SCOMM

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HB

58

Official Business

Alaska State Legislature

House of Representatives

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-4924

Special Committee on Fisheries

M E M O R A N D U M

DATE: January 19, 1985

TO: Members
Special Committee on Fisheries

FROM: Representative Peter Goll
Chairman

SUBJECT: Fisheries Priorities

The Special Committee on Fisheries will discuss goals and priorities at its initial meeting, Tuesday, January 22.

I hope you have the opportunity before the meeting to identify the issues you would like the committee address this session.

In addition to hearing referred bills, the role of the Fisheries Committee has been defined to include policy development, research and trouble shooting. This should allow us to get involved in most areas of concern to the fishing community.

To help expedite the priorities identification process, I have prepared a list of issues for your consideration. These have been brought to me by the fishing community, fellow legislators and members of the administration.

LIMITED ENTRY Nearly 14 percent of the permits originally issued to Natives now are in the hands of non-Natives. This has increased from less than 4 percent in 1979. The movement of permits out of rural Alaska is a major policy matter requiring investigation by the legislature.

AQUACULTURE Considerable interest has been expressed to the Departments of Fish and Game and Commerce concerning the pen-rearing of salmon, but the state has developed no policy governing fish-farming activities.

TAXATION Industry representatives have requested a review of the state's fisheries taxes, examining their relation to the developing fisheries and the expansion of Alaskan manufacturing of fish products.

QUALITY Some of the seafood quality assurance programs created by the legislature following the 1981 botulism crisis have yet to be implemented. Quality problems also are increasing in Alaska's halibut fisheries.

SALMON TREATY The legislature should review the impact of the recently negotiated U.S./Canada Salmon Treaty on Alaska's fishing fleets.

FOREIGN FLEETS AND INCIDENTAL CATCH The language of the legislation creating America's 200-mile zone appears to forbid the allocation of fisheries fully utilized by Americans to foreign fishermen and processing companies, yet the North Pacific Fishery Management Council has been allowing such harvests.

STREAM MANAGEMENT The management of lands adjacent to salmon spawning streams is an issue of increasing concern throughout the state.

Many other important issues remain. Your recommendations on priorities are appreciated.

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Special Committee on Fisheries

MEMORANDUM February 28, 1985

TO: Members
Special Committee on Fisheries

FROM: Representative Peter Goll

SUBJECT: Supreme Court Decision on Subsistence

Attached is the recent decision by the Alaska Supreme Court striking down the Board of Fisheries' management plan for Cook Inlet subsistence salmon fisheries. The issue appears likely to surface in the Legislature in the next couple weeks.

The basic message of the decision is that the subsistence priority cannot be restricted to rural residents. The Board of Fisheries management plan limited subsistence use in Cook Inlet to residents of three rural Native villages--Tyonek, English Bay and Port Graham. The Board adopted the restrictive management plan after subsistence fishing in Cook Inlet jumped dramatically. The number of subsistence fishing permits rose from 323 in 1978 to 1,331 in 1980; the subsistence salmon harvest went from 3,735 to 14,755.

The court essentially said all personal consumptive users of fish and wildlife are subsistence users who are entitled to the state's subsistence priority. This means that the board must first restrict all commercial and sport hunting and fishing before cutting back on subsistence activities.

THE SUPREME COURT OF THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN McGAHAN, SR., ANDY JOHNSON, MARGIE KIVI, J. W. WARE, DICK FRANCIS, DON GROLESKE, KEN JORDON and SHIRLEY DEVAULT, Appellants, v. ALASKA DEPARTMENT OF FISH AND GAME, and ALASKA BOARD OF FISHERIES, Appellees, and THE ALASKA FEDERATION OF NATIVES, Intervenor.	File Nos. 6824/ 7181 O P I N I O N
ALASKA DEPARTMENT OF FISH AND GAME, RONALD SKOOG, ALASKA BOARD OF FISHERIES, Appellants, v. LOUIS GJOSUND, DORA MULCH, and KACHEMAK BAY SUBSISTENCY GROUP, INC., Cross-Appellees.	File No. 7410 [No. 2911 - February 22, 1985

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

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

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

MOORE, Justice.

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

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

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

I. SUMMARY OF FACTS

Records indicate that subsistence fishing in Cook Inlet was minimal through the mid-19'.0s.[1] However, a core group of residents of each Cook Inlet community has traditionally fished for Cook Inlet salmon for subsistence. Participation in the subsistence salmon fishery is most visible in the smaller, more isolated villages, where the subsistence group represents a larger percentage of the population.

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

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

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

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

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2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

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(Footnote Continued)

the Board of Fisheries.

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

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

5. AS 16.05.251(b) states:

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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6. AS 16.05.251(a) states:

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

(Footnote Continued)

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

(Footnote Continued)

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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

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

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

II. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

III. LEGISLATIVE HISTORY OF THE 1978 SUBSISTENCE LAW

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

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

15. The board stipulated in 1982 that it violated

(Footnote Continued)

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

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

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

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

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(Footnote Continued)

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

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

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

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

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

THE SUPREME COURT OF THE STATE OF ALASKA

ARTEMIE KALMAKOFF, Appellant, v. STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellee.	)	File No. 7767 O P I N I O N [No. 2900 - January 11, 1985]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karl S. Johnstone, Judge.

Appearances: Craig J. Tillery and Wilson A. Rice, Reese, Rice and Volland, P.C., Anchorage, for Appellant. Sarah Forbes, Assistant Attorney General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

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

RABINOWITZ, Justice.

Nine years ago, Artemie Kalmakoff applied for a limited entry permit for the Chignik purse seine salmon fishery. The Commercial Fisheries Entry Commission denied his request and the superior court affirmed this denial. On appeal, he attacks the Commission's factual findings and parts of the point system that is used to determine who receives permits. We affirm in part, reverse in part, and remand for further proceedings.

