

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

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

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

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

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

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

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

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

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

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

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

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

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

The state adopts AFN's description of the proceedings

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

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

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

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

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

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

## V. ARGUMENT

### A. Summary

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

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

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

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

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

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

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

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

1. Standard of review

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

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

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

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

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

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

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

Id.

2. Intent to narrow definition

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

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

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

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

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

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

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

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

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

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

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

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

the:

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

(Id. at 5) (Emphasis added.)

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

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

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

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

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

Id.

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

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

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

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

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

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

3. Criteria consistent with intent, and reasonable

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

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

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

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

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

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

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

1) long-term stability: Volume 4 at 84, 97; Volume 5 at 9, 47, 69-70, 85, 91-92; Volume 7 at 33, 53-54, 94, 130, 138, 139, 156, 160-162, 172; Volume 8 at 59-62, 75-76, 112, 113, 114-115, 116-117; Volume 10 at 18-19, 19-20, 32-35; Volume 12 at 77, 78, 81, 82; Volume 13 at 85-86; Volume 14 at 24-25, 31, 126-127; Volume 16 at 102-103; Volume 19 at 77, 78; Volume 20 at 103-104, 105, 108, 112, 115, 117-118, 123, 157, 170, 172-173; Volume 21 at 223-224, 278, 283-284, 296, 306; Volume 22 at 326;

2) community identification: Volume 1 at 70-71; Volume 5 at 22, 61-62, 85; Volume 7 at 33, 46-47, 64-65, 75, 87, 92, 100-101, 112-113, 115-116, 135-137, 144-146, 147, 154, 160-162, 179, 197; Volume 8 at 28, 59, 60, 75-76, 101-105, 107; Volume 12 at 79-80; Volume 13 at 86, 30; Volume 14 at 25-26, 27-28, 38-39, 114, 166, 168; Volume 19 at 77; Volume 20 at 158, 172, 177-198; Volume 21 at 203-205, 217-218, 220, 221, 225, 262-263, 267-268, 286, 288-289, 296, 301;

3) targeting on specific stocks: Volume 1 at 20-21, 33-37; Volume 7 at 19-20, 34-35, 36-37, 42-43, 44-45, 46-47, 57-58, 60, 62-64, 76, 87-89, 91, 96, 118, 141, 180-188, 228-229, Volume 8 at 59; Volume 12 at 29-30, 33-34, 96, 104; Volume 13 at 25-26, 32-38, 47; Volume 14 at 138, 217; Volume 18 at 269-273; Volume 21 at 234;

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

5) proximity: Volume 3 at 40; Volume 4 at 79, 88-90; Volume 5 at 24-25, 75-76, 82, 84; Volume 7 at 42-43, 46-47, 49-50, 60, 77, 99-100, 101-102, 103, 105-106, 126, 147, 150, 158, 180; Volume 12 at 41; Volume 14 at 43-44, 182-183; Volume 20 at 104-105, 171; Volume 21 at 297;

6) access relatively good: Volume 4 at 79, 86; Volume 5 at

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

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

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

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

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

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

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

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

18/ Plaintiffs assert that the method of applying the ten

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

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

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

200 rural communities throughout Alaska" and "the economic importance of subsistence uses to the rural economy." H.R. Rep. No. 1045, 95th Cong., 2nd Sess. 182 (1978). Congress commented on the "subsistence-dependent villages in the area," and the tension over subsistence "between the rural and urban communities in the State." H.R. Rep. No. 97, 96th Cong., 1st Sess. 158 (1979). It was also intended that former residents of communities reliant on subsistence who were currently living in a larger population center would not be eligible to participate in "subsistence uses." Id. at 192.

Congress was concerned with the issue because "Alaska's more than 200 rural villages are unique in that they are the last communities in the United States in which a substantial number of residents are still dependent upon the harvest of renewable resources...." S. Rep. No. 413, 96th Cong., 1st Sess. 230-231 (1979). Additionally, Congress intended to protect "subsistence uses" which "have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation." Id. at 269.

Those are but a few examples of Congress's concern with communities reliant upon resources. The clearest statement of that is included in the remarks of Representative Morris K. Udall, the chief sponsor of H.R. 39, just before ANILCA became law in December 1980:

It should also be noted that customary and traditional subsistence uses must be evaluated on a community or area basis rather than an individual basis.

126 Cong. Rec. H10546 (daily ed. Nov. 12, 1980) (statement of Rep. Udall). (Emphasis added.)

The fact that Congress was so concerned in enacting the federal subsistence law with communities reliant upon fish and game resources augments the evidence demonstrating that the board in adopting criteria which identified communities in Cook Inlet reliant upon fish and game resources was acting reasonably.

