board of Fisheries, maybe you can start looking at examples of how these things occur in your regulations. It's an entirely different way of looking at hunting regulations than you're used to, and it's probably going to be difficult to grasp hold of it all at once. We've spent in the office the last several weeks meeting fairly regularly to get the materials ready for this meeting, and it's still not clear to us exactly what all has to be done. And we've come up with numbers of examples that we think we've got a handle on and then we don't, and so this is a fairly complex set of problems that you're facing now. I think you really need to be sure you understand what approaches you're going to take. I think we'll have Larri explain how your proposal book is laid

out. We went ahead and called them proposals, even though they aren't, just for ease of handling, and then maybe you can start to see how you would begin to approach this. We recommend that you actually begin by dealing with Tier II, and thoroughly understanding what Tier II is before you go ahead and start moving through the regulations.

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Mr. Collinsworth - Yes, Madam Chair, before you get into more detail that'll be provided by Mr. Edfelt, I think the, I have I think great familiarity with the issue having participated very closely in this whole discussion with the Department of Law and Public Safety and internally with the staff and with the folks in the administration and the legislature over the last several weeks. And I think that listening again to the overview provided you this morning, while it was summary in nature, I think it did provide a good kind of a framing of the situation that you have to deal with.

I would like to suggest, however, that in trying to cope with the situation that has been laid on the table in front of you, that you keep in mind that what I mentioned earlier, that we are working against a certain statutory and legal framework during this meeting where we're trying to take the actions that are reasonable and necessary to bring us into compliance with the state subsistence law as it has been interpreted by these court decisions. But, while we need to do that so we can have a regulatory framework that we can enforce against and manage against for this season, also keep in mind that what we're probably doing is engage in a series of short term actions. It's my belief that the legal framework that we're working against during this session is going to change, as I said earlier, that either the state legislature will take some action which will change the regulatory or the statutory framework that you're working against, or there is going to be federal action that is going to change the environment that you're working against.

And because of that, I'm going to encourage you not to spend much time in developing your regulatory actions extending these things into the future. In other words, I know we have done it internally in trying to figure out what kind of remedial action would be taken, we got ourselves into a trap of thinking over a much longer period of time and fine-tuning the system that would be in place over a series of years. It's my opinion that what we're really doing is looking at a near term solution for this season. And so we wasted time thinking about how you would implement some kind of a management program to deal with the permit hunts and we were kind of carrying that on through the building of a system that would allow this thing to continue over time. And if you get involved in too much of that you can waste time as we wasted time, and your agenda is very tight, and you've set a very vigorous schedule for yourself in the evening meeting, so I think the issue is near term. You need to do those things that are suggested by the Department of Law as being reasonable to bring you in compliance with the state law so that we do have that enforceable framework, but

always keep the dimensions of the issue in front of yourself so that you don't start thinking on down the line. I mean, if we felt that what the statutory framework that we're going to be dealing with, both the state and the federal, were going to persist for a long time, we would start to build a program that we would fine tune over a series of years. I don't see that as a real situation that we're in, because there are going to be actions external to what we control either in the department or you control that will alter the framework and we're going to be coming back in some time in the fairly near future to be making adjustments.

So I guess the only purpose of taking this time was to hopefully save some time as we move along in the next several days.

Mr. Bennett - Well I don't mean to object to anything that you're saying Don. really, except that there's something about what you're saying that doesn't feel right to me. It seems to me we're in this situation now and having these extra meetings and extraordinary sessions for the very reason that we've not really dealt with this issue fully enough, and soon enough, in the past. And I'm not sure we can operate totally on the theory that the legislature is going to change something. Lots of things could change. The election's going to change a lot of things, for instance. We have to operate under the law as it is now. Frankly, I think we've just -----? this thing all along as it is, and I don't want to see us do more than we need to do, but at the same time it seems to me that the Board members have to come to grips with the idea that we need to address this full on, and not just provide a short term, you know, limited hoped for temporary solution. I mean I want to come to grips with this in the best way I can, and I'm sure the other Board members do too, and I'm tired of waiting for the legislature to do something.

Mr. Collinsworth - Yes, Mr. Bennett, I tried to choose my words very carefully, and I said compliance with the law, and I'm agreeing with you. We do need to take some very specific action. And maybe the point I was trying to make was that we have sat in our various forms internally discussing these issues, and if you start extending these concepts out for a long period of time, how you would deal with these issues in a very finite way, you're going to spend more time than I think you have in the short term. I think Larri said that we're going to have to take some fairly gross actions in terms of trying to implement the law and do it in a reasonable way and do it in a way that we will be in compliance. I'm in full agreement of that. I'm not suggesting at all that we do not take the steps necessary, nor that we undershoot our target. But I think, it's fairly clear to me, that there is going to be a change in the legal structure that we're going to be working against. We're either going to have federal intervention, or we're going to have some change in the state subsistence law. And under either case, those things are external to this body, and it's going to change how we do business.

I do agree that we do need to implement the law, and do it very, in a very constructive way. And in fact we would not be here if we had taken a different set of actions in the past. That's hind sight, that's not to criticize the actions that were taken in the past. We were working against a different understanding. We need to take the understanding that we have now and make sure that we take the right set of actions.

Larri Spengler - Don's comments brought to mind something I basically omitted from my earlier introductory remarks, and that has to do with federal intervention. It has nothing to do with specifically what you have to do now, but as Don pointed out it is a very real possibility given the interpretation of Madison, by Madison, of our state law. I thought a brief review of why that is the case might be helpful, just so we have a complete picture as we go forward.

The federal subsistence law, ANILCA, allows the state to continue managing fish and game on all lands in the state, including federal lands. And federal lands make up about 60% of the land in the state, if the state provides three things in law. One of those things is the regional council system, an advisory committee system, which we already have. One is a priority for subsistence use, which is the same as the priority basis that we have in our statute. The third is the same definition of subsistence uses that's found in ANILCA. ANILCA defines subsistence uses in statute virtually identically to the words used in the state law, except that ANILCA has one small but very important difference. It says rural, it's customary and traditional uses by rural Alaska residents of fish and game for various purposes, by rural Alaska residents. Before Madison, the Boards in their joint regulation, had interpreted the state law to cover that same definition, so that before Madison the regulation, the joint Board procedural regulation, had interpreted the state law to be the same as ANILCA so we were certified to be in compliance.

Since Madison has come out, that may well not be the case any more, cause the Supreme Court said that we can no longer use rural as a way of identifying subsistence uses. The federal government may not be eager to come in and take over management, but there is a provision in ANILCA under which people can seek judicial assistance, can go to the federal court, can get an expedited hearing on the matter, and can basically ask for the federal government to do something. And then if the court ordered, the federal government would have no choice, even if they didn't want to.

So when Don talks about the legal framework that we're working in at this particular point in time, not extending into the future, I think he's not only referring to the fact that the legislature may change the law, but he's also referring to the fact that the federal government may be required by a court or of their own initiative under ANILCA to come in and take over management on a significant portion of our land. So I think that may be a missing link in what I left out in the earlier discussion that fits in with what Don was saying.

. . . .

Larri Spengler - Under the subsistence statute we have two different situations which the Supreme Court in Madison called Tier I and Tier II. And the first thing that we have to be absolutely clear about is that people are not either Tier I people or Tier II people. Tier I and Tier II are situations.

Tier I is a situation where you can let all Alaskans go hunt and let them have the same legal opportunity to hunt without significantly impairing subsistence uses. You can have cut out non-subsistence uses, but you can still have all subsistence uses present.

Tier II is a situation where you cannot let all Alaskans go hunt, or you cannot let them all have the same legal opportunity to hunt, or in some other way you are significantly impairing their subsistence uses. So when we talk about Tier II, we're not talking about a defined subset of Alaskans that would be, you know, 549 would be Tier II Alaskans for a particular hunt. If a particular hunt is in a Tier II situation, it means the Board has to decide how many people are going to go, but it wouldn't always be a static number if the number of animals in that population increased, the number of people that could go would also increase, or could also increase, up until the time when you finally got back to a Tier I situation, and everyone could go hunting.

The Tier I, sorry, the Tier II factors are listed on this overview sheet that I handed out, under Roman Numeral IIc, and what those are, are criteria that are set out in the statute that say once you've eliminated non-subsistence uses, and you still need to restrict, you still need to significantly impair subsistence uses, then you decide how to distribute the opportunity for subsistence hunting based on these three criteria--customary and direct dependence on the resource as the mainstay of one's livelihood, local residency, and availability of alternative resources. Now these criteria are directed at individual situations, and theoretically, under a very sophisticated system of analysis and scoring, you would have a set of factors correlating with each of the three criteria and you could score every single Alaskan in some numerical way, the Board could assign points and weights to the different factors, you could score everybody out and then you would have this line of everybody with their own score. And then you could let forty people go hunting in the Tier II situation, you would let the first forty on the list with the highest scores go hunting. If you could let forty-seven go hunting, the next seven would go on. It would be a continuum, it's not one set and then for all time those are Tier II people.

The point of the subsistence law according to Madison is to protect these uses of Alaska's fish and game resources by Alaskans for food, etc., and (garbled) those were to be protected at the expense of non-subsistence uses, non state resident hunting for game, and then if it was necessary to distinguish among Alaskans to protect those people who had the most customary and direct dependence, the most local

residency and the least availability of alternative resources. So those are all things that have to be weighed and arranged out. These must be applied when you have a permit drawing situation. Currently we've been using random drawings. People put their name in a hat and we distribute who gets to go hunting based on whose name gets pulled out of the hat.

If the game population is being hunted for the specified purposes-- food, fuel, etc.--then we can't distribute that opportunity anymore based on random drawing. We have to make some kind of crude cut at something that matches these criteria or according to the Chief Prosecutor's memo, those hunts, there won't be able to be enforcements in those hunts.