After it received Kalmakoff's application, the Commission's staff eventually decided that he should be awarded seventeen points.[1] He had fished as a gear license holder from 1960 through 1966 (7 points), and fished as a crewman on other people's boats from 1967 through 1972 (6 points). Because he had been living in Ivanof Bay, an isolated village in a primarily rural census district, he received four points on the ground that alternative occupations to fishing were not readily available. Points for consistent participation as a gear license holder, investment in gear, and income dependence on the fishery

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1. For a general description of the Limited Fisheries Entry Act, AS 16.43.010-.990, and the point system which governs permit applications, see Rose v. CFEC, 647 P.2d 154, 155-57 (Alaska 1982).

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were not awarded. Thus, Kalmakoff was classed at seventeen points, three short of the number needed for a permit.[2]

He challenged this classification and presented his claims at an administrative hearing on March 19, 1979. More than 20 months later, the hearing officer issued a recommended decision, rejecting Kalmakoff's claims for points for gear ownership and for income dependence. The gear ownership claim depended on Kalmakoff's alleged ownership of a usable purse seine, including a usable net, on January 1, 1973. See 20 AAC 05.630(b)(3)(C). The income dependence claim depended, at the administrative stage, on Kalmakoff's assertion that he had been a de facto gear license holder during 1972, and that this entitled him to income dependence points under the Commission's regulations and interpretive decisions. See 20 AAC 05.630(b)(1).[3] The Commission adopted the hearing officer's recommended decision on November 19, 1981. The superior court affirmed that decision and rejected Kalmakoff's attack on the regulations. This appeal followed.

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2. The Chignik purse seine salmon fishery is a "20-point" fishery. See 20 AAC 05.640 and 05.320(6).

3. On appeal, Kalmakoff challenges the income dependence point regulations themselves. He could not do so at the administrative hearing because a hearing officer has no power to set aside a challenged regulation. See 20 AAC 05.815(b).

I

Initially, Kalmakoff asserts that the Commission denied him a meaningful opportunity to be heard. We disagree. Formally, the Commission did all it should have done. It supplied Kalmakoff with copies of settlement sheets, which record transactions between fishermen and buyers. It wrote him thirty days before the scheduled hearing, informing him that he had a right to have an attorney or other representative present at the hearing, instructing him of other rights, and offering help in locating evidence. The Commission did not tell him that he could bring a translator if he needed one, but there is no indication in the record that it knew or should have known, before or even during the hearing, that Kalmakoff's command of English was inadequate. At the hearing, Kalmakoff was accompanied by members of his family and a personal representative. Although the hearing officer asked the Kalmakoff family "not to assist Mr. Kalmakoff in his answering," the hearing officer later allowed Mrs. Kalmakoff to translate a question, asked extensive questions of his own, and heard testimony from Joe Kalmakoff, Mr. Kalmakoff's son. Thus, our review of the record does not reveal a denial of due process.

In itself, we see no constitutional violation in the Commission's failure affirmatively to provide an attorney or an interpreter for Kalmakoff. No one requested such

assistance. Kalmakoff was told that he had the right to have an attorney present. He did not exercise this right, choosing instead to have at the hearing a non-attorney as his personal representative.[4] Nor is it obvious to us that the lack of an interpreter denied Kalmakoff due process of law. When translation was necessary, Mrs. Kalmakoff did the translating. Further, review of the recording of the hearing leads us to agree with the Commission that Mr. Kalmakoff's faulty memory, rather than his lack of fluency in English, was primarily responsible for his testimony being incomplete and ambiguous.

Limited Entry, unlike, for example, Social Security Disability Insurance, is not a benefit program for which hearing officers have an affirmative duty to develop the evidence. Due process considerations underlie a hearing officer's duty to ensure that a full and fair hearing takes

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4. To the extent that Kalmakoff is asking us to hold that applicants have a constitutional right to be represented by Commission-appointed attorneys at administrative hearings, we reject his invitation. "While civil litigants have a constitutional right of access to the courts in limited situations, they have no general right to the assistance of counsel once access has been provided." Catz and Firak, The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard, 19 Harv. C.R.-C.L. L. Rev. 397, 407 n.41 (1984). The record shows that Kalmakoff was in occasional contact, before and after the hearing, with staff attorneys from the Alaska Legal Services Corporation.

place only if the benefit which a program provides is vitally important to those eligible for it.[5] A limited entry permit, while economically important to the person who applies for it, does not usually stand between that person and destitution. Assuming for purposes of argument that the hearing officer could have done more to assist Kalmakoff in remembering events which might have supported his point claims, we hold that this failure does not in and of itself constitute a denial of due process of law.

II

Artemie Kalmakoff bought a purse seine in 1963 or 1964. If the seine was "used or to be used" in the Chignik fishery as of January 1, 1973, he should have received three gear ownership points under 20 AAC 05.630(b)(3)(C).[6] The hearing officer's findings and conclusions are as follows:

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5. Early federal cases holding that in social security disability matters hearing officers have an affirmative duty to develop evidence relied upon 20 CFR § 404.927 as support for their holdings. See, e.g., Coulter v. Weinberger, 527 F.2d 224, 229 (3d Cir. 1975). This regulation no longer exists, but the duty remains. See, e.g., Lewis v. Schweiker, 720 F.2d 487, 489 (8th Cir. 1983). Due process concerns must therefore underlie the duty.

6. Under 20 AAC 05.630(b)(3), an applicant can receive points for "investment . . . in vessel, gear or set (footnote continued)

Applicant's son testified that he used his father's purse seine in the Chignik purse seine fishery in 1969, that after that season the seine was stored, and then cut into pieces for use in the subsistence fishery sometime before 1972. Applicant testified that he used the old lead and cork lines and new webbing to construct a seine for the Chignik purse seine fishery in 1974. No bill of sale nor depreciation schedules were introducted [sic] evidencing seine ownership as of January 1, 1973.

. . . .