#### 4. Conclusion

In providing guidelines for the board, the Alaska legislature created a definitional framework for "subsistence uses." The legislature thus avoided imposing a more rigid approach which would have entailed inherent risks identified by one commentator:

[S]ome content for the term "subsistence" must be agreed upon before a management scheme can be developed. This does not mean that such agreement should necessarily be in the form of a legislative definition. A too-rigid meaning ... could impinge on at least three other criteria: flexibility and assurances to both subsistence ... and nonsubsistence interests.

....

... An exhaustive statutory list of harvestable resources and permitted takers, methods, and uses not only would be difficult to generate but also would be too narrow and too rigid for practical administration. Use of animals and plants has varied widely among geographical regions, cultural groups and time periods. Harvesting methods have continued to evolve--particularly since introduction of high-powered hunting arms and motorized vehicles. Concentrations and locations of

resources, populations and users have also changed. These diverse factors will undoubtedly move rapidly in the future, and a legislative description of the uses intended to be permitted should provide both breadth and flexibility to deal with new conditions.

D. Kelso, "Legal Issues in Federal Protection for Subsistence on Proposed National Interest Lands," (unpublished) (1976), reprinted in H.R. Rep. No. 16, 95th Cong., 1st Sess. 273 (1977), at 407 and 412 (footnote omitted).

The board correctly determined that the legislature intended the definition of "subsistence fishing" to be narrowed by the 1978 amendments, and carried out its delegated responsibility to identify "subsistence uses" in a reasonable manner, consistent with the legislative guidelines of "customary and traditional."

C. The Board's Violation of the Public Meetings Law while Developing the Criteria in December 1980 Is Moot

As explained in the statement of the case, the board in December 1980 gathered a great deal of information about the uses of salmon in Cook Inlet. In order to sort through that information, a committee was appointed, and its meetings were announced during the board meetings, and held during board recesses. (Volume 3, at 122-126) However, the state has stipulated that the committee meetings in December 1980 were conducted in violation of AS 44.62.310, which requires public meetings to be open. (M File 7, at 371-372)

Action taken contrary to the public meetings

requirement is void. AS 44.62.310(f). In University of Alaska v. Geistauts, 666 P.2d 424, 430 (Alaska 1983), the consequences of such voidness are discussed. The court concludes that the process which led to the void result must "begin anew." Id. Since that has already occurred three times since the violation in December 1980, the Madison court correctly concluded that count II, alleging procedural irregularities, was moot. (M File 4, at 296)

The first rehabilitation of the violation occurred in the same December 1980 meeting. After the committee reported to the board, with the first draft of the ten criteria, the board discussed the criteria and supporting reasoning in great detail. (Volume 10, at 8-54) The board concluded that the ten criteria accurately summarized the common threads that had appeared throughout the testimony and that had emerged from the information presented, and the full board then adopted the ten criteria. (M File 3, Exhibit H)

The second time the process began anew was in the spring 1981 meeting, which was noticed twice in regard to subsistence. The first notice was the board notice of proposed changes for March 1981, which stated in part:

The issues that will be before the board are the establishment of a subsistence salmon fishing permit system for Cook Inlet ...

(M File 3, Exhibit O) The second notice was the Cook Inlet subsistence fishing special notice, which stated in part:

The session will focus on the application of the State's subsistence law to salmon fishing in Cook

Inlet. The law sets a priority on certain customary and traditional uses of subsistence resources. The board intends to examine different methods for providing the priority in Cook Inlet.

(M File 3, Exhibit P)

As set out in the statement of the case, additional oral and written testimony was received during the spring 1981 meeting, and the board readopted the ten criteria, after slightly amending them. (M File 3, Exhibit I)

The third time the process began anew was in the December 1981 board meeting. The general legal notice for that meeting listed the subjects open for consideration, including the Cook Inlet subsistence fishery, which was noticed broadly. (M File 3, Exhibit W) The board could adopt, amend, repeal or take no action on the following:

set characteristics that describe or define subsistence uses and users that will be used by the board to identify subsistence fisheries; set locations open and closed to subsistence fishing; set fishing seasons, periods, gear requirements and restrictions; set conditions and requirements for obtaining subsistence fishery permits; set harvest limits; set fish marketing requirements.

(Id. at 3)

In addition to the general subject area being opened and noticed, a specific proposal in the board's proposal packet outlined the ten criteria already adopted by the board.

(M File 3, Exhibit X)

Alaska law is clear that courts should not decide issues not actually in controversy. Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972).

Mootness precludes judicial determinations. Jefferson v. Asplund, 458 P.2d 995 (Alaska 1969). The consequence of the voidness resulting from the violation of the public meetings law during the December 1980 board meeting is that the process must "begin anew." Since that has occurred on three occasions since the violation occurred, the matter is moot, and the court should not consider it.