Now, nobody expects a sophisticated, elaborate scoring system at this point, but we do need to have some rough approximation of factors that correlate with the three criteria so that we can roughly distribute hunting opportunities among people, and we've spent days here trying to think of different factors, to come up with different ways that might work that will be discussed in a bit more detail in a bit.

You do have to use all three factors at once. You can't say OK, first we'll let in everybody local, whatever you decide under this theory "local" would mean, and then once we still can't let everybody go, then use the other criteria. All three criteria are relative to one extent or another, and all three criteria have to be used at the same time. It doesn't mean that everybody would qualify on all three criteria. If somebody had never hunted a resource before, it would be very hard for them to show that they had a customary, direct dependence on that resource. But you have to use it in evaluating their chances on going hunting.

I suppose what might be most useful next is for someone else, either Beth or Steve, to discuss various ways we might approach this. I'm not sure if we want to do this now or after lunch when we have the paper to hand out. I don't know what's best.

Mr. Kelso - Madam Chair, the Department has prepared a summary of the approaches that may be useful to you, and we'll have that for you right after lunch. It's in final draft right now. It may be most useful if you wish to break early for lunch and reconvene early, we can have that for you and perhaps instead of having more summary by Larri at this point, Beth and Steve Behnke could walk through that paper with you very quickly and then you'll have it for future reference, and then perhaps we could talk some specific applications so we can really have particular fact situations to work with in looking at how Tier II would really work, would really require some changes. That would be my suggestion. If you would prefer to continue now, we'll still have that paper for you right after lunch. Either way, whichever you prefer.

Joel Bennett - Is the paper to be sort of a checklist then, for evaluating how a person might fall into those three, or measure up against those three standards?

Mr. Kelso - The paper is designed to explain some of the background, some of which you already received, but also to identify some of the possible standards that you may want to consider for using the three criteria. There will be a separate checklist or decision tree that Steve Behnke and Lou Pamplin and the Department of Law have worked up, but initially what we were trying to do is to come to grips with what standards might be useful and what we might actually be able to employ this year in order to make the three criteria actually have some effect.

Sarah Scanlan - Denny, what's the definition of a general hunt? We've been talking about general hunts and subsistence hunts, and I was just trying to think of cases where we would have both and maybe it would give me a better understanding of what we're trying to talk about when we're defining subsistence hunts to define what a general hunt is.

Denny Kelso - I think this is one of those areas that the Chairman and Joel were both mentioning earlier where we have the difficulty of letting go of the way we used to think about all of this and starting in a new direction. In the past, we had a number of formats for hunts, some of which were simply open for a particular season using whatever methods and means the Board had adopted and with whatever bag limit. Anyone, at least any Alaskan, could participate in those hunts and they tended to be those that had the, either were not in the most heavily populated parts of the state where the demand was heaviest, or for some other reason--maybe because the population of animals was sufficient--there wasn't the need to have the same kind of restrictions that there had been in other areas.

Then we had sort of a continuum of hunt formats. There would be, for example, registration hunts where participation was not limited, but we had registration for information reasons to make sure we knew exactly what the participation was to avoid over-harvesting in a particular area. We had registration hunts that were limited, where for administrative reasons or because of the conditions in that particular place we used the registration hunt format, where people came in and registered, but we either limited the number or required the registration to happen in a particular area that required a commitment from individuals to get there and get registered in order to participate. Then further down the continuum, and I guess really at the end of the continuum, we used permit drawing hunts which the Board is very familiar with.

When we've used the term "general", what we've tended to mean is hunts that were not limited by one of these other methods, in which any Alaskan could participate and they were not restricted by registration requirements or by permit drawing hunt requirements. Now there might be other restrictions such as length of season, type of access, or other regulatory measures that the Board had taken, but in terms of participation, that's what we have meant when we say "general". Now I should ask Bob Hinman whether there's anything that he'd like to add to that or correct.

Mr. Hinman - Madam Chair, I think that what we used to call in the slang "general hunts", just indicated as you say, Denny, that it was those for which there was no particular restriction. What we're calling general hunts now, however, are those opposed to subsistence. In other words, a general hunt would be any hunt that non-resident as well as residents could participate in. And I guess it's a matter of choice of using that phrase or calling it sport hunt, which I personally do not particularly care for, and so I'd prefer staying with the term general hunt. But I think it's just any hunt that is not restricted just to state residents.

Ms. Scanlan - Madam Chair, Denny or Bob, are those then now restricted because of the definition by Eluska and Madison to a few isolated areas around the state where we have an abundance of resource? Are we going to totally eliminate those now with the new criteria that we have to deal with?

Mr. Hinman - Madam Chair, I guess that's going to be up to the Board, after listening to the summary of information and so on. But it seems to me that there are a number of situations in which we would recommend having general hunts, that is it's unnecessary to restrict it only to state residents, deer in Southeastern being a good example, where there's no, we don't see the need for restricting only to residents of the state in order to provide a reasonable opportunity, and so I think there'll be, there should be, opportunity for quite a number of general hunts in the state. Does that answer the question you were asking?

Ms. Scanlan - Yes, I disagree with you maybe, until we get into a more detailed discussion about which hunts those are.

Ms. Johnson - I think one of the things we need to reiterate here again, Sarah, is that when we talk about the subsistence hunt, we're talking about the hunt that Madison has given us that all Alaskans that hunt for food are subsistence users. Larry?

Larry Edfelt - Madam Chair, my interpretation of how to define this general hunt would be if the subsistence use is at Tier I under Madison, and there's still enough animals to allow non-resident hunting, then you have a general hunting season. And as soon as you get into Tier II and the subsistence use, then the general hunt would have to disappear.

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Larri Spengler - I just put a very illegible chart on the board just for conceptual purposes. We have to have subsistence regs, which is what that says over to the left on top--subsistence regs--and those would be for Alaska residents only for food and the other purposes listed. If we're in a Tier I situation, the subsistence regs would let everyone hunt. All Alaskans would go hunting with the same legal opportunity and wouldn't be significantly impaired. If we're in a Tier II situation we have different opportunities among Alaskans. So those

are off on one side. The general regs are not the subsistence regs. Thus the general regs would not provide food for Alaskans. They would either be a hunt that would allow food for non state residents, like in the caribou herd where there are so many caribou you can let everyone hunt, then the hunt would be for food for non state residents--that would fall in the general category. Or, it could be for trophies for anyone. So if you decide that a brown bear population has never, I don't know if this is the case by the way, but if it has never been hunted for food by anyone and nobody wants to hunt it for food, then you set up a hunt that's open to anyone, either Alaskans or non-Alaskans, but the focus of the hunt is trophies and they don't have to salvage the meat. So those would fall into the general regs.

You could have either, you could have general regs on a, let's say you have a population of animals, you could have either general regs and subsistence regs letting, at the Tier I situation, letting everyone, all Alaskans, hunt, or you could have no general regs, if you had to wipe out non-residents, and if that were enough to make it possible for all Alaskans to hunt, then you could have Tier I again, or you could have Tier II, but you couldn't have Tier II and general regs at the same time.

FOCUS 6/17/85

Subsistence quotient may decide who hunts

By DAN JOLING
News-Miner Bureau

JUNEAU—Planning a big game hunt this year? For certain species, Fish and Game Department officials may measure your "subsistence quotient" to determine if you're more qualified than other state residents to kill a moose, caribou, or sheep.

Fish and Game Department officials say a likely solution to turmoil over big game allocation may be a point system based on the criteria in the 1978 subsistence law. Residents would be ranked based on their proximity to the animal, the availability of food and their customary dependence on the game.

Accorded with a pair of court decisions that define virtually all Alaskans as subsistence hunters, the Board of Game will meet here today to draw up emergency regulations for the 1985 hunting season.

In the Madison decision four months ago, the state Supreme Court ruled that the Board of Fisheries had incorrectly limited the definition of a subsistence user before limiting other users of the state's fish resources. The court said sport and commercial fishing had to be curtailed because the pool of "users" could be restricted.

On the game side, that's been interpreted to mean all resident Alas-

kan hunters are subsistence hunters since they're required to salvage and consume the meat they shoot.

The board must now narrow the pool of hunters based on three criteria included in the 1978 subsistence law for distinguishing between them when all other uses have been excluded and there's still too much pressure on the resource.

- The three criteria in law are:
- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
 - Local residency;
 - Availability of alternative resources.

Department officials say the board will probably have to come up with a system that determines how each Alaskan measures up under the criteria.

"Our guess is that it's probably going to have to be a point system of some kind," said Paddy McGuire, a Fish and Game Department special assistant for public communications.

In the past, the department has determined subsistence users in part by having them sign affidavits in which they swear that more than 50 percent of their fish and meat diet comes from wild fish and game they harvest themselves.

McGuire said such surveys could be expanded to find out more about people so that they could be ranked. Once the boards set a limit on

caribou or moose or bear in a certain area, the Alaskans who most closely fit the definition of subsistence user would get the hunting permits.

The alternative to emergency regulations would have been a change in the law, a solution Gov. Bill Sheffield pursued by introducing language to define a subsistence user as a "rural" resident. That matches the regulations the Board of Fisheries had promulgated from the '78 subsistence law.

The Senate refused to pass Sheffield's quick fix, but pledged to pass a comprehensive bill in the 1986 session. That means the system the board comes up with for 1985 may not be the final solution.

"The board is going to be covering a lot of new ground," McGuire said. "It's safe to say that what they do next week, probably five years from now, it won't be recognizable to what they're doing now. It's an evolving process."