Applicant's claim of gear ownership under 20 AAC 05.630(b)(3)(C) must fail because of the testimony at hearing. As detailed in Case File 75-324 (currently under Commission consideration), 20 AAC 05.630(b)(3) requires that in order to receive gear ownership credit an applicant must have owned gear as of January 1, 1973, that was used or to be used in the fishery for which application is made and that "gear" in the salmon net fishery includes the net.

The testimony at hearing established that the gear in question, a purse seine, was, "cut up for subsistence" before 1972 and that the old lines were reused in 1974. It must be concluded, therefore, that the net portion of the seine was cut up before 1972 since the

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(footnote continued)

net site used or to be used in the fishery for which application is being made." The relevant part of this regulation reads:

> (C) Owns gear . . . . . 3 points
>
> (Gear must include the net in salmon net fisheries. In the troll fisheries, gear includes the lines, leaders and lures);

> lines were capable of being used on a full seine in 1974. Consequently, I recommend that no points be awarded for gear ownership because as of January 1, 1973, applicant did not possess gear as defined by 20 AAC 05.630(b)(3)(C).

(Emphasis added).

In our view substantial evidence does not support crucial parts of these findings.[7] According to the transcript, Artemie Kalmakoff's own testimony was ambiguous:

> Q. In 1972, was the web still good on the seine that you had?
>
> A. Yes.
>
> Q. Why did you decide to replace it in 1974?
>
> A. It snagged (indisc.) buy a new one yet.
>
> Q. When did it snag up and tear up, can you remember?
>
> A. In '72.
>
> Q. In '72?
>
> A. I don't remember?
>
> Q. You don't remember. Was it used in 1973?
>
> A. I don't remember.
>
> Q. Okay, you don't remember . . . .

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7. When a CFEC decision depends on factual findings, a reviewing court applies a "substantial evidence" standard. Jones v. CFEC, 649 P.2d 247, 249 n.4 (Alaska 1982).

The tape from which the transcript was made shows that Kalmakoff did not, in fact, say that the webbing snagged or tore up "in '72." What he actually said is unclear; the hearing officer may well have thought that he said "in '72," but the next question and answer should have established that he had said something else.

When Artemie Kalmakoff's son, Joe, testified, the interchange is easier to understand but not much more enlightening:

Q. And after you used the seine in '69, you say you stored it.

A. Um-hum.

Q. And then it was used after that in subsistence.

A. It was mostly subsistence.

Q. How? Was it cut apart . . . .

A. Yeah, it was all cut up.

Q. The web was used?

A. Yes.

Q. Can you remember what years when it was used?

A. There's still little pieces laying around.

Q. What shape was the webbing in in 1972?

A. It was pretty well used up.

Q. The lines were there but the webbing had been cut off of it?

A. In '72?

Q. Um-hum.

A. Or what year?

Q. In '72.

A. Well it's still physically down there in just little chunks, you know, so -- up in the (indisc.--simultaneous speech).

Q. That's the original web?

A. Yeah.

Q. What shape was it in in '72? The same shape as it is now?

A. It's pretty hard to say. It's used anyhow.

Q. But it had been used, say, before '72 for subsistence fishing?

A. Yeah, and it was used by my dad, I guess, in his fishing at Chignik, St. George.

In our view the evidence the hearing officer heard was far less definite than the conclusions he drew. His conclusions depend on his factual finding that the net had been "cut up for subsistence" before 1972. Joe Kalmakoff did not, however, testify that the net had been cut up before 1972. He said that the net had been cut up, but twice failed to say when this had occurred. Nor did his father's testimony establish when this happened. And, the fact that the net had been used for subsistence fishing before 1972 does not in itself show that it had been cut up

before 1972. It is possible to fish for one's subsistence with commercial gear. As far as the testimony itself is concerned, we conclude that there is no substantial evidence in the record that the net was not usable in 1973.[8]

On the other hand, the testimony does not show that the net was usable, and we think a holding that Kalmakoff had not carried his burden of proof on the issue would, on this record, have been difficult to challenge. The problem is that the hearing officer thought the testimony had established something which, in fact, it did not. His decision rests on his factual findings, not on burdens of proof. The superior court, reviewing the hearing officer's decision, held that the testimony was ambiguous, but that in any event Kalmakoff did not carry his burden of proof at the hearing. But the superior court's memorandum decision shows that it misinterpreted the hearing officer's reasoning: "Because of the conflicting testimony about when the net was torn, the hearing officer found Kalmakoff did not meet his burden . . . ." (emphasis furnished). This is not what the hearing officer found. His decision

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8. "It must be concluded," the hearing officer observed, "that the net portion of the seine was cut up before 1972 since the lines were capable of being used on a full seine in 1974." At first glance this is, as Kalmakoff argues, a non sequitur. Perhaps the hearing officer just meant to indicate that the lines had not been cut up.

concentrates on the net having been cut up, and does not mention burden of proof in this context. We thus conclude, so far as gear ownership is concerned, that both the hearing officer's decision and the superior court's affirmance of that decision were erroneous.[9]

Not all errors, of course, require reversal. We have employed a "harmless error" standard in reviewing administrative determinations. See North State Telephone Co. v. Alaska Public Utility Commission, 522 P.2d 711, 715 (Alaska 1974). The relevant federal cases suggest that a court reviewing an agency decision should be much more reluctant to find "harmless error" than it would be if reviewing a lower court decision.[10] With this in mind, we

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9. It is the Commission's decision, not the superior court's, which is our primary concern. When the issue before us is whether or not substantial evidence supports an agency's decision, we need not and do not defer to the superior court's conclusions on the issue. See, e.g., Interior Paint Co. v. Rodgers, 522 P.2d 164, 170 (Alaska 1974).

