

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

3555 HRES HB 288 (FILE 1)

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

March 6, 1985  
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### III. Necessity for Governor's Briefing

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

### IV. Background

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

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

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V. Relevant Laws

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

B. Federal law:

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

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

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

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

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VI. Alternatives

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

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

# MEMORANDUM

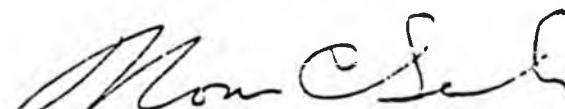
# State of Alaska

TO For Jolin, Chairman  
Joint Boards of Fisheries and Game

DATE March 11, 1985

FILE NO 366-375-85

TELEPHONE NO. 465-3600

FROM   
Norman C. Gorsuch  
Attorney General

SUBJECT Subsistence

The State subsistence law must be implemented by the Boards of Fisheries and Game in a new and problematic way under Madison v. Alaska Department of Fish and Game, No. 7410, a decision issued by the Alaska Supreme Court on February 22, 1985. The precise holdings of the court could be interpreted by extrapolation to affect the entire state and regulation of game as well as fish.

The state statutes require:

- That subsistence hunting and fishing be allowed, unless the resource would be harmed.
- That subsistence be given a priority, if restrictions are necessary.

Before Madison:

- These special protections applied to fishing and hunting by rural Alaskans.
- Because subsistence consisted only of those rural harvests, the boards were able to accommodate non-state resident and guided hunting, personal use net fishing by non-rural Alaskans, sport fishing, and commercial fishing.
- The state was in compliance with ANILCA.

After Madison:

- All Alaskans may engage in subsistence fishing or hunting.
- Subsistence fishing or hunting on a resource by all Alaskans cannot be restricted unless all non-subsistence uses are first eliminated.
- Example: The Prince William Sound commercial fishery may need to be restricted or even closed if necessary to accommodate the dip net fishery in the Copper River.

- Example: The Kenai River and Susitna drainage sport fisheries may need to be restricted or even closed if "subsistence fishing" by gill net must be allowed in large areas of Cook Inlet closed in recent years.
- Example: All Alaskans could subsistence fish near Tyonek for kings, near Angoon for cohos, in the Naknek River for kings, sockeye, and coho, and in the Iliamna-Lake Clark drainage for sockeye, unless any associated sport or commercial fishery were closed.
- Example: For any permit hunt, non-state resident and guided hunting may need to be eliminated.
- If the boards cannot protect fishing and hunting by rural Alaska residents under the state statutes, non-compliance with ANILCA could mandate some federal action.
- It is unclear precisely what federal management would entail, but it has been argued that besides all federal land, all navigable waters would be affected, and that possibly some state lands would be affected if migratory species were involved.

NCC/LIS:rn

# MEMORANDUM

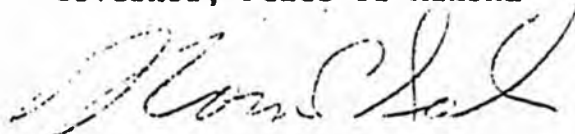
State of Alaska

TO: Honorable Bill Sheffield  
Governor, State of Alaska

DATE: February 22, 1985

FILE NO.: 822-642-82

TELEPHONE NO.: 465-3600

FROM:   
Norman C. Gorsuch  
Attorney General

SUBJECT: Madison v. Alaska  
Dept. of Fish & Game

The Alaska Supreme Court today issued an opinion in Madison v. Alaska Department of Fish and Game, file No. 7410, which holds that the regulatory approach of the Boards of Fisheries and Game to subsistence is inconsistent with Alaska's subsistence statutes. A copy is attached.

The state's position on the Alaska statutory and regulatory framework before this decision was that:

- The legislature in 1978 intended to protect fishing and hunting 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.
- The eight criteria developed by the board correctly identified subsistence uses in rural, reliant areas.
- The harvest of people in other areas of the state could be accommodated through the personal use fishing category, created in regulation by the Board of Fisheries.
- Personal use fishing did not have a priority over sport fishing and commercial fishing.

With regard to the statutory and regulatory framework in Alaska, the court in Madison held:

- The legislature did not intend that subsistence uses were to be limited to rural uses, and the boards do not have the authority to do so.
- The legislature did not intend subsistence uses to be identified in terms of the uses of a community or area.
- The legislature did not intend that people qualify for subsistence fishing on an individual basis, and there is no authority to develop a "grandfather" rights system with respect to subsistence.

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- The legislature intended that subsistence uses could be restricted only if it is necessary to restrict harvest for sustained yield purposes and if sport and commercial uses have already been eliminated.
- If a situation requires restriction of subsistence uses, distinction among subsistence users will be based upon the three statutory criteria, customary and direct dependence on the resource, local residency, and availability of alternative resources.

