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HJUD

HB 288

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STATUTES RELIED ON

AS 01.10.040

Words and phrases. Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.

AS 16.05.094:

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

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

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

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

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

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

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

(7) participate with other divisions in the preparation of statewide and regional management plans so that 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

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.

AS 16.05.94J - pre-1978

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

AS 44.62.31J

Agency Meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivision, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the

motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

AS 44.62.312:

State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the

people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

AS 44.62.330:

(a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 - AS 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 - 44.62.630 is limited to named functions of the agency

(40) Board of Fisheries

AS 44.62.633:

Impartiality. The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties.

REGULATIONS RELIED ON

5 AAC 01.597

CHARACTERISTICS OF SUBSISTENCE FISHERIES.(a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

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

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

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

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

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

- (6) a use pattern occurring in locations with easiest and most direct access to the resources;
- (7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;
- (8) a use pattern which includes the intergenerational transmission of activities and skills;
- (9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and
- (10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.

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

(c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests. (Eff. 4/14/82, Reg. 82)

5 AAC 99.020 Definitions.

In this chapter, "rural" means outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more, as determined by the Alaska Department of Community and Regional Affairs. (Eff. 5/30/82, Reg 82)

## STATEMENT OF ISSUES

The issues under consideration have been set out in the Opening and Responsive Briefs of the parties. This Reply will deal with the points raised in the State and Intervenor's briefs. The argument heading in this Reply refers to the issue discussed under that heading. All arguments in this reply have been dealt with and described in the Statement of Issues in the Opening and Responsive Briefs.

## ARGUMENT

"A word is not a crystal, transparent or unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Mr. Justice Holmes in Towne v Eisner, 245 US 418, 425 (1918)

### I. LEGISLATIVE INTENT

Gjosund and Madison (hereinafter Plaintiffs) will try to clarify the primary issues in this case and deal with the legal arguments countering and supporting these issues in subsequent parts of this reply.

With time for reflection and a renewed and hopefully clearer examination of the heart of this controversy, it appears that much has been done about nothing. If this Court, independent of the Board's interpretation, examines AS 16.05.251(b) and AS 16.05.940 (17) and (26), this conclusion will result. It will not be because of any reference to newly discovered insights into applicable legal standards, but by macroscopic view of the acknowledged history and bias of the Board of Fisheries in dealing with subsistence fishery issues. (Intervenor's brief, page 3, 18 and 37 through 46 and Plaintiff's opening brief.)

Plaintiffs will attempt to minimize repetition by referencing to earlier briefs.

Plaintiff's position regarding the subsistence legislation is that the intentions of the state legislature were permissive, protective and inclusive. The legislature wanted to maintain and protect the status quo regarding subsistence uses in the state of Alaska. The subsistence bill also reflects a delineation and expansion of uses by including some uses, such as barter and trade, which were not included in the pre-1978 subsistence use definition. To argue that inclusion of the words 'customary and traditional use' instead of 'personal use' was intended to be restrictive, narrowing and exclusive ignores the plain and simple meaning of the words used as well as every legislative and legislator's statement of intent.

An objective view of legislative intention shows an intention to maintain and protect the usual uses by 'all Alaska residents,' 'native and non-native' by setting out in particular what those usual uses are. Subsistence use now means and includes, in particular, uses for food, shelter, clothing, tools or transportation and what had been excluded before, customary trade and barter. (Compare AS 16.05.940(17)(26) with the pre-1978 AS 16.05.940(17)).

The new legislative statement is more inclusive than the

former, which contained means and uses in one statute, and excluded sale and barter from personal use. The subsistence law was passed to force the Board, by statutory enactment, to protect subsistence use. The legislature felt that the 1973 policy statement of the Commissioner of Fish and Game was neither adequate nor sufficient legal justification for protecting subsistence uses because the Board had failed to protect subsistence users where competition existed in the fishery with other user groups.

" There are other individual examples of the failure of the Board to protect subsistence use in light of competing uses. In summary, however, the subsistence law was passed to enable the Board to provide for subsistence use during times of resource shortage and intense competition and to make certain that the Board took care of subsistence use prior to allowing other uses of these important economic resources ... .In the same way reliance upon the 1973 policy statement of the Commissioner and Board was not deemed adequate. First, this policy did not provide the legal justification for protecting subsistence uses and, in the generally held view in rural Alaska, was only a policy statement which the Board could point to without implementing it with any substantive measures. Be that as it may, all the subsistence law did was to codify this policy in order that its intent be enforceable rather than subject to the whims of the resource managers ....While this is only one example of the Board of Fisheries proclivities when 'left with its own devices' it is a clear indication of what fate is in store for subsistence users in highly intensive competitive fisheries and hunting situations, where there is no protection guaranteed by statute". (page 44, 45 - Draft Report of Special Committee on Subsistence. G file #2, page 13-221, Appendix BB) (emphasis

added)

The cases involving the Board of Fisheries (except the first Gjosund case (1977)) arose subsequent to the passage of the subsistence bill in 1978. These cases evidence the Board's approach to the Cook Inlet subsistence fishery.

The legislature must have been aware of the Cook Inlet Management Plan adopted by the Board in 1977, which omitted any consideration of subsistence. That plan was the subject of KPECA v State, 628 P2d 897 (Alaska 1981) and was another impetus to upgrading the 1973 policy into legislation.

Tyonek v Alaska Board of Fisheries, 3An 80-3073, occurred after 1978 when the Board was fully aware of the particular wording and direction of the subsistence bill. However, they completely ignored the village of Tyonek which, for the past 15 years, had not been able to fish legally for King Salmon. After the stock recovered, the sports and commercial users were allowed to fish. Obviously Tyonek would be considered a subsistence user without any discussion. However, court action was still necessary. Through a Superior Court Order the Board enfranchised the village of Tyonek, its residents, and all timber and logging workers and state and school district employees working in the area. In other words anyone who moved to or near Tyonek was now, at least after the Court order, a subsistence user.

The record before the Board and before this court shows a long time continual, usual, common, historical use by plaintiffs of the salmon in Cook Inlet.

The entire foundation for the Board's actions, and the position of Intervenor and the State, is that the division of subsistence uses from subsistence methods into two separate statutes, together with the language 'customary and traditional uses', justifies every action the Board has taken in excluding the plaintiffs in these cases. That change supposedly authorized the Board to adopt 5 ACC 01.597 i.e.

Characteristics for Subsistence Fisheries. These criteria confuse what is a very simple legislative statement.

Customary and traditional should be interpreted according to their common and approved usage. They have not acquired any peculiar meaning and no further statutory definition, judicial interpretation, or construction of these words has been set out. Taken in their very simple form or dictionary definition, they are adjectives meaning 'usual' and/or 'conventional'.

Alaska Statute 01.17.040 states as follows:

"Words and phrases: Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise shall be construed according to the peculiar and appropriate meaning." (For interpretation see Lynch v McCann, 478 P2d 835, (1970))

Customary and traditional should be accorded their common and approved usage. i.e. dictionary definition and general understanding of those words. These words are not terms of art from which the legislature intended 5 AAC 01.597(Q)(1-10)(b)(c) to emerge.

Intervenor's brief (page 24) and the State's brief (page 21), both refer to a quote of Representative Anderson discussing the subsistence bill in the Alaska State Legislature as support for their understanding of the legislative intent. The language is much more consistent with plaintiffs' position. Since it has already been quoted twice, one additional time can't be too harmful.

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

traditional' rather than leaving the section wide open. The design is not to be restrictive but to provide guidelines and that is basically what I feel and many...many members felt it was necessary in retaining those two words 'customary and traditional'." (emphasis added).

Representative Anderson's points indicate that the statute wanted to 'put some guidelines around the use of Alaska's freedom of resources' and that the 'design was not to be restrictive.' 'Customary and traditional use' is recognition of historical use 'of those (Alaskan residents) that come in later'...'the non-native people.' 'Customary and traditional' are used to give the Board more clarification. The State and Intervenor are now arguing that plaintiffs pre-1978 use of salmon is no longer subsistence use because the Board has developed 10-criteria (plus two community criteria) which do not include the plaintiffs. In fact they were adopted to exclude them. (See discussion of Knik hearings in plaintiff's brief at page 21-23).

5 AAC 01.597(b) & (c) are examples of over-extension of the Board's authority and are exactly why the legislature felt a need to adopt a subsistence bill. Subsistence users had to be protected from the Board. However, the Board has again pursued its own course and found a means to subvert the intentions of the subsistence bill. 5 AAC 01.597(b) states.

"The Board will identify established geographic communities which may be participating in a subsistence system. The Board will then apply

all the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority."

The Board has developed an exclusion mechanism for any individuals, families, or groups of families from consideration as subsistence users unless they live in an 'identified established geographic community which may be participating in a subsistence system.' Where does the subsistence bill authorize or offer a hint as to what this regulation means? The Board then goes on in subparagraph (c) to state:

"for purposes of this section, a "community" is generally considered to be several households of full time residents who all reside in a specific geographic area because of common interest."

The intention of this regulation is clear. It is to exclude anyone in Cook Inlet who does not live in a model native rural village and completely controvenes the legislative intent.

