ALASKA LEGISLATURE COMMITTEE FILE 1985-1986 8072

3324 HJUD HB 284 - HB 28

200

ALASKA LEGISLATURE COMMITTEE FIL

3324 HJUD HB 284 - HB 2

1985-1986 8672 200

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M April 1, 1985

SUBJECT: Elections (HB 284)

TO: Representative Red Boucher

FROM: Richard A. Bradley
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 of the bill amends AS 15.20.030, a section relating to the preparation by the director of ballots, envelopes, and other election material. The only substantive change to the section occurs in the addition of the last sentence: "The larger envelope used for the return of the absentee ballot by the voter shall require the voter to apply any required postage." The larger envelope is, of course, the outer envelope.

Section 2 of the bill amends AS 15.20.081(d). The subsection is concerned with the procedures used by the voter to vote an absentee ballot. The only substantive changes involve the change of the requirement of two witnesses to one witness and the added requirement that the witness provide a full address.

Section 3 of the bill amends AS 15.20.081(e). The section is concerned with a requirement that the absentee ballot be marked and attested to by the date of the election. The amendment repeals the existing requirement that the ballot be mailed not later than election day and that, if the ballot

is postmarked, it be postmarked on election day. The amendment adds the requirement that the ballot be returned to the election supervisor not later than 8:00 p.m. on the day of the election.

Section 4 of the bill add a new subsection to AS 15.20.081. New subsection (h) permits absentee ballots returned by mail from outside the United States or from an APO or FPO address that were marked and attested not later than election day to be counted if received after the day of the election but not later than 4:00 p.m. on the tenth day following the election.

Section 5 of the bill amends AS 15.20.201(a). The provision deals with the responsibility of election supervisors to review the election certificates on absentee ballots received. The only substantive change amends the last sentence as follows: "The review of absentee ballots shall continue at times designated by the election supervisor until completed (AND SHALL INCLUDE ALL ABSENTEE BALLOTS RECEIVED IN THE OFFICE OF THE ELECTION SUPERVISOR BY 4:00 P.M. ON THE SEVENTH DAY FOLLOWING THE DAY OF THE ELECTION).

Section 6 of the bill amends AS 15.20.201(c). The section deals with the day on which the district absentee ballot counting board certifies the absentee ballot review. It changes the day on which that occurs from the eighth day following the election to the 10th day following the election.

Section 7 amends AS 15.20.450. The section relates to the requirement for deposits in those situations where a deposit is required as a condition to the occurrence of a recount. It changes the amount required for a precinct recount from $50 to $300, for an election district recount from $250 to $1,500, and for an entire state recount from $2,000 to $5,000.

Section 8 of the bill amends AS 15.20.480. The section deals with the procedure for recounts. The only substantive change is the repeal of the following: "The director shall count absentee ballots received after 4:00 p.m. on the 15th day following the election and before the completion of the recount."

If I may be of further assistance, please advise.

RAB:csh

STATE OF ALASKA

DIVISION OF ELECTIONS
POUCH AF
JUNEAU, ALASKA 99811-9974

OFFICE OF THE GOVERNOR

PHONE: (907) 586-6181

Position Paper
House Bill 284
Prepared by
Division of Elections
April 8, 1985

The Division of Elections has reviewed House Bill 284, "An Act relating to elections," and supports the bill in its entirety.

The first substantive amendment proposed by this bill under Sec. 15.20.030, (Page 1, lines 23-25) eliminates pre-paid postage on absentee ballots returned to the division by mail. Rather, the amended language calls for the voter paying the postage on his or her return ballot.

We have researched the potential impact of such a change and have concluded that we could anticipate no negative affect.

Our research through personal contacts with several other states, and with the Federal Election Commission indicates that with very few exceptions the majority of states require the voters to pay their own postage. We were particularly interested in evaluating what affect such a measure would have on the return rate of absentee ballots if the voter paid postage. Based on the 1984 General Election, Alaska experienced an average 73% return rate of voted ballots from those individuals who originally applied. We were concerned that this rate might be lower if the postage was not pre-paid. We found, however, that in Oregon and Washington where voters pay their own postage, they experienced an 85% - 90% return rate. Conversely, in California where postage is pre-paid, they had a 39% return. It appears that the return rate is more seriously impacted by other considerations, and that postage in and of itself, has little or no impact.

By having the voter pay his or her own postage, the state could anticipate saving up to $9,000.00 in major election years. We therefore support this change.

The next substantive amendment suggested by this bill, relates to AS 15.20.081 (d) (Page 2, lines 9 - 10) and calls for reducing the number of witnessing signatures on the voter's oath and affidavit envelope from two, to one.

It further requires the single witness to provide a full address where he or she can be contacted. We endorse this changes for several reasons.

1) Lack of proper witnessing under the current statutes is one of the most commonly enforced rules for challenging an individual's vote. Because of the current statute, a ballot that in all other ways is properly cast, is rejected if it isn't witnessed by an official authorized to administer an oath, or by 2 witnesses.

2) Requiring 2 witnesses puts an undue burden on remote voters who often have no access to such an official and are therefore required to get 2 witnessing signatures. In Alaska we have many people who live in such isolated conditions that often the only witness they have access to is the bush pilot who brings them their supplies and their mail. We have had several inquiries from such individuals who feel they are disenfranchised because of this requirement.

3) It is our understanding that the reason to require 2 signatures was to provide an extra layer of assurance that the voter voting the ballot is indeed eligible and properly identified. Right now, we require 2 signatures, but no other information from the witness. If we had reason to research the individual's identity, we would have virtually no way of doing so. With the addition of a full address, we feel the assurances we initially sought, are more readily available because there would be a way to track the individual who served as a witness.

Perhaps the most critical change to current law proposed by this bill, is that regarding AS 15.20.081(e) (Page 2, lines 14 - 18), requiring that absentee ballots cast by mail be received no later than 8:00 p.m. on Election Day in order to be counted. Our research in this area confirms that this requirement is indeed reasonable and feasible, and that the Election Day deadline is mandated in almost every other state. Alaska's current extended deadline is a rare exception.

One consideration deserving our attention was whether or not the lateness of our Primary, delaying the availability of general election ballots, would cause a severe handicap to voters voting by mail if we required an election day deadline for receipt. We found that virtually all states send out their ballots in relatively the same time period, regardless of the date of their Primary, specifically 3 to 4 weeks prior to the election. Such a state is Oregon, and even with the Election Day deadline, they enjoy a 90% return rate of ballots meeting the tight deadline.

It would be difficult to say how our 73% return would be impacted if the deadline were changed, however, a cursory estimate from our regional supervisors indicates that 80% - 85% of all absentee by mail ballots received, did arrive by Election Day. In Anchorage that percentage seems to be slightly lower. Of those ballots received after Election Day, there is no way to anticipate with accuracy how many were sent later specifically because of the extended deadline, or how many would have been mailed earlier if the Election Day deadline had been in effect.

We feel that the added section AS 15.20.081 (h) (Page 2, lines 24 - 28) protect the primary sector upon whom the tightening of the deadline would have the greatest effect, military and overseas voters. This section provides an extended deadline specifically for these individuals. Many states with the Election Day deadline are now adding such provisions to their statutes.

The advantages of the deadline changes called for in this bill, with the extension provided for by (h), are two.

1) At the moment, all absentee ballots may be accepted up to 15 days after the election. Concern has been expressed that since current statutes mandate, that "if the ballot is postmarked, it must be postmarked on or before election day", there is a potential for fraudulent or unethical use of the system. Specifically, since this part of the statute requires the election day stamp if the ballot is postmarked, but does not require it on all ballots, candidates could respond to election night returns by soliciting absentee voters who have not mailed in their ballots to do so in the few days right after the election. Because no postmark is required for counting, these ballots cast after the election, but received within the 15 day period, could be included in the totals. In close races, these late votes could impact the outcome.

   Our research show that requiring a postmark on all ballots is not feasible because of irregularities in the postal systems worldwide. We feel because of these irregularities, many voters could find their votes challenged through no fault of their own, if a postmark didn't appear.

   It is our opinion that an Election day deadline could limit the potential for fraud, and would address these concerns.

2) Finally, an election day deadline would enhance the faster announcement of election results. The two week deadline while we await receipt of the final absentee ballots would be greatly minimized. Candidates, particularly in close races, would know the outcome more quickly as certification of election results could be completed many days sooner.

Amendments to AS 15.20.201 (a) and (c) merely make appropriate changes in the counting schedule pursuant to the change in the deadline for receipt of voted ballots.

With regard to amendments in the fees payable to the state for recounts, the division supports the changes. The estimated costs for conducting a recount for a single district is approximately $1,700.00. The current fee of $250.00 for recounts in races outside the margin allowing for a recount free of charge, obviously does not begin to cover the expenses.

Finally, the bill seeks to amend AS 15.20.480 (Page 4, lines 19 - 21) by eliminating the inclusion of absentee ballots received after the 15 day deadline, in recount totals. We agree with the intent of this

provision, because the introduction of these very late ballots, adds new data to the materials being recounted. Therefore, we may change the original totals automatically by introducing new ballots that have not been counted before. Such additions may be inappropriate if the purpose of the recount is to verify the accuracy of the original count.