10. See Braniff Airways, Inc. v. C.A.B., 379 F.2d 453, 465-66 (D.C. Cir. 1967) (Leventhal, J.) ("Of course, an error cannot be dismissed as 'harmless' without taking into account the limited ability of a court to assume as a judicial function, even for the purposes of affirmance, the distinctive discretion assigned to the agency."); Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 n.16 (D.C. Cir. 1970) (Leventhal, J.) ("The [harmless error] doctrine must be used gingerly, if at all, when basic procedural rights are at stake."); cf. People of the State of Illinois v. I.C.C., 722 F.2d 1341, 1348-49 (7th Cir.

(footnote continued)

are hesitant to affirm the Commission on a ground it did not consider. One important fact about the hearing supports our reluctance. The Kalmakoffs' testimony about gear ownership was in large part a response to the hearing officer's questions. It is apparent from the record that neither Mr. Kalmakoff nor his representative knew precisely what information would be relevant in getting points for gear ownership. The information before the hearing officer, then, depended almost entirely on the questions he asked. If the hearing officer made up his mind too quickly -- and his factual findings suggest that he did -- he would not have asked questions that might have created a more complete record. Because the hearing officer effectively decided what information would be produced, taking on himself the role that a better represented applicant's personal representative would have assumed, we will not affirm his decision on the ground that Kalmakoff failed to introduce enough evidence. For similar reasons, we think that a

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(footnote continued)

1983) (Posner, J.) (Although "we are not permitted to say, as we would be if we were reviewing a district court decision, that though we have doubts about the propriety of the stated ground for decision there is another ground that shows the decision was correct and we affirm on it," court was "sure that the agency would if we remanded the case reinstate its decision," and "reversal would be futile," as court thought it "inconceivable" that if the agency had applied a different standard it would have come to a different conclusion.)

simple remand to the Commission for a determination of whether Kalmakoff met his burden of proof would be unwise. The appropriate disposition, given the ambiguities in the evidence, is a remand to the CFEC for a new hearing.[11]

III

Kalmakoff argues that he fished as a partner with a gear license holder in 1972, and that for this reason he should have received "special circumstances" points pursuant to State v. Templeton, 598 P.2d 77 (Alaska 1979).

Kalmakoff claimed that in 1972 he fished either with Frank Battishil (or "Bartishole"; it is not clear from the record how this name is spelled) or with Richard Culver on the boat "Mars." Apparently, he received 18.25% of the gross earnings. Testimony at the hearing did not establish what a crewman's normal share of the gross would have been during these years, or whether or not Kalmakoff's share was commensurate with what a partner would have received.

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11. Other members of Kalmakoff's family might be able to shed some light on the factual problems this record presents.

Kalmakoff also argues that the hearing officer applied the wrong legal standard. In its briefing, the Commission says that a net was "used or to be used" on January 1, 1973, if with ordinary repairs it could have been made usable for the next fishing season. Kalmakoff claims
(footnote continued)

The hearing officer found:

> It was never clearly established that in the years 1969 to 1972 applicant was [anything] but an experienced and knowledgeable crewman hired by licensed skippers who wanted to avail themselves of his experience and knowledge. Applicant's crew share reflected this and nothing more.

For this reason, the hearing officer concluded, Kalmakoff had not met his burden of establishing his qualifications for "gear license participation" points. See 20 AAC 05.520(a) and 05.820(d). Substantial evidence supports the hearing officer's factual finding, which we note was based on burdens of proof as well as factual conclusions. Kalmakoff contends, however, that the hearing officer applied the wrong legal test.

Kalmakoff is correct. The hearing officer's decision, written more than fifteen months after Templeton was decided and almost a year after the Commission decided not to enact regulations implementing Templeton, does not mention that case. Instead, the hearing officer referred to Commission decisions dealing with "constructive possession of a gear license," implying that Templeton points should only be awarded to people who: (1) were on board the vessel

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(footnote continued)

that this standard is inconsistent with other Commission decisions involving similar facts. The decisions he cites do not support his claim.

during fishing operations, while the actual holder of the gear license was absent; and (2) were under a belief that the gear license was being transferred to them. This standard does not purport to be a response to Templeton. Moreover, the State does not actually defend this standard in its briefing.[12] We therefore conclude that the hearing officer applied the wrong standard.

Nevertheless, the finding that Kalmakoff did not demonstrate that he was anything more than a crewman is supported by substantial evidence. If Templeton applies only to partners, not crewmen, then it is clear that Kalmakoff, who did not show that he was a partner, should not receive Templeton points. We thus affirm the CFEC on this issue, although the standard it used was inconsistent with Templeton.

IV

We now turn to a more general problem. The parties agree that in 1971 and 1972 Kalmakoff derived income from fishing. They also agree that he did not personally hold a gear license in those years. Commission regulations

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12. The Commission's present five-factor test for the award of Templeton points is at issue in Chocknok v. CFEC, File No. S-222.

reserve "income dependence" points for people who were gear license holders during the year being assessed, and for those who can show that "special circumstances" entitle them to income dependence points for the year in question. 20 AAC 05.630(b)(1) and (2). The Commission has determined that being a crewman is not a "special circumstance." See, e.g., Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980) (Apokedak I). Kalmakoff challenges this regulation and ruling, which combine to deny him any points for income dependence, as conflicting with the Limited Fisheries Entry Act, unconstitutional, and inconsistent with our own decisions. For the reasons which follow, we reject his arguments.

A. The Statutory and Regulatory Scheme.

The program prescribed by the Limited Fisheries Entry Act is complex, and the first part of our analysis depends on several specific provisions of the governing statutes. Before turning to those provisions, however, we think it appropriate to mention two important themes which run through these provisions and aid in their interpretation. First, the Act effectively transfers much of the legislature's rulemaking authority to the Commercial Fisheries Entry Commission. The statutes are general, but the regulations are necessarily specific; and it is clear

that the legislature intended to give the Commission considerable discretion in promulgating them. See AS 16.43.100 and 110 (listing Commission powers). Second, the Act asks the Commission to reserve permits for people who had previously fished in a particular area and would suffer hardship if excluded from it. AS 16.43.250, 260(a).[13] "Grandfather rights" and "hardship" are both important considerations. The task before us, then, is to determine whether in the exercise of the discretion the legislature has given it, the Commission may define one type of hardship partially in terms of grandfather rights.