"Right now we're looking to getting through this hunting season and giving people access to their hunting seasons," McGuire said.

Game employees are expecting a board meeting of 10 days to two weeks. That may be conservative.

"Every hunt in the state is going to have to be looked at as a subsistence hunt and new regulations will have to be adopted," McGuire said.

(See GAME, page 5)

(Continued from page 1)

"They have to come up with an entirely new book. Presumably, the new book will bear a fair amount of resemblance to what people are used to," McGuire said.

"It's going to be a real burden on the board members to go through this," he said.

By law, emergency regulations will last only 120 days, which will carry the state through October unless the board makes them permanent at its fall meeting.

A point system is by no means assured.

"We are often surprised by what the board does. It's up to the board, not the department, to make these determinations," he said.

"They may dream up some other system that we haven't even imagined. It might be a lot better than anything we've thought of. That would be great," McGuire said.

If the board does not pass subsistence regulations for each game

unit, the state is vulnerable to poaching in each unit where a sport hunt is allowed some time during the year.

That's a result of the Eluska decision, in which the state Court of Appeals ruled that state regulations had not made adequate provision for subsistence hunting in Game Unit 8.

The court said David Eluska, a Kodiak resident who killed a female Sitka black tail deer out of season in May 1983 and used it to satisfy the subsistence needs of his family, could use subsistence as a defense against prosecution.

6-25/8

Subsistence hunting
may be...

Daily News-Miner, Fairbanks, Alaska, Monday, June 10, 1985-7

Governor doesn't expect much from Game session

By ANDY RYAN
Alaska News Service

JUNEAU—Proposed hunting regulations under consideration is week by the state Board of Game will probably have little effect on Alaska hunters, Gov. Bill Sheffield says.

And the governor said that unless major problems flare up with regard to regulation of hunting and fishing under a pair of recent court rulings, it probably will not be necessary to call the Legislature to special session this year.

"I don't think they're really going to change much of anything," Sheffield said of the proposed hunting regulations drafted for consideration by the Game Board.

The board meets here in emergency session, beginning today.

The suggested regulations, prepared by the staff of the Department of Fish and Game, are in response to two recent court rulings which, in effect, interpreted the state's current law as extending subsistence hunting and fishing rights to most Alaskans.

"I think the same people who hunted before are going to be able to hunt (after new regulations are

adopted)," Sheffield said.

"It just won't be as free for all as far as the permits are concerned. They'll be tightened up. There'll be the same number of moose and caribou killed as there was the year before."

In an interview last week, Deputy Commissioner of Fish and Game Dennis Kelso said the court rulings require that in situations where there are more Alaskans who want to hunt than there are animals that can be harvested without harming the resource, the state must weigh three factors.

In such cases, he said, prospective hunters must demonstrate a customary and direct dependence on the resource as a mainstay of their livelihood. Local residency and availability of alternative resources will also be factors in determining who gets to hunt, he said.

"We're going to protect the resource, no matter how the allocations are made. That's our fundamental responsibility, and we stand by that," Kelso said.

"We're going continue to protect the resource, but it's going to change the way Alaskans have an opportunity to hunt."

Kelso said the net effect of the

new regulations may be to end the use of lottery-type permit drawings and limited registrations in picking who gets to hunt.

"We're no longer free simply to use those, and the board will have to decide how it's going to apply the criteria. How it's going to figure out a new balance. But whatever it is, it's not going to be business as usual," Kelso said.

Sheffield said that although the use of drawing permits may be curtailed under the proposed regulations, he hopes it will be done in a manner that will not work hardships on any Alaskans.

"They won't be as free and easy on the number of permits, or how you get that permit, or how you get your name in the hat. Hopefully, there won't be any hardships put on anyone," Sheffield said.

The governor also said that, although he will call a special leg-

islative session if necessary to deal with subsistence hunting problems, no problems have yet arisen that cannot be handled through regulation, and through emergency powers of the administration.

Problems have not yet occurred to the extent that I would call a special session over. We'll just have to wait and see what happens

throughout the summer," Sheffield said.

"If necessary I will. Hopefully, we won't have to, and we can resolve it with various Fish and Game Board regulations and by the strength that the commissioner of Fish and Game has, and the things that he's empowered to do," the governor said."

Game board meets to consider subsistence laws

by Larry Persly
Times-Juneau Bureau

6/10/85

Juneau — The Alaska Board of Game is meeting in emergency session today to consider regulatory changes in response to the demise in court of the state's subsistence hunting and fishing laws.

The meeting will determine who gets to hunt what, when and how much in Alaska this year.

Because of the recent court decisions, "the board must take emergency action to provide enforceable hunting regulations for this year," according to Department of Fish and Game officials.

The meeting started this morning at Fish and Game headquarters in Juneau.

No public testimony will be taken at the emergency meeting, which is expected to last 10 days

to two weeks. Emergency regulations become effective immediately upon notice by the game board, and expire 120 days after adoption.

Before the Feb. 22 Alaska Supreme Court decision that struck down existing laws, the game board "under the subsistence law had been providing reasonable opportunities for subsistence hunting by Alaskans living in

rural areas or communities," while also providing hunting opportunities for other Alaskans and non-residents through permit drawings, registration hunts and general open hunts, according to an April memo from the game board.

After the court decision, the memo states, "If a game population has been hunted by Alaskans for food, subsistence hunting

must be allowed, unless the resource would be jeopardized. All Alaskans are eligible for subsistence hunting...."

The game board will attempt to fashion regulations that protect the subsistence rights of all Alaskans, while also establishing rules to limit the number of subsistence hunters in those areas where game stocks cannot sup-

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port unlimited hunting.

Elimination of permit drawings poses a big problem to the board, which must come up with a new system for limiting the number of hunters in areas where game stocks are not strong enough to support large numbers of hunters.

"The legal principles set out by the court will require substantial reallocation of game among Alaskans, because in most cases

the board cannot use permit drawings to decide who may participate in a particular hunt," said Brenda Johnson, chairman of the game board, in an April letter to Don Collinsworth, Fish and Game commissioner.

She added, "Rather, the opportunities to hunt must be distributed based on three criteria:

- "Direct dependence upon the resource as the mainstay of one's livelihood.
- "Local residency.
- "Availability of alternative resources."

Johnson also noted, "The court's reasoning requires that non-state residents be excluded from many hunts."

The game board has in place 164 permit drawing hunts, which operate on chance, and 11 registration permit hunts, which distribute permits based on the order of application. These 175 hunts "must be restructured," according to the board's April memo, because they do not follow the criteria of need, residency and alternative sources of food.

"While the current random drawing or first-come, first-served system must be replaced by systems based on the three criteria," the memo adds, "the board must not act arbitrarily," and must work within the guidelines of the court decision.

Any decision to eliminate non-resident hunters from certain areas likely would meet with protests from big game guides, who would lose much of their business if their clients were denied access to the hunts.

Board tackles hunting

**'Perfect' statutes
are not expected**

by Larry Persily
Times Bureau Bureau

6/11/85

Juneau — The Alaska Board of Game opened its emergency meeting on subsistence hunting regulations Monday to address some "obvious" problems in allocating game animals to hunters.

"Obviously we can't allow all Alaskans to hunt all the time because the resources just aren't there," said Sarah Scanlan, game board member from Anchorage.

"Obviously the board will not be able to create a perfect set of regulations," said Beth Stewart, director of the state Department of Fish and Game's Division of Boards.

Many of the hunts in Alaska will be relatively easy to regulate, Stewart said, because there is sufficient game to support the hunting effort, with reasonable bag limits and seasonal closures.

"But probably what will take up the majority of this meeting will be the very popular hunts," she said, where there are far too many people who want to hunt too few animals, forcing the game board to choose who hunts and who doesn't.

"You now have to think of subsistence in a different way," Stewart told the board at Monday's opening session of a scheduled nine-day meeting in Juneau to adopt emergency hunting regulations.

Defining subsistence hunting as rural "is simply not the case any more," she said.

Prior to this spring's court ruling, which tossed out the state's regulations on subsistence hunting and fishing, rural residents were given priority for fish and game resources.

Stewart said although priority had been given to rural residents in the past based on their historical use of fish and game resources, the court decision means, "This multi-generational

Attorney General Norm Gorsuch told game board members that February's supreme court decision "expands subsistence eligibility to include hunting by all Alaskans," forcing the game board to establish a new system for choosing which Alaskans will be allowed to participate in hunts that must be restricted.

In a related case, a state appeals court decision in April created "the subsistence defense," Gorsuch explained, all-
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lowing defendants in cases of fish and game violations to claim subsistence as a defense. To allow for the prosecution of fish and game violators, he said, the game board needs to take away the defense by adopting subsistence regulations for every hunt in the state.

Board members will review both court cases as they work to adopt emergency regulations at their meeting in Juneau. The meetings are open to the public, though no public comments are allowed under emergency regulation procedures.

Following adoption of the emergency regulations, the board will move to adopt permanent regulations, allowing for public comment this summer and fall during that process.

Larri Spengler, the assistant attorney general who has handled the state's subsistence case in court, explained that since the state can no longer limit subsistence hunts to rural Alaskans and can no longer utilize permit

drawings to select who is allowed to participate in a particular hunt, the board must establish a new system for "determining how hunting opportunities are to be distributed among Alaskans."

Spengler said the Game Board needs to consider three criteria listed in state regulations in determining who is allowed to participate in hunts that need to be limited:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood.
- Local residency.
- Availability of alternative resources.

In drafting regulations this week and next, the game board needs to set up a point system for the scoring of eligible hunters. All three factors must be considered in each case, Spengler said.

One option would be for the board to set up a scoring system utilizing the three criteria, with the Department of Fish and Game then sending out questionnaires and scoring the responses to select eligible hunters, according to department staff.