Sandra J. Stout
Director

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 284

Title: An Act relating to elections

Sponsor: Rep. Boucher

Requestor: House State Affairs

Date of Request: 3/29/85

FISCAL DETAIL

Agency Affected: Office of the Governor

Program Category Affected: Division of Elections

BRU, Program or Subprogram(s) Affected: Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES		-0-	(9.5)	-0-	(10.5)	-0-
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	(9.5)	-0-	(10.5)	-0-
CAPITAL						
REVENUE			(9.5)		(10.5)	

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

The negative costs reflected in this fiscal note reflect the estimated savings to the state if postage on absentee by mail ballots were paid by the voter rather than prepaid by the state. There is a 10% increase included for FY89 to cover the increase expected in the number of absentee voters in the 1988 Election.

Prepared By: Linda Edgeworth Phone: 465-4611

Division: Elections Date: 4/8/85

Approved by Commissioner: Linda Stout Date: 4/8/85

Agency: Office of Lt. Governor

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

Special note should be made that the bill also would result in increased fees paid to the state for reccunts of election returns. Those fees do not impact the division's operating budget and therefore are not indicated on the face of this fiscal note. However, additional monies deposited to the general fund would be substantially increased. A comparison is provided noting the increase.

	Current Statutes	HB 284
Primary Election Recounts	3 @ $250 = $750	3 @ $1500 = $4,500
General Election Recounts	5 @ $250 = $1,250	5 @ $1500 = $7,500
TOTAL FEES TO GENERAL FUND	$2,000	$12,000

In fiscal years FY87 and FY89, based on these assumed number of recounts the net increase benefitting the state would be $10,000 each year.

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
POUCH AF
JUNEAU, ALASKA 99811-9374

PHONE: (907) 586-6181

February 20, 1985

The Honorable Katie Hurley
Chairperson
State Affairs Committee
Alaska State House of Representatives
Pouch AF
Juneau, AK 99801

Subject: Comments in support of House Bill 110, "An Act amending the elections laws of the state; and providing for an effective date."

Dear Representative Hurley:

Enclosed for the information and review of your committee are comments in support of HB 110 which is scheduled to be heard on Thursday, February 21, 1985. They include a brief description of the specific amendments being proposed, as well as some discussion of the rationale behind these changes. Many of the changes are housekeeping measures but there are a few which are more substantive in nature.

As you also requested, in addition to the comments we are submitting regarding HB 110 as it currently exists, I am offering some input on your proposed addition which would require a postmark on all absentee ballots cast by mail. We recognize the importance of the concerns you have raised in this vital area. At this point, our research indicates that the solutions may not be simple ones, and are looking forward to working with you and the committee on developing workable solutions.

We appreciate your personal interest in this bill. Please feel free to contact me if you or your committee would like additional information. Thank you for placing our bill on your agenda.

Sincerely,

Sandra J. Stout

Sandra J. Stout
Director

Enclosure

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
POUCH AF
JUNEAU, ALASKA 99811-9974

PHONE (907) 586-6181

REQUIRED POSTMARKS: ABSENTEE BALLOTS BY MAIL

Prepared For

The Honorable Katie Hurley
Alaska State House of Representatives

February 20, 1985

Current Absentee By Mail Procedures

Under current election policies and procedures in Alaska, voters wishing to vote by mail are required to have their ballots marked and attested on or before the date of the election. Further, it is provided in AS 15.20.081(e), that the voter who returns the ballot by mail will use the most expeditious mail service, and mail the ballot not later than the date of the election. Finally, this statute mandates that "if the ballot is postmarked, it must be postmarked on or before election day."

Concern has been expressed that in the last part of the provision, the statute as written creates a potential for fraudulent or unethical use of the system. Specifically, since this part of the law only requires the election date stamped, if the ballot is postmarked, but does not require the postmark on all mailed absentee ballots, candidates could respond to election night returns by soliciting absentee voters who have not mailed in their ballots to do so in the few days right after the election. Because no postmark is required for counting, and because absentee ballots may be received in the mail for 15 days after the election, these late voters could still cast their ballots after the legal deadline. The concern has been raised that the division would have no way of knowing that the ballots were cast after election day. In the instances of close races these late ballots might have an impact on the outcome.

The division's first response to this concern is that both the voter and the attesting witnesses are required to stipulate the date of their signing the absentee affidavit. When no postmark appears on the envelope, it is this date that is

used to verify that the ballot was cast on or before election day. Assuming that in all other ways the ballot appears to be legitimately cast, and that it is received within the 15 day period, the ballot is counted.

U.S. Postal Service Policy

According to Mabel O'Connell, Assistant General Counsel, General Administrative Law, for the Postmaster General in Washington, D.C., current regulations require that on all first class mail, a postmark be affixed which by law will include full name of the post office handling the piece, state abbreviation, zip code, date of mailing, and a.m. or p.m. There are exceptions with regard to the first class mail requirement. Mail that is prepaid with a postal permit, even though it is for first class postage, will not be postmarked. Rather the post office processing the prepaid piece merely cancels the letter. This cancellation serves as a registration of postal usage for which the entity owning the permit will be charged for postage. Under this system the permit owner is charged only for the mail actually returned. Current estimates indicate that 27% of the ballots requested by mail in Alaska are not returned at all.

It has been the policy in Alaska to prepay return postage under a first class permit. Therefore, for the most part we would not expect a postmark on the majority of ballots submitted by mail.

Required Postmarks

In order to assure that to the greatest degree possible, all mailed absentee ballots are postmarked, the State would have to change it procedures to include requiring affixing a postage stamp to the return envelopes, rather than pre-printing the postal permit stamp as is currently being done. Two options are available.

State Pays Postage: If the State is to continue paying for postage on ballot returns, manual stamping will incur some additional costs. The process of preparing mailing packets for the voter (even before addressing, inserting ballots, coding, sealing and mailing occurs) consists of collating instructions, secrecy envelopes and manually folded return envelopes, which are then inserted in the outer mailer. These packets are also sorted by regional office to which the voter will eventually mail his or her ballots.

In keeping with its conversion to an automated data entry system which will take place by fall of 1985, the division is in the process of researching and designing

a computerized pull apart self-mailer which would eliminate most of the steps associated with the manual system used in the past. As a computerized mailing packet, there would be no need for any of the manual preparation steps described. The computer would automatically print the mailing address, and district and precinct of the voter, as well as the return of the appropriate regional supervisor based on the voting district, on the self-mailer in which all required materials are already enclosed. All that would be necessary at that point is to slip the ballots inside, and seal.

Requiring the manual placement of a postage stamp on the return envelope in order to assure that the ballot is postmarked would eliminate the possibility of using this streamlined and computerized mailer. Below are some of the costs incurred in the postage and manual preparation of the mailing packet based on an estimated 25,000 absentee by mail applicants anticipated for the 1986 General Election.

Printing of Materials	$ 3,318
Postage @ .25 each	6,250*
Labor - manual preparation based on 50 packets per hour per employee @ Range 8 = 500 man hours	4,683
	$ 14,251

* With an estimated 27% of the ballots never returned, there is a waste of $1,687 in postage not actually used for voting.

On the other hand, the computerized self-mailer would incur the following estimated costs.

Printing of Mailer Form	$ 7,000
Postage based on a 73% return rate actually billed by Post Office	4,562
	$ 11,562

This represents a savings in just the preparation phase of $2,599 over the manual system.

In addition, because the computer system would be linked directly to the mainframe registration program, the potential error factor would be reduced especially in the area of districting and precincting.

Voter Pays Postage: While this policy has not been utilized by the State of Alaska in the past, it should be explored for adoption in the future. Research indicates that in most states this is the norm. According to the Federal Election Commission in Washington, D.C. the vast majority of states require the voter to pay the postage. Of the western states contacted directly only California prepays postage.

Adopting this policy would obviously save the state from $4,683 to $6,250 based on 25,000 absentee applicants.

It should be noted however that many states require only civilian and in-country voters to pay their own postage, while military and overseas voters are allotted prepay returns. States making these allowances often do so under the provisions of the Overseas Citizens Voting Rights Act of 1975, which appears generally as 42 USCS ss 1973dd et seq, which provides that voting and other election materials may be mailed from any Armed Forces post office in an overseas area, unless otherwise prohibited by a treaty or other agreement, free of postage. It stipulates that such ballots may be segregated from other forms of mail and placed in special bags marked with special tags printed and distributed by the Postmaster General for this purpose.

At the present moment Alaska does not record the numbers of military voters voting by mail, as this information is not required on registration documents and no other system has been implemented for tracking this data. Even if the state were to continue to prepay ballot postage, use of this Federal provision would result in savings to the State.

Potential Impact of Voter Paid Postage on Ballot Return Rate

Consideration should be given to determining if there would be any negative impact resulting from voter paid postage requirements. As of the 1984 General Election, a sampling of a cross section of diversified districts throughout the State indicates that Alaska is averaging a 73% return rate of the absentee by mail ballots requested. It is difficult to say how this figure would decline if the voter was required to pay the postage, however, discussions with other states

indicate that this has not been detrimental.