At issue is the Commission's regulatory interpretation of AS 16.43.250(a), which provides:

> Following the establishment of the maximum number of units of gear for a particular fishery under AS 16.43.240, the commission shall adopt regulations establishing qualifications for ranking applicants for entry permits according to the degree of hardship which they would suffer by exclusion from the

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13. AS 16.43.260(a) provides:

> Application for initial issue of entry permits. (a) The commission shall accept applications for entry permits only from applicants who have harvested fishery resources commercially while participating in the fishery as holders of gear licenses issued under AS 16.05.536 - 16.05.670 and interim-use permits under AS 16.43.210(a) before the qualification date established in (d) or (e) of this section.

> fishery. The regulations shall define priority classifications of similarly situated applicants based upon a reasonable balance of the following hardship standards:
>
> (1) degree of economic dependence upon the fishery, including but not limited to percentage of income derived from the fishery, reliance on alternative occupations, availability of alternative occupations, investment in vessels and gear;
>
> (2) extent of past participation in the fishery, including but not limited to the number of years participation in the fishery, and the consistency of participation during each year.

(Emphasis added). In the exercise of its discretion the Commission has established a point system for, among others, the Chignik purse seine salmon fishery, which awards points for "percentage of income derived from the fishery" as follows. If an applicant's "income dependence percentage" -- "based on harvesting the fishery resource while participating in the fishery applied for as a gear license holder" -- is 90% or more for 1972, the applicant receives six points. If the percentage is between 70% and 90%, the applicant receives three points; if less than 70%, no points. For 1971, an applicant who has derived 90% or more of his or her income for the fishery receives four points; 70% to 90%, two points; less than 70%, no points. 20 AAC 05.630(b)(1) and (c)(2). For Kalmakoff, the problem is not that he did not derive income from the fishery in those years but that he was not then a gear license holder.

"[I]f special circumstances exist such that an applicant's income dependence is not realistically reflected by his income dependence percentage for the years 1971 and 1972," the regulations provide, "the commission may award an applicant up to a maximum of 10 points based on a special showing of income dependence." 20 AAC 05.630(b)(2). It is this regulation, we held in Templeton, which requires the Commission to award some income dependence points to people who but for the structure of their business partnerships during 1971 and 1972 would have held gear licenses during those years. "Special circumstances", we held, entitled those people to points. But we did not hold that being a crewman, as opposed to a gear license holder or a gear license holder's partner, is a "special circumstance," and the Commission has rejected this possible interpretation of

its regulation. It argues that gear license holders and their partners, as a class, are dependent on fishing in ways that crewmen are not.

B. Are the Regulations Consistent With The Statute?

Alaska Statute 16.43.250(a)(1) directs the Commission to consider an applicant's "percentage of income derived from the fishery." Kalmakoff argues that in doing this the Commission may not limit its consideration to the percentage of an applicant's income derived as a gear license holder. If "percentage of income" were the only inquiry the statute authorized the Commission to make, we would agree with Kalmakoff. For, just as much as a gear license holder, a crewman may have derived all or part of his income from fishing. But AS 16.43.250 also authorizes the Commission to

(1) "adopt regulations establishing qualifications for ranking applicants according to the degree of hardship they would suffer by exclusion from the fishery";
(2) "define priority classifications of similarly situated applicants";
(3) strike a "reasonable balance" among the statutory hardship standards; and
(4) evaluate applicants' "degree of economic dependence upon the fishery, including but not limited to" the four statutory economic dependence standards.14/

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14. As we have said, the four statutory economic dependence standards are: "Percentage of income derived (footnote continued)

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We hold that these statutory grants of authority give the Commission the power to define one of the statutory economic dependence standards in terms of gear license ownership.

The question is a close one because the Commission is not free to disregard any of the standards the legislature has articulated. Rutter v. State, 668 P.2d 1343 (Alaska 1983). Rutter involved the Commission's determination that three of the standards set out in AS 16.43.250(a)(1) were irrelevant to the hardship fishermen would suffer by being excluded from the salmon hand troll fishery. The Commission attempted to evaluate economic dependence by assessing only one statutory factor, the availability of alternative occupations.[15] We held that it had exceeded its authority:

> That the Commission feels it could design a better classification scheme using only one of the factors is beside the point; it is not free to substitute its judgment for that of the legislature. Once the legislature determined that percentage of income derived from the fishery, reliance on alternative occupations and investment were relevant to economic dependence, the Commission was deprived of the power to decide otherwise.

(footnote continued)

from the fishery, reliance on alternative occupations, availability of alternative occupations, [and] investment in vessels and gear."

15. The Commission also considered "income from the fishery;" but "income from the fishery," unlike (footnote continued)

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668 P.2d at 1349. Kalmakoff contends that the Commission has effectively disregarded the "percentage of income" standard. We disagree. It has defined the standard, not disregarded it, and while other definitions would have been possible the Commission's definition is permissible.