With regard to the federal subsistence law:

- Federal management of fish and game on all federal lands in Alaska is mandated if the state does not by a law of general applicability define subsistence uses as uses of rural Alaska residents.
- It is unclear precisely what federal management would entail.

LIS:rn

cc: (with attachment)

Don Collinsworth  
John Shively  
Lenny Boston  
John Greeley  
Molley McCarmon

# MEMORANDUM


State of Alaska

TO: Hon. Bill Sheffield  
Governor

DATE: February 25, 1983

FILE NO: 166-448-83

TELEPHONE NO:

  
FROM: Norman C. Gorsuch  
Attorney General

SUBJECT: Subsistence law:  
real and perceived  
problems

I recently asked the attorneys on my staff who work in the fish and game area to prepare an overview of the current status of the state subsistence law, with relevant background information for your review. The material which follows is the result of that effort. I have reviewed it personally and concur fully with its content.

## OVERVIEW

The framework for the implementation of the subsistence law is now in place. The approach codified in regulation by the Joint Boards of Fisheries and Game is fairly straightforward, and with one notable exception, the definition of "rural," it is likely to be upheld by Alaska courts. See Madison v. ADF&G, 3KN 81-542, CIV; Giosund v. ADF&G, 3HO 80-92, 77-22104 Homer. This memorandum will explain the state statutory and regulatory framework and its relationship to federal law. It also will discuss three actual problems and twelve perceived "problems" in the current situation and identify specific issues that require attention.

## STATE LAW

The Alaska Boards of Fisheries and Game are authorized by the legislature to allocate Alaska's fish and game resources among various uses, so long as sustained yield will not be jeopardized. Since statehood, the boards and their predecessor, the Board of Fish and Game, have had the discretion to decide which non-subsistence uses (for example, sports, commercial) should be allowed in each area of the state, and to what extent. Under AS 16.05.251(b) and 255(b), the boards are required to adopt regulations allowing subsistence uses, unless sustained yield will be jeopardized. Attachment A.

Although contained in the same statute, the requirement to allow subsistence uses is separate from the priority for subsistence uses over non-subsistence uses, which is triggered only by a relative resource shortage. The boards must accord the priority to subsistence uses whenever "it is necessary to

restrict the taking" of a fish stock or game population in order to assure maintenance of sustained yield or continuation of subsistence uses. AS 16.05.251(b) and 255(b). Attachment A. As discussed below, the mere existence of regulations authorizing subsistence uses does not mean that taking is "restricted" so as to trigger the priority. Rather, the priority comes into play only in relative resource shortage, when restrictions on non-subsistence uses must be imposed because harvest competition among user groups or decline in numbers of fish or game would jeopardize sustained yield of the resource or subsistence uses of the resource.

The legislature has defined subsistence uses as "customary and traditional uses" of wild, renewable resources for certain purposes. AS 16.05.940(26). Attachment B. The state statutory definition of "subsistence uses" is practically identical to that found in Title VIII of the federal Alaska National Interest Lands Conservation Act (ANILCA). Virtually the only difference is ANILCA's specification that subsistence uses are "customary and traditional uses by rural Alaska residents." ANILCA §803 (emphasis added). Attachment C.

However, the boards have determined that the state definition of "subsistence uses" also is limited to customary and traditional uses by "rural Alaska residents." 5 AAC 99.010(a). Attachment D. Not all uses of fish and game by rural Alaska residents are "subsistence uses." Rather, subsistence uses by rural Alaska residents are customary and traditional uses, which can be identified by eight criteria. 5 AAC 99.010(b). Attachment D. See April 1, 1982, memorandum from our office to Clint Buckmaster, Chairman of the Joint Boards of Fisheries and Game, A66-432-82. These criteria are based upon the ten criteria in 5 AAC 01.597 which the Board of Fisheries has employed to identify which uses of salmon in Cook Inlet are subsistence uses. The ten criteria have been upheld by two state superior court judges in the last year. Madison v. ADF&G, supra; Giosund v. ADF&G, supra. In approving the ten criteria, the court in Madison concluded at page 4 of the March 5, 1982, findings of fact and conclusions of law that:

The intent of AS 16.05.251(b) and .940(26) is to provide for and protect personal use ... fisheries conducted by persons who reside in rural communities which historically have been dependent upon hunting and fishing as a significant characteristic of the social and economic life of the community. (Emphasis added.)

The boards determine on a case by case basis whether a use qualifies as a subsistence use by evaluating information presented by the public, the advisory system, and the Department of Fish and Game in light of the criteria. Attachment D. The joint board regulation also sets out the procedures each board will follow in allocating between subsistence uses and other uses. § AAC 99.010. In brief, if a fish stock or game population can be harvested without jeopardizing sustained yield, the board will provide reasonable opportunities for subsistence uses of that resource. If the resource population is adequate, the board may permit opportunities for other uses as well. Attachment D.