While the Federal Election Commission reports that there are no solid figures recorded on the nationwide level, direct contact with western states does give us some information. Washington and Oregon for example, required voter paid postage. Each of them reports to us, however, an 85% to 90% return rate on absentee by mail ballots. California, on the other hand, prepays the postage. However in Los Angeles County, which they feel is representative of the state, they experienced a 35% return rate. It should be noted that about one month before the election, California sends each registered voter an application for an absentee ballot. Because of this mass mailing, their numbers of applicants are exaggerated to well beyond what would be considered average. Most of the states we contacted experienced an applicant rate of approximately 10%. In California it is believed that because they receive an application in the mail, more voters return them than actually intend or need to vote by mail. That could account for the low return rate of ballots.

Irregularities in Post Office Procedure

One of the elements which would have to be considered if the state were to require a postmark on all absentee by mail ballots as prerequisite for counting, is the lack of uniformity in the postmarking procedures actually implemented by individual post offices across the nation. There is no doubt that even on mail hand stamped with a postage stamp, there is a very good chance that no readable postmark will appear. In some cases it will merely be an omission on the part of the postal clerk, on others a voter will pay full postage but stamp it though a postage machine, while on still others a particular postal station just doesn't postmark at all. Based on discussions with the Federal Election Commission there is even a general understanding that the use of a date bearing postmark may be on the way out altogether.

No matter what the circumstances, attention would have to be given to the countability of ballots on which no readable postmark appears. We would have to ask ourselves if the postmark was a criteria for counting the ballot, how many legitimate voters would be disenfranchised through no fault of their own. One option would be to revert back to the verification of the date signed and attested by the voter and the witnesses, as we are currently doing.

Impact of Legislation Currently Being Considered in Congress

It should be noted that on January 24, 1985, House Resolution 639, and House Resolution 640 were introduced in Congress

which would amend the Federal election laws to provide that all absentee ballots be mailed free of postage. It calls for "any envelope or other cover containing such a ballot shall bear the words "Free Postage--Absentee Ballot" (or words to that effect specified by the Postal Service) in the upper right-hand corner". While this wording is duplicated in both, other issues are addressed in each of the separate resolutions.

If either of these resolutions were to pass, the free postage imprint on the envelope would most likely circumvent the necessity of any postmark as defined by current post office policy, therefore voiding our use of such a mark as a verification of timely mailing and a criteria for counting.

Alternative Safeguards to Assure Timely Voting

As an option to the required postmark as verification of timely voting which may only prove marginally feasible, we might want to give some thoughtful consideration to a more substantive change in our current election laws. That change would be in the deadline by which an absentee ballot would have to be received by the division, in order to be eligible for counting.

Specifically, the most sure way of avoiding the potential for fraudulent or unethical submission of late ballots which initiated our research into this area, is to require that all absentee ballots be received in the elections office by the close of the polls on election day. There is input from other states which supports this action as a reasonable and acceptable requirement.

With the exception of Washington, all other western states contacted directly reported that the election day deadline was a requirement in their statutes. Confirmation was also received from the Federal Election Commission, that this is the case in the vast preponderance of all states, and that extended deadlines such as that afforded voters in Alaska is the rare exception.

One consideration which seems relevant in determining the feasibility of this more restrictive deadline in Alaska is the possible impact of mail turnaround time, based on our very late primary election and the availability of general election ballots for distribution. It appears that most states regardless of their primary date, mail out their ballots in relatively the same time period as we do in Alaska, specifically, 3 to 4 weeks before the election.

In Oregon, for example, even with the tight deadline, they enjoy a 90% return rate

It would be difficult to say how our own 73% return rate would be impacted by such a change in our laws, however, a cursory estimate from our regional supervisors indicates that even with our extended deadlines, approximately 80-85% of our absentee ballots are received by election day. In Anchorage it appeared that the percentage may be slightly lower. Of those ballots received after election day, there is no way to anticipate with accuracy how many are sent later specifically because of the extended deadline, or how many of them would be mailed earlier if the election day deadline for receipt were mandated.

Extended Deadline for Military and Overseas Voters Only

It is important to note an exception which appears to becoming the trend across the nation. Because of test cases through the court brought by the Department of Defense, it is becoming clear that exceptions to the election day deadline will be built into the statutes of states requiring such a restriction. For example, Colorado whose statutes are very clear about the election day deadline is currently under a restraining order to extend the deadline for military and overseas voters by ten days. While Colorado has been reluctant to make such an exception many other states are embracing it willingly. Because of the slow turnaround mail time we experience for overseas and APO/FPO voters, Alaska would probably want to incorporate this exception into its laws if we were to adopt an election day deadline.

Advantages to an Election Day Deadline

The major advantages to such a deadline change are two. First, the possibility of untimely ballots being included in the count would be eliminated. Secondly, the new deadline would certainly enhance the faster announcement of election results. The two week delay while we await the receipt of absentee ballots would no longer exist. Candidates, particularly in close races, would know the outcome much more quickly. In addition, the certification process could also be completed many days sooner.

Absentee Deadlines Involved in Recounts

If changes were considered in the deadlines for receipt of absentee ballots, another area which should be reviewed is that of absentee ballots which under current law may be included in recount totals if received even later than the 15 day extended deadline, but before a recount. In very close races where one, two or three votes may separate the candidates, the inclusion of these very late ballots add all

new data to the recounted totals. In such races, the winner may be decided based on the sole impact of these previously uncounted ballots received too late to be included in certified results. If the purpose of a recount is to verify the accuracy of the vote count just completed, some thought might be given to the appropriateness of changing those results by introducing new data.

AMENDMENT

Offered in the HOUSE By GRUENBERG

TO: CSHB 284 (JUD)

1. Page 4 line 4. Insert a new section 8 as follows:

AS 15.13.070(f) and (g) are repealed.

2. Renumber all suceeding sections.

COMMENTARY:

These provisions are unconstitutional. See editor's note (attached) citing Buckley vs Valeo, 424 U.S.1 (1976), and May 13, 1976 Attorney General's opinion.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Cited in State, Pub. Offices Comm'n v. Marshall, Sup. Ct. Op. No. 2406 (File No. 5614), 633 P.2d 227 (1981).

II. SUBSECTION (C).

Editor's notes. — Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977), cited in the notes below, was decided under subsection (c) as it existed before the 1977 amendment. Prior to that amendment, subsection (c) read: "Each candidate shall file the name and address of the campaign treasurer with the commission no later than seven days after the date of filing his declaration of candidacy or his nominating petition. The name of the candidate may be placed on the ballot by the lieutenant governor or municipal clerk only if the candidate has complied with this subsection."

This section is not unconstitutional in that it sets up "invalid class legislation." Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

The two groups classified by virtue of this section are those candidates who have complied with the law and those who have not; the failure to adhere to this section is the dividing line. Therefore, under any possible equal protection test this section passes constitutional muster. Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

Statutory requirement that a candidate's designation of treasurer be filed by a specified due date is not constitutionally unreasonable. Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

Subsection (c) should be strictly enforced. — Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

Effect of unequal enforcement of AS 39.50.020 on enforcement of subsection (c). — Unequal enforcement of AS 39.50.020, which requires candidates to file a financial disclosure statement did not require the conclusion that a candidate had in fact substantially complied with the filing requirements of subsection (c) where the record did not show any intentional or purposeful discrimination against the candidate. Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

Subsection (c) requires candidates to "file" campaign treasurer statements within a specified time limit. Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

The definition of "file" is well established in the law. It has been consistently held that a document is filed only when the proper officer has received it, and that it is not considered filed when it is deposited in the mails. Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

Telephone conversation not appropriate filing. — Given the text of subsection (c), the legal meaning of the term "file" and the supreme court's adoption of the doctrine that statutory election deadlines are to be strictly enforced, a telephone conversation between the candidate's treasurer and the Alaska Public Offices Commission seven days after the declaration of candidacy was filed cannot be deemed an appropriate filing within the intendment of subsection (c). Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

No regulations were necessary to implement the mandatory provisions for filing an appointment of campaign treasurer established by subsection (c) of this section. Silides v. Thomas, Sup. Ct. Op. No. 1362 (File Nos. 3019, 3020, 3021), 559 P.2d 80 (1977).

Sec. 15.13.070. Contributions and expenditures; amount and form of payment. (a) No person or group, including but not limited to all political committees, businesses, corporations, and labor unions, may contribute to or expend more than $1,000 a year on behalf of or in opposition to the competing candidates for each elective office. Political parties and their subdivisions are not subject to the limitation

prescribed in this subsection, but they are subject to the reporting requirements prescribed by AS 15.13.040(b) and 15.13.110. Nothing in this chapter prohibits

(1) a candidate from contributing more than $1,000 of his own money to his own campaign; or

(2) individuals or groups, including but not limited to all political committees, businesses, corporations, and labor unions, from contributing to or expending on behalf of a ballot proposition or question more than $1,000 a year; however, these contributions and expenditures shall be reported in accordance with AS 15.13.040 and 15.13.110.

(b) No contribution over $100 may be made in cash or by cash payment and it may not be accepted by or on behalf of a candidate.

(c) No expenditures over $100 may be made in cash or by cash payment unless a written receipt is obtained and filed with the commission.

(d) No contribution may be made, and no expenditure may be made or incurred, directly or indirectly, anonymously, in a fictitious name, or by one person or group in the name of another, to influence the election of a candidate in an election. A contribution made by a person wishing to remain anonymous, and received by a candidate, campaign treasurer or deputy campaign treasurer, may not be used or expended, but shall be returned to the donor, if his identity is known, and if no donor is found, the contribution escheats to the state if not donated by the candidate to the charity of his choice.