Survey may decide subsistence hunts

By DAN JOLING
News-Miner Bureau

JUNEAU—In big game hunts this fall, answers to a questionnaire now being written by the Board of Game may be as critical to success as a rifle.

In special meetings here, the game board Monday began to formulate its response to recent court decisions that recognize virtually every Alaskan as a subsistence hunter and subsistence hunting as a defense in poaching cases.

The board plans to adopt emergency regulations that will narrow the pool of hunters when too many apply for a particular species.

That's expected to be accomplished through some form of a point system, measured by a questionnaire, grading hunters on their subsistence needs compared with other applicants.

Adopting specific subsistence regulations for every hunt will also

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allow state law enforcement officials to resume poaching prosecutions.

Where there are too many subsistence hunters, the field can be narrowed based on three criteria in the 1978 subsistence law:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
- Local residency;
- Availability of alternative resources.

Any one of the three can be weighted more heavily, according to Assistant Attorney General Larry Spengler, but they all must be considered.

Translating them to a questionnaire is expected to take the first days of meetings planned to last 10 hours daily, seven days per week. The meetings may last for two weeks or longer.

"Any system you come up with has to be administratively 'do-'
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able," said Steve Behnke, director of the fish and game department's subsistence division.

He also urged board members to keep it simple.

"A complex scoring system probably isn't workable if you're going to do it this summer," Behnke said.

In discussions Monday, the board wrestled with questions on how to measure customary and direct dependence or local residency.

They discussed whether a person should earn points for every year he has hunted in a particular area,

how close he has to live to be credited with local residency, and whether there should be degrees of local residency.

In considering availability of alternative resources, the board discussed whether "resources" meant other wild game, access to grocery stores, jobs, or transportation that would allow hunting elsewhere.

The emergency regulations must end after 100 days unless adopted after a public hearing process. Whatever system is adopted, it may be scrapped next year if the Legislature modifies the subsistence law.

Sen. Mitch Abood, R-Anchorage, introduced legislation late this session to base subsistence eligibility in part on a person's income. Gov. Bill Sheffield advocated basing subsistence preference on "rural" residency in conformity to federal law.

Whatever is adopted, there will be some expense to the state.

License fees and tag fees account for more than \$2 million in state coffers, 67 percent of which is paid by non-residents.

Dipnetters strike it rich on Copper: 1,300 fish

6/12/95 FBK

By KATHI BERRY
Staff Writer

Dipnetters on the Copper River surprised Fish and Game officials by defying low-catch predictions and capturing 1,300 salmon during the second open period at Chitina last weekend.

Fish and Game expects more than 1,600 fish will be harvested during the third open period, sche-

duled for noon Friday to midnight Monday.

After three salmon were netted during the first open period, Fish and Game officials warned that they did not expect the fish to be plentiful in the Copper River near Chitina until the third weekend in June.

The meager take was attributed
(See CHITINA, page 3)

CHITINA . . .

(Continued from page 1)

to the late breakup of ice at the mouth of the Copper River, which had delayed the arrival of the majority of the salmon. Fish and Game officials reported that they expected the second open-period take to be as poor as the first.

But a large number of fish defied the officials' predictions by arriving in Chitina toward the end of the second 48-hour open period, which ran from midnight Friday to midnight Sunday.

"The salmon have definitely arrived," Alaska Department of Fish and Game Management Coordinator Dennis Haanpaa said. "Many more fish could have been taken during the second open period if there had been greater effort. There were not a lot of people fishing."

Fish and Game officials issued 136 permits, compared with the 479 permits issued the first weekend.

"It's too bad more people didn't show up," said Lenore King, owner of the Chitina Cash Store. "The weather was good and many of the dipnetters got so many fish that they limited-out for the season."

The limits this year are 15 fish per individual or 30 fish per household.

The 84-hour period next weekend is the longest yet this season.

"We are running a lengthy session because there are lots of fish available out there," Haanpaa said. "We expect the reds and kings to be traveling through Chitina all the way up until August."

Nineteen kings and 1,281 reds were netted last weekend.

"There is no problem with the kings," Haanpaa said. "They are never as plentiful as the reds."

The Chitina Native Corp. reported that they had no difficulties last weekend collecting a \$15 fee imposed on dipnetters who want to cross Native land to get to the Copper River. Six dipnetters initially refused to pay a guard set up in a booth at the beginning of the popular O'Brien Creek Trail during the first open period. The offenders were apprehended and dismissed without incident when they later agreed to pay the fee.

The Native corporation would not say how many permits they issued last weekend.

Most of the dipnetters avoided paying the fee by camping on state-owned land, netting by the Chitina-McCarthy bridge or riding in boats over to the Copper River banks within the highwater marks, which are not under the Native corporation's jurisdiction, King said.

Information about open periods can be obtained at least 24 hours in advance by dialing 456-8482 in Fairbanks, 822-5224 in Glennallen or 344-2622 in Anchorage.

ing of subsistence tangled Game Board struggles with '78 big game law

DAN JOLING
S-Miner Bureau

The state Board of Game is attempting to write new big game regulations, but is guessing what the legislature meant when it passed the subsistence law. The Alaska Supreme Court ruled that the subsistence law had been improperly interpreted when the Board limited the pool of subsistence users to rural residents. The legislature said the law was intended to limit users until the subsistence had been eliminated. That means that virtually any hunter qualifies as a subsistence hunter.

The court said the pool of subsistence users can be narrowed by three criteria in the law. It's those meanings, applied when there are too many subsistence hunters bringing pressure on a certain species, that the Game Board has been struggling to interpret.

"It would make our job easier if we had explicit definitions, but we don't," said Game Board member Victor VanBallenberghe of Fairbanks.

- The three criteria are:
- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
 - Local residency;
 - Availability of alternative resources.

Where only a limited number of animals may be killed to prevent biological damage to the resource, the board can use the three criteria to limit hunters identified as "tier two" subsistence users in the court decision.

As of this morning, the board had begun drafting a questionnaire to gauge who is most eligible to hunt when the pool of hunters must be narrowed.

The next task will be assigning values to each question and fitting it into a point system that can be tabulated by computer.

But members have yet to agree on the Legislature's terms.

For example, they disagree on a

definition of "alternative resources."

Board Chairwoman Brenda Johnson said that should mean the availability of non-wild meat, like food in a grocery store.

"If you're in an area where you have access to grocery stores, it's going to be easier to obtain that meat," Johnson said after the meeting. "Most of those places have better employment."

She said the game board has used the criteria before when requested to extend certain hunts for particular groups.

In the absence of clear definitions, she said, it's left to the board's discretion to interpret the Legislature's meaning.

"That's where we have that responsibility of making that regulation since we have no information about what they meant," she said.

But VanBallenberghe said he's bothered by assuming factors that were not specifically ordered.

"The courts have told us that all subsistence users are subsistence users. When we're into tier two and we have to start dropping people out, I think we have to look at the rules by which we drop them out very carefully," he said.

He does not believe non-wild resources should be considered.

"I don't feel comfortable instituting those as criteria," he said. "As far as I can tell, neither the courts nor the Legislature in defining

alternative resources have spoken to wild resources," he said.

VanBallenberghe instead believes that alternative resource refers to wild resources like other game animals or fish.

For the first criterion, customary and direct dependence on the resource, the game board may ask hunters how directly dependent they are on the harvest, with one of four declining categories to check off.

To judge local residency, a questionnaire could ask only where a person lives and give varying points depending on how close it is to the species in question.

Johnson said she believes the first two criteria are most important.

Special session hinges on Game Board decisions

KEAN FOSDICK
Associated Press

JUNEAU (AP)—The odds of Gov. Bill Sheffield calling a special session appear reduced since lawmakers left town a month ago. But it's still possible they could be brought back this year to deal with subsistence-related hunting and fishing problems, a Sheffield spokeswoman says.

Molly McCammon, Sheffield's assistant press secretary, said that depends upon what the state Game Board decides after its emergency meeting in Juneau. The eight-member panel is trying to sort out who will be

allowed to hunt what in Alaska this fall.

"It's expected that the board, which began its meeting Monday, will need at least another week to 10 days to resolve a number of subsistence questions raised recently by the courts. That's in addition to making some technical changes in Alaska's 60-year-old patchwork of game laws.

"There's always the possibility of a special session," McCammon said. "He'll be looking at what comes out of the Game Board in the next couple of weeks. The state will use all the tools it has available."

While the state Department of Fish and Game manages the state's wildlife resources, the fish and game boards separately make the allocations.

The current system of doling out fish and wildlife to a variety of users has been turned upside down by two recent court cases pertaining to subsistence. The rulings mean that virtually all Alaskans now qualify for subsistence rights.

Sheffield introduced a bill about mid-session that would have allocated the same subsistence rules by statute that had been mandated by the fish and game boards. His

measure would return first subsistence rights to rural users.

But legislative leaders — particularly Senate President Don Bennett — delayed final action on the issue until next year. They argued it was too complicated and too politically charged to be solved in just a couple of months.

Sheffield had warned shortly before lawmakers adjourned May 12 that he might call a special session if he wasn't satisfied with their output on a combination of things — the capital budget, the state's troubled longevity bonus program, and subsist-

ence.

Although vetoing \$35.8 million from next year's \$433 million public construction budget last week, he commended legislators for fashioning a capital spending plan that "makes the most of the limited dollars available unlike some capital spending bills in the past."

The governor also signed into law a measure calling for an advisory vote in next year's general election on the future of old-age benefits.

That delays a final legislative solution for the state's \$250-a-month longevity bonus program at least until 1987.

"Even though he had some reservations, he obviously signed the longevity bonus bill so there's no reason for a special (session) on that," McCammon said.