#### FEDERAL LAW

ANILCA established a procedure for the state to continue managing fish and game on federal lands and in all the waters of Alaska if the state meets certain standards. In particular, ANILCA §805(d) requires the state to have "laws of general applicability" which mirror the federal provisions in three areas: (1) the definition of "subsistence uses," (2) a preference for those uses in times of relative resource shortage, and (3) public participation which includes advisory committees and regional councils. The Department of the Interior has determined that the state statutes, together with the boards' procedural regulation (5 AAC 99.010) and the regulations governing fish and game advisory committees and regional councils (5 AAC 96), satisfy the requirements of ANILCA. See December 2, 1981, and April 28, 1982, letters from our office to Governor Hammond, A66-120-82. Thus, under the approach now in place, the state is authorized to continue to regulate the taking of fish and game on federal lands and in all the waters of Alaska.

#### ACTUAL PROBLEMS

There are three actual problems with the implementation of the subsistence law which have not yet been resolved.

1. "Rural": When the joint boards adopted the criteria and procedures specified in 5 AAC 99.010, they also adopted a definition of "rural" in 5 AAC 99.020, Attachment E:

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 definition poses serious equal protection problems under state and federal constitutions, in part in that whether an area of the state is "rural" is to be determined by whether the area has or has not organized as a borough. Equal protection requires that persons similarly situated be treated alike. Ketchikan Gateway Borough, Alaska v. Breed, 639 P.2d 995 (Alaska 1981). A definition of "rural" keyed to the presence or absence of a borough appears to violate that principle. For example, the Matanuska-Susitna Borough boundary bisects game management unit 13. Under 5 AAC 81.055(c)(3), rural residents of game management 13 who meet certain other requirements qualify for a subsistence permit to hunt Nelchina caribou. If the definition of "rural" in 5 AAC 99.010 is applied, residents of game management unit 13 living outside the borough are eligible, and those living inside are not. Information supplied to the Department of Law by the Alaska Department of Fish and Game would probably lead a court examining the classification to conclude that persons living inside and outside the borough are apparently similarly situated, except for the location of the borough boundary line. That boundary appears to be entirely unrelated to factors considered important by the boards in identifying subsistence uses, such as available opportunities. Consequently, a court would probably conclude that classification of land as being within a borough is a factor which does not reflect a difference in the pattern of harvest and use of resources and that different treatment of Alaskans based only on their residency in a borough violates equal protection principles. See June 17, 1982, memorandum from our office to Ronald Skoog, Commissioner of Fish and Game, J99-098-82.

The current definition of "rural" is also potentially flawed by vagueness. Regulations must be precise enough to enable the agency implementing them and the public to know what is intended. Woodards v. State, 604 P.2d 250 (Alaska 1979). For that reason, the Department of Law discourages the use in regulations of words like "adjacent" or "near", since courts have found that other such relative terms are too vague to be enforceable. Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972). Similarly, in the definition of "rural" the term "road connected area" is potentially vague. There is no way of knowing whether the definition of "road" was intended to include frozen

rivers in winter, logging roads, animal trails, or railroads. Nor is there any information on the amount of "area" anticipated to be included in terms of specific distances in yards or miles from a "road." It should also be mentioned that even if specific guidelines were set out, a differentiation in treatment based on proximity to a road also would have to bear a fair and substantial relationship to a legitimate governmental purpose under an equal protection analysis. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

A definition of "rural" is not required by state law. The April 2, 1982, letter from our office to Representative Ramona Barnes, J66-561-82, points out that it is not necessary under federal law either. ANILCA requires only that subsistence uses be rural customary and traditional uses, not that "rural" be defined. ANILCA §803, §805(d). As the April 2, 1982, letter discusses, the legislative history of ANILCA indicates that Congress envisioned subsistence uses occurring in rural areas, and rural areas being places where subsistence uses occur. Although seemingly circular, that approach enables the state to provide for subsistence uses on a case-by-case basis through the operation of criteria which have the effect of limiting those uses to rural areas. The joint boards' eight criteria for identifying subsistence uses and their acknowledgement in 5 AAC 99.010(a)(2) that subsistence uses are rural uses would probably be sufficient under ANILCA to accomplish the rural focus. For example, Madison, supra, and Gjosund, supra, held that the Board of Fisheries' ten criteria, which are similar to the joint boards' eight criteria, identified rural subsistence uses in the Cook Inlet area.

In addressing the concept of "rural," consideration also should be given to the term "residents" as used in section 803 of ANILCA and 5 AAC 99.01(b). Enforcement of the subsistence regulations will require a definition of residency for subsistence purposes. A possible model is the definition of "domicile" recently approved by the Board of Fisheries at its January meeting. See 5 AAC 39.975(30) (not yet filed with Lt. Governor's office).