D. The Board May Use the Criteria to Identify "Subsistence Uses" of Cook Inlet Salmon Regardless of the Biological Status of the Target Stocks

As discussed, prior to the board's development and application of the ten criteria, the "subsistence fishing" which was authorized in Cook Inlet was simply fishing for personal use with set gill nets, under the pre-subsistence law definition of that term. After the board developed the ten criteria, and it determined that no communities on the Kenai Peninsula except English Bay and Port Graham had evidenced "subsistence uses" of Cook Inlet salmon. (M File 3, Exhibit L) Thus, "subsistence fishing" was not authorized. However, in 1982 the board did authorize "personal use fishing." 5 AAC 77.546 and 5 AAC 77.547.

The Gjosund court upheld the ten criteria as a mechanism to identify "subsistence uses" which is consistent with the intent of the subsistence law. (G File 2, at 260-261, ¶¶ 6-8) However, the court then concluded that the board could not apply the criteria to see if what had been authorized as "subsistence fishing" was still "subsistence fishing" under the new definitions supplied by the subsistence law unless the target fish

stocks were in such jeopardy that the fishing required restriction. (Id. at 261, ¶¶ 9, 10.)

In reaching this conclusion, the court misconstrued AS 16.05.251(b) by melding its three distinct statutory mandates to the board. In order to understand the misconstruction upon which the court's conclusion is based, it is necessary to understand how AS 16.05.251(b) operates.

The first sentence of AS 16.05.251(b) states:

The Board ... shall adopt regulations ... permitting the taking of fish for subsistence uses unless ... adoption of the regulations will jeopardize ... sustained-yield....

Thus, unless sustained yield is jeopardized, the board is required to allow opportunities for "subsistence uses." Identifying these uses is implicitly authorized in the requirement to provide for them. At the same time, the board may, under AS 16.05.251(a) allow opportunities for nonsubsistence uses, such as "personal use fishing."

The second sentence of AS 16.05.251(b) states:

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

Thus, if increase in competition or decrease in harvestable surplus result in a relative resource shortage, restriction of some harvest opportunities may be necessary, and, if so, the priority for "subsistence uses" would come into play. The board can use any of the many management options available to it in imposing the needed restrictions on nonsubsistence uses and in

continuing to regulate "subsistence uses" in a way that protects the opportunity for "subsistence fishing." Of course, in extreme cases the option of precluding nonsubsistence uses would remain available.

The third sentence of AS 16.05.251(b) states:

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.

Thus, a more serious resource shortage resulting from greater increase in competition or decrease in harvestable surplus may require still further restriction of harvest opportunities, even after only "subsistence uses" remain. At that point, the criteria listed in the statute would form a basis for distributing the allowable harvest among the participants in "subsistence uses."

The statutory mandate contained in AS 16.05.251(b) that sustained yield always be the paramount concern is consistent with the constitutional requirement contained in article VIII, section 4 of the Alaska Constitution. If the status of a fish stock is such that maintenance of sustained yield requires that all harvest cease, no use (including subsistence) may be allowed.

The first requirement of AS 16.05.251(b) is that the board authorize the taking of fish for "subsistence uses." The board has determined in the ten criteria that "subsistence uses"

of salmon in Cook Inlet are targeted on specific stocks during specific seasons. 5 AAC 01.597(a)(3). Thus, "subsistence fishing" must be permitted on those specific stocks during those specific seasons. No matter what the biological status of the stocks is, the board may wish to examine the fishing that has been called "subsistence fishing" to determine what segment of it is really "personal use fishing" that may be authorized reasonably on whatever stocks and in whatever seasons the board selects, under its discretionary authority in AS 16.05.251(a), rather than being mandated on specific stocks and in specific seasons.

It is implicit in the requirement that the board authorize "subsistence uses" that it have the authority to identify those uses. That task is separate from the later portions of AS 16.05.251(b) which come into play when the priority has been triggered and when the biological status of the target stocks is relevant. The Gjosund court confused the relevance of the biological status of the resource at the priority stage with the requirement that "subsistence uses" be provided at the first stage.

E. The Classification Described by and Resulting from the Application of the Criteria Do Not Violate Equal Protection

1. Equal protection standards

Although plaintiffs allege violation of both the state and federal equal protection clauses, their brief focuses only on the state test, which generally has been discussed in connection with article I, section 1 of the Alaska Constitution, providing

in part that "all persons are equal and are entitled to equal rights." See also Alaska Constitution art. VIII, § 17.