"On the budgets, he could have vetoed almost the whole thing and called them back to deal with the fact they'd gone about \$50 million over (budget)," she said. "Or he could have vetoed out \$50 million. And that's what he decided to do."

Public pressure about dealing with subsistence-related problems is expected to build through the summer, McCammon said.

Game Board nears subsistence ruling

6/13/85

By DAN JOLING
News-Miner Bureau

JUNEAU—Alaska Board of Game members were a step closer to determining who will qualify as "Tier 2" subsistence hunters today after deciding to weigh equally three criteria set forth by the 1978 Legislature.

In past years, subsistence users were limited to rural residents. However, court decision this year ruled that the pool of subsistence users cannot be reduced until all other uses have been eliminated. Virtually all Alaskans fall into the category of "Tier 1" subsistence hunters.

When there is too much subsistence hunting pressure on a big game species, the Game Board can limit the hunt to "Tier 2" subsistence users.

There were approximately 150 hunts in the state planned before the court decisions in which hunting was limited by randomly drawn permits or first come, first served permits.

The court said Tier 2 users must be determined based on three criteria in the 1978 subsistence law:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
- Local residency;
- Availability of alternative resources.

The board so far has decided to weight the criteria equally. They have yet to figure out a scoring system, but the three criteria may be

measured with the following standards.

For customary and direct dependence, the board picked standards of the number of years an applicant has harvested an animal and his dependence on it as his primary food source. The latter would be gauged by answering, "great, moderate, slight or no dependence."

Applicants would score the most points for local residency if they lived in the affected hunting area. They would receive a declining number of points for living outside the hunting area but within the game management unit, then adjacent game management units.

The board could make exceptions depending on the range and distribution of the animal, such as caribou.

For determining alternative resources, the department would ask how available other fish and game resources are in the applicants hunting area or another reasonably accessible area: greatly, moderately, slightly or not available.

The board also included a standard to award points if the applicant's financial resources were not adequate to purchase non-wild resources as a reasonable alternative to purchasing game.

This morning, board members were figuring out a scoring system to measure the standards.

Board approves hunter point system

By DAN JOLING
News-Miner Bureau

FAIRBANKS—A point system designed to distinguish "Tier 2" subsistence hunters from the general hunting population was unanimously adopted Thursday by the Alaska Board of Game.

The system follows guidelines in the 1978 subsistence law and will determine who is most qualified to

hunt for subsistence purposes.

Applicants will be questioned on the location of their home, financial status, past dependence on an animal for food, and other factors.

The system to refine the pool of users will be applied only when pressure from hunting by all subsistence hunters could cause biological damage to a species. Court decisions this year determined that

the subsistence law had been incorrectly applied to restrict subsistence taking of wild fish and game to rural residents.

The court rulings meant virtually every Alaska resident could be considered a subsistence hunter.

The point system applies only to Alaska's big game, including moose, caribou, brown bear, black

bear, sheep, goats, elk, musk ox and bison.

A maximum of 90 points can be earned, 30 for each of the three criteria included in the 1978 law:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
- Local residency;
- Availability of alternative resources.

The three criteria will be scored as follows:

- Customary and direct dependence: One point can be earned for each year an applicant has harvested an animal from the population, to a maximum of 10 points.

Also, 20 points can be earned for "great" dependence on killing the big game animal for the primary food source of the applicant. The

applicant can earn 15 points for "moderate" dependence, 10 points for "slight" dependence and 5 points if he does not depend on harvest as a principal meat support.

- Local residency: 30 points will be awarded if the applicant lives in the hunting area where the species lives. The applicant will receive

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points if he lives outside the hunting area but within the same game management unit. The applicant will receive 10 points if he lives in a game management unit adjacent to the unit in which the species lives, and no points if he lives in any other game management unit.

The board included an exception clause under local residency: When the board determines that the zones set out would treat a specific concentration of similarly located individuals differently, or would be inappropriate due to the range and distribution of the resource, the board will, by regulation, modify the boundaries of the zones.

- Alternative resources: Applicants will receive 15 points if other fish and game resources are not available in their hunting area, or another "reasonably accessible"

area: Applicants will receive 10 points if other wild resources are "slightly" available, 5 points if they're "moderately" available and no points if they're "greatly" available.

An additional 15 points will be given to applicants if their financial circumstance "is not adequate to purchase non-wild resources as a reasonable alternative to taking the game."

Board of Game Chairwoman Brenda Johnson said Thursday applicants will score themselves as to great, moderate or slight dependence on a wild game animal or availability of another, and that filling out sworn questionnaires will be somewhat of an honor system.

However, the department will be able to cross check some factors such as past success at hunting and what other fish and game is avail-

able near an applicant's home, she said.

There are about 150 hunts in Alaska which were restricted last year by randomly selecting a limited number of permits or issuing a limited number on a first-come, first-serve basis.

"I'm satisfied with the point system we came up with," Johnson said. "There's going to be a lot of holes in it, but I think it's a lot more fair than the other ones we looked at."

Rather than judge hunters strictly on where they live, Johnson said, the point system gauges dependence, past hunting and the ability to buy or hunt other meat.

After agreeing on the point system Thursday, the board began deciding how it should apply to specific hunts, taking into consideration past permits issued, past number of animals killed, success rate and other factors.

Subsistence statutes set a clear mandate

FBKS 6/14/85

By MARC GROBER

No doubt someone, someday, will write at least one book about the politics of subsistence. Certainly a few inches of this paper can't scratch the surface of this topic. We do have just enough space, however, to mull over a few items.

The boards of Game and Fisheries are meeting in Juneau this week to adopt emergency regulations due to the Madison and Eluska decisions (and because the Legislature failed to adopt the governor's proposed bill). No testimony will be taken at this meeting nor has any input been requested from advisory committees. A number of attorneys who have been involved in litigating Madison and Eluska issues have offered to assist in drafting regulations without charge to the state, and to my knowledge the state has not sought this help. What is really happening in Juneau this week?

To even begin to address this question you must first understand what the holding in Eluska (requiring implementation of a subsistence priority as provided by statute) was first enunciated several years ago by District Court Judge Stephen Cline in Nenana (State vs. Ketzler). The state appealed the

matter and the case was eventually affirmed and dismissed on other grounds. The point here is that the argument adopted by the Court of Appeals is not new to the state, but has for years been forcefully opposed by the state despite the clarity of the underlying statute mandating the opinion finally issued as Eluska.

After Madison was handed down the joint boards in March called for testimony on the impact of that decision. The boards heard public testimony from the attorneys in Madison requesting that the boards take steps to adopt regulations proffered from the inception of that litigation. The board took no action. The boards also heard testimony that Madison was equally applicable in game matters, that the boards' current regulations were void for failing to meet subsistence requirements, and that it was just a matter of time before opinions such as that of the District Court in Ketzler were adopted by the Court of Appeals or the Supreme Court. The testimony fell on deaf ears.

Further, proposals regarding subsistence priorities were placed squarely before the board in March. The proposal specifically relating to compliance with the subsistence statute was unilateral-

Guest Opinion

ly rejected by the office of Elizabeth Stewart, director of the Division of Boards, acting on behalf of the boards, and the Board of Game refused to adopt any regulation in response to the balance of the proposals (requesting protection for subsistence hunters in portions of unit 20).

Finally, Eluska was handed down by the Court of Appeals. The opinion can only be viewed as a severe reprimand of agencies knowingly violating the clear intent of the law. The court's language is unequivocal.

The boards have had years to comply with the statutes and have, with the advice of counsel, simply refused to comply. Yet now there is an alleged emergency of such exigency that the boards will not accept testimony on the issue, even from the population segment they have been abusing for all these years. And the director of the Division of Boards is heard to be making remarks that the emergency regulations are necessary because the Legislature failed to do its job.

Let's get a few things straight: The Legislature has already adopted a law and directed the boards to adopt regulations to implement the law. The bottom line is that the boards have simply refused to implement a law that they find distasteful. The debate over the governor's stop-gap measure only detracts (as one supposes it was meant to do) from the issue (perhaps more clearly set out in Eluska than in Madison); the boards have knowingly and willfully violated state statute in refusing to implement the subsistence priorities required by law. There is just no other way to say it.

Now the boards, having waited until the midnight hour, intend to adopt hunting and fishing regulations under emergency authority without any public input. Even advisory committees, the quasi-agencies responsible for grassroots input, have been excluded. Can the boards be expected to turn 180 degrees and act in good faith with respect to subsistence users while cloistered in Juneau, free of public comment, with the very advisors who have brought them to this precipice?

Marc Grober, a lawyer practicing in Nenana, is a member of the Tanana Fish and Game Advisory Committee.

FBIS

Villages could enforce hunting, Williams says

By KATHI BERRY
Staff Writer

Village governments—not the federal or state government—should be allowed to enforce subsistence regulations within rural communities, according to Spud Williams, president of the Tanana Chiefs Conference.

"The village government is the only one that can deal with local problems," Williams told the Farthest North Press Club Friday.

To illustrate his contention, Williams cited an incident in which a U.S. Fish and Wildlife Service officer arrested a Barrow Native for shooting a restricted duck in the 1960s. Nearly 200 community residents reacted by shooting the same species of duck and bringing them in bags to the arresting officer.

The officer's case against the arrested man was eventually dropped and state officers have been hesitant to enforce subsistence regulations against Natives ever since, Williams said.

By contrast, management plans involving federal, state and village Native corporations work well to curb the hunting of restricted fish and game, according to Williams.

As proof, he cited a recent incident in which a Barrow Eskimo was fined \$5,000 for spearing a bowhead whale in defiance of the Alaska Eskimo Whaling Commission. The whaling commission is responsible for enforcing whale quotas set in conjunction with the National Marine Fisheries Service.