2. Avoiding disruption of non-subsistence harvest opportunities: Another problem related to implementation of the subsistence law is the authorization and use of a workable system to avoid disrupting harvest opportunities of those whose uses are no longer classified by the boards as subsistence uses and are not commercial or sport. A solution to this problem is the personal use category established by the Board of Fisheries in 5 AAC 77.001-015, in response to the court's action in Madison.

supra. \*/ This category is intended to authorize regulations which provide access to fishery resources for those whose uses do not qualify under the criteria as subsistence uses, and cannot be classified as commercial or sport.

This personal use category has generated concern among some members of the public. There are those who fear that it will receive a disproportionately high allocation of the resource, and others that it will consistently be relegated to the lowest position. If the relationship between personal use and sport and commercial use can be resolved, the application of the personal use category as the board addresses different fisheries can be a useful tool to assure the adequacy of harvest opportunities when a particular use is not classified as subsistence use. For example, suppose a fishery has been conducted on a particular fish stock under subsistence fishing regulations for a number of years. As the Board of Fisheries considers proposals for regulations, the uses of that fish stock are examined, and only some of the uses are identified under the criteria as subsistence uses. In addition to providing for the identified subsistence uses, the board could authorize a personal use fishery to continue the uses no longer eligible to be classified as subsistence uses. Assuming the target stock and the continuation of subsistence uses would not be jeopardized, the personal use harvests could be regulated as before, except

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\*/ In 1981 in Cook Inlet, the board had identified the non-commercial gillnet fisheries in Port Graham, English Bay and Tyonek as subsistence use fisheries. Gillnet fisheries had long occurred in other parts of Cook Inlet under previous subsistence regulations, but the board in 1981 simply eliminated those other harvests. In Madison, the court did not find that the subsistence law was flawed, nor that the board had erred under the law or the constitution in identifying subsistence uses in Cook Inlet. However, the court ruled at the preliminary injunction stage that the board's action in eliminating the other gillnet harvests which did not qualify as subsistence uses violated due process, in that all use groups had not been treated fairly. In response, the board established the personal use category. For 1982, a personal use gillnet fishery was permitted in Cook Inlet for gillnet harvests not qualifying as subsistence uses. 5 AAC 77.547.

under a new name. If it ever became necessary to restrict the harvest of that particular fish stock, the board would then of course treat the personal use and subsistence fisheries differently.

3. Apparent reluctance to follow Attorney General's advice and confusion among state officials:

There has been reluctance by some board members and some Department of Fish and Game personnel to follow the advice of the Department of Law in implementing the subsistence law. For example, that department chose to ignore our recommendation that the flawed definition of "rural," Attachment E, be severed and not be applied in issuing permits for the subsistence hunt of the Nelchina caribou herd. Such a procedure would have allowed any qualifying resident of game management unit 13 to apply for a subsistence permit, rather than only those living outside the Matanuska-Susitna Borough. That would have avoided the equal protection problem discussed above which was caused by the use of the borough boundary in the classification of uses. See July 23, 1982, memorandum from our office to Ronald Skoog, Commissioner of Fish and Game, 366-042-83.

Another example is the refusal to publish a legal notice for the March 1982 meeting of the Joint Boards of Fisheries and Game which was adequate to allow action at that time to bring the state into compliance with ANILCA. Under the Administrative Procedure Act, state agencies are required to give notice to the public at least 30 days before taking action adopting proposed regulations. The notice must be specific enough to give a clear idea of the area in which action may be taken. AS 44.62.190, .200. For the March 1982 joint board meeting, despite advice from our office, a decision was made not to publish a notice sufficient to give the boards the flexibility to adopt regulations to meet the specifications of ANILCA at that session.

An additional ongoing problem is confusion among some board members and department personnel about what is possible or necessary under the subsistence statutory and regulatory framework. For example, some board members continue to insist that partial compliance is sufficient under ANILCA. As discussed earlier, ANILCA §805(d) requires the state law to be the same as the federal law in three areas: (1) the definition of "subsistence uses," (2) preference for those uses in times of relative resource shortage, and (3) a public participation system (advisory committees and regional councils). Although this has

been explained on a number of occasions by our office, suggestions have continued to be made by some board members that Alaska could fail to comply in one or more of the areas specified and somehow still retain management on federal lands and in all the waters of Alaska.

Another example of ongoing confusion is the discussion outline prepared by the boards' executive director for the joint board meeting which began on November 30, 1982. The thrust of the outline is the purported need to formulate a "policy" on subsistence when, in fact, as discussed earlier, 5 AAC 99.010 already clearly sets out the boards' approach. Attachment D. It is now simply a matter of following those procedures.

#### PERCEIVED "PROBLEMS"

Numerous other "problems" which are perceived as stemming from the subsistence law are based on misinformation and misinterpretation.

1. Misperception: unconstitutional: In an April 1, 1982, memorandum to Clint Suckmaster, Chairman of the Joint Boards of Fisheries and Game, A66-432-82, our office analyzed the most commonly alleged constitutional flaws in the state subsistence law and concluded that the law was constitutionally sound.