Initially, we note that this part of our review of these regulations is relatively deferential. The legislature has directed the Commission to design hardship regulations. If, given this fact, a regulation is consistent with a statute's purposes and reasonably necessary to carry them out, we will not overturn it, provided it is reasonable and not arbitrary. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

The statute's purpose, we believe, is that the Commission should determine which fishermen, among the group of former gear license holders eligible to apply, would have suffered the greatest hardship as of January 1, 1973, by being forbidden to operate gear. AS 16.43.260(d) provides that "an applicant shall be assigned to a priority classification based solely upon the applicant's qualifications as of January 1, 1973." Admittedly, hardship evaluated as of 1973 is not the same thing as present hardship, but this is

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(footnote continued)

"availability of alternate occupations," is not one of the statutory economic dependence standards.

a choice which Kalmakoff does not challenge and which the legislature has explicitly made. January 1, 1973, then, is the relevant date.[16]

The Commission has determined that persons who held gear licenses in 1971 and 1972 were more likely, other things being equal, to have been dependent on fishing and subject to hardship by being forbidden to fish in 1973 than those who did not hold gear licenses in 1971 and 1972. We recognized in Apokedak I that the group of people who had held gear licenses at any time was, in a "rough way," the "group having most to lose by being excluded from the fishery." 606 P.2d at 1268. Members of this group, unlike, for example, crewmen, risked the loss of a status they had previously enjoyed. Moreover, people who were gear license holders in 1971 or 1972 were probably more likely to have operated gear in 1973 than people who were not gear license holders in those years. People who would have operated gear in 1973 would have suffered substantial hardship had they been forbidden to do so. The class of people the Commission's regulation favors is thus more focused on hardship than the class of former gear license holders we dealt with in Apokedak I. We therefore conclude that the regulations

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16. AS 16.43.260(e) outlines an exception, not relevant here, for fisheries limited after January 1, 1975.

favoring 1971 and 1972 gear license holders are consistent with the statute's purpose.[17]

We also believe that these regulations were reasonably necessary to further this purpose. The Commission chose to define one of the four statutory hardship categories to favor 1971 or 1972 gear license holders, while also allowing people who could demonstrate "special circumstances" to receive points even though they had not held a gear license in 1971 or 1972. We think that it was reasonably necessary, in furtherance of the purpose of evaluating and avoiding hardship, to favor people who had held gear licenses in 1971 or 1972 over people who first held gear licenses after 1972[18] and people who last held gear licenses before 1971. People who had not yet held gear licenses as

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17. The regulations at issue in Rutter may also have been consistent with Limited Entry's general purposes, as we have just defined them. The difference between Rutter and the case now before us is that in Rutter the Commission had disregarded explicit legislative language. Here, in contrast, it has defined and not disregarded the factors the legislature has specified. For some fishermen the Commission's decision not to award percentage-of-income points to people who did not hold gear licenses means that the percentage of income they derived from the fishery will not be considered. This fact makes this issue close. But the legislature left decisions on how to define income dependence up to the Commission, and this choice, unlike the choice challenged in Rutter, is not inconsistent with AS 16.43.250(a)(1).

18. Some people who first held gear licenses after 1972 became eligible for permits under our decision in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

of January 1973 were less likely to have committed themselves to the fishery as of that date, as we implicitly recognized in Isakson v. Rickey, 550 P.2d 359, 364-65 (Alaska 1976). People "who had fished commercially under a gear license a number of years previously, but had abandoned an interest in the fishery," we said in Apokedak I,[19] "may suffer less hardship" than others by being excluded from the fishery; these people, we now note, were unlikely to have held gear licenses in 1971 or 1972. The challenged regulations thus favor the people who had the most to lose if they had been forbidden to fish. We think the Commission correctly determined that the regulations were reasonably necessary.

Having said this, we have little trouble holding that the regulations in question are reasonable and not arbitrary. To the extent that they may be seen to draw rigid lines among people whose hardships seem indistinguishable, we note that the Commission's regulations provide for awards of income dependence points to people who can demonstrate that "special circumstances" exist. We held in Templeton that people who were not gear license holders in 1971 and 1972, but fished as partners with gear license holders during one or both of those years, were entitled to

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19. 606 P.2d at 1267 n.50.

points under the "special circumstances" regulation. The regulation, as we have interpreted it, reduces the arbitrariness inherent in this as in all other regulatory schemes. The income dependence regulations are not arbitrary.[20] It remains to determine whether or not they constitute "unjust discrimination" or are unconstitutional.

C. Are the Regulations Unjustly Discriminatory or Unconstitutional?

The distinction to which Kalmakoff objects is a distinction between gear license holders, and people whom the Commission determines should be treated like gear license holders, and crewmen. The Commission has determined that as a group, 1971 and 1972 gear license holders had more to lose by being excluded from the fishery than did 1971 or 1972 crewmen. We will not repeat our discussion of the reasons why regulations based on this determination are consistent with the Limited Entry statutes, reasonably further their purposes, and are not arbitrary. The considerations we have already addressed persuade us that denying

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20. Kalmakoff urges us to decide that crewmen, as a class, are entitled to "special circumstances" points. The problem is that crewmen, as a class, would have suffered less hardship by being forbidden to fish in 1973 than would the class of gear license holders. Substituting our judgment for the Commission's on this issue, as we did in Templeton, we hold that the Commission was correct.

Kalmakoff income dependence points violates neither AS 16.43.010(a) ("It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination") nor the Alaska Constitution's equal protection clause. Kalmakoff's challenge is not to Limited Entry in general[21] or to the Commission's refusal even to consider his application.[22] Rather, it is a challenge to the way the Commission has designed its point system. Accordingly, our review is deferential. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 161 (Alaska 1982). We think the regulatory preference for 1971 and 1972 gear license holders bears a fair and substantial relation to Limited Entry's purposes,

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21. See State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), appeal dismissed, ___ U.S. ___, 81 L. Ed. 2d 339 (1984).

22. See Wickersham v. State, 680 P.2d 1135 (Alaska 1984).

Isakson v. Rickey, 550 P.2d 359 (Alaska 1976),[23] and does not constitute unjust discrimination.

AFFIRMED in part, REVERSED in part, and REMANDED.

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23. Kalmakoff relies on passages in Isakson which suggest that the holding of a gear license has little if any relation to hardship. As we explained in Apokedak I, these passages have been superceded. 606 P.2d 1255 at 1261 & n.20.

Official Business

Alaska State Legislature

House of Representatives

Pouch V
Juneau, Alaska 99811

Phone:
(907) 465-4924

Special Committee on Fisheries

M E M O R A N D U M

January 16, 1985

TO: House Resources Committee
Representative Adelheid Herrmann
Representative Richard Shultz
Co-Chairs

FROM: Special Committee on Fisheries
Representative Peter Goll
Chairman

SUBJECT: HJR 8

After reviewing HJR 8 and discussing the matter with interested members of the Special Committee on Fisheries, it is suggested that the following amendments be made to address the concerns of Kodiak-based fishermen.