Williams was reacting to a recent controversy created when two court decisions made it almost impossible for Alaska Fish and Game to enforce subsistence hunting regulations.

The court rulings, which nullified the "rural preference" qualification outlined in state subsistence law, meant that virtually all Alaskans qualify as "subsistence hunters."

The Alaska Board of Game, meeting in Juneau, Thursday

adopted a point system that separates subsistence users into two categories.

The system, which gives Fish and Game the authority to enforce hunting regulations again, applies only when the population of a hunted game animal drops below specified limits.

State and federal subsistence regulations would definitely be enforced by village governments because hunting is the only means of survival for many Natives living in rural communities, Williams said.

"The villages would be turned into welfare states or the villagers would have to leave if their resources were depleted," Williams said. "The economy of those communities is not based on cash flow."

Construction projects and seasonal fire fighting jobs give villagers cash to buy three wheelers, snow machines, boats "and other things that are a necessary part of their subsistence lifestyle," Williams said.

6.15.85

'Tier 2' hunts assigned

By DAN JOLING
News-Miner Bureau

JUNEAU—Moose hunts in three Southeast game management sub-units are the first declared "Tier 2" hunts under emergency regulations adopted by the Board of Game Friday.

That means they will be open only to applicants determined to be most qualified as subsistence users under a point system adopted by the board Thursday.

All non-residents are automatically excluded from Tier 2 hunts.

In addition, the Game Board declared musk oxen hunting on Nunivak Island off-limits to non-residents to protect subsistence hunting, but did not place it in a Tier 2 category because of a 1980 law.

The Game Board has met this week in emergency meetings to write subsistence regulations, sessions prompted by a pair of court decisions earlier this year.

In the Madison decision, the Alaska Supreme Court declared that the pool of subsistence users of Alaska's fish and game could not be limited until all other uses had been curtailed. That means virtually all Alaskans have been designated as "Tier 1" subsistence users.

If a species could suffer damage because there are too many Tier 1 hunters, the board can narrow the pool to Tier 2 hunters based on three criteria listed in the 1978 subsistence law: customary and direct dependence on the resource as the mainstay of one's livelihood, local

(See GAME BOARD, page 3)

GAME BOARD ...

(Continued from page 1)
residency and availability of alternative resources.

In the Eluska decision, the Alaska Court of Appeals ruled that a Kodiak deer hunter charged with poaching could use a subsistence defense in the absence of the adoption of specific subsistence regulations for a hunting area.

It's those subsistence regulations that the Board of Game have been developing this week.

Thursday they adopted a scoring system to rate subsistence hunters to be determine Tier 2 hunters.

In Tier 2 hunts, applicants will "earn" up to 90 points depending on how they answer questions on the location of their home, financial status, past dependence on eating an animal and other factors that measure the three criteria.

The three moose hunts designated as Tier 2 hunts include a Game Management Unit 1C moose season at Berners Bay, north of Juneau; a sub-unit 1D moose season near Haines; and a sub-unit 5A moose season on the "forelands" near Yakutat.

The board determined that no other subsistence hunts in Southeast would be impaired by allowing other types of hunting, and all other

Hunting rulings' effects weighed

6/15/85

By DEAN FOSDICK
The Associated Press

JUNEAU — Only three of about 35 permit hunts in Southeast Alaska would be affected by two recent court rulings on subsistence under emergency regulations adopted Friday by the state Board of Game.

That means virtually no changes in the way deer, goats, brown and black bear are hunted in Alaska's Panhandle, said Don McKnight, the state Fish and Game Department's Southeast regional game supervisor.

But several moose hunts may have to be put on hold until officials can determine if they'll be able to handle the paper work in time, he said.

"The board is taking a look at all the hunting populations for all species and deciding where subsistence hunting is being impeded," McKnight said. "In Game Unit One (Southeast Alaska), they've found that court rulings should not change the way things were being handled for all species and all hunts except three moose hunts."

Those include the Berner's Bay moose hunt near Juneau (15 animals), the Haines Unit 1-D herd (15 bulls) and the

Yakutat forelands fall hunt (50 bulls), McKnight said.

"We'll have to determine who gets the permits," he said. "We'll probably do things by questionnaire, rating information on a number of things — local unit residence, hunting history and availability of other resources."

"A computer will score it and the people with the highest scores will do the hunting," McKnight said. "It will still be a lottery, but it won't be open to the general public, only to people who have met subsistence requirements."

"But I don't know yet if those hunts will be conducted at all," he said. "It may be logistically impossible."

Alaska's complex hunting and trapping regulations depend upon a system of 26 game management units, 14 of which are divided into subunits.

Those units are the bedrock for all area regulations. Hunting and trapping seasons, bag limits, possession limits, methods and means of taking game are set out in terms of those geographic units.

All that, however, was

See Page B-3, SUBSISTENCE

Subsistence rulings weighed

Continued from Page B-1.

thrown up for grabs by two recent court cases pertaining to subsistence. The rulings mean that virtually all Alaskans now qualify for subsistence rights.

Gov. Bill Sheffield introduced a bill about midsession that would have returned first subsistence rights to rural users. Legislative leaders refused to rush the bill into law, however, contending the issue was too complicated and politically charged to be solved in two months.

They shelved a long-term solution for the subsistence issue until next year, forcing

the Game Board to come up with a temporary set of rules to determine who gets to hunt what in Alaska this fall.

While the state Department of Fish and Game manages the state's wildlife resources, it's the fish and game boards which separately determine the allocations.

The Game Board began what's expected to be 10 to 14 days of meetings Monday in efforts to resolve the subsistence questions raised by the courts. A set of statewide regulations could be ready as early as Wednesday, according to Paddy McGuire, a spokesman for the Fish and Game Department.

Nelchina herd hunt plan set

FBKS
6/19/85

By DAN JOLING
News-Miner Bureau

JUNEAU—"Tier 2" subsistence hunters will get first crack at harvesting the roaming Nelchina caribou herd this fall, the state Board of Game decided this morning, and Fairbanks resident may rank third behind the Matanuska Valley and Anchorage in qualifying.

A Tier 2 designation means all out of state residents will be excluded from receiving permits to hunt Nelchina caribou, which roam in game management units from the Palmer-Wasilla area almost to the Fairbanks North Star Borough.

It also means that under a scoring system adopted last week, residents who live within the game management units where the caribou roam could earn the most points for qualifying as Tier 2 hunters.

Residents outside the actual hunt area but within the game management unit, such as Anchorage, would earn the next greatest number of local residency points.

Adjacent game management units such as Unit 20, which includes Fairbanks, would receive fewer points.

The Tier 2 designation is to be applied if a biological resource remains threatened if all subsistence hunters are allowed to receive permits.

Hunters will be ranked in the 90-point scoring system based on answers they provide on a questionnaire.

(See GAME, page 3)

GAME . . .

(Continued from page 1)

Residents living in game management units 11, 12, 13 and sub-units 14A, 14B will earn the maximum—30 points—for local residency. Anchorage, which falls in sub-unit 14C, would earn 20 point and Fairbanksans in Unit 20 would earn 10 points for local residency.

Besides local residency, hunters will be ranked based on customary and direct dependence on the resource as the mainstay of one's livelihood and the availability of alternative resources.

The Nelchina caribou hunt has been one of the state's most popular, in part because of the accessibility via the Parks Highway and other roads.

Last year 450 permits were reserved for local residents and 1,450 distributed based on a random drawing. This year all 1,800 will be issued based on the Tier 2 ranking.

A court decision this year determined that the definition of subsistence user could not be limited to just rural residents, which made virtually every Alaskan a potential subsistence hunter.

A second court decision determined that subsistence hunting

could be used as a defense for poaching arrests where the Board of Game has not adopted specific subsistence hunting regulations.

The Game Board has been meeting in emergency sessions since June 10 to adopt subsistence regulations for each hunt in the state.

So far the board has designated all or part of the following hunts as Tier 2 hunts:

Southeast:

1C: Berners Bay moose.

1D: Haines moose.

5A: Yakutat moose, except Nunatak bench.

Southwest:

Kodiak, Crown Mountain goats.

Southcentral:

11: Chitina bison herd.

6C: Cordova road system moose.

7: Placer River moose.

13: Moose.

14A: Antlerless moose in the Wasilla-Palmer area.

14C: Moose in the Anchorage-Girdwood area.

15A: West Kenai Peninsula moose.

15B: 50-inch rack central Kenai Peninsula moose.

16B: Skwetna and Tyonek area moose.

13, 14A, 14B: Nelchina caribou.

Daily News - Miner*"Independent in All Things . . . Neutral in None"*

Other opinions expressed on this page do not necessarily reflect those of the Daily News-Miner.

6/19/85

Long-term solution needed

It appears that Alaska will be able to restore some order to the management of game resources under the plan currently being structured by the Board of Game.

We shouldn't fool ourselves into thinking that this plan will provide us with more than an interim fall-back position, though. It's sure to need fine tuning after implementation begins and it skirts around the requirement under state law that commercial and sport fishing and hunting be eliminated before subsistence activities can be restricted. Nor does it address the inequity in federal law that requires that we accord a subsistence priority to all rural residents.

Under the Game Board's approach, all Alaskans are considered Tier 1 subsistence hunters. Where there are adequate game resources to meet the needs of all hunters; no restrictions on who can hunt will be applied. The usual seasons and bag limits will prevail. If game resources are not adequate to meet the needs of all hunters, only those who qualify as Tier 2 subsistence hunters will be permitted to hunt. Tier 2 subsistence hunters will be determined under a point system that ranks three factors: customary and direct dependence on the resource as a mainstay of one's livelihood; local residency; and availability of alternative resources.