Article VIII, section 4, of the Alaska Constitution allows for preferences "among beneficial uses." Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 904 (Alaska 1981), affirmed the authority of the Board of Fisheries to provide for "different treatment of such diverse user groups as commercial, sports, and subsistence." That authority is not diminished by Article VIII, section 15, of the Alaska Constitution, which prohibits exclusive fisheries and was derived from 48 USC §222, The White Act. 1961 Op. Att'y Gen., No. 3. The intent of the White Act, and Article VIII, section 15, was to preclude creation of classes of use of Alaska's fisheries for which some individuals could never qualify. Hynes v. Grimes Packing Co., 11 Alaska 564, 165 F.2d 323 (9th Cir. 1947), vacated and remanded on other grounds, 23 Alaska 348, 337 U.S. 86 (1949). As discussed below, the subsistence law is not the equivalent of exclusive use, nor does it create a class closed to participation by people who wish to qualify.

The constitutionality of the subsistence law also is not affected by Article VIII, section 3, of the Alaska Constitution, which reserves fish and wildlife to the people for common use. As the April 1, 1982, memorandum explains in more detail, the record of Alaska's constitutional convention shows that section was intended to prohibit private ownership of fish or game still in their natural state. This does not occur under the subsistence law.

The April 1, 1982, memorandum also concluded that identifying subsistence uses as rural uses was permissible under state law. The classification does not violate the equal protection clause of the Alaska Constitution, since the boards have received substantial evidence that basic differences exist between rural and urban areas with respect to economies, social and cultural systems, and resource use characteristics. Indeed, in another context the state supreme court has acknowledged the great differences. In Alvarado v. State, 486 P.2d 891, 894 (Alaska 1971), the court described the differences:

... economies which rely on hunting, fishing, and gathering activities, strong kinship bonds, isolation from those parts of Alaska that approximate mainstream America, different seasonal activity patterns, concepts of time and scheduling, which, in accordance with other cultural divergences, may be quite different from those of mainstream America, and finally, very limited participation in the cash economy.

2. Misperceptions: exclusive use: Participation in subsistence uses is not restricted to a closed class. This means eligibility is not limited in a way that precludes entry; it is not limited to individuals who have lived here since statehood, or to Alaska Natives. For example, in Cook Inlet the Board of Fisheries has determined that the uses of salmon by English Bay, Port Graham, and Tyonek are subsistence uses, and that any person domiciled in those communities may participate. 5 AAC 01.580(a). The class is not closed, since individuals may move to one of the communities and enter the subsistence system, or may move away.

The subsistence law also does not automatically preclude non-subsistence uses, for example, sport and commercial fishing. As always, no harvest is allowed if sustained yield would be jeopardized, but the legislature obviously intended non-subsistence uses to continue, and the boards have the discretion to authorize them. AS 16.05.251(a) and .255(a). For

example, when the Board of Fisheries provides for subsistence uses identified by the eight criteria, some fisheries which previously have been termed "subsistence" may not qualify. That does not mean those harvests will cease to exist. As discussed above, the personal use category can be employed at the board's discretion to permit continued resource harvest opportunity.

If relative resource shortage, which is described earlier, occurs and the priority must be implemented, the boards still have available all their traditional management options to restrict non-subsistence uses and to continue regulating subsistence uses, such as altering seasons or prohibiting use of aircraft. These options can be used to implement the priority in ways that do not exclude non-subsistence uses, although that option is available to the boards in extreme cases.

3. Misperception: harm to resource: Under the regulations, statutes, and Article VIII, section 4 of the Alaska Constitution, maintaining sustained yield of the resource is always the paramount consideration. No uses, including subsistence uses, are allowed to interfere with that. If any harvest of a fish stock or game population will jeopardize sustained yield, no harvests, subsistence or otherwise, may be authorized on that stock or population.

4. Misperception: dilution of advisory committee effectiveness and creation of regional council regulatory authority: Created by the boards to assist in gathering information on resource issues, fish and game advisory committees have existed in all regions of Alaska long before the state or federal subsistence laws. Currently, there are 67 of these advisory committees, each of which is represented on one of the state's six regional councils, which were formed by the boards before passage of ANILCA.

In order to satisfy the public participation requirements of ANILCA §805, modifications were made to the advisory system regulations, some of which strengthened the regional councils' role in the regulatory process. Two concerns have since emerged regarding the regional councils. The first is that the councils will replace the committees, and thus hinder public access to the boards. However, under the current regulations, individuals may express their views directly to the boards, councils and committees. Committees may channel information both to the councils and to the boards. The councils supplement, rather than replace, communication with the boards by individuals and committees.

The second concern is that the councils will have undue authority over the boards, or will have separate regulatory authority. In conformance with the specifications of ANILCA §805(d), the boards now give limited deference to council recommendations concerning subsistence uses, although they receive council recommendations on all fish and game issues. The boards may reject the recommendations concerning subsistence uses if they are not supported by substantial evidence, if they would violate conservation principles, or if they would harm subsistence uses. 5 AAC 96.610(e). The regional councils have no authority to promulgate regulations; rather, they are authorized to make recommendations to the boards.