(e) Contributions to a candidate or a political committee may be received by, and expenditures of a candidate or political committee may be made by, only the candidate, campaign treasurer, or deputy campaign treasurer.

(f) The total amount of expenditures made by a candidate and by all groups operating under his control may not exceed (1) 40 cents times the total population of the state according to the latest United States census figures, or estimates of population certified as correct for administrative purposes by the Department of Community and Regional Affairs, if the candidacy is for governor or lieutenant governor, of which amount no more than 50 per cent may be spent in a primary election campaign and no more than 50 per cent in the general election campaign; (2) $1 times the total population of the geographical area of the constituency according to the latest United States census figures, or estimates of population certified as correct for administrative purposes by the Department of Community and Regional Affairs, divided by the number of seats in the senate district if the candidacy is for the state senate; (3) $1 times the total population of the geographical area of the constituency according to the latest United States census figures, or estimates of population certified as correct for administrative purposes by the Department of Community and Regional

Affairs, divided by the number of seats in the house district if the candidacy is for the state house of representatives. The expenditure limitations in this section include expenditures for both a primary and a general election campaign, or for a special election.

(g) Each general election year the commission shall adjust the campaign expenditure limitations for each category of (f) of this section to reflect cost-of-living changes as determined and published by the Bureau of Labor Statistics of the United States Department of Labor.

(h) No campaign expenditure of any type whatsoever shall be made by any candidate, treasurer, or group unless the source is disclosed as required by the provisions of this chapter whether or not those funds were received prior to May 10, 1974. (§ 1 ch 73 SLA 1974; am §§ 20, 21 ch 189 SLA 1975)

Editor's notes. — In Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), the supreme court held that the 1st amendment of the federal constitution required the invalidation of certain provisions of the Federal Election Campaign Act of 1971, as amended in 1974: Its independent expenditure ceiling, 18 U.S.C. § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, 18 U.S.C. § 608(a), and its ceiling on overall campaign expenditures, 18 U.S.C. § 608(c), since these provisions placed substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression. This holding has been accepted as law in Alaska and the expenditure limits in this chapter have not been enforced. See notes from the opinion of the attorney general dated May 13, 1976, cited below.

Opinions of attorney general. — There seems to be no difference between § 608(c) of the Federal Elections Campaign Act of 1971, former 18 U.S.C. § 608(c), and subsection (f) of this section; accordingly, based on the reasons stated in Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), for finding unconstitutional § 608(c) of the federal act, subsection (f) of this section is invalid as a violation of the rights and privileges protected by the 1st amendment. May 13, 1976, Op. Att'y Gen.

The Public Offices Commission should not undertake investigations of violations of subsection (f) of this section, and candidates or others may be advised that no implementation or enforcement of subsection (f) of this section is planned by the office of the attorney general. May 13, 1976, Op. Att'y Gen.

NOTES TO DECISIONS

Cited in State, Pub. Offices Comm'n v. Marshall, Sup. Ct. Op. No. 2406 (File No. 5614), 633 P.2d 227 (1981).

Collateral references. — Construction and application of provisions of corrupt practices act regarding contributions by corporations. 125 ALR 1029.

Power of corporation to make political contribution or expenditure under state law. 79 ALR3d 491.

State regulation of the giving or making of political contributions or expenditures by private individuals. 94 ALR3d 944.

Sec. 15.13.080. Statement by contributor. A person or group contributing to a candidate over $250 or contributing goods or services

SECTIONAL ANALYSIS OF CSHB 284

Submitted By:

Division of Elections
February 4, 1986

The following is an analysis of the recommended changes to Title 15 of the Alaska Statutes proposed by CSHB 284:

Sections 1 and 2

These sections of the proposed bill relate to the provisions of Title 15 in place to ensure that persons convicted of felonies involving moral turpitude are prevented from voting prior to their unconditional discharge. Under current law upon release of the convicted felon from the authority of the court, voting rights are automatically restored with no action required by the individual. The intent of these sections is to cancel the voter registration of convicted felons, and require them to reregister upon unconditional discharge.

Section 3

AS 15.07.160(a) provides that it is unlawful for a registration official to refuse to register a qualified individual. The proposed amendment stipulates an exception in cases of otherwise qualified individuals who are not yet unconditionally discharged from custody of the court.

Section 4

This amendment to AS 15.07.160(b) which provides that it is unlawful for an individual to register who knowingly lacks the qualifications of a voter, changes the reference citation from AS 15.05.010 (1)-(4), Voter Qualifications, to AS 15.07.030, Who May Register.

Section 5

AS 15.10.180 relates to the appointment of party representatives for participation on state canvassing boards. By specifying the participation of 2 persons from each political party, the current statute limits the size and composition of the board. The proposed amendment gives the director discretion as to the number of teams that may serve, and stipulates that each team must have members from at least 2 political parties. The flexibility offered by the amendment allows the director to accommodate fair party

representation for all parties, as the number of recognized parties fluctuates. As the State has grown, and registration rolls have increased, voter turnout has also dramatically increased. The certification process is becoming more difficult to complete in a reasonable amount of time. It is estimated that certification requires the review of nearly 65,000 mathematical calculations over 442 precincts Statewide. This proposed amendment would allow the director to appoint additional teams as needed to assure that the process can continue to be completed in a reasonable amount of time, while guaranteeing fair party representation in the process.

Section 6

This section concerns the posting of public notices in conspicuous places in each precinct. Present law provides that the posters contain the legal boundary description of the precinct. Having legal descriptions preprinted on the posters would be a very expensive process as there are only 2 for each precinct required by law. Therefore, Divisional staff must clip and paste each legal description on 884 individual posters by hand. Additionally, legal boundary descriptions are often confusing, hard to read, and difficult to understand and therefore are of questionable benefit to the voters as used in this application. The division has better methods in place by which to notify voters of their proper precinct and polling place. Each voter is sent a polling place card before major elections that indicate the precinct in which he or she should vote and where the polling place is located. The list of polling places for all precincts are published in the Official Election Pamphlet and in newspapers prior to the elections. Therefore, it is proposed that legal boundary description requirement be deleted from AS 15.15.070(c).

Section 7 (Also see Sections 15, 16, 17 and 20)

This section seeks to make a housekeeping change in the start date for state canvass board review, from the 8th day after the election to the 11th day. This amendment relates to the tightening of the deadline for receipt of absentee ballots as proposed in section 14 of this bill, which provides that the last day to receive military and foreign by mail ballots would be the 10th day. Under the existing statute the state review board is required to begin its canvass before counting of absentee ballots is completed at the regional level because of the extended absentee deadline beyond the 8th day. Regional Boards have been required to submit incomplete precinct data to Juneau. This has resulted in additional counting of ballots received after the 8th day being concluded at the director's level, after

the state canvass has begun. The amendment allows time for all counting to be completed at the regional level in accordance with the proposed 10 day receipt deadline, and before the state canvass would begins its audit.

Sections 16, 17, and 20 of this bill propose similar housekeeping changes to dates related to the review and counting of absentee and question ballots, and the forwarding of precinct records to the directors office for inclusion in the state review, pursuant to the amended deadline for receipt of absentee ballots.

Sections 8, 10 11 and 12

These sections accommodate the deletion of language referring to witnessing requirements on absentee voting materials, pursuant to a conceptual amendment proposed in House Judiciary to eliminate all witnessing requirements for any form of absentee voting, whether by mail, in person or by personal representative. Research indicates that 43% of rejected absentee ballots were not counted because of inadequate witnessing, however concern has been expressed that elimination of witnessing altogether could be perceived as impairing the integrity of the absentee voting process.

Section 9.

This proposed amendment would make mandatory district absentee voting in municipalities with 2,000 or more residents, for 8 hours a day, each day including Saturday and Sunday, for the week preceding a Primary, General or Special Statewide election. While the existing statute does provide for absentee voting in person in advance of election day, it does not currently stipulate Saturday and Sunday voting or specify the number of hours per day required.

Section 13.

Presently, all absentee by mail ballots may be accepted up to 15 days after the election. This proposed amendment would require that absentee by mail ballots be received no later than the sixth day after the election for ballots mailed from within the United States.

Concern has been expressed that since current statutes mandate, that "if the ballot is postmarked, it must be postmarked on or before election day", there is a potential for fraudulent or unethical use of the system. Specifically, this part of the statute requires the postal stamp on or before election only if the ballot is indeed postmarked, but does not require a postmark on all ballots, Research shows that requiring postmarks on all ballots is not feasible because of irregularities in the postal systems

worldwide. Because of postal inconsistences candidates or campaign workers could respond to election night returns by soliciting absentee voters who have not mailed in their ballots to do so in the few days right after the election. Because no postmark is required for counting, these ballots cast after the election, but received within the 15 day period, could be included in the totals. In close races, these late votes could impact the outcome. Research shows that 98% of mailed ballots take fewer than 6 days for delivery.

Shortening the deadline for receipt of absentee ballots would enhance the faster announcement of election results. Candidates, particularly in close races, would know the outcome more quickly as certification of election results could be completed sooner.

Section 14.