(1) Insert the following language on line 7, page 2, after the words "..fish fishery":

", and set aside reserves to allow incidental catch of sablefish based on actual needs rather than Optimum Yield"

DISCUSSION--This amendment is designed to allow the continuation of the joint venture fisheries in the Gulf of Alaska without cutting back on the amount of sablefish available for harvest by Alaska's longline fleet. All parties agree that the 10 percent figure is too high.

(2) Delete the following language on line 10, page 2:

[ALASKA]

DISCUSSION--Under the MFCMA, no distinction may be made between U.S. fishermen on the basis of residency in individual states.

Introduced: 1/14/85
Referred: Resources

IN THE HOUSE

BY GRUSSENDORF,DUNCAN,M.M.MILLER, TAYLOR,GOLL AND CATO

HOUSE JOINT RESOLUTION NO. 8

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

Relating to the allocation of Gulf of Alaska sablefish harvest by the North Pacific Fishery Management Council.

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

WHEREAS the North Pacific Fishery Management Council on December 8, 1984, voted to allocate 10 percent of the optimum yield of sablefish in the Gulf of Alaska groundfish fishery to incidental catch by joint venture fishermen; and

WHEREAS joint venture operations in the Gulf of Alaska have expanded dramatically in recent years; and

WHEREAS continued expansion of joint venture participation with foreign processors in the Gulf of Alaska will diminish the tonnage of fish landed in Alaska and jeopardize the survival of small business commercial fishermen in Alaska; and

WHEREAS use of longline gear in catching sablefish is ecologically sound; and

WHEREAS Alaska longline fishermen have the capacity to harvest, and United States processors have the capacity to process, the entire allowable catch of sablefish in the Gulf of Alaska; and

WHEREAS the Magnuson Fishery Conservation and Management Act establishes a priority for United States fishermen delivering to United States processors; and

WHEREAS the North Pacific Fishery Management Council, in allocating fishing privileges among fishermen and among gear types, is directed by management plan guidelines to consider such relevant factors as the

economic and social consequences of the allocation scheme and the dependence on the fishery by present participants and coastal communities;

BE IT RESOLVED by the Alaska State Legislature that the North Pacific Fishery Management Council is respectfully requested to rescind its action allowing joint venture fishermen an incidental catch of sablefish equal to 10 percent of the optimum yield of sablefish in the Gulf of Alaska groundfish fishery; and be it

FURTHER RESOLVED that the North Pacific Fishery Management Council is respectfully requested to take action at its February 1985 meeting to grant Alaska longline fishermen exclusive fishing rights in the sablefish fishery in the Gulf of Alaska.

COPIES of this resolution shall be sent to the Honorable Ronald Reagan, President of the United States; to the Honorable George Bush, Vice-President of the United States and President of the U.S. Senate; to the Honorable Thomas P. O'Neill, Jr., Speaker of the U.S. House of Representatives; to the Honorable John B. Breaux, chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, House Committee on Merchant Marine and Fisheries; to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; to the Honorable Malcolm Baldrige, Secretary of Commerce; and Mr. James Campbell, chairman, North Pacific Fishery Management Council.

Official Business

Alaska State Legislature

House of Representatives

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Special Committee on Fisheries

M E M O R A N D U M January 22, 1985

TO: House Resources Committee
Representative Adelheid Herrmann
Representative Richard Shultz
Co-Chairs

FROM: Special Committee on Fisheries
Representative Peter Goll
Chairman

SUBJECT: HJR 8/Effect of Incidental Catch Allocations

Information supplied by federal fisheries agencies should be carefully considered during committee discussions regarding HJR 8. Examination of the enclosed statistics reveals that the amount of sablefish for incidental catches of sablefish in the Gulf of Alaska by joint venture fisheries will vary by as much as 1.3 million pounds, depending upon the mechanism selected for determing the allocations.

The National Marine Fisheries Service staff says that joint venture operations will take place in 1985 only in the Western and Central regulatory areas of the Gulf.

According to an analysis by the NPFMC staff, the "observed bycatch rate" for the types of joint ventures planned in the Gulf during 1985 would result in the need for setting aside 1,057 metric tons of sablefish. If the sablefish incidental catch allocation is set at 10% of the Optimum Yield for the two regulatory areas, joint venture operations would be allowed to catch 473 metric tons of sablefish.

Based upon this information, it is suggested that the following amendment be made to HJR 8:

(1) Insert the following language on line 7, page 2, after the words "...fish fishery":

"<u>, and set aside reserves to allow incidental catch of sablefish based on 10 percent of the Optimum Yield for the Western and Central regulatory areas</u>"

North Pacific Fishery Management Council

James O. Campbell, Chairman
Jim H. Branson, Executive Director

411 West 4th Avenue
Anchorage, Alaska 99510

Mailing Address: P.O. Box 103136
Anchorage, Alaska 99510

Telephone: (907) 274-4563
FTS 271-4064

December 28, 1984

Robert D. Alverson
Fishing Vessel Owners' Assn.
Building C-3, Room 232
Fishermen's Terminal
Seattle, Washington 98119

Dear Bob:

Thank you for your letter of December 13, 1984. As requested, I have enclosed a copy of the bycatch data that I used during the December Council meeting. In addition to bycatch rates for sablefish, the worksheets also include bycatch rates and amounts for POP, Atka mackerel and other rockfish.

Table 1 shows the "Final JVP" estimates that were adopted by the Council. These JVP estimates were used to calculate expected bycatches by joint ventures in 1985. As you are well aware, as a result of the U.S.-Japan Industry meetings, the 1985 JVP needs are now considered lower than estimated during the Council meeting.