Intervenor (page 26 and 27) and the State (page 20) use two quotes attributed to Representatives Miller and Huntington describing hunters flying in to rural areas to hunt and take meat from the subsistence users. These quotes emphasize, (and its a point we do not disagree with), that the people in the place of the subsistence resources should have a say about the use of resources in the area they live in. Assumedly

Intervenor and State accept these quotes as supporting their case. It is our position, illustrated by the record, that plaintiffs in Madison and Gjosund live where the fish are, and the Board has in fact excluded them from subsistence fishing, instead of protecting and permitting their subsistence fishery, because of threats to the resource by people from other areas. I assume Representatives Miller and Huntington wanted the area users protected from, and not excluded by, the fly-in hunters or fishermen.

## II ADMINISTRATIVE REVIEW

One point connected to the discussion and argument above relates to the continual flux of positions, arguments and rationales that this case seems to birth. As an example, the Intervenor and State briefs are apparently now disagreeing with both Judge Carlson's and Judge Jones' standard of review of administrative action. The Superior Courts, in both cases, deferred to the Board's interpretations and resultant promulgations of subsistence criteria and refused to substitute their judgment for that of the Board. Intervenor and the State argued 'judicial deference' at the Superior Court level. It appears that they are now arguing that the Superior Court and this Court should substitute their judgment in the first stage of analysis for the Board's interpretation of the intentions of the subsistence bill (Intervenors brief, page 21; State's

brief, page 19) and defer to the Board regarding the enactment of the criteria regulations.

Plaintiff's position is that Judge Jones in Gjosund would have found that the criteria were not an accurate reflection of the intention of the statute and voided those criteria if he had substituted his judgment for that of the Board. The same could be argued for Judge Carlson. If the State and Intervenor are stipulating that the Superior Court erred in arriving at their conclusion regarding the administrative review issue all parties are now in agreement.

Plaintiffs have consistently argued that the courts should substitute their judgment for the Board's. The Board has predictably misintrepreted the intention of the subsistence statute and has over-extended and distorted the words 'customary and traditional' to the point where the criteria are incomprehensible to the public and tailored to fulfill the Board's pre-set intentions to close Cook Inlet to subsistence.

This Supreme Court must view the events and arguments in this case in a continuum. Individual elements of the issues may hold a certain attractiveness or reasonableness, however, when viewed in process from 1973 through 1983, the picture becomes much clearer.

The fact that subsistence use and gear prior to 1978 was set out in one statute and subsistence use and gear subsequent

to 1978 is set out in two statutes is nothing more than an intention to keep the same gear criteria to identify methods of harvest, and to amplify and exemplify subsistence uses separately. The uses set out in AS 16.05.940(26) are the particular and usual subsistence uses. The statute both expands on, and particularizes personal use to the existing users by including barter and specifying other uses that had heretofore been general. Substituting the words 'usual' in paragraph (26) for the words customary and traditional would make much more sense than substituting all of the characteristics contained in 5 AAC 01.597(a)(b) & (c) for customary and traditional.

In Gjosund, Judge Jones deferred to the Board of Fisheries' adoption of the criteria, however, he found that the criteria were only effective when determining priorities between and amongst subsistence users under subparagraphs (1), (2), & (3) of 16.25.251(b). Judge Jones determined that the Board's interpretation, insofar as excluding the plaintiffs in Gjosund, was unsound at the pre-priority level. He found that the plaintiffs in Gjosund were subsistence users of Cook Inlet Salmon stocks in accordance with AS 16.05.251(b) & AS 16.05.940(17)(26) and that they could not be restricted unless there was a factual showing that the salmon stocks were jeopardized.

## "RURALNESS" ISSUE

Although this issue was not brought up in plaintiffs' opening brief, it has been assumedly and subtly included in Intervenor's and State's briefs. It appears as a new criteria, undefined and absolute, called 'ruralness'. How and under what conditions it has been injected into the Cook Inlet drama is unclear. However, it seems that both Intervenor and State have accepted, and are now arguing, that the subsistence legislation includes the term 'rural' as a prerequisite to subsistence use. They also must then argue that the legislative intent was to define rural so the public and the Board could identify and know that it was a pre-condition to subsistence use. The State and Intervenor argue that rural is as integral to the subsistence legislation as customary and traditional. However, if that is so, why did not the legislature set out rural, as it did customary and traditional.

Plaintiffs were never presented with the question of whether they were rural or not. In fact rural is now a conclusion without a defined origin. If the legislature was going to use a rural versus non-rural subsistence use discrimination, then one must assume that because of the history and source from which the subsistence bill arguably originated, (i.e. ANILCA, according to the Intervenor and the State; page 32, & 30 of their briefs respectively), then the

state legislature would have said what they were in fact doing. They would have defined rural and described its application to the issue. However, the state subsistence legislation does not include a rural versus non-rural standard.

One federal standard for rural in Alaska designates Fairbanks, Ketchikan, Anchorage, and Juneau as urban and all else rural. (see Federal Register January, 1981, Statement of Secretary of Interior) The State Board of Fish and Game became aware of the problem and tried to resolve it by adopting a definition of rural in 1982. (5 AAC 99.020, Attachment E) stated:

"In this chapter 'rural' means outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more as determined by the Alaska Department of Community and Regional Affairs."

The Board apparently realized that defining 'rural' exposed their errors more than it hid them and repealed this regulation in 1983.

No opportunity to respond to the rural criteria in proceedings before the Board was ever noticed nor was this standard anticipated in the state subsistence bill or the Board's action. A rural standard without notice and definition poses serious constitutional questions. What and where are the rural/non-rural borderlines and what is the delineation of, and factors identifying 'ruralness'? Are these Borough or City

boundaries, population or census district boundaries, or life style characteristic delineations? (See Ketchikan Gateway Borough, Alaska v Breed, 639 P2d 995 (Alaska 1981)), (persons similarly situated must be treated alike.) Obviously persons residing on opposite sides of a border boundary must be distinguished by something other than an arbitrary line. Questions arise of vagueness and due process, in light of the fact that no regulatory definition of rural existed at the time the Board excluded plaintiffs, (See Woodards v State, 604 P2d 250, (Alaska 1979), and Marks v City of Anchorage, 500 P2d 644 (Alaska 1972)).

Also raised are procedural and substantive due process questions regarding notice and hearing in conjunction with plaintiffs' due process argument in their brief.

Rural or area categorizations are not unconditionally repugnant. Plaintiffs feel that their situation is the same as that referred to by Representatives Miller and Huntington. They live where the subsistence resources and uses are located and they live where the customary and traditional i.e. historical, conventional, usual, uses have and do exist. Plaintiffs have never had an opportunity to respond or relate to the rural criteria since it appears to have developed in the conclusions of the Board and briefs of Intervenor and State and not in the subsistence legislation or regulations.

THE PUBLIC MEETINGS ISSUE

Intervenor takes no position on the question of violations of the public meetings provisions except to imply that this issue only relates to actions prior to the adoption of 5 AAC 01.597.

The State responds by saying that the issue is moot. However, plaintiffs refer this Court to our brief (page 26 through 30) and point out that the policies and regulations adopted in the December 1980, Board meeting were in violation of AS 44.62.310 & 312. That illegality, by acknowledgment of the State, has not been, nor could it be, remedied by the subsequent public notices and meetings on subsistence issues, especially when the policy was formulated at an illegal closed meeting and all subsequent policies, with certain minor deviations, mirror the policy originating from the closed meeting. Until such time as there is a replay and representation of what in fact took place at those closed meetings, so the public will have an opportunity to confront and participate in the presentations and deliberations, claims of mootness and remoteness do not vitiate the original and acknowledged stains.

Without relinquishing our claim that the issue is not moot, plaintiffs offer that an exception to the mootness doctrine exists in public interest situations. The Board's

violation of the public meetings laws can be reviewed by this court, especially if it is a matter of public concern and capable of evading review. (See Doe v State, 487 P2d 47 (Alaska 1971); Alaska Transportation Commission v Grandia, 602 P2d 402 (Alaska 1979))

It is rare that issues of violations of notice or public meetings can be pursued both through trial and appellate stages within the period of time between public meetings. In this case the record of the Board's proceedings mandates an independent review by this court of the actions of the Board at the illegal public meeting to determine how much of the Board's subsequent policy and regulations on Cook Inlet subsistence uses were tainted.

#### EQUAL PROTECTION

The State's description of Gjosund's equal protection questions lumps equal protection with due process by confusing the constitutional distinctions between the two. They also, (State's brief page 40), refer consistently to the fact that the Board has identified subsistence fishing only in 'rural' communities. As earlier indicated, 'rural' has never been clearly identified, defined, or applied.

The Board has apparently used some notion of 'ruralness' to set up a class of residents of the idealized rural native village community model as subsistence users as opposed to the

class of people which plaintiffs belong (who cannot tell whether they live in a rural or non-rural area because no definition exists), and who have otherwise historically fished by subsistence means and used salmon for their family and personal consumption and nevertheless have been excluded from subsistence fishing.

The Intervenor misstates our case. It matters little whether state or agency legislation sets up classifications. If the classifications are arbitrary and unrelated to the object of the legislation and do not treat all persons similarly circumstanced alike it is an equal protection issue.

Plaintiffs' claim is that the regulatory scheme, i.e. the ten plus criteria, has set up two classifications of Alaskan residents and that these classifications are not substantially related to the purposes of the statute and discriminate against plaintiffs without any reason.