This amendment extends the deadline for receipt of absentee ballots mailed from overseas or any APO or FPO address to the 10th day after the election. Research of such ballots indicates that 98.5% of these ballots are delivered in fewer than 10 days.

Section 15, 16, 17, 19, and 20. (Also see Section 7)

These sections are additional housekeeping amendments making changes to specified days on which regional boards begin and complete review and counting of absentee and questioned ballots and forward materials to the directors office for inclusion in the state review. These changes are related to the proposed deadline for receipt of absentee ballots.

Section 18. (Also see Section 21)

This section amends the grounds for which a absentee ballot may not be counted. First, it deletes the omission of attesting by an official or 2 witnesses as reason for rejection pursuant to the conceptual amendment eliminating this requirement. Second, it eliminates the mere failure to enclose the marked ballot in a secrecy envelope as grounds for not counting the ballot. It does not seek to eliminate the use of a secrecy envelope as an administrative requirement but removes failure of a voter to use one, as reason to reject an otherwise properly cast ballot.

Section 21

This section makes the same amendments to statutes covering grounds for not counting questioned ballots.

Section 22.

Under current statutes, a candidate requesting a recount may select representatives to observe and participate in tne recount process. Often candidates choose to represent themselves. These observers and candidates are currently paid for this participation at the same rate as the counting team members. In essence, the candidates pay the nominal fee and are then repaid for participating. The proposed amendment removes the provision for paying recount representatives.

Section 23.

The cost to the State for conducting recounts are approximately $1700 per District. This proposed amendment would increase the fees required of candidates for recounts. Additionally, the amendment raises the difference between the number of votes cast between candidates from 10 votes to 20, as a basis for determining if a recount is to be completed free of charge.

Section 24.

Presently under current statutes, recounts do not involve just the ballots that were included in the State Ballot Counting Review, but also involves any ballots that were received after the statutory deadline and therefore could not be included in certification. It is the intent of this amendment to provide that only those ballots that were received by the deadline and considered in the entire review and certification process be included in the recount.

Section 25.

The addition of this section formalizes the authority of the Director to supervise punch-card voting and counting procedures as necessary. This formal placement of final authority is critical, especially under emergency situations which sometimes occur during election night counting. As an example, during the failure of the mainframe com uter in Anchorage during the 1984 Primary election, the decision to go to the backup system had to be made quickly. This addition clarifies the role of the Director in making such decisions while coordinating the work of the Data Processing Review Board as responsible for testing and implementing the actual computer counting of ballots. Timely and responsive decisions by a single authority is required to ensure the counting process continues to proceed as smoothly and efficiently as possible.

Section 26.

This proposed amendment seeks to make the filing fees paid by candidates non-refundable. In addition it deletes the provision that these fees be paid to the central committee of the political party of that candidate subject to legislative appropriation.

Sections 27 through 35.

The proposed amendments to these sections are in response to an Alaska Supreme Court decision in Vogler vs. Miller, 651, P.2d 1 (Alaska 1982), and Vogler vs. Miller, 660 P2d 1191 (Alaska 1983).

In particular, the court held that AS 15.25.160 and 15.60.010(20) are unconstitutional as being unduly restrictive of ballot access and as to other consequences of "political party" status. AS 15.25.160 requires that a petition for the nomination of candidates for the office of governor, lieutenant governor, United States senator and representative be signed by qualified voters equal in number to at least three percent of the number of votes cast in the preceding general election. AS 15.60.010(20) defines "political party" as a group of organized voters that represent a political program and that nominates a candidate for governor who received at least 10 percent of the vote cast at the preceding general election for governor.

This bill amends those two sections to reduce the required percentage to one percent and three percent, respectively. The bill also amends other sections to similarly reduce the required percentages in light of the Vogler decision.

Section 36.

This section repeals various statutes which are inappropriate or no longer applicable under the amended provisions of this bill.

AS 15.20.160 prohibits charging a fee for witnessing absentee ballots.

AS 15.20.201(d) requires election supervisors to forward absentee ballots received after the 7th day to the director by the most expeditious service.

AS 15.25.180(10) requires that nominating petitions for no-party candidates state that the subscribers intend to vote for the candidate being nominated at the general election.

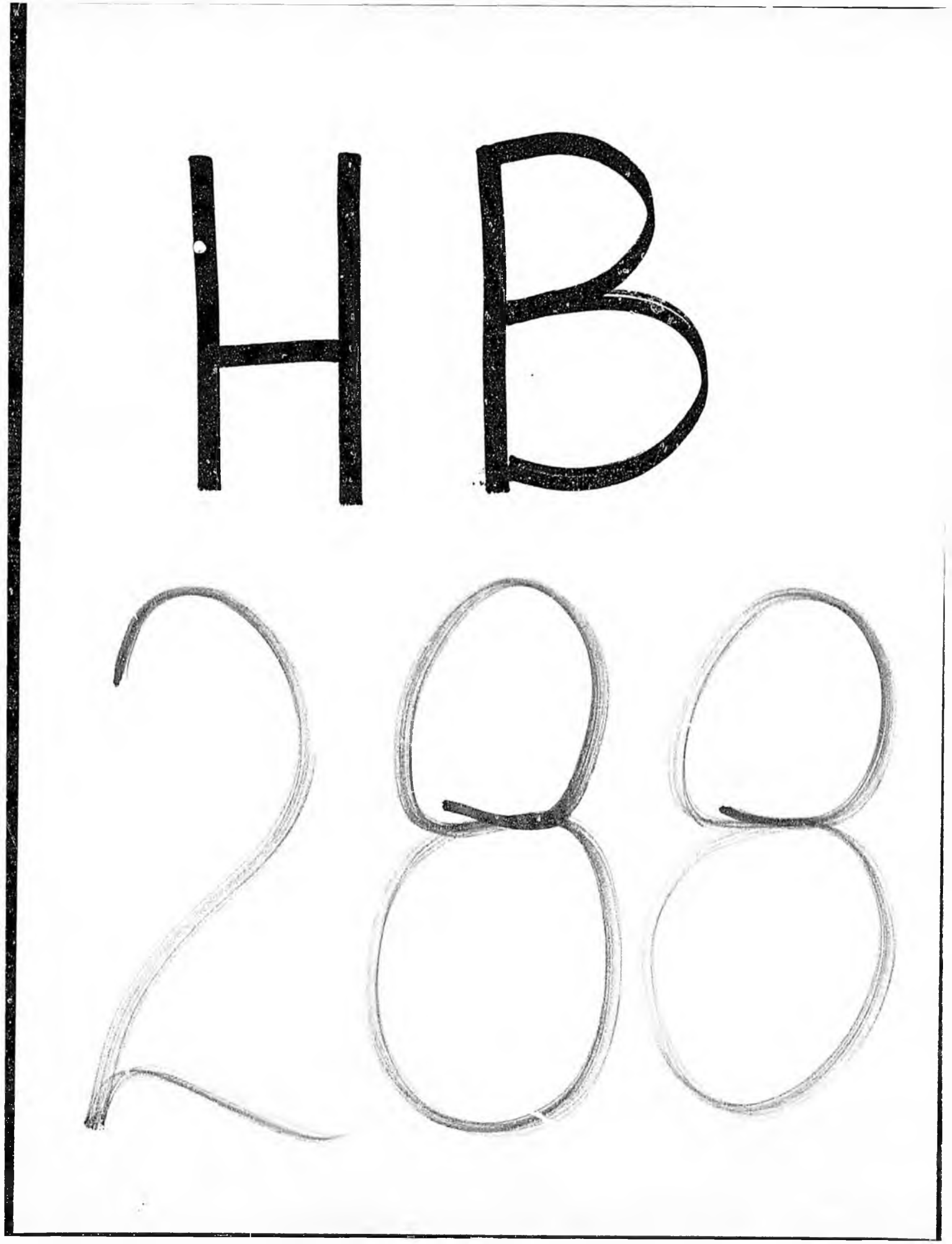
RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)


HB
2288

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	4/18/85	7pm
House Resources	3/25/85	8:30 AM
" "	3/26/85	8:30 AM
" "	4/2/85	8:30 AM
" "	4/9/85	8:30 AM

COMMITTEE REPORT

HOUSE

(7)

FURTHER:

4/15/85

Date: _____

The Committee on JUDICIARY has had ~~HB~~ SB 233

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

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for ~~HB~~ HB 233 (JUD) [ ] same title [ ] new title

and recommends ~~report out back with individual recommendations~~ as follows

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 288(Res)

Page 2, after line 24, insert a new bill section to read:

"* Sec. 3. AS 16.05.940(22) is amended to read:

(22) 'subsistence fishing' means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, long line, hook and line held in the hand, hook and line with the line attached to a pole or rod that is held in the hand or closely attended, or other means defined by the Board of Fisheries;"

Renumber remaining bills sections accordingly.

M. M. Miller

Memo: To House Judiciary Committee

From: Mary Bishop
1555 Gus's Grind
Fairbanks 99701
Phone: 455-6151

Date: 18 April 1985

Regarding: CSHB - 288

The recent finding by the appeals court in the Eluska case have made the situation even more difficult for the Boards of Fish and Game. In particular please consider footnote 6 on pages 7,8 of court decision.

I have attached April 12 Memorandum to Commissioner Collinsworth from AG's office.