It's too soon to tell just how the Game Board's plan will work. For most Alaskans, we'll need to figure out just what it means in terms of hunting in our favorite area; managing game resources for sustained yield, and providing access to game resources for people truly in need.

During the months before the next legislative session, we urge legislators to examine this system, as well as the others that are before it. A bill introduced by Rep. Mitch Abood basing the subsistence priority on income is a far simpler approach that should be seriously considered.

Alaska needs a long-term solution to the problem of balancing subsistence needs with biologically sound game management and fair treatment for all Alaskans. Since we've gained some time within which to work, the Legislature should pursue such a solution aggressively.

Abood scott's at subsistence 'chaos'

by Dean Fosdick
Associated Press

Juneau — Warnings that "total chaos" would come of the legislature's decision to shelve subsistence legislation last session appear to have been little more than political noise, according to Sen. Mitch Abood, R-Anchorage.

Abood, who said Wednesday he will hold public hearings on the issue in August, made the comments while the state Game Board was putting the final touches on temporary rules meant to determine who will hunt what in Alaska this fall.

The panel has been meeting in Juneau for the past 10 days, trying to resolve subsistence questions raised by courts. Two recent court rulings can virtually all Alaskans qualify for subsistence.

But regulations drawn up by the Game Board that would set up a point system to distinguish among subsistence hunters could be ready by Friday, officials said.

"I think they're approaching it, but they're not going deep enough," Abood said of the Game Board. "There's no reason why a guy from Spenard can't qualify as a subsistence user."

Gov. Bill Sheffield introduced a bill about mid-session that would have returned first subsistence rights to rural users. Legislative leaders refused to rush the bill into law, however, contending the issue was too complicated and too politically charged to be solved in two months.

Native group wants rods, reels allowed for subsistence fishing

Soldotna (AP) — The Kenaitze Tribal Council has passed a resolution urging state officials to allow the use of rods and reels for subsistence fishing.

Clare Swan, spokeswoman for the 600-member group, said use of such equipment would not be unusual. "For thousands of years, natives have used hook and line to subsist on fish," she said.

Currently, the only way to subsistence fish for salmon in Alaska is with nets.

In early May, the Department of Fish and Game denied Tom Brown of Homer a subsistence permit to fish for salmon in the Kenai River

with rod and reel.

Brown appealed, saying the Board of Fisheries and the Department of Fish and Game are violating state law by denying him subsistence rights on the Kenai River.

Currently, the boards of Fish and Game are in a quandary about subsistence rules which were struck down by the state Supreme Court earlier this year. The court ruled that the regulations restricted subsistence to rural residents, and that was unconstitutional.

Now, the boards are trying to come up with new ways to determine who can qualify for subsistence rights.

They shelved a long-term solution for the subsistence issue until next year, forcing the Fish and Game boards to come up with some short-term allocations.

"They said there would be total chaos," Abood said. "I haven't seen the slightest bit of chaos. People are concerned, but they aren't going to go out and kill the golden goose."

Nine subsistence bills were referred to his Senate State Affairs Committee before the legislature adjourned May 12, he said.

"One of those bills was mine,"

Abood said. "It would define subsistence. No one has done that yet."

The first public hearing probably will be held the second week of August in Anchorage, he said.

"I don't want to interfere with commercial fishing," Abood said. "We'll probably go up to Fairbanks later this summer."

"There will be plenty of opportunities for the public to comment. I want to make sure we accomplish something with these bills. Whatever emerges won't be like the Sheffield bill that wouldn't have changed things

one little bit."

Sheffield press aide Molly McCammon said the governor's bill would have made a statute out of the same subsistence regulations "that have been working for the last three to four years, providing a balance among all user groups."

"What we have now is a situation where the department (of Fish and Game) and the boards have to use every means available to protect the resource," McCammon said. "The department has said all along that the potential for chaos is out there. And the potential is still there."

"It depends upon the public and how it responds to things," she said. "Some of those subsistence fisheries don't start until next month, so it (legislative inaction) will have kind of a cumulative effect."

Kodiak hunts may be allowed

6/20/85

News-Miner Bureau

JUNEAU—One of Alaska's prime trophy animals, the Kodiak brown bear, will be available for subsistence hunting this fall, with one significant caveat.

If you declare yourself a subsistence hunter, you'll be required to forfeit the hide and skull of the animal to the Department of Fish and Game. You'll also be required to "immediately" salvage the bear carcass for human consumption.

For sport hunters, Kodiak brown bear hunting will be business as usual, without a requirement to eat the meat.

Alaskan sport hunters will be eligible to kill one brown bear every four years after obtaining a registration permit. Out-of-state residents will be able to hunt in the presence of a "second degree of kindred" relative or a registered guide.

The state Board of Game has met since June 10 to draw up emergency regulations for subsistence and sport hunting.

The Alaska Supreme Court ruled in February that the Board of Fisheries had improperly interpreted the 1978 subsistence law limiting the definition of subsistence users to rural residents. The court said the pool of subsistence users could not be limited until other "uses" had been curtailed.

For hunting, that means virtually every Alaskan is eligible to be called a "Tier 1" subsistence hunter if a game animal is eaten.

The court said that the 1978 law provided three criteria—direct dependence, local residency and availability of alternative resources—for narrowing the pool of subsistence users to "Tier 2" users if there was too much hunting pressure brought on a species by allowing all Alaskans to subsist on the hunt.

In a subsequent decision, the state Court of Appeals ruled that in the absence of specific subsistence regulations for each particular hunt in the state, Alaskans could

claim subsistence hunting as a defense against poaching violations.

The Game Board has declared about a dozen hunts to be Tier 2 hunts, but decided against it for Kodiak brown bear.

The board determined that there are subsistence users but that their ability to subsistence hunt would not be impaired by allowing a general hunt.

Both subsistence and general hunting will be open Oct. 25 to Nov. 30 and again from April 1-15, 1986.

However, to win a permit every year, subsistence bear hunters will be required to sacrifice bear parts sought by trophy hunters.

"The hide and skull must be surrendered to the department within five days," said Beth Stewart, director of the division of boards.

Brown bear meat is not considered palatable by significant numbers of hunters and the Game Board has power to require the general requirement to waive salvaging the meat.

State returns hunters' fees

FBY 6/22/85

By DEAN FOSDICK
Associated Press Writer

JUNEAU—Fish and Game officials in Anchorage will be returning \$275,000 in fees for 55,000 permit hunt applications—an exercise prompted by new subsistence rules and one that will cost the state about \$60,000, a spokesman said Friday.

Sterling Eide, regional game supervisor for the department's Southcentral office, said new subsistence regulations adopted by the state Game Board during an emergency meeting in Juneau have changed the way hunt permits for wildlife will be allocated in Alaska this year.

Along with costing the state a substantial amount of money for overhead and overtime costs, implementing the new rules also could mean closing some of the early permit hunts scheduled for this fall, Eide said.

"We haven't got it all worked out yet," Eide said. "There's a possibility we won't have all the permit applications out and back for the early seasons. With mailing, plus scoring, we think we'll have a tough time getting these things out by the 15th of October or the 1st of November."

Changing the rules for about 100 hunts around the state will cost the state some cash, he said.

"We'll be sending back money for fees for the drawing permits we've already got," Eide said. "That will amount to \$275,000 for about 55,000 applications. It will cost us around \$60,000 to administer, but we'll get back some of that money back with the new permits."

Two court decisions earlier this year determined that Alaska's subsistence law had been too tightly applied because it restricted sub-

The Board of Game adds Delta bison and Minto moose to the subsistence system, Page 3.

sistence hunting and fishing to the state's rural residents.

Those rulings mean that virtually all Alaskans now qualify for subsistence rights, a situation the Game Board has been trying to clarify.

The panel last week adopted a point system designed to prioritize the needs of one subsistence hunter over those of another.

The point system would apply only to Alaska's big game—moose, caribou, brown and black bear, sheep, goats, elk, musk ox and bison.

And it means applicants now will have to submit affidavits with their permit applications, Eide said.

"They'll be weighted," he said.

"Scoring will depend in part on where you live, how dependent you are upon the resource and whether you have access to other resources.

"There could be problems with some local hunts where people year after year will get the permits," Eide said. "Like Cordova, where there's a limited number of animals. Those most needy and most dependent will get it."

"People getting permits the first year will go higher in the scoring the next year and the next," he said. "That could lead to some dissatisfaction on the part of people who don't get permits."

Changes will be made in several of Alaska's most popular big-game hunts—the brown bear hunt on Kodiak, some Anchorage-area moose hunts and the Nelchina caribou hunt.

(See *SUBSISTENCE*, page 3)

Game board wraps up subsistence rules

By DAN JOLING
News-Miner Bureau

JUNEAU—The state Board of Game Friday added Delta bison and Minto moose to the list of big game animals for which the state's most stringent subsistence criteria will apply.

The board put the finishing touches on the subsistence regulations after 12 straight days of emergency meetings Friday in sessions that sometimes started in the morning and ended well past business hours.

The board will now have approximately five months to see how well a new point system for ranking subsistence hunters works.

The next regular meeting of the board is in November. Rather than requesting proposed regulations as is customary, the board will ask for public testimony on its emergency regulations.

"We did the best we could with the available data and information we had," said Board Chairwoman

Brenda Johnson of Nome. She said she expects some adjustments.

"Hopefully the public hearings will help us fine tune some of these areas," Johnson said.

For example, the board set up a subsistence hunt for Kodiak brown bears even though sport hunters are allowed to leave the carcass in the field and there's little evidence that anyone eats the meat.