There is no legitimate purpose or distinction to setting up a class of subsistence users in Port Graham, English Bay and Tyonek, which class includes all residents of that area whether they be natives, non-natives, school district employees, transient cannery workers, or timber employees, and setting up an excluded class of all other persons residing on Kachemak Bay in or near Homer or Kenai or any place on the entire shoreline of Kachemak Bay or Cook Inlet i.e. Halibut Cove, Bear Cove,

Fritz Creek, Clam Gulch, Aurora Lagoon, Ninilchik, etc.

The class exclusion does not suit the purposes of the legislation nor does it further the purposes of permitting the taking of fish for subsistence uses and "of recognizing the needs, customs, traditions, of all Alaskans" and "maintaining fish stock on a sustained yield basis."

As indicated earlier, the plaintiffs have all been fishing for lengths of time up to 50 years by the use of set gill nets. They are residents of the general Kenai Peninsula Borough area, have fished in the localities closest to where they live, have used the fish for family and personal consumption and have participated in other subsistence activities (i.e. coaling, gardening, gathering, clamming, etc.) To argue that this is not an equal protection issue overlooks the obvious.

#### DUE PROCESS ISSUES

The plaintiffs' due process claims are on pages 41-47 of their brief and will only be discussed here to counter specific arguments raised by Intervenor and State. Intervenor claims that Judge Carlson's remand of plaintiffs' Count IV, (Intervenor's brief, pages 35-37), somehow postpones what Intervenor acknowledges is a close substantive due process question. i.e. whether plaintiffs' right to due process of law was violated by exclusion of their use as a subsistence user.

This issue will be addressed in the reply brief to amplify

our claim that the Board acted arbitrarily in an aspect other than those set out in plaintiffs' opening brief. The inclusion of rural as a prerequisite to subsistence use inclusion is one more cumulative step in our claim. As indicated earlier in the reply brief, no definition, discussion, or elements of 'ruralness' were set out by the Board for plaintiffs' to confront or respond to. This is a cumulative element in the Board's behavior patterns which plaintiffs' claim have resulted in violations of fundamental principals of liberty and justice and is another arbitrary administrative action 'shocking to the universal sense of justice.' See Green v State, 462 P2d 994, (Alaska 1969).

The remand order on Count IV is lacking integrity when compared with the simultaneous order of Judge Carlson denying plaintiffs' Motion for Summary Judgment on Counts III and IV on 30 August 1982. By denying plaintiffs' motions, he was finding that no violations of due process or equal protection existed, therefore a remand is inappropriate.

Judge Carlson's remand suggested that proposals be resubmitted to the Board. Plaintiffs did in fact submit another round of proposals. The result and record before the Board were the same.

The Board had the same record before it as this Court does, i.e. testimony on behalf of Kenai area plaintiffs and the

Kenai Kenaitze reports, testimony and reports of Kachemak Bay subsistence group and Larry Smith; affidavits presented to the court in Madison and Gjosund; and proposals requesting establishment of subsistence use fisheries. The Board responded as it had done in the past.

At the time those proceedings took place this appeal was moving through the court system and to date nothing has in fact changed. The remand to the Board was an empty remand. No standards were set nor were instructions or directions given to the Board. The Superior Court merely said "proceed as you had in the past" and the Board followed that instruction and did not acknowledge any subsistence uses in Cook Inlet or Kachemak Bay other than Port Graham, English Bay, and Tyonek.

The obligation to research and provide information on plaintiffs subsistence use (in addition to plaintiffs' contributions to the record) is with the Division of Subsistence (see AS 16.05.094) and this data should be before the Board prior to any action. The Braund report (G File #2 Appendix M, revised November 1982) concludes that there are numbers of subsistence users both on the east shore of Cook Inlet and along the borders of Kachemak Bay. Assumedly the Board had, or should have had, this information and the Board still retained its stubborn stance.

Plaintiffs claim that the record in this case demonstrates

that confronting the Board again would be a futile gesture and that judicial action is plaintiffs' only hope for a remedy (see Aleknagik Native's Limited v Andrus, 648 F2d 496).

#### IMPARTIALITY

Plaintiffs aver, contrary to Intervenor's position, that ample record exists to determine that the Board has acted arbitrarily, discriminatorily, and with prejudice. Alaska Statute 44.62.630 states as follows:

Impartiality: The functions of hearing officers and those officer participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or arguments from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties."

This section applies to the Board of Fishery. (See AS 44.62.330(a)(40)). It further supports plaintiffs' claim that the public meeting law deviation is a serious breach which cannot be rectified without a full and complete statement and avowal of the events that occurred during that closed meeting.

This section also relates to plaintiff's due process claims. Remand to the Superior Court and/or the Board for

trial/hearing would be superfluous. Very little could be added to the record that is not there already. Additionally the tenuous state of the Board's composition and existence, in light of the conflict between the governor and the legislature regarding confirmation of appointments of Board members, together with recently proposed legislation aimed at reorganizing Board member representation, changes the complexion of plaintiffs' position again.

#### PERSONAL USE FISHERY

Questions of the personal use fishery must be decided on the basis of statutory interpretation and due process standards. Judge Carlson's decision specifically did not consider any record of the Board's personal use hearings and those records were not a part of the record on appeal. It is deceitful to suggest or imply that the personal use fishery involved only a name change and minor shift in location on the 'use scale.' The personal use fishery moved the pre 1980 subsistence users from first consideration to last consideration.

#### THE GJOSUND DECISION

In reviewing and trying to discredit the Gjosund decision, Intervenor raises the spectre of catastrophe 'to tens of thousands of Alaskans who live in the bush.' This is not the case and Intervenor misinterprets what Judge Jones did.

Judge Jones deferred to the Board's adoption of the criteria but determined that the criteria 'kick in' when a priority selection was necessary. The court firstly found that the plaintiffs were subsistence users of the Southern District salmon based upon the legislative definition and history of use of the Gjosund plaintiffs. He found that the criteria would come into effect when and to the extent that jeopardy to the sustained yield of fish stocks took place and that the criteria were applicable to the need for further restrictions, based upon AS 16.05.251(b)(1), (2), & (3), to distinguish between different types of subsistence users.

It is offered that if Judge Jones had determined that he could substitute the court's judgment for that of the Board in interpreting the statutes, (as the Intervenor and State now concede is the law) then Judge Jones would most likely have voided the criteria if they were to be used to exclude plaintiffs as subsistence users. Judge Jones found that the statute was clear and no further criteria was needed to find that plaintiffs were subsistence users.

#### CONCLUSION

Plaintiff again asks this Supreme Court to review the subsistence statutory scheme and the state legislative record and independently determine if, in fact, that scheme was meant to be restrictive, narrowing and as complex as the Board,

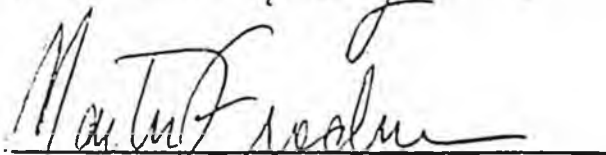
Intervenor, and State suggest. We also ask this court to examine how, when and where 'ruralness' enters into any of the legislative enactments or Board deliberations to the point where plaintiffs were put on notice of a rural prerequisite for subsistence inclusion.

Plaintiffs offer that they, in their community and together with their families, reside near, and have been subsistence fishing in and around Cook Inlet for periods of time up to 50 years. They live in the area and are the persons intended to be included under subsistence use by the legislature. We also claim that the convolutions undertaken to exclude plaintiffs fatally taints the Board's actions regarding the Cook Inlet subsistence fishery.

Plaintiffs submit that the Board has violated the equal protection and due process rights of the plaintiffs.

We request this court to make such findings and to order that the plaintiffs' use of the salmon moving in and through Kachemak Bay and Cook Inlet is a subsistence use as intended by the State legislature.

SIGNED AND DATED this 29 day of May, 1984.

  
Martin Friedman

  
Arthur Robinson

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN McGAHAN, ) SR., ANDY JOHNSON, MARGIE KIVI, J.W. ) WARE, DICK FRANCIS, DAN GROLESKE, KEN ) JORDON and SHIRLEY DEVAULT, ) Appellant, )	Supreme Court Nos. 6824/7181 Superior Court No. 3KN-81-542 Civil
v. )	
ALASKA DEPARTMENT OF FISH AND GAME, ) and ALASKA BOARD OF FISHERIES, ) Appellees, )	APPEALED FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT, HONORABLE VICTOR D. CARLSON
and )	
THE ALASKA FEDERATION OF NATIVES, ) Intervenor. )	
<hr/>	
ALASKA DEPARTMENT OF FISH AND GAME, ) RONALD SKOOG, ALASKA BOARD OF FISHERIES ) Appellants, )	Supreme Court No. 7410 Superior Court Nos. 3HO-80-92 Civil 3HO-77-11014 Homer
v. )	
LOUIS GJOSUND, DORA MULCH, and KACHEMAK ) BAY SUBSISTENCY GROUP, INC., ) Cross-Appellees. )	APPEALED FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT, HONORABLE PAUL B. JONES

BRIEF OF APPELLEES/APPELLANTS

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Filed in the Supreme Court in  
Anchorage of the State of Alaska  
this 25 day of January, 1984.