5. Misperception: courts managing resources: Although the subsistence law was enacted in 1978 (ch 15, SLA 1978), the boards did not begin implementing it immediately. In fact, the boards' actions were often inconsistent with the law. As a consequence, the state lost four lawsuits in 1980. For example, Tvonek v. Alaska Board of Fisheries, 3AN 80-3073, ruled that it was improper for the board to authorize a sport fishery on Susitna River king salmon while not allowing a subsistence fishery on those stocks, when sustained yield would not be jeopardized by harvest of the fish.

However, once the boards began articulating and applying standards for implementation of the subsistence law, recent litigation has been more successful. For example, the Board of Fisheries' approach to subsistence uses in Cook Inlet has been upheld completely in Madison, supra, and in large part in Giosund, supra. The state's success in such cases hinges primarily on the boards' reasonableness in following the requirements of the law.

6. Misperception: waste permitted: The subsistence law does not authorize waste, which is prohibited separately by statute and regulation. See, for example, AS 16.05.831. Waste is not allowed by any use, subsistence or otherwise.

7. Misperception: racial criteria: The requirements of the subsistence law are race neutral. This is true of both the state statute and ANILCA.

8. Misperception: guaranteed take: 5 AAC 99.010(c) requires that "reasonable opportunities" for subsistence be provided. Attachment D. No participant is guaranteed a harvest.

9. Misperception: subsistence harvests may not be regulated without triggering the priority: AS 16.05.251(b) and .255(b) require the boards to "adopt regulations" allowing subsistence fishing and hunting. Attachment A. However, the fact that a subsistence harvest is regulated does not automatically trigger the priority. The priority becomes active if "it is necessary to restrict the taking" of fish and game, because of relative resource shortage, which is described earlier. AS 16.05.251(b) and .255(b). Attachment A. See February 1983, memorandum from our office to Don Collinsworth, Commissioner of the Department of Fish and Game, 166-423-83. This is also true under ANILCA §804. See S. Rep. No. 413, 96th Cong., 1st Sess. 269 (1979).

Just as with other uses, subsistence harvests can be regulated by specified areas, openings, and other management measures. Indeed, regulation of subsistence uses has been and is part of sound resource management, and it was expected by the legislature. For example, the legislature indicated in section 1, ch. 151, SLA 1978, the intent section of the subsistence law, that beneficial uses of fish and game by all state residents "should be carefully monitored and regulated." Historically, the Board of Fisheries has adopted regulations denominated "subsistence." The Board of Game has generally regulated subsistence uses without designating the regulations as "subsistence."

10. Misperception: requirement for precipitous change: As discussed in the March 22, 1982, memorandum regarding subsistence regulations from our office to Clint Buckmaster, Chairman of the Joint Boards of Fisheries and Game, the regulatory process contemplated by ANILCA is ongoing. Under ANILCA §806, the Department of the Interior will monitor the state's subsistence program on a continuing basis. Accordingly, instantaneous regulatory change in all fishing and hunting situations statewide is neither necessary nor desirable. As potential problems are identified and as data become available, the boards should act according to the procedures in 5 AAC 99.010. Attachment D. See May 4, 1982, memorandum to Milstead Zahn, Executive Director, Boards of Fisheries and Game, regarding effect of joint boards' subsistence regulations.

11. Misperception: limited entry system threatened and commercial sale or subsistence harvested fish or game allowed: Both state and federal laws include "customary trade" as a component of "subsistence uses." AS 16.05.940(26), Attachment B; ANILCA §803, Attachment C. However, legislative history indicates that Congress was mostly concerned about trapping, and neither state law nor ANILCA authorizes significant commercial activity. The state law limits the scope of customary trade by the phrase "for personal or family consumption." AS 16.05.940(26). Attachment B. Although those words do not modify "customary trade" in ANILCA §803, legislative history is clear that Congress did "not intend that 'customary trade' be construed to permit the establishment of significant commercial enterprises under the guise of 'subsistence uses.'" S. Rep. No. 413, 96th Cong., 2nd Sess. 234. See December 2, 1981, letter from our office to Governor Hammond, A66-120-81, p. 26-29. Thus, under the subsistence law any exchanges involving cash which are eventually authorized by board regulation would be of a very limited nature, perhaps recognizing established exchange and distribution networks within subsistence economic systems.

The inclusion of "barter" as a component of "subsistence uses" as defined in AS 16.05.940(26) does not authorize commercial exchanges, either. "Barter" is defined in AS 16.05.940(27) as the exchange of fish or game taken for subsistence uses for other fish or game, or for "other food or inedible items other than money if the exchange is of a limited and noncommercial nature."