Table 2 provides my JV bycatch estimates for the Western Regulatory Area. You will note that a bycatch rate is provided for incidental species. These rates were obtained from the Northwest and Alaska Fisheries Center's observer program and reflect "observed bycatch rates" during 1984. The data base used to calculate these rates were examined to eliminate data where there appeared to be targeted fishing on these species. However, it must be assumed that the resulting bycatch rates probably include some targeting that we were not able to eliminate due to the resolution of the data base.

These bycatch rates observed during 1984 were then applied to our estimated 1985 JVP. The calculation (bycatch rate x estimated JVP) provides a bycatch amount that would be required to harvest the JVP. This same procedure was used for the Central Regulatory Area (see Table 3).

You also asked where the 1,000 mt of sablefish bycatch came from. As you will recall, during the Council meeting, I was asked what the estimated bycatch needs would be for sablefish during 1985. I answered that my calculations showed that 339 mt and 731 mt would be needed in the Western and Central Areas respectively. John Peterson noted that the total sablefish bycatch would be about 1,000 mt or approximately 10% of the sablefish OY for the Gulf of Alaska. This is how the 1,000 mt number was generated.

Since the Council meeting I have made several observations which you may find of interest. First, given that the Japanese JVP is lower than originally anticipated, the total JVP for the Western and/or Central areas is

31D/II

By CATCH OF HALIBUT is Approx 10-15%
ALL FISHERIES WILL STOP WHEN B.C. QY is CAUGHT
WITH NO - DOWNTIME

subsequently lower. It is also likely that a 70,000 mt Polish JV for pollock will not materialize. With a lower JVP, bycatch needs will be smaller. Second, with the Council's "10% Rule" for JV bycatch, where a maximum limit of 10% of the sablefish OY is set aside for JV bycatch purposes, it is clear that given my calculated bycatch amounts, there could be severe limitations on JVs. In the case of the Shelikof Strait pollock fishery, I see no problem with trawlers taking the entire JVP. The observed bycatch rates for this fishery are very low. However, trawlers fishing for flounder, Atka mackerel or cod could find themselves approaching the bycatch limit before their JVP goal is reached. These vessels will have to clean up their operation or cease fishing. Examining the potential bycatch ceilings for sablefish, POP and other rockfish using the 10% rate, it is clear that sablefish will be the limiting species to joint ventures.

If you have any additional questions on my calculations, feel free to contact me.

Sincerely,

Steve Davis
Plan Coordinator

Enclosures

31D/II

1985 Final JVP Estimates

1. Western Area

all bottom trawl	Pacific cod	= 7,327	(from Permit Review Committee)
	Atka mackerel	= 4,678	(increased by Council; permit review estimates all in W. area)
	Flounder	= 102	(600 mt total Gulfwide; 1984 proportion of total joint venture flounder catch was 17% in W. area, 83% in Central)
Total Western JVP =		12,107 mt	

2. Central Area

mid water trawl	Pollock	= 263,925	(90% of the 1984 pollock harvest was taken by this gear in Shelikof Strait 90% of 1985 pollock JVP = 263,925)
Total mid water trawl JVP		263,925	
bottom trawl	Pollock	= 29,325	(10% 1985 pollock JVP)
	Pacific cod	= 10,073	(from Permit Review Committee)
	Flounder	= 498	(83% 1985 flounder JVP)
Total bottom trawl JVP		39,896	

Note: JVP for thornyhead, squid and other species is viewed as a bycatch to the targetted species identified above. Therefore, inclusion of the JVP estimates is not necessary when calculating the JVP base for use in determining bycatch amounts of fully-utilized species.

Gulf of Alaska - Western Regulatory Area

Proposed JV Bycatch Rates and Amounts for 1985

Given: Western area bottom trawl JVP = 12,107 mt Pacific cod = 7,327
Atka mackerel = 4,678
est. flounder = 102

Incidental species:

1667 T.	Sablefish	bycatch rate = 2.8%	bycatch amount = 339 mt 167 T.
	POPc	bycatch rate = 0.6%	bycatch amount = 73 mt
	Atka mackerel	bycatch rate = 6.4%	bycatch amount = 775 mt
	Other rockfish	bycatch rate = 0.5%	bycatch amount = 261 mt

Given: Western area mid-water trawl JVP = ?

Incidental species:

Sablefish	bycatch rate =	bycatch amount =
POPc	bycatch rate =	bycatch amount =
Atka mackerel	bycatch rate =	bycatch amount =

Western area JVP breakdown by gear for 1984.

100% JVP harvested by bottom trawl.

0% JVP harvested by mid-water trawl.

3060 DY

Gulf of Alaska - Central Regulatory Area

306 TONS MAX BY CATCH with 10% limit

Proposed JV Bycatch Rates and Amounts for 1985

Given: Central area mid-water trawl JVP = 263,925 mt

Central 90% Pollock JVP = 263,925 mt

Incidental species:

Sablefish	bycatch rate = 0.005%	bycatch amount = 13 mt
POPc	bycatch rate = 0.02%	bycatch amount = 53 mt
Atka mackerel	bycatch rate = 0.002%	bycatch amount = 5 mt

Given: Central area bottom-trawl JVP = 39,896 mt

10% pollock = 29,325
Pacific cod = 10,073
est. flounder = 498

LAST YEAR

Incidental species:

Sablefish	bycatch rate = 1.8%	bycatch amount = 718
POPc	bycatch rate = 0.2%	bycatch amount = 80
Atka mackerel	bycatch rate = 0.7%	bycatch amount = 279
Other rockfish	bycatch rate = 0.3%	bycatch amount = 120

Total Central Area bycatch amounts:

Sablefish	= 731 mt
POPc	= 133 mt
Atka mackerel	= 284 mt
Other rockfish	= 120 mt

Central area JVP breakdown by gear for 1984.

10% pollock JVP harvested by bottom trawl.

90% pollock JVP harvested by mid-water trawl.

DEC84/Z-4