ROBERT B. BACON  
Clerk of Court

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# **CORRECTION**

**THIS DOCUMENT  
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State Constitutional Provisions

Alaska Const. art. I, § 1, cl. 2 (in pertinent part)

that all persons are equal and entitled to equal rights, opportunities, and protection under the law; ...

Alaska Const. art. I, § 7 (in pertinent part)

No person shall be deprived of life, liberty, or property, without due process of law.

Alaska Const. art. VIII, § 17

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

Federal Statutes

16 U.S.C. § 3113

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

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

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

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

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

Sec. 703, H.R. 39, 95th Cong., 2d. Sess. (1978) (the version of H.R. 39 passed by the House of Representatives in 1978).

As used in this Act, the term "subsistence uses" means the noncommercial (except as provided under paragraph (2)) customary and traditional utilization within the State of wild, renewable resources for --

(1) direct personal or family use for food, shelter, fuel, clothing, tools, or transportation;

(2) the making and selling of handicraft articles (including clothing), but only out of nonedible byproducts of fish and wildlife taken for such personal or family use; or

(3) customary trade, barter, or sharing among subsistence users for personal or family use.

#### State Statutes

AS 16.05.221(a)

For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

AS 16.05.251

REGULATIONS OF THE BOARD OF FISHERIES. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 4, ch. 131, SLA 1960 (formerly AS 16.05.940(17))

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

AS 16.05.940(22) (prior to renumbering, AS 16.05.940(17))

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

AS 16.05.940(23) (prior to renumbering, AS 16.05.940(26))

"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 with the household on the permanent basis.

AS 44.62.310(a)

All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the aforementioned bodies.

AS 44.62.310(f)

Action taken contrary to this section is void.

### State Regulations

5 AAC 01.597

#### CHARACTERISTICS OF SUBSISTENCE FISHERIES.

(a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

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

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

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

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

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

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

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

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

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

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

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

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

5 AAC 77.001(a)

The Board of Fisheries finds that

(1) before the enactment of the state's subsistence priority law in ch. 151, SLA 1978, an individual could fulfill his personal use needs for fish under subsistence fishing regulations;

(2) the state's subsistence priority law changed the definition of subsistence in a manner that now precludes some individuals from participating in customary and traditional subsistence fisheries and efficiently harvesting fish for their personal use;

(3) there presently are areas of the state with harvestable surpluses of fish in excess of both spawning escapement needs and present levels of subsistence, commercial and sport uses; and

(4) it is necessary to establish a new fishery classified as "personal use" because

(A) since the sale of fish is not appropriate or permissible, this fishery cannot be classified as commercial;

(B) since the use is not a rural customary and traditional use this fishery cannot be classified as subsistence; and

(C) since the gear for this fishery is often different from that historically associated with sport fishing, this fishery should not be classified as a sport fishery, to prevent confusion among the public.

5 AAC 77.001(b)

It is the intent of the board that the taking of fish under 5 AAC 77 will be allowed when that taking does not jeopardize the sustained yield of a resource and either does not negatively impact an existing resource use or is in the broad public interest.

5 AAC 99.010

JOINT BOARDS OF FISHERIES AND GAME SUBSISTENCE PROCEDURES. (a) In applying a subsistence priority, the Board of Fisheries and the Board of Game

will provide for conservation and development of Alaska's fish and game resources according to the following procedures:

(1) each board will assess the biological status of fish or game resources and determine whether a surplus may be harvested during a regulatory year consistent with the conservation and development of the resources on the sustained yield principle and compatible with the public interest;

(2) each board will identify subsistence uses of fish or game resources, recognizing that subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing.

(b) Customary and traditional subsistence uses by rural Alaska residents will be identified by use of the following criteria:

(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.

(c) After identifying subsistence uses based upon the criteria set out in (b) of this section, each board will determine the approximate amount of fish or game necessary to provide fully for reasonable opportunities to engage in these customary and traditional uses.

(d) Each board will adopt regulations that provide an opportunity for the subsistence taking of fish or game resources in amounts sufficient to provide for the customary and traditional uses identified in (b) of this section, and consistent with sound conservation and management practices. In no instance may the subsistence taking jeopardize or interfere with the maintenance of a specific fish stock or game population on a sustained-yield basis.

(e) Each board will, in its discretion, adopt regulations that provide an opportunity for non-subsistence uses of the resource, to the extent that the non-subsistence uses do not jeopardize or interfere with the conservation and development of fish or game resources on a sustained yield basis, or with the opportunity for taking these resources for customary and traditional subsistence uses as provided in (d) of this section.

(f) When circumstances such as increased numbers of users, weather, predation, or loss of habitat may jeopardize the sustained yield of a fish stock or game population, each board will exercise all practical options for restricting non-subsistence harvest before subsistence uses are restricted. If all available restrictions for

non-subsistence uses have been implemented and further restrictions are needed, each board will reduce the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who

(1) live closest to the resource;

(2) have the fewest available alternative resources; and

(3) have the greatest customary and direct dependence upon the resource.

(g) In no event, however, will a board allow uses which will jeopardize or interfere with the conservation and management of fish stocks or game populations on a sustained-yield basis.

## I. JURISDICTIONAL STATEMENT

This is a consolidated appeal from two third judicial district superior court cases. The final judgments in Madison, et al. v. Alaska Department of Fish and Game and Alaska Board of Fisheries, 3KN-81-542 Civil (hereinafter, "Madison"), were entered on March 5, 1982 and January 26, 1983, by Judge Victor D. Carlson. The final judgment in Gjosund, et al., v. Alaska Department of Fish and Game, et al., 3HO-80-92 Civil and 3HO-77-11014 Homer (hereinafter, "Gjosund"), was entered on November 19, 1982, by Judge Paul B. Jones. This court has jurisdiction to consider this consolidated appeal pursuant to Alaska Appellate Rule 202 and AS 22.05.010.

## II. ISSUES PRESENTED FOR REVIEW

The state intends to address the issues raised in this appeal in the context of the following questions: 1/

1. In enacting the subsistence law, did the legislature intend "subsistence fishing" to mean fishing by individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area, rather than

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1/ Plaintiffs list seven questions in their statement of issues, but the briefing in their argument sections does not entirely adhere to those seven questions, nor to the argument headings. The state submits that its list of questions subsumes all issues plaintiffs raise and brief from their appeal in Madison, as well as the issue that the state is appealing in Gjosund.

all fishing for personal use?

2. Is the Board of Fisheries' determination that "subsistence uses" of salmon in Cook Inlet can be identified on a community basis by the application of the ten criteria in 5 AAC 01.597 consistent with the intent of the subsistence law, and reasonable?

3. Did the promulgation in December 1981 of 5 AAC 01.597, codifying the ten criteria used to identify "subsistence uses" of salmon in Cook Inlet moot a violation of the public meetings law which occurred when the criteria were first formulated in December 1980?

4. Is the Board of Fisheries authorized by AS 16.05.-251(b) to identify "subsistence uses" of salmon in Cook Inlet in order that only fishing for those uses will be provided for as "subsistence fishing," regardless of the biological status of the target stocks?

5. Are the classifications determined by the ten criteria of individuals eligible and individuals ineligible to participate in "subsistence fishing" in Cook Inlet a reasonable means to accomplish a legitimate state purpose?

6. Is the Board of Fisheries authorized by AS 16.05.-251(a) to established "personal use fishing" as a category for regulatory purposes?

7. Has the Board of Fisheries treated plaintiffs fairly by not authorizing "subsistence fishing" opportunities for them, but instead authorizing "personal use fishing"?

### III. STATEMENT OF THE CASE

This appeal in its most general perspective is about fishing. More particularly, about the different kinds of fishing that occur in the waters and tributaries of Cook Inlet. "Commercial fishing" is defined as fishing for profit; "sport fishing" is defined as taking fish for personal use, primarily by hook and line. AS 16.05.940(5) and (21). Before 1978, "subsistence fishing" was defined as taking fish for personal use, with, among other gear, gill nets. Sec. 4, ch. 131, SLA 1960. All three kinds of fishing occur in Cook Inlet. These lawsuits arose because the legislature in 1978 narrowed the definition of "subsistence fishing."

The Alaska Board of Fisheries ("board") is established in AS 16.05.221(a) to promote the "conservation and development" of state fisheries. Before 1978, the board had the discretion to determine whether and how much of a fish stock should be allocated to various uses. In AS 16.05.251(a), the legislature delegated to the board the authority to adopt regulations "the board considers advisable" on twelve different subjects, including establishing seasons, areas, quotas and bag limits, and methods and means. AS 16.05.251(a)(2), (3) and (4).

Under its discretionary authorities, in 1977 the board adopted a salmon management plan for upper Cook Inlet to address the annual allocation controversy involving sport fishing and commercial fishing. The plan, now 5 AAC 21.363, reflects the

board's determination that salmon stocks which move through Cook Inlet between July 1 and August 15 would be managed primarily for commercial uses, and those moving through the inlet before and after those dates would be managed primarily for sport uses. See Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981).