The equal protection guarantees are designed to ensure that those situated similarly with regard to the subject matter and purpose of a law will be treated equally under that law. Ketchikan Gateway Borough, Alaska v. Breed, 639 P.2d 995 (Alaska 1981). A classification must bear "a fair and substantial relationship to a legitimate governmental objective." Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1264 (Alaska 1980). However, equal protection does not demand absolute perfection in the classification system. Id. at 1267. As the court noted in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982):

The focus of our inquiry under Alaska equal protection analysis is whether the legislative classification is a reasonable means to accomplish a legitimate state purpose.

2. The classifications described by the criteria

The basic classifications at issue in this appeal are those individuals eligible to participate in "subsistence fishing," and those individuals who are not. As discussed above in section B, use of the ten criteria results in the identification of rural communities reliant upon fish and game resources. The board has determined that people residing in rural communities reliant on fish and game resources in the Cook Inlet area are differently situated with regard to fish and game resources than individuals residing elsewhere in the Cook Inlet area. Again, as discussed above in section B, this determination is consistent

with the intent of the subsistence law, and is reasonable.

Not only is the identification of "subsistence uses" in Cook Inlet as uses by residents of rural communities reliant upon fish and game resources reasonable, but it also bears a fair and substantial relationship to a legitimate governmental objective, as required by the equal protection test. Commercial Fisheries Entry Commission v. Apokedak, supra, at 1264. State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854, 859-860 n.18 (Alaska 1978), acknowledged the critical importance in Alaska of preserving and protecting "subsistence uses," and in Kenai Peninsula Fisherman's Cooperative Association v. State, supra, at 903, the court noted that the subsistence law addressed the important issue on a statewide basis.

The classifications described by the ten criteria are "a reasonable means to accomplish a legitimate state purpose," and do not violate equal protection. Rose v. Commercial Fisheries Entry Commission, supra, at 160.

3. The classifications resulting from the application of the criteria

To the extent that plaintiffs challenge the specific results of the application of the criteria to their communities, and allege that they are "similarly situated" to those living in communities in Cook Inlet which are eligible under 5 AAC 01.597 for "subsistence uses," the equal protection issue is not ripe for review. A superior court decision which remands an issue for further proceedings is not a final judgment for purposes of appeal. City and Borough of Juneau v. Thibodeau, 595 P.2d 626.

629 (Alaska 1979). The Madison court remanded count IV, questioning the application of the ten criteria to the Madison plaintiffs, to the board with instructions to consider under 5 AAC 01.597, containing the ten criteria, any proposals to authorize "subsistence fishing" in Cook Inlet. (M File 4, at 293)

The remand occurred because plaintiffs were apparently claiming that they are similarly situated to those individuals residing in the qualifying Cook Inlet communities, English Bay, Port Graham, and Tyonek, with respect to their use of fish and game resources. See 5 AAC 01.580(a). However, on the evidence before it the board could not reach that conclusion, and neither could the Madison court. The board's findings of fact regarding subsistence fishing in Cook Inlet first discusses the communities of English Bay, Port Graham, and Tyonek, and measures them against the ten criteria, finding customary and traditional uses present. (M File 3, Exhibit L, at 1-9) Then, the board measures some of the other Cook Inlet communities against the ten criteria, and finds them all lacking on the evidence presented. (Id. at 9-10) The board's determination means that individuals residing in those communities are situated differently for the purposes of the subsistence law with regard to fish and game resources than individuals residing in English Bay, Port Graham, and Tyonek.

Specifically, the board finds that no showing had been made that a long-term, stable and reliable use pattern applied to

any community or subcommunity. The board finds that lack extremely important, viewing the other criteria which may have been demonstrated as less persuasive, in light of the absence of long-term, stable and reliable use patterns. The board acknowledges that some groups, such as the Kachemak Bay Subsistence Group, had shown the existence of a community of interest at the present time, but the board finds that the members were either too widely dispersed or were too heterogeneous to be considered identifiable as a community. The board acknowledges that in parts of Cook Inlet there was targeting on specific stocks, use of the most efficient and productive gear, reasonable geographic proximity to the town sites, and easy and direct access to the resource. However, the board points out that only the Kenaitze Indians had made an adequate showing of handling salmon by traditional modes (e.g., using all the parts of the fish, including the heads, fins, tails and eggs; drying, smoking). The board finds that no user concentration showed technique and skill transmittal within and between families, distribution throughout the entire user concentration, nor reliance on a wide range of wild resources taken in proximity to the community. (Id.)

The board did not close the door on further proposals seeking to demonstrate "subsistence uses" in Cook Inlet communities, and in fact stated:

As with all its determination, the Alaska Board of Fisheries will consider additional information from the public during its next regulatory proposal cycle, if such information is offered. In the event adjustments to the findings or regulations are necessary, appropriate changes can be

made at that time. However, no extension of eligibility ... is warranted on the present record.