I urge the Judiciary Committee to consider participation in the review suggested in the last paragraph of that memo. I also hope you will immediately encourage a State Supreme Court review of the Eluska case as is also suggested.

brought in
Submitted by Jenny King
for Mary Bishop

(1)

Bst - 16 - Subsist.
4-25

MEMORANDUM State of Alaska

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

DATE: April 12, 1985 1985

FILE NO: 122-389-84

TELEPHONE NO: 276-3550

FROM: Norman C. Gorsuch
Attorney General

By: Sarah Elizabeth McCracken SEM
Assistant Attorney General
Natural Resources-Anchorage

SUBJECT: State v. Eluska (subsistence deer hunting in Kodiak); Court of Appeals No. A-210

Enclosed for your review is the decision issued today by the Court of Appeals in the Eluska case, dealing with subsistence deer hunting in Kodiak.

In a nutshell, the court holds that the deer regulations (six month season, seven deer bag limit) for Kodiak do not on their face comply with the subsistence law, and remands the matter to the trial court to determine whether the seasons and bag limits restrict subsistence use, i.e. whether they constitute "any significant impairment" of subsistence uses.

The court also holds that the 1978 law required the board to take action to specifically provide for subsistence hunting and to grant subsistence uses a priority. The court holds that the board may not restrict subsistence hunting at all in an area in which sport or commercial hunting is permitted, and that even if sport and commercial hunting are totally prohibited at all times in an area, the board is still prohibited from restricting subsistence hunting unless the board specifically finds that unrestricted hunting would jeopardize sustained yield.

In the Eluska case, a doe deer was taken in mid-May. The fact that there was a six month long season and seven deer bag limit did not on its face satisfy the legislative mandate that the board specifically adopt subsistence regulations.

The court formally recognizes a "subsistence defense," and sets up a procedure whereby a defendant would have to make a preliminary showing, before trial, that that person believed in good faith that he or she was engaging in subsistence hunting as defined by statute. If the defendant makes a preliminary showing, then the state is given an opportunity to establish

> "that the regulations did not in fact restrict to the taking of game, i.e. it was a regulation of time, place and manner that did not significantly impact or impair subsistence use or,

(2)

alternatively, that any restriction on subsistence use recognized the subsistence priority and was intended to protect sustained yield."

The court interprets the term "restriction" to mean "any significant impairment of subsistence uses." If, after hearing the evidence, the court is convinced that a jury could not find guilt beyond a reasonable doubt, the case must be dismissed. If reasonable men and women could differ, the defense is then submitted to the jury with appropriate instructions.

I suggest that the Department of Fish and Game, interested Board of Game members, and the Department of Law meet in the very near future to discuss the implication of the case, and the best course of action to take. There is no right of appeal to the supreme court, but there is a procedure for requesting the supreme court to review the decision. The state has 15 days (until April 29) in which to file such a request for discretionary review.

SEM:csd

cc: Col. Robert Henderson
Dennis Kelso
Stephen Behnke
Lewis Pamplin
Larri Spengler
Board of Game
Sue McLean

(3)

Original sponsor: Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 288 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

* Section 1. FINDINGS. The legislature finds that

(1) the taking of fish stocks and game populations for personal and family consumption and related uses is essential to the health, safety, and general welfare of Alaskans domiciled in rural communities or rural areas in which the taking of fish and game for such uses is a significant part of the economy of the community or area; and

(2) the taking of fish stocks and game populations for personal, sport, and commercial uses is also of economic and recreational importance to Alaskans who reside anywhere in the state.

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

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.-62) for

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

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

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

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

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

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

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

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

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

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

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

(12) personal use fishing.

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

(23) "subsistence uses" means the customary and traditional noncommercial uses [IN ALASKA] of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or

transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in [FOR THE PURPOSES OF] this paragraph [,]

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

(B) "rural area" means a community or area of the state in which the taking of fish or wildlife for personal and family consumption is a significant characteristic of the economy of the community or area;

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

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

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

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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

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

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 17, 1985

Honorable John G. Fuller
Chairman, Alaska Legislative Council
Pouch V
Juneau, Alaska 99811

Re: HB 288 (Subsistence and personal use)

Dear Representative Fuller:

You have asked what the immediate effect of HB 288 would be on fishing opportunities of Alaskans. Under Madison v. Alaska Department of Fish and Game, _____ P 2d _____, Op. No. 2911, (Alaska, Feb. 22, 1985), all Alaskans would be eligible for subsistence fishing, anywhere subsistence fishing is authorized in the state. Passage of HB 288 would return the situation to the way it was immediately before the Madison decision was issued. In other words, the bill would validate the regulations passed so far by the boards, and would not result in any instantaneous change of fishing opportunities which were available under those regulations.

In areas where the board had addressed the identification of subsistence uses under the eight criteria in 5 AAC 99.010, some people would qualify for subsistence uses and some would not. For example, in the Cook Inlet area, the board examined the uses of salmon, and determined that the evidence showed that only people domiciled in Tyonek, English Bay, and Port Graham were eligible for subsistence uses. Therefore, if HB 288 were to pass, people in those three communities would be eligible for subsistence fishing as authorized by regulation near their communities, and people from other Cook Inlet communities would be eligible for the personal use fisheries the board had established.

In other areas of the state, such as Southeast Alaska where the board had not yet gone through the procedures in 5 AAC 99.010 to identify subsistence uses, all Alaskans would be able to continue to participate in subsistence fishing until the board applied the procedures. For example, people in Ketchikan would be able to continue subsistence fishing as authorized by the Southeast regulations. It is possible that after the board

examines the uses in Ketchikan it will determine that they are not rural uses qualifying under the eight criteria. If the board determines that, the board will establish by regulation, personal use fishing opportunities for those individuals. On the other hand, when the board assesses the uses of a smaller community, such as Hydaburg, the board may determine that the uses qualify as subsistence and will continue to authorize subsistence fishing for the residents of the community.

Attached is a May 4, 1982 memorandum from the Attorney General to Milstead Zahn, Executive Director, Boards of Fisheries and Game, AG File No. 366-639-82, on the effects of the joint boards' adoption of 5 AAC 99.010. In that provision, the boards had for the first time in regulation specified that subsistence uses were customary and traditional uses by rural Alaskan residents which could be identified by eight criteria. The memorandum evaluates the question of whether the passage of that regulation in itself meant that the Department of Fish and Game should modify the way it distributed subsistence fishing permits. The memorandum concludes that the department should not unilaterally restrict the issuance of subsistence permits to particular people, absence specific, situation by situation regulatory action by the boards. The memorandum emphasized that the implementation of the subsistence law is an ongoing process, rather than something that can be completed instantaneously, and that people could not be precluded from subsistence fishing unless the board considered authorizing personal use fishing opportunities for them.

If you have any other questions, please do not hesitate to ask.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Larri Irene Spengler
Larri Irene Spengler
Assistant Attorney General

LIS:rn

Attachment

Phillips #1

IN THE SENATE

BY THE RULES COMMITTEE
BY REQUEST OF THE
GOVERNOR

Amendments for HB 586

~~SENATE BILL NO. 231~~

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

* Section 1. FINDINGS. The legislature finds that

(1) the taking of fish stocks and game populations for personal and family consumption and related uses is essential to the health, safety, and general welfare of Alaskans domiciled in rural communities or rural areas in which the taking of fish and game for such uses is a significant part of the economy of the community area; and

(2) the taking of fish stocks and game populations for personal, sport, and commercial uses is also of economic and recreational importance to Alaskans who reside anywhere in the state

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

(a) The Board of Fisheries shall in accordance with the Administrative Procedures Act (AS 44.62) adopt regulations permitting the taking of fish resources, unless it determines that such taking will jeopardize the maintenance of such resource on a sustained yield basis. At such times, and under such circumstances that it is necessary to restrict the taking of fish to maintain fish stocks on a sustained yield basis, the Board may allocate the use of these resources among beneficial uses. Except for regulations adopted under (b) of this section, allocations shall be calculated to achieve conservation of the resource, be fair and equitable, and no use shall receive an excessive share of the resource with regard to the intended purpose of the use.

the customary trade, barter, or sharing for personal or family consumption, for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

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

(28) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources by Alaska residents for personal or family consumption, for food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft out of nonedible by-products of fish resources taken for personal or family consumption and for the customary trade, barter, or sharing for personal or family consumption. The taking of fish for personal use shall be with gill net, seine, fish wheel, long line, or similar means defined by the Board of Fisheries.

* Sec. 5. AS 16.05.940 is amended by adding a new paragraph to read:

(30) priority use shall mean a use of fish resources that is not exclusive but shall be preferred. When necessary to assure maintenance of fish stock on a sustained yield basis or to assure continuance of subsistence use of such resource priority use shall mean that reasonable restrictions on a step by step basis shall be imposed on all beneficial uses of fish resources including subsistence use. Subsistence use restrictions shall be the last imposed in each step by step restriction.

* Sec. 6. This Act takes effect immediately in accordance with AS 01.10.070(c).

Consistent with the above, the Board shall adopt regulations for

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

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

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

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

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

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

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

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

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

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

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

(12) personal use fishing.