There was no need to address "subsistence fishing" in Cook Inlet, authorized as fishing with set gill nets for personal use, in the plan, because it was viewed as a minimal presence. Between 1971 and 1977, there were an average of only 87 "subsistence fishing" permits issued annually, with an average yearly total catch for the fishery for that period of 405 salmon. (G File 4, at 21) 2/ The area open to the "subsistence fishing" included most of the east side beaches in the northern district and central district (near Kenai) of Cook Inlet and the north shore of Kachemak Bay and the Homer spit in the southern district, all of which are relatively accessible by road. (G File 4, at 24, 29, and 70) 3/

Between 1978 and 1980, "subsistence fishing" experienced substantial growth in Cook Inlet. This was partly due to commercial fishermen obtaining "subsistence" permits after

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2/ The Madison and Gjosund records on appeal will be identified by "M" and "G".

3/ For a map of the Cook Inlet fishing districts, see M File 3, Exhibit S.

August 15, when commercial fishing was precluded under the upper Cook Inlet management plan, and partly due to increased publicity about the availability of "subsistence fishing." (G File 4, at 19 and 22) The number of permits rose in 1978 to 323, and in 1979 it jumped to 1,161. In 1980, permits began to be issued on a household, rather than individual, basis, but still the number of permits increased to 1,331. The amount of salmon harvested by "subsistence fishing" increased as well, to 3,735 fish in 1978, 9,923 fish in 1979, and 14,775 fish in 1980. (G File 4, at 21)

Over the same period, the board instituted restrictions on "subsistence fishing." The east side beaches in the northern and central districts were closed to "subsistence fishing," except for a small open section, and in the southern district, the north shore of Kachemak Bay and the Homer spit were closed. (G File 4, at 25, 30 and 70) Beginning in 1980, permits were issued on a household, rather than an individual, basis, and the limits were modified from 50 fish per permit to 25 fish for head of the household plus 10 additional fish for each dependent. (G File 4, at 26, 27 and 70) The board also reduced the gear length in all three districts from the previously authorized 50 fathom total to 20 fathoms, and finally to 10 fathoms. (G File 4, at 26, 27 and 70)

In the meanwhile, the Alaska legislature in 1978 had enacted ch. 151, SLA 1978, the subsistence law, which made important changes in the statutes authorizing the board's activities, including the definitional change which brought about

these lawsuits. The legislature amended the definition of "subsistence fishing" so that it no longer meant the taking of fish for personal use with, among other gear, gill nets. Under the new definition, "subsistence fishing" means the taking of fish for "subsistence uses," with, among other gear, gill nets. AS 16.05.940(22). A definition of "subsistence uses" was established, which is more restrictive than simply "personal use."

'[S]ubsistence uses' means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption [for specified purposes] ...

AS 16.05.940(23). (Emphasis added.) Thus, under the statutory definitions, simply fishing by gill net for personal use is no longer "subsistence fishing." Rather, "subsistence fishing" would be taking fish with gill nets for "customary and traditional uses."

The subsistence law also removed the board's discretion to determine whether or not to allocate salmon to "subsistence fishing." In AS 16.05.251(b), the legislature mandated that the board authorize "subsistence uses," unless sustained yield would be jeopardized, and also mandated that if a relative resource shortage occurred, "subsistence uses" would be the last to be restricted. (The board retains its discretion under AS 16.05.-251(a) to make allocation decisions regarding other fishing activities.)

Although the subsistence law was enacted in 1978, the board did not modify its authorization of "subsistence fishing" in Cook Inlet for the 1979 or 1980 seasons in response to the

law. As noted earlier, the board had promulgated restrictions, but they were in response to the growth of what was still being called "subsistence fishing" in Cook Inlet, rather than in response to the new definitions provided by the subsistence law.

During the summer of 1980, three lawsuits were directed at the board's actions in Cook Inlet, all alleging noncompliance with the subsistence law. 4/ (See, G File 3, Exhibit A)

Realizing that the "subsistence fishing" that it was authorizing in Cook Inlet was still simply taking fish with set gill nets for personal use, under the old statutory definition, in December 1980 the board began examining the uses of salmon in Cook Inlet, so that in the future it would authorize as "subsistence fishing" only that subset of fishing for personal use that involved "customary and traditional uses." It considered the report of the subsistence section (now the division of subsistence) of the Alaska Department of Fish and Game on a year long study on Cook Inlet, which detailed the number of fish taken, number of people participating, trends, etc. (M File 2, Volume 3, at 1-43) 5/ It listened to the explanation of the results of a survey taken by the division of subsistence of Cook Inlet

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4/ The three cases were Tycnek v. Alaska Board of Fisheries, JAN-80-3073, Gjosund v. Alaska Department of Fish and Game, 3HO-80-92 Civil (the first phase of the Gjosund case on appeal here) and Francis v. Alaska Department of Fish and Game, 3KN-80-546 Civil.

5/ Hereinafter, the board transcripts contained in M File 2 will be designated by volume and page number alone.

"subsistence" permit holders. Volume 3, at 106-121. It was given a history of territorial and state "subsistence" regulations in Cook Inlet by the Department of Fish and Game. Volume 7, at 7-24. It also heard a presentations on behalf of Native groups. 6/

The local advisory committees, which are established by the board under AS 16.05.260, were asked to report on the uses of resources in their areas. 7/ Additionally, the board heard testimony on uses of resources in Cook Inlet from at least 18 other individuals, mostly from small and large communities and isolated areas on the shores of Cook Inlet, but from areas farther away as well. 8/

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6/ There was a report by the North Pacific Rim (a nonprofit Native corporation) subsistence coordinator, explaining a survey which she had conducted of English Bay and Port Graham's use of resources, Volume 7, at 104-115, and by the president and chief of the Kenaitze Indians, accompanied by his resource and research person, who also presented the results of their information gathering activity on the use of resources by the Kenaitze Indians. Volume 7, at 171-201.

7/ Reports were received from the Anchorage committee, Volume 5, at 66-92, the Seward committee, Volume 5, at 93-107, the Homer committee, Volume 7, at 34-64, the Central Peninsula committee, Volume 7, at 70-78, and the Port Graham committee, Volume 7, at 87-93.

8/ The board heard testimony from individuals from North Kenai, Volume 4, at 74-99, from the Kenai Peninsula Fishermen's Cooperative, Volume 5, at 2-26, from the Cook Inlet Drift Association, Volume 5, at 26-32, from Tyonek (three witnesses), Volume 5, at 50-66, from the Isaac Walton League and Sports and Game Preservation Association, Volume 6, at 56-81, from the Parks Highway area, Volume 7, at 2-7, from a commercial fisherman from Bristol Bay, Volume 7, at 64-69, from English Bay, Volume 7, at 93-104, from the Homer Kachemak Bay Subsistence Group, Volume 7,

Thus, the board received a mass of information about the uses of salmon in Cook Inlet. The task remained to identify which uses were "customary and traditional uses" that must be provided for under the subsistence law. In order to facilitate that identification, the chairman of the board appointed a committee, which consisted of board members and staff of the Department of Fish and Game. Its meetings were announced at the board meetings, and were held during recesses in the board meetings. Volume 3, at 122-126.

This committee drafted ten criteria which could be used to identify "subsistence uses" of salmon in Cook Inlet, and presented them to the board for full review and consideration. Volume 11, at 2. The board generally concurred that the ten criteria restated in a manageable framework what had been discussed in the board meeting during the preceding two weeks. Volume 11, at 5. The board analyzed the proposed ten criteria in detail, and concluded that they formed a common thread which could be used to identify "customary and traditional uses" of salmon in Cook Inlet. Volume 10, at 8-54. 9/ The ten criteria

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at 115-155, from the west side of Cook Inlet, Volume 7, at 155-162, from Seldovia, Volume 7, at 201-211, from a Cook Inlet commercial fisherman, Volume 7, at 211-214, from Anchorage, Volume 7, at 224-228, from a commercial fisherman, Volume 7, at 228-237, from Resurrection Bay, Volume 8, at 9-29, and from Kenai, Volume 8, at 58-76.

9/ The contents of Volume 11 precede the contents of Volume 10 chronologically; this is clear because both contain precedings from December 19, 1980, and Volume 10 begins at 7:00 p.m., while

were set out in the findings and policy regarding subsistence uses of Cook Inlet salmon. (M File 3, Exhibit H)

The criteria included a long term pattern of resource use by an identifiable community. Such uses targeted on specific stocks relatively close and accessible to the community. Efficient and economical methods of harvest were used, as well as traditional modes of preparing and storing the harvest. Skills were passed from one generation to the next, and sharing of the harvest product occurred on a community basis. Finally, there was a reliance on a wide range of resources. See 5 AAC 01.597.

The criteria have the effect of restricting the identification of "subsistence uses" of Cook Inlet stocks to fishing with set gill nets for personal use by residents of the rural communities around Cook Inlet which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community. (See unchallenged finding of fact entered in both Madison (M File 1, at 56, ¶ 10), and Gjosund (G File 2, at 258, ¶ 18).) This determination was certainly not agreeable to some witnesses who had testified to the board on behalf of sportsmen's groups. These witnesses argued that "subsistence uses" should encompass all personal use of the resource, the ultimate "use" being

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Volume 11 ends with a statement that the meeting would reconvene after dinner at 7:00 p.m. Volume 10, at 1, and Volume 11, at 20.

consuming the fish. 10/

In the spring 1981 meeting, further testimony on uses of salmon in Cook Inlet was received from the Cook Inlet area advisory committees. 11/ Much of it favored the ten criteria, although the view of the estimated 800 people who attended the Anchorage advisory committee meeting was that the term "subsistence uses" should apply to any personal consumption of noncommercially caught fish.