(Id. at 10)

Since the board reasonably did not find on the evidence before it that plaintiffs were similarly situated to those residing in Cook Inlet communities authorized to participate in "subsistence fishing," and since the Madison court remanded this issue to the board, a violation of equal protection cannot be found in the board's application of the ten criteria.

F. The Board Is Authorized to Establish "Personal Use Fishing" as a Category for Regulatory Purposes

In 1982, the board established "personal use fishing" as a category which it can use in regulating fishing in the state. 5 AAC 77.001. This action is consistent with the board's statutory authorities and is reasonable, and thus, it should be upheld. Kelly v. Zamarello, supra, at 911.

AS 16.05.251(a)(6) authorizes the board to make regulations it deems necessary for "classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes." (Emphasis added.) Plaintiffs' assertion that the provision only authorizes the board to use categories established by the legislature is inconsistent with the language itself, which delegates that authority to the board.

Under AS 16.05.251(a)(6), the board may employ "other categories" only if to do so is "essential for regulatory purposes." In establishing the category of "personal use fishing," the board made specific findings on the necessity. The board

found that before the subsistence law, individuals could fulfill their personal use requirements by "subsistence fishing," but that now "subsistence fishing" is narrower in scope, and does not include all such previously authorized personal use fishing. The board found that "commercial fishing" was not the proper category for that activity, since the sale of fish is not involved. Further, "sport fishing" has become so associated with hook and line, rather than nets, that to classify personal use net fishing as sport fishing would be confusing to the public. Thus, it was necessary to establish "personal use fishing." 5 AAC 77.001(a).

Assuming the board is correct in its interpretation that the new definition of "subsistence fishing" is narrower than the previous one, it seems odd that plaintiffs would challenge the board's authority to establish "personal use fishing," since the category was established in order to provide for fishing which cannot now be called "subsistence fishing." Plaintiffs are incorrect in characterizing "personal use fishing" as a matter of "charity;" the board made clear that "personal use fishing" could be authorized whenever it "is in the broad public interest." 5 AAC 77.001(b). The board can thus authorize it in its discretion under AS 16.05.251(a), just as it does commercial fishing and sport fishing.

The board was authorized to establish "personal use fishing" as a category, since it is essential for regulatory purposes. Indeed, if it had not done so, there would be no mechanism for it to authorize fishing for personal use by set

gill nets by plaintiffs.

G. The Board Has Not Violated Plaintiffs' Substantive Due Process Rights by Not Authorizing "Subsistence Fishing" Opportunities for Them, but instead Authorizing "Personal Use Fishing"

Substantive due process, guaranteed in article I, section 7 of the Alaska Constitution, protects people against arbitrary governmental action, and encompasses "our traditional concept of fair play and substantial justice," "fundamental principles of liberty and justice," and "fundamental fairness." Green v. State, 462 P.2d 994, 996-997 (Alaska 1969). Thus, the board may not take arbitrary or unreasonable action. Kelly v. Zamarello, supra. Plaintiffs assert that they have been treated unreasonably; however, an examination of their allegations demonstrates that the board has not violated plaintiffs substantive due process rights, and has not treated them arbitrarily.

Plaintiffs first assert that they have been treated unreasonably because of the violation of the public meetings act which occurred during the December 1980 board meeting. As discussed above in section C, that violation has been cured, and is moot.

Plaintiffs next assert that they have been treated unreasonably because there was not a biological need to restrict the "subsistence fishing" that was authorized in Cook Inlet under the old definition. Plaintiffs refer to a report that purportedly confirms that "subsistence fishing" occurs in their part of the inlet, but that report speaks in the terms used in the years reported on, which were terms related to the old definition.

(G File 4, at 1-97) As discussed above in section D, the board may identify "subsistence uses," regardless of the biological status of the target stocks.

Plaintiffs third claim of unreasonable treatment is that the board in applying the ten criteria undertook an administrative function which the board is prohibited from engaging in under AS 16.05.241. That claim is based on a misconception that the board was granting and denying "subsistence fishing" opportunities to particular individuals. In fact, the board was identifying "subsistence uses," which can be participated in by anyone in Cook Inlet living in a community where "customary and traditional uses" exist. Kenai Peninsula Fisherman's Cooperative Association v. State, supra, at 901-902, noted that the board has no administrative powers, but simultaneously held that the board

has the power to make decisions effecting the utilization of fishery resources in this state.

Id. at 903.

What the board did in applying the ten criteria was to identify "subsistence uses" and provide for them. For the 1982 season the board also identified and provided for "personal use fishing," for which any Alaska resident qualifies. 5 AAC 77.015, 5 AAC 77.546, and 5 AAC 77.547. Kenai Peninsula Fisherman's Cooperative Association v. State, supra, states that the board is not prohibited from:

differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen.