12. Misperception: flexibility to define subsistence uses by economic need: It has been suggested that either the legislature or the boards should narrow the definition of subsistence to encompass only economic need, based, for example, on individual income level. Whatever the policy advantages or disadvantages of that approach, it is not an amendment that can be made if the state is to remain in compliance with federal law. An economic need requirement would be inconsistent with the language of ANILCA and with Congressional intent, as amply evidenced in legislative history. For example, in discussing the policy expressed in ANILCA §802(1), Representative Udall noted that it "also requires that regulatory systems which employ income requirements not be imposed upon rural residents." 125 Cong. Rec. H10546 (daily ed. November 12, 1980).

Hon. Bill Sheffield  
Governor

February 25, 1983  
Page 14

### CONCLUSION

State regulations and statutes provide a framework for implementing the subsistence law in a manner consistent with ANILCA. Many "problems" which have been perceived with the framework actually arise from misinformation and misinterpretation. Providing the public with correct information on the law would dispel the impression that these "problems" exist.

One problem which needs to be addressed is the authorization and use of a workable system to avoid disrupting harvest opportunities for those whose uses are no longer classified by the boards as subsistence uses. The personal use category established by the Board of Fisheries is a potential solution, though its relation to sport and commercial uses needs to be resolved. For example, Cook Inlet is a highly populated area where all four categories of fishery -- subsistence, sport, commercial, and personal use -- occur. Examining the appropriate application of the personal use category in Cook Inlet could develop a model not only for Cook Inlet but for other areas in the state.

Another problem is the current definition of "rural", which is vulnerable to equal protection and vagueness challenges. The definition could be amended, or even repealed, since a definition of "rural" is not required by either state or federal law.

If I can provide any further information or assistance, please let me know.

BOARD OF FISHERIES FINDINGS

1985

ALASKA BOARD OF FISHERIES FINDINGS  
SUBSISTENCE REGULATIONS FOR THE 1985 FISHING SEASON

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

- (1) The board will, by emergency regulation, authorize the subsistence take of smelt, herring, shellfish and bottomfish as they were allowed under the 1978 subsistence regulations.
- (2) The board will, by emergency regulation, authorize access by all Alaska residents to existing Tyonek, Port Graham, and English Bay subsistence salmon fisheries in Cook Inlet. Existing bag and possession limits, time, gear and area regulations and overall guideline harvest will not be adjusted for the 1985 season. The board finds that such regulations promote an orderly harvest which will reasonably satisfy anticipated subsistence uses. Modification of these regulations at this time is not in the best public interest of the public given the inadequate opportunity for public comment at this time, and uncertainty about 1985 participation levels.
- (3) During 1985, the board will continue the following presently authorized personal use salmon fisheries in Cook Inlet as personal use fisheries:

the spring Kasilof gill net fishery,  
the Kasilof and Kenai River sockeye dipnet fishery,  
the China Foot hatchery sockeye fishery,  
and the shellfish, herring, and smelt fisheries.

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

- (4) The fall coho set gill net personal use fishery will however, by emergency regulation, be identified as a subsistence fishery, as required by Madison, and will be managed under the regulations used during the 1981 season, except that current reporting requirements will apply.

- (5) The Kachemak Bay salmon set gill net fishery will, by emergency regulation, be identified as a subsistence fishery, as required by Madison, and will be managed under the regulations

developed for the court ordered fishery. Alaska residents will be able to participate in both of these fisheries.

(6) The board will, by emergency regulation, allow access by all Alaska residents to the following existing subsistence fisheries:

Copper River (salmon)  
Iliamna/Lake Clark (salmon)  
Naknek River (salmon), and  
Angoon (salmon).

The bag and possession, time, area, gear, and overall harvest guidelines of each of these fisheries shall remain as described in existing regulations. The board finds that such regulations are necessary to conduct an orderly fishery and to provide a reasonable opportunity for subsistence needs. Modification of these regulations at this time is not in the best interest of the public given the inadequate opportunity for public comment at this time.

(7) As to the Copper River subsistence and personal use salmon fisheries, which will be combined into a subsistence fishery by emergency regulation, the board will retain existing regulations as to bag and possession limits, time, area, gear, and overall harvest guidelines, except that rather than separate regulations based on domicile, the regulations developed for those domiciled in the Copper Basin and other specified communities will be applied to the fishwheel fishery and those developed for those not so domiciled will be applied to the dip net fishery. The board finds these regulations to be necessary to conduct an orderly fishery and to provide a reasonable opportunity for subsistence needs. Further, the overall harvest guidelines, bag limits, and areas represent historical harvest. The dip net portion of this guideline represents a total harvest which was not taken during the 1984 season. The harvest lid is necessary to manage the downriver commercial salmon drift gill net fishery to ensure escapement for reproductive needs and the upriver subsistence fishery. The bag and possession limits, while different for dipnetters and fishwheel fishermen were developed by the board after extensive public testimony and information demonstrating that the differing bag limits reflected historical use by each group.