Seven witnesses were called by board members. Two represented political and sportsmen's groups, which advocated the view that all personal use of fish was "subsistence use." 12/ Other witnesses, some representing a Native group and a commercial fishing group, spoke directly to the ten criteria, and two

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10/ This was advocated in the December 1980 meeting by a representative of the Isaac Walton League and the Sports and Game Preservation Association, Volume 6, at 66-81, and by the Isaac Walton League, Volume 14, at 50-78, the Sports and Game Preservation Association, Volume 14, at 78-94, and the Alaska Sports Council, Volume 14, at 94-106.

11/ Advisory committees testifying were from Seward, Volume 20, at 102-110, mentioning the ten criteria, from English Bay and Port Graham, Volume 20, at 110-115, praising the ten criteria, from Homer, Volume 20, at 115-129, employing the ten criteria in its analysis, from the Matanuska Valley, Volume 20, at 129-133, from the Central Peninsula, Volume 20, at 134-138, from Anchorage, Volume 20, at 138-151, and from Kenai/Soldotna, Volume 21, at 230-232.

12/ Testifying were Dale Bondurant, from Alaskans for Equal Fishing and Hunting, Volume 20, at 163-168, and Sam McDowell, from the Isaac Walton League, and the Alaska Fisheries Resource Committee, Volume 20, at 182-191.

of the witnesses praised the criteria and urged their use by the board. 13/ Additionally, extensive written comments were received, and a long period of time was allotted for the board to review those. Volume 21, at 315.

After those deliberations, the board again embraced the criteria as a mechanism to identify "subsistence uses" in Cook Inlet. Volume 22, at 318-334 and Volume 29, at 6-16. The final wording was adopted on April 6, 1981. (M File 3, Exhibit I)

At the spring 1981 meeting, the board applied the ten criteria to the uses of salmon in Cook Inlet, and concluded that the uses in Tyonek, English Bay, and Port Graham were "customary and traditional uses." The board also concluded that, on the evidence before it, no communities on the Kenai Peninsula (other than English Bay and Port Graham) satisfied the criteria. The board developed findings of fact regarding subsistence fishing in Cook Inlet, reflecting those determinations. (M File 3, Exhibit L)

The Board was not required by AS 16.05.251(b) to authorize the personal use gill net fishing which had been previously authorized as "subsistence fishing" on the Kenai Peninsula,

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13/ Testifying were Chief Alex and Dr. Elizabeth Shadura, of the Kenaitze Indians, Volume 20, at 169-181, Chuck Robinson, on behalf of the Kenaitze Indians, speaking to the ten criteria, Volume 21, at 277-314, Don Mitchell, speaking on his own behalf, Volume 20, at 191-201; and Volume 21, at 202-228, urging the board to ratify the ten criteria, and Rodger Painter, Executive Director of the United Fishermen of Alaska, Volume 20, at 154-159, speaking approvingly of the ten criteria.

since "customary and traditional uses" had not been evidenced there. The board did not authorize under its discretionary powers contained in AS 16.05.251(a) any personal use set gill net fishing on the Kenai Peninsula for the 1981 season.

During the summer of 1981, the Gjosund plaintiffs filed a "petition" in the superior court in Homer, and the Madison plaintiffs filed a complaint in the superior court in Kenai. (G File 2, at 1-9 and M File 1, at 1-5) Both lawsuits challenged the validity of the ten criteria, alleging that they were inconsistent with the intent of the subsistence law. Also, both lawsuits alleged that there had been procedural irregularities in the adoption of the ten criteria, and that the board's actions had violated plaintiffs' due process and equal protection rights. Gjosund additionally asked that the board be held in contempt. The Alaska Federation of Natives ("AFN") intervened as a party in Madison. 14/

In December 1981, the validity of the ten criteria was upheld in Madison, with the granting of motions for partial summary judgment filed by the state and AFN on that claim. (M File 1, at 45-49) The ten criteria were then codified into the Alaska Administrative Code after the board adopted them again at its December 1981 meeting. 5 AAC 01.597.

In March 1982, the validity of the ten criteria as a

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14/ AFN's motion to intervene and the order granting the motion are not a part of the record on appeal.

mechanism for identifying subsistence uses in a manner intended by the subsistence law was also upheld in Gjosund. (G File 2, at 221-245) However, Gjosund inexplicably further concluded that the board could not apply the criteria to identify what personal use set gill net fishing should be authorized as "subsistence fishing," unless it was necessary to do so because of the biological status of the target fish stock.

At the spring 1982 meeting, the board established a new category of fishing, "personal use fishing," to accommodate those activities which had formerly been termed "subsistence fishing," but which could no longer be so designated since the subsistence law had narrowed the definition to only those uses which were "customary and traditional." 5 AAC 77.001. The board specified that "personal use fishing" would not be authorized if sustained yield would be jeopardized, but other than that safeguard, maintained the flexibility to authorize "personal use fishing" whenever it would be "in the broad public interest." 5 AAC 77.001(b). Thus, "personal use fishing" joined "commercial fishing" and "sport fishing" as activities which can be regulated by the board in its discretion under AS 16.05.251(a).

At that same meeting, the board then authorized "personal use fishing" on the Kenai Peninsula for the 1982 season. A sockeye salmon fishery in June was established in the central district (near Kenai), 5 AAC 77.547, and a fall coho fishery was established in the southern district (near Homer), 5AAC 77.546, though the latter was superceded by the so-called "subsistence

fishing" authorized by the court in Gjosund. The harvest limits imposed on "personal use fishing" in these two locations were identical to the "subsistence fishing" limits previously in effect for those areas. 5 AAC 77.530(a).

In the spring of 1982, the board, together with the Board of Game, jointly adopted a procedural regulation which describes how "subsistence uses" will be identified and provided for under the subsistence law. 5 AAC 99.010. The joint regulation contains eight criteria which are to be used to identify "customary and traditional subsistence uses" throughout the state, and which are very similar to the ten criteria at issue here. 5 AAC 99.010(b).

In August 1982, the court in Madison upheld the authority of the board to establish and authorize "personal use fishing," and determined that the authorization of "personal use fishing" in June on the coho salmon in the central district of Cook Inlet was reasonable and fair, despite the fact that plaintiffs would have preferred a fall coho fishery. The court also refused to second-guess the board's determination that none of the communities on the Kenai Peninsula met the ten criteria. Instead, it remanded that claim to the board with instructions to consider any properly submitted proposals to authorize "subsistence fishing" under the ten criteria contained in 5 AAC 01.597. (M File 4, at 293-295; M File 6, at 361-369)

#### IV. COURSE OF PROCEEDINGS IN THE TRIAL COURTS

The state adopts AFN's description of the proceedings

in Madison and of the consolidation. Although AFN's description of the proceedings in Gjosund is accurate, some further detail may be useful.

On May 29, 1981, the Gjosund plaintiffs filed a "petition" in the superior court in Homer, setting forth five claims for relief. (G File 2, at 1-9) A preliminary injunction was issued on August 4, 1981, which ordered the opening of a personal use set gillnet fishery in the southern district, which the court termed a "subsistence fishery." In December 1981, plaintiffs moved for summary judgment on all five counts, and the state moved for partial summary judgment on count I, and to dismiss count II as moot. Oral argument occurred on those motions on February 16, 1982. (G File 2, at 254)

On March 8, 1982, the court issued a decision resolving counts I and IV, and part of count II. (G File 2, at 221-253) On June 22, 1982, the parties stipulated to the disposition of counts III and V, and the remaining part of count II. (M File 6, at 328)

On November 19, 1982, the court entered amended findings of fact and conclusions of law, and an amended final judgment, setting out the disposition of all the counts. (G File 2, at 254-261 and 265, ¶ 8; M File 6, at 328-330) The state was granted summary judgment on count I (the validity of the ten criteria). Plaintiffs were granted summary judgment on counts II (procedural aspects) and IV (the application of the ten criteria). The court refused to dismiss count II as moot, and counts

III (contempt) and V (subsumed by count IV) were dismissed according to the stipulation.

On December 13, 1982, the state filed a notice of appeal from the court's ruling on count IV. (G File 2, at 262)

## V. ARGUMENT

### A. Summary

The legislative history of the subsistence law clearly indicates that the legislature intended to narrow the definition of "subsistence fishing" to mean fishing by individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area. To the extent that there is any question in that regard, the board's interpretation and implementation of the subsistence law, which is entitled to significant weight, resolve it.

In carrying out its delegated responsibilities under the subsistence law, the board determined that "subsistence uses" of salmon in Cook Inlet can be identified on a community basis by the application of ten criteria, and that determination is both consistent with the intent of the subsistence law and reasonable.

The promulgation by the board in December 1981 of 5 AAC 01.597, codifying the ten criteria used to identify "subsistence uses" of salmon in Cook Inlet, was a sufficiently new beginning to cure and moot a violation of the public meetings law which occurred when the criteria were first formulated in December 1980.