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

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

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 288(Res)

Page 3, after line 18, delete section 2 and insert new bill sections to read:

"* Sec. 5. AS 16.05.251(a) is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.-62) for

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

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

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

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

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

(6) classifying as commercial fish, sport fish, [PERSONAL USE FISH,] or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management,

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 288(Res)

Page 6, after line 18, delete section 8 and insert new bill sections to read:

"* Sec. 9. AS 16.05.251(a) is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.-62) for

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

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

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

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

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

(6) classifying as commercial fish, sport fish, [PERSONAL USE FISH,] or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management,

conservation, protection, use, disposal, propagation and stocking of fish;

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

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

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

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

(12) PERSONAL USE FISHING].

* Sec. 6. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the customary and traditional [NONCOMMERCIAL] uses <u>in Alaska</u> of wild, renewable resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph

[(A)] "family" means all persons related by blood,

marriage, or adoption, and any person living within the household on a permanent basis;

[(B) "RURAL AREA" MEANS A COMMUNITY OR AREA OF THE STATE IN WHICH THE TAKING OF FISH OR WILDLIFE FOR PERSONAL AND FAMILY CONSUMPTION IS A SIGNIFICANT CHARACTERISTIC OF THE ECONOMY OF THE COMMUNITY OR AREA;]

* Sec. 7. Section 1 of this Act and AS 16.05.940(28) are repealed.

* Sec. 8. Sections 1 - 4 of this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 9. Sections 5 - 7 of this Act take effect January 1, 1986."

Pettyjohn #1

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

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

* Section 1. FINDINGS. The legislature finds that

(1) the continuation of the opportunity for non-wasteful subsistence uses by many Alaskans is important and in many cases essential to their physical, traditional, cultural, and social existence, and that in certain instances no practical alternative resources or means are available to replace food, supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(2) in order to protect subsistence users, and in order to protect sport and commercial uses of fish and wildlife, and in order to maintain healthy fish and wildlife populations available to subsistence, sport and

commercial users, it is necessary for the Board of Fisheries and the Board of Game to have authority, only for the 1985 fishing and hunting seasons and until March 31, 1986, to regulate subsistence fishing and hunting in the manner in which they were regulated in 1984.

(3) conservation of fish and wildlife during the 1985 season and thereafter will be furthered if the legislature is unhurried in its consideration of complicated social, political, and biological questions related to subsistence; by March 31, 1986 the legislature should be able to consider, after statewide hearings, more complicated subsistence issues that cannot be adequately considered in the remaining days of the first session of the fourteenth legislature.

* Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.258. SUBSISTENCE CRITERIA. Until March 31, 1986, and in accordance with the Administrative Procedure Act (A.S. 44.62), the Board of Fisheries and the Board of Game may adopt regulations in order to identify customary and traditional subsistence uses by Alaskans by using the criteria set forth in the regulations in effect in 1984 and found at 5 AAC 99.010 and 5 AAC 01.597 and those criteria are hereby established for the 1985 fishing and hunting seasons.

* Sec. 3. For the 1985 fishing and hunting seasons, the

Commissioner of Fish and Game shall use his authority, in AS 16.05.060, to issue emergency regulations in order to provide for subsistence as it occurred in 1984; provided however, that in this instance a biological emergency need not exist as is otherwise required by AS 16.05.060.

* Sec. 4. Until March 31, 1986, only subsistence uses specifically recognized and authorized by the Board of Fisheries or Game have any legal standing.

* Sec. 5. This Act shall take effect immediately in accordance AS 01.10.070 (c).

Contents - HB 288
April 18, 1985

Letter of Intent for CSHB 288 (Res)
an act relating to the taking of fish and and game for subsistence and personal use
by the House Resources Committee
4/15/8

The purpose of this bill is to authorize the Alaska Board of Fisheries and the Alaska Board of Game to adopt regulations identifying "subsistence uses" of fish stocks and game populations as the boards did from May 30, 1982 until February 22, 1985.

Pursuant to this bill the boards will limit the identification of "subsistence uses" of fish stocks and game populations to the taking of such stocks and populations by Alaska residents who are domiciled in rural communities and rural areas in which the taking of fish stocks or game populations for personal and family consumption is a significant characteristic of the economy of the community or area, as determined by the boards.

This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities and rural areas in Alaska is significantly dependent participation by the residents of these communities in the taking of fish stocks and game populations for personal and family consumption. Further, the Legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.

The boards will be authorized to adopt regulations for identifying customary and traditional uses by Alaska residents of those rural communities and rural areas. It is the intent of the Legislature to preserve the approach to implementing the state's subsistence law embodied in 5 AAC 99.010, (as adopted by the Joint Boards of Fisheries and Game on May 30, 1982), for identifying subsistence uses on a community or area basis.

The Legislature finds that implementing the subsistence law is consistent with the intent of the definition of subsistence hunting and fishing and personal use fishing contained in House Bill 288 when criteria such as those outlined below are used to identify customary and traditional uses of the resource:

(1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in specific seasons of each year;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community of persons, including customary trade, barter, sharing, and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection; and

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and which provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

This legislation establishes that the commercial sale of fish and game taken for personal and family consumption is prohibited, but does not preclude the sale of handicraft articles made from the non-edible by products taken for such uses. Accordingly, the Legislature intends that barter, sharing and customary trade of fish or game taken for personal and family consumption be of a non-commercial nature. This restriction however, does not apply to the existing limited sale of animal furs by subsistence users of the resource.

The bill also establishes a statutory definition of "personal use fishing." Although sport, commercial and personal use fishing are not afforded a statutory priority over each other, the inclusion of a definition of "personal use" is to indicate that the intent of the Legislature is to delegate to the Alaska Board of Fisheries adequate regulatory authority to provide all persons engaged in sport, commercial, and personal use fishing a reasonable opportunity to participate in the harvest of Alaska's fish stocks.

Adelheid Herrmann

Adelheid Herrmann, Co-chairman
House Resources Committee
4/15/85

EXCERPT FROM MINUTES

DRAFT

HOUSE RESOURCES
STANDING COMMITTEE
April 8, 1985
5:30 p.m.

Members Present: Rep. Adelheid Herrmann, Co-Chair, Rep. Bettye Cato, Rep. Roger Jenkins, Rep. John Sund, Rep. Dick Schultz, Co-Chair, Rep. Drue Pearce, Rep. Kay Wallis

Joined By: Rep. Jack G. Fuller, Rep. Peter Goll, Rep. Randy Phillips

COMMITTEE CALENDAR

HB 288

WITNESS REGISTER

Rep. Peter Goll
Pouch V
Juneau, AK 99811
465-4925
Position Statement: Supports HB 288

Lynn Levengood
Fairbanks, AK
Position Statement: Opposes HB 288

Jim Fry, Sr.
Slana, AK
Position Statement: Opposes HB 288

Ivan (Hank) Avery
Savoonga, AK
Position Statement: Opposes HB 288

Byron Haley
Fairbanks, AK
Position Statement: Opposes HB 288

James Martinez
Klawock, AK
Position Statement: Supports HB 288

Harvey Samuelsc
Dillingham, AK
Position Statemen : Supports HB 288

David Wiley Stevenson
Copper Center, AK
Position Statement: Opposes HB 288

Roxy Estes
Cordova, AK
Position Statement: Supports HB 288

Louis GJosund
Homer, AK
Position Statement: Opposes HB 288

Chris Nevison
Fairbanks, AK
Position Statement: Supports HB 288

William Shee
Yakutat, AK
Position Statement: Opposes HB 288

Pete Schaeffer
Kotzebue, AK
Position Statement: Supports HB 288

Ralph Andy Johnson
Soldotna, AK
Position Statement: Opposes HB 288

Constance Griffith
Ketchikan, AK
Position Statement: Supports HB 288

Roland Quimby
Fairbanks, AK
Position Statement: We should look at the resource not the users.

Woodrow Morrison, Jr.
1736 Davis
Juneau, AK
Position Statement: Supports HB 288

Leo Land
Haines, AK
Position Statement: Supports HB 288

Jeff Parker, Attorney
Kenai River Sports Fishing Asso.
Anchorage, AK
Position Statement: Concerned about user group definitions.

Dave Rector
Homer, AK
Position Statement: Does not support HB 288 unless "rural" is defined.

Otto Florshutz
Sitka, AK
Position Statement: Supports HB 288

Mark Jensen
Juneau, AK
Position Statement: Opposes HB 288

Armin Koenig
Cordova, AK
Position Statement: Supports HB 288

Doug Fredericks
Slana, AK
Position Statement: What about impacts on sport hunting, fishing and related industries.

Charles Derrick
Fairbanks, AK
Position Statement: Opposed to HB 288

Arthur Stites
P.O. Box 3188
Salamatof, AK
Position Statement: Opposed to HB 288

Joe Hotch
Klukwan, AK
Position Statement: Supports HB 288

Robert Rausch
Juneau, AK
Position Statement: Opposes HB 288

Raymond Pete
Bethel, AK
Position Statement: Opposes HB 288 unless urban and rural areas are more defined.

Bob Hunter
Alaska Sportsfishing Asso.
Anchorage, AK
Position Statement: Would like a temporary measure until the issue can be resolved.

Walter Sampson
Kotzebue, AK
Position Statement: The Legislature should recognize the real subsistence users, when considering a bill such as this.