Id. at 904. Thus, in identifying "subsistence uses" and

providing for them pursuant to AS 16.05.251(b), the board is not improperly exercising administrative powers. In fact, although plaintiffs suggest that somehow the Department of Fish and Game should apply the criteria (brief of appellant/cross-appellee at 45-46), that task has been delegated to the board, not the department.

Plaintiffs fourth assertion is that the board has treated them unreasonably by allegedly excluding them from fishing opportunities. It is true that after the board identified and provided for "subsistence uses" for the 1981 season, it did not authorize any other fishing for personal use with set gill nets for that season. At that time, the board had not yet established "personal use fishing" as a category under which it could accommodate individuals such as plaintiffs.

Additionally, the board was very cognizant of its responsibility in weighing biological factors with the interests of different user groups and making a decision that would be in the greatest public interest. The board extensively discussed its reasons for not authorizing any fishing for personal use with set gill nets for 1981, other than "subsistence fishing." (Volume 28, at 42-72) The board expressed concern that the net fishing was not efficient, and involved too many people, so that even though it had historically existed, it might not be reasonable to allow a large number of people to continue to use the most efficient gear type. (Id. at 51) The board felt that if the more efficient set gill nets harvested the fish before they

reached their home streams, a few people could benefit disproportionately, whereas the maximum benefit to the maximum people could be provided by restricting the fishing to rod and reel (sport fishing), thus allowing more fish to reach their home streams. (Id. at 44-45) The set gillnet fishing was compared to snagging, which has also been discontinued:

I don't look at any differently then say, for instance, snagging in the sport fishery. For a long time snagging was -- was permitted in the sport fishery. The board came to a point where it was too efficient, there were too many people in it, there was harvesting at a higher rate than what the board felt was prudent as far as the conservation of the resource. And so, even though historically snagging had existed for a long time the board decided that it was just not something that could be justified as far as the conservation of the resource.

And so, I look at this net fishery in a similar fashion, and in order to live up to the mandates of the constitution to -- for providing the resources for the maximum use of its people you can no long -- when you get to a point where you have a limited resource you -- you cannot continue to allow the most efficient means of harvest.

(Id. at 44) The board noted net fishermen had alternative means to meet their protein needs, and that they would have access to the resource by use of rod and reel. (Id. at 48)

In light of those reasons, the board for the 1981 season did not authorize fishing for personal use with set gill nets, other than "subsistence fishing," in Cook Inlet.

However, by the time the board considered the matter again for 1982, it had established "personal use fishing" as a category it could employ. 5 AAC 77.001. The board authorized "personal use fishing" in both the southern and central districts

of Cook Inlet, under the same individual harvest limits that had been in effect for what was called "subsistence fishing" in those areas previously. 5 AAC 77.530(a), 5 AAC 77.546 and 5 AAC 77.547.

The Madison plaintiffs would like to fish on coho salmon in the central district of Cook Inlet in the fall. Instead, the board authorized a fishery on sockeye salmon in the central district in June. (M File 6, at 365-366, ¶¶ 17, 18) A consequence of the absence of "subsistence uses" is that the board retains the discretion to authorize "personal use fishing" on whatever stocks and in whatever seasons it determines best serve the public interest, just as it retains discretion for when and where to authorize commercial fishing and sport fishing. AS 16.05.251(a). Kenai Peninsula Fisherman's Cooperative Association v. State, supra, recognized that the board is authorized to make allocation decisions. The factors upon which those allocations are based may change over time, and the allocations may shift accordingly. Such allocations are consistent with the board's statutory authority. AS 16.05.221(a) and AS 16.05.-251(b).

Thus, the board must authorize "subsistence fishing" on the specific stocks and in the specific seasons with which the "subsistence uses" are associated. See AS 16.05.251(b) and 5 AAC 01.597(a)(3). On the other hand, the board has the latitude to direct "personal use fishing" to any stock or season, as long as its decision is reasonable and not arbitrary. Kelly v.

Zamarello, supra, at 911. The Madison court determined that the shift from the fall coho to the summer sockeye was reasonable and not arbitrary. (M File 6, at 368-369, ¶¶ 11, 12)

The plaintiffs finally assert that they have been treated unreasonably because particular board members allegedly had a biased attitude toward them. <sup>19/</sup> The incidents that plaintiffs rely upon to attempt to demonstrate the "unreasonable" attitude of particular board members all involve board action that plaintiffs did not like. The board did not authorize "subsistence fishing" for plaintiffs, but the criteria that the board used in that process were consistent with the intent of the subsistence law and reasonable, and under the remand to superior court, plaintiffs are free to submit proposals to the board and show why, under the criteria, they do in fact engage in "subsistence uses." See sections B, D, and E above.