The board is authorized by the subsistence law to identify "subsistence uses" of salmon in Cook Inlet in order that only fishing for those uses will be provided for through "subsistence fishing," regardless of the biological status of the target stocks.

The classifications determined by the ten criteria of individuals eligible and individuals ineligible to participate in "subsistence fishing" in Cook Inlet are a reasonable means to accomplish the legitimate state purpose furthered by the subsistence law.

The board is authorized to establish "personal use fishing" as a category for regulatory purposes.

In not authorizing "subsistence fishing" opportunities for plaintiffs, but instead authorizing "personal use fishing" opportunities, the board has treated plaintiffs fairly.

B. The Criteria for Identifying "Subsistence Uses" of Cook Inlet Salmon Are Consistent with the Intent of the Subsistence Law, and Are Reasonable

1. Standard of review

Plaintiffs assert that the ten criteria which the board developed to identify "subsistence uses" of salmon in Cook Inlet are not consistent with the intent of the subsistence law. Plaintiffs' argument can be separated into two alternatives: 1) that the legislature did not intend the scope of what had been called "subsistence fishing" to be narrowed when it changed the definition of "subsistence fishing" and established the definition of "subsistence uses," or 2) that the legislature did intend

to narrow the scope, but that the board has not properly accomplished that result with the ten criteria.

The state contends that the 1978 amendments reflect a legislative intent to narrow the scope of "subsistence fishing," and that the method chosen by the board is both consistent with that intent and reasonable. The standard of review for each of the two questions is somewhat different.

There is no question that it is the court's job to construe statutes, and that the court is free to substitute its judgment for that of an administrative agency when reviewing a regulation which merely interprets a statute. However, it is also true that the court should give "consideration and respect" to the agency's construction, and substitute its judgment only if there are "weighty reasons" for doing so. Kelly v. Zamarello, 486 P.2d 906, 910-911 (Alaska 1971). Accordingly, this court should apply "the long-standing principle of statutory interpretation that special consideration will be given to the interpretations of the agency charged with administering the statute," State v. Aleut Corporation, 541 P.2d 730, 737 n.15 (Alaska 1975), when determining whether the legislature intended to narrow the scope of fishing classified as "subsistence fishing" when it amended the definition of that term in AS 16.05.940(22).

However, assuming the legislature did intend a narrower meaning, the question is whether or not the ten criteria as established in 5 AAC 01.597 are "consistent with and reasonably necessary to carry out the purposes of the statutory provisions"

and are "reasonable and not arbitrary." Kelly v. Zamarello,  
supra, at 911. The court said:

when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.

Id.

2. Intent to narrow definition

Before 1978, "subsistence fishing" was defined in terms of "personal use." Sec. 4, ch. 131, SLA 1960. Following the enactment of the subsistence law, it now is defined in terms of "subsistence uses," which in turn are defined as "the customary and traditional uses in Alaska of wild, renewable resources" for certain purposes. AS 16.05.940(22) and (23). Thus, "subsistence fishing" is now defined in terms of "customary and traditional uses," not just "personal use." On its face, it would seem that "subsistence fishing" now requires something other than merely catching fish to eat. If no change had been intended (as contended by plaintiffs), there would have been no need for the amendments.

The legislative history of the subsistence law supports this facial analysis and demonstrates that the legislature intended to narrow the scope of fishing which could be termed "subsistence fishing." In essence, the legislature determined that fishing for "subsistence uses" would include only fishing by

individuals who reside in rural areas of the state which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the area, and not merely the taking of fish for personal use.

For example, during the House debate on the bill that became the subsistence law, proposed Amendment No. 3 to the bill would have eliminated the qualifying words "customary and traditional" from the definition of "subsistence uses." (M File 3, Exhibit U, at 8) Representative Anderson explained that the two words were used "to put some guidelines around the uses of Alaska's ... resources." (Id. at 9) The remarks of Representative Anderson, floor manager for the bill, assume a special role in determining legislative intent. See 2A C. Sands, Sutherland Statutory Construction, § 48.13 (4th ed. rev. 1973).

The fear was that without those modifiers, the field of definition would be "wide open." (M File 3, Exhibit U, at 9) Representative Anderson further commented:

The use of "customary and traditional" also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with aboriginal uses, but also those that have come in, those people who have come in later. They have ... the non-native people in the State of Alaska have established customary and traditional use of Alaska's fish and game resources for subsistence purposes. And in order to give the Board of Fish and Game more clarification in the area, we have come up with the (inaudible) of "customary and traditional" rather than leaving that section wide open.

(Id. at 9-10) Representative Anderson certainly intended "customary and traditional" to encompass something narrower than all

personal use. By not adopting Amendment No. 3 (id. at 16), the legislature answered part of the question put by Representative Cotton:

What is the difference between a sport fisherman who takes his fish home and eats it, and a subsistence fisherman who takes his fish home and eats it?

(Id. at 11) The answer is bound up in the historically significant role fish and game resources play in the social and economic life of certain rural areas of the state. In leaving the modifying terms "customary and traditional," the legislature showed that it intended something other than "personal use." 15/

A different provision of the bill requires the board in certain circumstances to distinguish among subsistence users, giving priority among them on the basis of customary and direct dependence upon the resource, local residency and availability of alternative resources. See AS 16.05.251(b). In discussing proposed Amendment No. 2, which eventually failed (id. at 7), but which would have deleted this requirement (id. at 1-2), Representative McKinnon asked what the difference was between those three criteria, and "subsistence uses" generally. (Id. at 4-5) Representative Anderson responded that in a very poor resource situation, sport and commercial fishing would be cut first, and

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15/ Nor was it relying on gear type as the controlling definitional element. Representative Gruening, in the House debate, made it very clear that "there are two questions here," referring to "methods of taking" and "customary and traditional use." (M File 3, Exhibit U, at 12)

the:

last people that you are going to cut off are the subsistence people who have the greatest reliance on the resource.

(Id. at 5) (Emphasis added.)

The answer to Representative McKinnon's question is thus that "subsistence uses" are not defined in terms of individual dependence on the resources. This is relevant only in certain circumstances. (See discussion in section D.) Instead, "subsistence uses" are associated with all those living in rural areas in which the social and economic life of the area is reliant upon fish and game resources. That conclusion is supported by the letter of intent accompanying the subsistence law, which notes: "Presently, research is not being specifically directed toward the subsistence hunting and fishing economy of the state." House Journal, 10th Leg., 2nd Sess. 1155 (1978). "Economy" is defined most pertinently as "the structure of economic life in a country, area, or period ... an economic system." Webster's New Collegiate Dictionary 375 (1981). It is clear that the legislature intended the importance of fish and game to the economy of an area to be within the scope of "subsistence uses."

When a statute involves the same subject matter as a subsequent, but approximately contemporaneous statute, the legislative history of the first is indicative of the legislative intent of the second. State v. Bundrant, 546 P.2d 530, 545 (Alaska 1976). The subsistence law was preceded by AS 16.05.257,

the statutory basis for subsistence hunting areas. Ch. 199, SLA 1975; amended ch. 269, SLA 1976. In amending that statute in 1976, the legislature indicated that "subsistence uses" should not be considered to exist throughout all Alaska. For example, it found "that traditional dependence on fish and game resources is a continuing and necessary way of life in many areas of the state and that the protection of subsistence usage of these resources is essential to the health, safety and general welfare of the citizens of the state in those areas." Sec. 1, ch. 269, SLA 1976. (Emphasis added.)

The House debate on subsistence hunting area amendments in 1976 also indicates that proponents of the bill contemplated a limit to geographical scope. For example, Representative Miller, the floor manager for the House debate, indicated that "subsistence uses" which occurred in a particular area should not be subordinated to "pressures from outside sportsmen like myself." Recording of proceedings, 9th Leg., 2nd Sess., tape 130 H, index nos. 527-1276 (1976). Representative Huntington, the original sponsor of the bill which became chapter 199, SLA 1975, expressed concern about outside hunting pressure on people "in the area where they live." Id. He noted:

Now, the Nowitna River on the Yukon River above Ruby, 30 miles above Ruby, has been hunted for many years. It was one of the finest hunting rivers in the area, and it was destroyed by hunting, there is not doubt about that. The people were flown in from airplanes and they cut the moose down to practically zero in two-year's time.

Id.

In light of this legislative history, it appears clear that the legislature intended the 1978 amendments to narrow the scope of "subsistence fishing." To the extent that there is any remaining question in that regard, however, it is removed by the board's subsequent action interpreting and implementing the subsistence law. Since board determined that the legislature intended by the definitional change to narrow the scope of what would be called "subsistence fishing," this determination should be given "great deference":

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

Pan American Petroleum Corporation v. Shell Oil Company, 455 P.2d 12, 22 (Alaska 1969).

Both Madison and Gjosund concluded that in developing the ten criteria to identify "subsistence uses" of salmon in Cook Inlet and in focusing upon rural communities around Cook Inlet which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community, the board is acting consistently with legislative intent. (M File 1, at 57, ¶ 4; G File 2, at 260, ¶ 6)

There are no "weighty reasons" to overturn the board's determination. See Kelly v. Zamarello, supra, at 910-911. The

decision the board made was that "customary and traditional uses" amounted to something more than simply eating fish, and its decision is consistent with the amendments which occurred in 1978. In light of the ample legislative history supporting the board's determination, the court need not overturn it under a substitution of judgment analysis.