The board hereby calls for proposals from the public on all subsistence and personal use regulations to be considered at the fall/winter 1985 finfish meeting. The board will consider all proposals to establish, eliminate or modify any or all subsistence or personal use regulations any changes in commercial or sport fishery regulations required by such regulations.

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Ron Jolin, Chairman Board of Fisheries

March 27, 1985

SUPREME COURT DECISION

MADISON V. ALASKA DEPARTMENT OF FISH AND GAME

SUPREME COURT OPINION NO. 2911, FILE NOS. 6824/7181/7410

ALASKA COURT SYSTEM NEWS RELEASE

For release Friday, February 22, 1985, 12:30 p.m.

Court Strikes Down Fisheries Regulation

Madison v. Alaska Department of Fish and Game

Supreme Court Opinion No. 2911, File Nos. 6824/7181/7410

Contact: David A. Lampen  
Clerk of the Appellate Courts  
Anchorage (907) 264-0607

[The following was prepared by the office of the Clerk of the Appellate Courts and is not an official statement of the Alaska Supreme Court.]

The Alaska Supreme Court Friday struck down a Board of Fisheries regulation designed to identify eligibility for subsistence fishing in the Cook Inlet region.

Under the regulation, certain residents of the Kenai coastline and an area near Homer were forbidden to fish for subsistence purposes. The regulation had been declared valid by Superior Court Judges Victor D. Carlson and Paul B. Jones.

The supreme court, in an opinion by Justice Daniel A. Moore, Jr., held that the board erred in denying subsistence permits to certain residents who had fished with set nets for personal and family use for many years.

The supreme court found that the board's regulation on subsistence uses was inconsistent with Alaska law because the regulation was too restrictive.

The opinion stated: "Under a statute designed to protect subsistence uses, the board has devised a regulation to disenfranchise many subsistence users whose interests the statute was designed to protect."

END

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

THE SUPREME COURT OF THE STATE OF ALASKA

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

File Nos. 6824/  
7181

Appellants, )

v. )

O P I N I O N

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

Appellees, )

and )

THE ALASKA FEDERATION OF NATIVES, )

Intervenor. )

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

File No. 7410

Appellants, )

v. )

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

Cross-Appellees. )

[No. 2911 - February 22, 1

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

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

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

MOORE, Justice.

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

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

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

#### I. SUMMARY OF FACTS

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

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

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

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

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

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2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

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(Footnote Continued)

the Board of Fisheries.

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

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

5. AS 16.05.251(b) states:

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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

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6. AS 16.05.251(a) states:

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

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

CHARACTERISTICS OF SUBSISTENCE FISHERIES.

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

## II. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

### III. LEGISLATIVE HISTORY OF THE 1978 SUBSISTENCE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

The board based its restrictive regulation, 5 AAC 01.597, on the words "customary and traditional." The legislature did not define these words in the 1978 subsistence law. In such a case, reference to legislative history may provide an insight into the legislature's intent and a statute's meaning. North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 340 (Alaska 1978). In the House floor debate on House Bill 960, Representative Cotton introduced an amendment to delete the words "customary and traditional" from the statute. The floor manager of the bill, Representative Anderson, opposed the amendment in the following speech:

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

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

(Emphasis added).

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

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

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

(Footnote Continued)

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

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

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

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(Footnote Continued)

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

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

15. The board stipulated in 1982 that it violated

(Footnote Continued)

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

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

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

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

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(Footnote Continued)

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

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

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

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

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

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

(Footnote Continued)

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

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

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

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(Footnote Continued)

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

BRIEFS SUBMITTED BY ATTORNEYS

IN THE SUPREME COURT CASE

MADISON VS. ALASKA DEPARTMENT OF FISH AND GAME

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, )

v. )

ALASKA DEPARTMENT OF FISH AND GAME, )  
and ALASKA BOARD OF FISHERIES, )  
Appellees, )  
and )  
THE ALASKA FEDERATION OF NATIVES, )  
Intervenor. )

Supreme Court Nos. )  
6824/7181 )  
Superior Court No. )  
3KN-81-542 Civil )

APPEALED FROM THE )  
SUPERIOR COURT, )  
THIRD JUDICIAL )  
DISTRICT, HONORABLE )  
VICTOR D. CARLSON )

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

v. )

LOUIS GJOSUND, DORA MULCH, and KACHEMAK )  
BAY SUBSISTENCY GROUP, INC., )  
Cross-Appellees. )

Supreme Court No. )  
7410 )  
Superior Court Nos. )  
3HO-80-92 Civil )  
3HO-77-11014 Homer )

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 27 day of January, 1984.

ROBERT B. BACON  
Clerk of Court

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AUTHORITIES PRINCIPALLY RELIED UPON

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 Tyonek 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 66-81, 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 content of Volume 10 chronologically; this is clear because both contain proceedings 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.