It is true that no fishing for personal use with set gill nets was authorized for plaintiffs in 1981, but as the earlier discussion shows, the board based that action on resource

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<sup>19/</sup> AFN asserts that plaintiffs are alleging that the board as an institution suffers from unconstitutional bias. (Brief of intervenor/amicus curiae at 37-45.) That is not an accurate characterization of plaintiffs' allegations, which instead are directed at the attitudes of particular board members. For example, the contempt allegations in Gjosund were dismissed by stipulation "based upon a significant change in the membership and leadership of the [board]..." (M File 7, at 371) AFN asks that the purported issue be remanded to superior court to develop a record. In fact, the reason there is no record is that no such issue has been raised or briefed in either Gjosund or Madison.

and allocation concerns. However, before 1982, the board reconsidered, and authorized "personal use fishing" in which plaintiffs can participate.

The "personal use fishing" authorized by the board in the central district of Cook Inlet is on the summer sockeye, instead of the fall coho preferred by plaintiffs, but, as discussed above, that decision is within the discretion of the board and reasonable. AS 16.05.251(a). (M File 6, at 368-369, ¶¶ 11, 12)

Plaintiffs may not have made the decisions that the board made on these matters. That does not mean, however, that the board decisions were arbitrary, and, in fact, as the discussion shows, the decisions were reasonable.

Thus, the actions objected to by plaintiffs do not violate substantive due process.

## VI. CONCLUSION

This appeal is not about mere semantics. It is about important legislative changes in the definition of "subsistence fishing" which are being put into effect in a reasonable manner consistent with the legislative intent to protect 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. In Cook Inlet, "subsistence fishing" is now being authorized for rural communities reliant upon fish and game resources, and "personal use fishing" is being authorized for individuals, such as plaintiffs, who do not live in such reliant communities.

The state requests that the holdings of the Madison court be affirmed, that the holding of the Gjosund court which is the subject of this appeal be reversed, and that the request by AFN for a remand on an issue that is not at issue in this consolidated appeal be denied.

DATED: *January 26, 1987*

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By: *Larri Irene Spengler*  
Larri Irene Spengler  
Assistant Attorney General



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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

CONSTITUTIONAL PROVISIONS

Alaska Const., art. VIII, sec. 2

The legislature shall provide for the utilization, develop-  
ment, and conservation of all natural resources belonging  
to the State, including land and waters, for the maximum  
benefit of its people.

FEDERAL STATUTES

16 U.S.C. 3113

As used in this Act, the term "subsistence uses" means  
the customary and traditional uses by rural Alaska resi-  
dents 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 fam-  
ily consumption; and for customary trade. For the pur-  
poses of this section, the term -

(1) "family" means all persons related by blood,  
adoption, or any person living within the house-  
hold 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 wildlife 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 non-edible 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

sec. 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.

sec. 14, ch. 151 SLA 1978

A.S. 16.05.940(17) is amended to read:

(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, long line, or other means defined by the Board of Fisheries.

A.S. 16.05.05.221(a)

For the 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.

(a) The Board of Fisheries may make regulations it considers advisable in accordance with the Administrative Procedure Act (A.S. 44.62.010 - 44.62.650) 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) establishment of open and closed seasons and areas for the taking of fish;

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

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

(5) establishment of 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 men 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) establishment of 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 A.S. 16.43.010 - 16.43.380.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (A.S. 44.62.010 - 44.62.650) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such 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.

A.S. 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 within the household on a permanent basis.

#### STATE REGULATIONS

5 A.A.C. 01.597

(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 residence.

(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 A.A.C. 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 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.

(b) It is the intent of the board that the taking of fish under 5 A.A.C. 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.

(c) - (e) (These subsections are not pertinent).

(f) In this chapter, "personal use fishing" means the taking, attempting to take, or possession of finfish, shellfish or aquatic plants by an individual for consumption as food or use as bait by that individual or his immediate family.

(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 and 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 and 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.

STATEMENT OF THE CASE

In 1959, the Alaska legislature established a Board of Fish and Game (hereinafter "the Board") and delegated the Board authority to adopt "such rules and regulations as it deems advisable" relating to the taking of fish stocks and game populations in Alaska. sec. 6, art. II, ch. 94 SLA 1959.<sup>1</sup> The 1959 statute also included definitions of "sport fishing" and "commercial fishing". In 1960, the legislature added the following definition of "subsistence fishing":

"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.  
sec. 4, ch. 131 SLA 1960 (Emphasis added).

Based on the language of that definition, any Alaskan who used a set gill net to obtain fish for personal use was "subsistence fishing" regardless of whether he lived in Selawik, Anchorage, or Kenai. And the "as it deems advisable" regulatory standard afforded the Board near unfettered discretion to allocate access to salmon stocks among subsistence, sport, and commercial fishermen.