Hugh Dugan
Fairbanks, AK
Position Statement: Not enough time in session to consider this bill, the Attorney General lawyers have been wrong in every subsistence case.

D. W. (Bill) Dean
Gastineau Channel Fishery Advisory Committee
Juneau, AK
Position Statement: Opposes HB 288

William Miller, President

Dot Lake Village Council
Dot Lake, AK
Position Statement: Opposed to HB 288

Jimmie Ricks
Soldotna, AK
Position Statement: Speaking for Gene Madison, Opposed to HB 288

Tom Johnson
Cordova, AK
Position Statement: Supports HB 288

Vernita Billas
Fairbanks, AK
Position Statement: Supports HB 288

Ron Sommerville
Alaska Outdoor Council
Juneau, AK
Position Statement: Opposed to HB 288

Otto Kelcher
Homer, AK
Position Statement: Was happy with subsistence law as it was.

Chet Cheshier
Cordova, AK
Position Statement: Voluntarily pays 2% gross to aquaculture association to build up runs.

Unknown
Cordova, AK
Position Statement: Supports HB 288

Jack Lentfer
Juneau, AK
Position Statement: Opposes HB 288 until the definition of subsistence is refined.

Terry McClare
Mentasta, AK
Position Statement: Opposes HB 288, feels there should be a separation of fish and game.

Unknown
Box 967
Slana, AK
Position Statement: Opposes HB 288, feels there should be a separation of fish and game.

Alfred McKinley
816 Dixon
Juneau, AK (Originally from Hoonah)
Position Statement: Supports HB 288

THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. DAVID ELUSKA, Appellee.	File No. A-210
	OPINION
	[No. 456 - April 12, 1985]

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

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

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

SINGLETON, Judge.

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

---

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

(Footnote Continued)

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

---

(Footnote 1 Continued)

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

2. 5 AAC 81.140(a) provides:

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

3. Alaska Statute 44.62.030 provides:

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

Alaska Statute 11.81.220 provides:

> All offenses defined by statute. No conduct constitutes an offense unless it is made an offense
> (1) by this title;
> (2) by a statute outside this title; or
> (3) by a regulation authorized by and lawfully adopted under a statute.

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

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

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

DISCUSSION

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

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

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

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

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

> Regulations of the Board of Game. (a) The Board of Game may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for
>
> . . . .
>
> (2) establishment of open and closed seasons and areas for the taking of game;
>
> (3) establishment of the means and methods employed in the pursuit, capture and transport of game;
>
> (4) setting quotas and bag limits on the taking of game . . . .

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

> (b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:
>
> (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
>
> (2) local residency; and

(3) availability of alternative resources."[4]

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

---

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

meet "subsistence uses" before he could prevail on his motion to dismiss.[5] Since there is nothing in the record indicating that there were insufficient deer in Game Unit 8 to meet all needs, including both sport hunting and subsistence uses, the state contends it was unnecessary for the Board to adopt any specific subsistence regulations, and therefore the trial court erred in finding that prosecution of Eluska under 5 AAC 81.320(6) and 5 AAC 81.140(a) was inconsistent with the enabling statute.

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

---

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

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

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

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

This conclusion does not resolve the case, however, because we agree with the trial court that a proper resolution of this case requires consideration of AS 16.05.255(b) as well as AS 16.05.255(a). We must determine what the 1978 legislative enactment required the Board to do and then determine whether the Board properly carried out the legislative mandate. Finally, if the Board has not followed the legislative directive, we must determine what effect its failure would have on Eluska's prosecution. Having considered the record and the parties' arguments, we conclude that by enacting subsection (b) of AS 16.05.255, the legislature required the Board of Game to adopt specific regulations "permitting"[6] the

---

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

(Footnote Continued)

See page 16

"restriction" means "an ... ficant impairment ... subsistence uses ..."

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

(Footnote 6 Continued)

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

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

Finally, we do not read the supreme court's discussion of the legislative history regarding the use of the term "customary and traditional" as constituting an implicit finding that the statute is somehow void as a discrimination against outsiders and newcomers. See Madison, ___ P.2d at ___, Op. No. 2911 at 20-21. We assume that the Board will be able to adopt regulations adequately answering the questions left open by this case and Madison without violating state and federal equal protection guarantees. See Zobel v. Williams, 457 U.S. 55, 60-61, 102 S. Ct 2309, 2312-13, 72 L.Ed.2d 672, 677-78 (1982) (when a state distributes benefits unequally between past residents and newcomers the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment); cf. Alaska Constitution art. VIII (establishing limitations on state regulation of hunting and fishing).

I. Legislative Mandate

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

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

---

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

(Footnote Continued)

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

. . . .

Sections six and seven: These two sections, [AS 16.05.251(b) and .255(b)] which are virtually identical for the Boards of Fisheries and the Board of Game, are intended to statutorily set out the priority given to subsistence use of fish and game resources. While there are presently regulations for subsistence fishing, there is no mechanism for the promulgation of subsistence hunting regulations except with the creation of subsistence hunting areas pursuant to A.S. 16.05.257. Section seven would allow for these regulations so that subsistence hunting could be distinguished by separate regulations from sports hunting. Further, these sections set forth a priority of users if restrictions are needed because of the unavailability of resources. The priority list is an attempt to insure that those with the most dependence upon the fish and game resources are the last to be restricted.

If there is a need to restrict the taking of fish or game in order to avoid damaging the fish stocks or game populations, or in order to assure that subsistence users may continue to take fish or game, it is the intent of the Committee that sports or commercial use be restricted before subsistence use. If these restrictions are inadequate, restriction of subsistence use as well is authorized based upon the dependence on the resource, the local residence of the subsistence users, and the availability of alternate resources. It is the intent of the Committee that decisions and determinations by the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act.

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

(Footnote 7 Continued)

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

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

II. Board's Inaction

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

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

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

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

III. "Subsistence" Defense

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

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

> "defense", other than an affirmative defense, means that
>
> (A) some evidence must be admitted which places in issue the defense; and

---

8. The defense recognized in this opinion exists only to the extent that the state has not adopted detailed regulations providing for subsistence hunting within an area. Such regulations when and if adopted would have the additional effect of guarding against abuses and would aid in record keeping to determine the true impact of subsistence hunting upon game management. See Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979). Where the state has adopted valid regulations recognizing the subsistence priority they would be controlling and the defense recognized here would no longer apply. Whether given regulations are valid is of course a question of administrative law for the court not a question of adjudicative fact for the jury. Cf. Madison, ____ P.2d at ____, Op. No. 2911 at 13-15; Kelly v. Zamarello, 486 P.2d 906, 917 (Alaska 1971).

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

In order to permit a pretrial dismissal of charges where appropriate[9] and avoid delay in presenting such a defense, we will require a

---

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

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

(Footnote Continued)

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

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

(Footnote 9 Continued)

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

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

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

"Customary" and "traditional" are not further defined in the statute and therefore must be given their common meanings. AS 01.10.040. "Customary" means according to custom, the usual way of doing something. See Oxford American Dictionary 156 (1980). "Traditional" means according to tradition, a custom handed down from generation to generation

(Footnote Continued)

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

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

---

(Footnote 10 Continued)

especially without writing, a long established custom or method of procedure. Id. at 728. But see Madison, ___ P.2d at ___, Op. No. 2911 at 20: "customary and traditional" should be defined in accordance with legislative history. The words "customary and traditional" serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans. In addition, subsistence use is not strictly limited to rural communities.

subsistence use,[11] the requisite mens rea,[12] and the appropriate burden of proof. AS 11.81.900(b)(15)(B).[13]

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

This case is REMANDED to the superior court for trial of Eluska's subsistence defense.[14]

---

11. See note 10 supra.

12. "Reckless." See note 9 supra.

13. See note 9 supra.

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

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, et al. Appellant, ALASKA DEPARTMENT OF FISH AND GAME and ALASKA BOARD OF FISHERIES, Appellees, vs THE ALASKA FEDERATION OF NATIVES, Intervenor.	Supreme Court Nos. 6824/7181 Superior Court No. 3KN-81-542 Civil
ALASKA DEPARTMENT OF FISH AND GAME, et al., Appellants, vs LOUIS GJOSUND, et al., Cross-Appellees.	Supreme Court No. 7410 Superior Court Nos. 3HO-80-92 Civil 3HO-77-11014 Homer

MERIT APPEAL FROM THE SUPERIOR COURT, STATE OF ALASKA
THIRD JUDICIAL DISTRICT
JUDGE VICTOR CARLSON

REPLY BRIEF OF APPELLANT/CROSS-APPELLEES

MARTIN FRIEDMAN
P.O. Box 337
Homer, Alaska 99603

ARTHUR ROBINSON
P.O. Box 3519
Soldotna, Alaska 99669

Filed in the Supreme Court in Anchorage of the State of Alaska this 30 day of May 1984.

~~ROBERT B. BACON~~ David A. Lampen
Clerk of Court

TABLE OF CONTENTS

(7) participate with other divisions in the preparation of statewide and regional management plans so that these plans reorganize and incorporate the needs of subsistence users of fish and game.

AS 16.05.251

Regulations of the Board of Fisheries.

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

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

AS 16.05.940

Definitions. In this chapter

(17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence use with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as resources for direct personal or family

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

TABLE OF CONTENTS