As the regulations are written, the Kodiak bear subsistence hunt lets hunters avoid a random drawing for a permit but requires them to forfeit the hide, skull and claws. Also, subsistence Kodiak brown bear hunters will be allowed only one bear every four years and will only be able to hunt in the spring season.

If that's a hardship for subsistence hunters, they'll let the board know, Johnson said.

The meetings were forced by a pair of court decisions, including one by the Alaska Supreme Court.

In February the court ruled that the Fisheries Board, using identical law, had incorrectly interpreted "subsistence user" to mean a rural resident. The court said no Alaska resident could be restricted from the pool of subsistence users until all other uses had been curtailed.

If a species faced the threat of overharvest from too many subsistence users, the court said, a hunt could be restricted to "Tier 2" hunters based on criteria in the 1978 subsistence law: the hunter's customary and direct dependence on the resource as the mainstay of his livelihood, local residency and availability of alternative resources.

Applicants for Delta bison, Minto moose and other Tier 2 hunts will be required to fill out questionnaires to see how they compare to other hunters in the board's 90-point system.

The limited number of permits will be issued to those who rank highest in the point system.

Fish & Game Department officials say it will take at least a week to print the new regulations and two weeks to mail out applications for Tier 2 hunts.

Under the old regulations, applications for big game hunts were due at the end of May. Those applications and fees will be returned by the department.

Hunters will have at least 30 days to file new applications.

The board voted unanimously to give the Fish & Game Department commissioner authority to adjust season openings as necessary to process the new Tier 2 paperwork, and hunters may find some new dates on their customary hunts.

Besides Delta bison and Minto moose, the Game Board designated sheep hunts in the Tok Management Area, the Delta Controlled Use Area and parts of Game Subunits 20E and 20D as Tier 2 hunts.

Caribou harvests in parts of Subunits 20A and 20D will also be Tier 2 hunts.

SUBSISTENCE . . .

(Continued from page 1)

"There will be very little disruption in Kodiak," Eide said. "There will be a registration hunt for non-residents and a drawing hunt for residents.

"The board also will provide a spring (bear) season for subsistence hunters, but they'll have to salvage all the edible meat plus turn the hide, skull and claws over to Fish and Game," he said. "That

will limit it to the bears people need to eat, just a few bears."

The Nelchina caribou hunt probably will be limited to about the same number of hunters as last year—1,900 out of 11,000 applicants—but their composition will be changed and subsistence hunters will be looking at a shorter season, Eide said.

"We had a 55 percent success ratio last year," he said. "But with

scoring weighted toward people who have been successful in the past, and with it going more toward people who need the resource, we think they'll hunt harder this year.

"That will probably enhance the take but with a shorter season, limit it to about the same number of animals," Eide said.

Moose hunters in the Anchorage area—Hillside, Eklutna, Fort Richardson and others—also will

be chosen according to the point system, he said.

"We figure we'll be seeing a lot of moose hunters who score about the same, so we'll have to select the permits through some kind of lottery," he said. "Like the other hunts, that will mean looking more favorably at people who live in the same area they hunt and who've hunted there longer and have fewer resources."

Rules thin out Anchorage hunters

By CRAIG MEDRED
Daily News reporter

ANCH. NEWS
6/22/85

Most Anchorage hunters are probably going to lose the opportunity to hunt caribou in the Nelchina Basin — the state's most popular caribou hunting area — this fall, according to state wildlife officials.

New subsistence regulations approved by the Alaska Board of Game last week make the Nelchina Basin

one of many areas in the state where low-income, local residents now get a priority to harvest big game.

"I will say there will be a lot fewer people from Anchorage who will get to hunt, definitely," said Joel Bennett, a member of the board.

Last year, approximately 11,000 people from around the state competed in a lottery for about 1,200 permits to hunt in the area. This year, those

permits — plus about 800 that had originally been reserved for subsistence hunters in Glennallen, Paxson and other small communities — will be doled out on the basis of a complicated point system, said Lew Pampilin, director of the state Division of Game.

Prospective hunters will score points for place of residence, customary dependence on the caribou for

food and economic need for the meat, he said.

The rules will make subsistence permit holders from last year shoo-ins for permits this year, said Pampilin. The remaining 1,200 permits could likely go to residents of the Palmer and Wasilla areas. Those communities get a residency preference over An-

See Back Page, HUNTING

Continued from Page A-1

chorage, he said.

"If you've never hunted there and you live in Anchorage and you have an average income, you probably wouldn't have much of a chance (to get a permit)," Pampilin said.

Other hunts that will be similarly affected include the Delta bison hunt, the Tok Glacier dall sheep hunt and the Fort Richardson archery hunt for moose. Like the Nelchina hunt, they are among the most popular permit hunts in the state.

Fort Richardson will likely be the site of a rifle hunt instead of a bow hunt this year because the board concluded archery impairs the opportunities for some subsistence hunters, said Bob Hinman, deputy director of the game division.

Most non-permit hunts for moose, caribou, sheep, deer and bears will still be open to Anchorage residents, Pampilin said, but hunters will have difficulty sorting out new regulations.

Some permit hunters have been changed to registration hunts, he said. Some seasons

have been shortened, and many hunts will be governed by two separate sets of regulations — subsistence regulations and general hunting regulations — depending in part on what the hunter plans to do.

On Kodiak Island, for instance, a hunter who wants to subsistence hunt for bears can do so during any open season, but he must forfeit the hide and skull of the bear to the state and keep only the meat.

A hunter interested in the hide and skull must participate in a permit or registration hunt, but he can discard

the meat, Pampilin said.

"It's wild," he said. "There will be a lot of confused people. It's going to be tough for most people to understand it. It's got to be like chaos. That's probably an understatement."

The changes in hunting rules were mandated by an Alaska Supreme Court decision that subsistence — the use of fish or game for personal consumption — must be given priority in the harvest of Alaska resources.

A subsequent state Court of Appeals ruling that subsistence could be used as a

defense for poaching in areas without subsistence hunting regulations forced the game board into emergency sessions to write the rules.

"We only did what the courts told us to do," said Bennett. "We got the straight stuff from the attorney general's office and there really wasn't much wiggling room. I think we alienated every Alaskan in the state."

State wildlife officials said the timing of the board's action may make it impossible to conduct some of the fall permits hunts.

Some changes made in popular big-game hunts

By DEAN FOSDICK
The Associated Press

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"We had a 55 percent success ratio last year," he said.

6/24/95

Taku River reopens to subsistence fishing

The Juneau Empire

Commercial fishermen won't be the only ones with their nets in the Taku River this summer, thanks to an Alaska Supreme Court ruling opening subsistence to all Alaska residents.

After being closed to subsistence salmon fishing for about 10 years, the Taku River south of Juneau will be opened to local subsistence users from July 1 through Aug. 15, a Department of Fish and Game official said today.

The six-week subsistence season coincides with what should be a peak period for sockeye salmon in the Taku, said Paul Larson, Southeast management coordinator for the Commercial

Fisheries Division.

Subsistence catches in the Taku will be limited to 10 salmon per person or 25 per household. Interested persons may apply for a subsistence permit at the Fish and Game office in Douglas. To qualify, a person must be at least a 12-month resident of Alaska. About 10 subsistence permits for fishing in the Taku have been applied for so far.

Subsistence hunting and fishing rights were granted to all Alaska residents following a February ruling by the Alaska Supreme Court. The high court ruled that the Alaska Board of Fisheries interpreted Fish and Game

Continued on Page 16

Taku subsistence...

Continued from Page 1

regulations too broadly by limiting subsistence hunting and fishing to rural residents.

The subsistence permit for salmon fishing on the Taku is valid for two weeks but additional permits may be sought if a person hasn't caught the limit during that period. Gillnets or

beach seines may be used.

Larson's relatively strong run of sockeye salmon is expected in the Taku River this season so the fish harvested by subsistence users shouldn't be a major conflict with the commercial gillnet fleet.

Gillnetters had their first opening of the season last week and fishing in the

Taku River area and Lynn Canal was reported very slow, Larson said. About 40 gillnetters fished the Taku during the opening netting about 1,700 sockeye and 350 king salmon.

The late spring has apparently delayed the sockeye run, which is expected to be about 1.5 million fish in Southeast this year, according to Fish and Game projections. An average-sized run of about 70,000 sockeye is expected in the Taku this season.

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CHAPTER 90. GENERAL PROVISIONS

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- 5 AAC 90.010 is repealed
- 5 AAC 90.020 is repealed

CHAPTER 92. STATEWIDE PROVISIONS

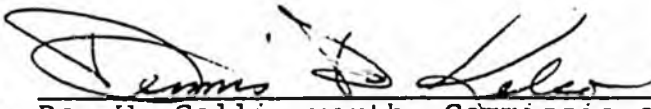
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- 5 AAC 92.037. PERMIT FOR FALCONRY

It is estimated that this action will require increased appropriations as follows: FY 86, \$321,400; FY 87, \$37,500; FY 88, \$37,500; FY 89, \$37,500.

Copies of these regulations may be obtained by writing to the Alaska Board of Game, PO Box 3-2000, Juneau, Alaska, 99802, or may be inspected at any Department of Fish and Game regional office.

Notice is given that the Alaska Board of Game intends to make these regulations permanent under AS 44.62.260, and any person interested may present written statements or arguments relevant to the proposed action by writing to the Alaska Board of Game, PO Box 3-2000, Juneau, Alaska, 99802, so that comments are received no later than August 30, 1985.

DATE: July 5 1985
Juneau, Alaska


for Don W. Collinsworth, Commissioner
Alaska Dept. of Fish and Game

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- 5 AAC 88.002. APPLICATION OF REGULATIONS
- 5 AAC 88.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 88.010. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BISON
- 5 AAC 88.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
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