3. Criteria consistent with intent, and reasonable

The job of identifying which uses of fish and game resources are "customary and traditional" has been delegated to the board within specific guidelines. In fact, the legislature intended the words "customary and traditional" to give "a better handle for the board to work for in defining the range of subsistence." (M File 3, Exhibit U, at 12) (Emphasis added.)

Since the legislature delegated authority to the board to carry out the task of further clarifying the definition of "subsistence uses," its actions in that regard should be reviewed for consistency with the purposes of the statute, and for reasonableness. Kelly v. Zamarello, supra, at 911. This clarification concerns "administrative expertise" as to a "complex subject matter," and in such cases, the court will not substitute its judgment for that of the agency, as explained in Borkowski v. Snowden, 665 P.2d 22, 25 (Alaska 1983). That case involved an interpretation of a regulation for which the substitution of judgment test was used. The meaning of the term "findings" was at issue, as it appeared in the phrase "written findings on each issue shall be issued to the respondent." Id. at 26. The

interpretation of the term "findings" takes no particular expertise, unlike the clarification of the term "customary and traditional" as it relates to uses of Alaska's fishery resources. The legislature intended in the subsistence law to narrow the purview of "subsistence fishing." However, the legislature had established the board to deal with just such complex subject matter, and the board was delegated the task of selecting a mechanism to accomplish the legislature's intent, within the guidelines provided. As discussed, in developing criteria that identify "subsistence uses" with rural communities around Cook Inlet with historic reliance on fishing and hunting activities, the board is acting consistently with the intent of the subsistence law.

In formulating the ten criteria challenged in this appeal, and applying them on a community basis, the board is also acting reasonably. Some evidence of that is found in the adoption by the board in conjunction with the Board of Game of a joint regulation which sets out the procedures for identifying subsistence on a statewide basis. This regulation contains eight criteria, very like the ten in question here. 5 AAC 99.010(b).

Where an "agency decision concerns 'administrative expertise as to either complex subject matter or fundamental policy formulation, deference should be given to an administrative determination if it has a reasonable basis in law and in fact'." Weaver Brothers, Inc. v. Alaska Transportation Commission, 588 P.2d 819, 821 (Alaska 1978). See also Hood v. State Workmen's Compensation Board, 574 P.2d 811, 813 (Alaska 1978).

In this instance, the board decision clearly was based on its factual expertise, as well as being consistent with the law. Information 16/ presented to the board in December 1980 and

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16/ That information is contained in the board record supporting the ten criteria in at least the following places:

1) long-term stability: Volume 4 at 84, 97; Volume 5 at 9, 47, 69-70, 85, 91-92; Volume 7 at 33, 53-54, 94, 110, 138, 139, 156, 160-162, 172; Volume 8 at 59-62, 75-76, 112, 113, 114-115, 116-117; Volume 10 at 18-19, 19-20, 32-35; Volume 12 at 77, 78, 81, 82; Volume 13 at 85-86; Volume 14 at 24-25, 31, 126-127; Volume 16 at 102-103; Volume 19 at 77, 78; Volume 20 at 103-104, 105, 108, 112, 115, 117-118, 123, 157, 170, 172-173; Volume 21 at 223-224, 278, 283-284, 296, 306; Volume 22 at 326;

2) community identification: Volume 1 at 70-71; Volume 5 at 22, 61-62, 85; Volume 7 at 33, 46-47, 64-65, 75, 87, 92, 100-101, 112-113, 115-116, 135-137, 144-146, 147, 154, 160-162, 179, 197; Volume 8 at 28, 59, 60, 75-76, 101-105, 107; Volume 12 at 79-80; Volume 13 at 86, 88; Volume 14 at 25-26, 27-28, 38-39, 114, 166, 168; Volume 19 at 77; Volume 20 at 158, 172, 177-198; Volume 21 at 203-205, 217-218, 220, 221, 225, 262-263, 267-268, 286, 288-289, 296, 301;

3) targeting on specific stocks: Volume 1 at 20-21, 33-37; Volume 7 at 19-20, 34-35, 36-37, 42-43, 44-45, 46-47, 57-58, 60, 63-64, 76, 87-89, 91, 96, 118, 141, 180-188, 228-229, Volume 8 at 59; Volume 12 at 29-30, 33-34, 96, 104; Volume 13 at 25-26, 32-38, 47; Volume 14 at 138, 217; Volume 18 at 269-273; Volume 21 at 234;

4) efficiency of harvest methods: Volume 3 at 41, 60, 92-93; Volume 4 at 85, 88; Volume 7 at 12, 34-35, 42-43, 46-47, 60, 76, 87-89, 92, 95-96, 96-98, 116, 121, 123-124, 180-188, 202; Volume 8 at 11, 14-15, 17; Volume 10 at 20-24; Volume 12 at 8, 31-32, 32-33, 92-96, 105; Volume 20 at 99, 104-105, 161-162, 196; Volume 21 at 236, 297;

5) proximity: Volume 3 at 40; Volume 4 at 79, 88-90; Volume 5 at 24-25, 75-76, 82, 84; Volume 7 at 42-43, 46-47, 49-50, 77, 99-100, 101-102, 103, 105-106, 126, 147, 150, 158, 180; Volume 12 at 41; Volume 14 at 43-44, 182-183; Volume 20 at 104-105, 171; Volume 21 at 297;

6) access relatively good: Volume 4 at 79, 85; Volume 5 at

spring 1981, regarding the uses of salmon in Cook Inlet included evidence that "customary and traditional uses could be distinguished from mere "personal use" by ten factors, which became the ten criteria of 5 AAC 01.597. 17/

The reasonableness of the board employing the ten criteria to identify communities 18/ in which "subsistence uses"

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36, 41, 45, 76, 84; Volume 7 at 37, 39, 105, 126-127, 131, 132, 133, 213, 231-232; Volume 10 at 25; Volume 12 at 42, 44, 45-46, 52, 86; Volume 14 at 182-183; Volume 21 at 297;

7) relationship to historical methods of preparation: Volume 3 at 18, 21-22, 61; Volume 5 at 55-56, 59-61, 85, 91-92; Volume 7 at 53-54, 54-55, 76, 87-89, 91-92, 94, 158, 233; Volume 8 at 25; Volume 10 at 25-27; Volume 19 at 77; Volume 20 at 172; Volume 21 at 297-298;

8) inter-generational transmission: Volume 4 at 74, 87; Volume 5 at 59-61, 85, 91-92; Volume 7 at 53, 96; Volume 8 at 25, 58, 59, 75-76; Volume 10 at 27-30; Volume 13 at 86; Volume 14 at 126-127; Volume 17 at 153; Volume 20 at 112, 172; Volume 21 at 278;

9) community and family sharing: Volume 3 at 115; Volume 5 at 61-63; Volume 7 at 90, 117; Volume 8 at 27-28, 58; Volume 10 at 35-41; Volume 13 at 86; Volume 21 at 298; and

10) reliance on variety of resources: Volume 5 at 64-65, 75-76; Volume 7 at 87-89, 94, 101-103, 106, 116, 123-124, 147; Volume 10 at 41; Volume 13 at 27; Volume 20 at 172; Volume 21 at 216, 221, 283-284, and 299.

17/ Contrary to plaintiffs' assertions, the criteria are not racially based. Anyone living in a qualifying community in Cook Inlet, currently Tyonek, English Bay, and Port Graham, 5 AAC 01.580(a), may participate, regardless of race. Conversely, individuals living in communities in Cook Inlet for which the existence of "subsistence uses" of salmon under the ten criteria has not been demonstrated may not participate. Thus, the Kenaitze Indians, who live on the Kenai peninsula, are not authorized. (M File 3, Exhibit L, at 9)

18/ Plaintiffs assert that the method of applying the ten

occur is also evidenced by the fact that the federal subsistence law was clearly aimed at protecting communities reliant upon resources. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487 (1980). "Subsistence uses" of Alaska's fish and game are protected by ANILCA Title VIII, 16 U.S.C. § 3111-3126. The definition of "subsistence uses" in ANILCA is virtually identical to the state definition, including the critical words "customary and traditional uses." 16 U.S.C. § 3113. The version of ANILCA that was under consideration by Congress in 1978 when the state subsistence law was passed also contains in its definition of "subsistence uses" the key words "customary and traditional." Sec. 703, H.R. 39, 95th Cong., 2nd Sess. (1978). The state legislature was aware of that definition when it was debating, and deciding against, removing the words "customary and traditional" from the state definition. (M File 3, Exhibit U at 8)

The legislative history of ANILCA and its precursors indicates that Congress was concerned about communities reliant upon resources in Alaska. There are references to the "more than

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criteria in Cook Inlet, on a community-by-community basis, is a strategy of recent vintage, devised long after the criteria were formulated. In fact, the explanation accompanying the motion to adopt the ten criteria as the method of identifying "subsistence uses" of salmon for all of Cook Inlet in March 1981 emphasized the need to focus on "an identifiable community, subcommunity or group" rather than "a small group intermingled throughout the length and width of the Kenai peninsula with other individuals and groups." (Emphasis in original.) (M File 3, Exhibit R, at 1)