This relatively simple regulatory system reflected Alaska's

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<sup>1/</sup> In 1975, the legislature divided the Board into two seven member boards. ch. 206 SLA 1975. However, the legislature retained the whatever regulations a board "considers advisable" rulemaking standard.. With respect to actions taken after 1975, "the Board" refers to actions taken by the seven member Board of Fisheries.

small population and abundant fishery resources. In 1960, the population of the Anchorage area was only 82,833 and the population of the Kenai Peninsula was only 6,097.<sup>2</sup>

Because of the lack of fishing pressure, the Board provided liberal opportunities for residents of Anchorage and the Kenai Peninsula to go "subsistence fishing". In the northern district of Cook Inlet the entire northern shoreline, the west side of Fire Island, and most of the shoreline between Boulder Point and the mouth of Turnagain Arm was open to "subsistence fishing". In the central district, Kalgin Island, most of the shoreline on the west side of Cook Inlet, and most of the shoreline on the east side of Cook Inlet between Ninilchik and Boulder Point was open to "subsistence fishing". In the southern district, the shoreline south of Anchor Point, around the Homer Spit, and then around Kachemak Bay was open to "subsistence fishing".<sup>3</sup>

But then the population of southcentral Alaska began to explode. Between 1960 and 1980 the population of the Anchorage area more than doubled to 173,017 and the population of the Kenai Peninsula almost quadrupled to 22,473.<sup>4</sup>

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2/ Rollins, Census Alaska: Numbers of Inhabitants, 1792-1970, University of Alaska Anchorage Library (1978).

3/ See Gjosund File No. 4, pp. 24, 29, 69. The Madison and Gjosund Records on Appeal are hereinafter designated "MA" and "GJ". A map of the boundaries of the northern, central, and southern districts of Cook Inlet is located at GJ File No. 4, p. 16.

4/ U.S. Dept. of Commerce, 1980 Census of Population and Housing (Alaska PHC80-V-3).

The major effect of such rapid population growth on the politics of fishery management was to bring tens of thousands of new sport fishermen to the rivers of the Kenai Peninsula to compete with commercial fishermen for access to valuable king and coho (silver) salmon stocks. The demands by sport fishermen for access to those stocks placed new and unfamiliar psychological and political pressures on members of the Board. And the relatively de minimus number of Alaskans on the Kenai Peninsula who engaged in "subsistence fishing" began to bear the brunt of the Board's inability to cope with those pressures.

For reasons known only to itself, in 1976 the Board closed the southern district of Cook Inlet to "subsistence fishing" for the 1977 fishing season. Homer residents filed a lawsuit challenging the closure and the Superior Court determined that the Board's decision to do so was without a substantiated rational basis. The Court then enjoined the Board from eliminating "subsistence net fishing" in the southern district and reinstated the regulations for the fishery which had been in effect prior to December 1976.<sup>5</sup>

In 1977, the Board responded to the political conflict between sport and commercial fishermen by adopting a comprehensive management policy for Cook Inlet salmon stocks. The heart of the policy was the Board's decision to manage all stocks which move through Cook Inlet before June 15th and after August 15th for the

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5/ GJ File No. 2, pp. 19, 22.

benefit of sport fishermen and to manage all stocks which move through Cook Inlet between those dates for the benefit of commercial fishermen. The practical effect of the policy was to allocate king and coho salmon (which move through Cook Inlet during the spring and fall) to sport fishermen and sockeye salmon (which move through Cook Inlet during the middle of the summer) to commercial fishermen. See Kenai Peninsula Fisherman's Cooperative Ass'n v. State, 628 P.2d 897 (Alaska 1981).

The third group of fishermen who harvested Cook Inlet stocks, i.e. Alaskans who engaged in "subsistence fishing", received little consideration during the development of the policy.<sup>6</sup>

Regulations implementing the policy were adopted by the Board for the 1978 fishing season. Id. The regulations closed the central district to commercial fishing after August 15th. However the district remained open to "subsistence fishing". As a result, some commercial fishermen who previously had harvested coho salmon for personal use during the now-closed commercial fishing periods applied for "subsistence fishing" permits.<sup>7</sup> That, combined with increased publicity about the fishery, resulted in a significant increase in the number of "subsistence fishing" permits issued during the 1978 fishing season.<sup>8</sup>

In response, the Board made a number of regulatory changes

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6/ GJ File No. 4, pp. 19, 22.

7/ Id. 19.

8/ Id. 20.

for the 1979 fishing season intended to limit access to the "subsistence" fishery. The new regulations reduced the length of gill nets, the number of fishing periods, and the area of shoreline available for "subsistence fishing". The regulations also moved the "subsistence fishing" season in the central district from August 1 - September 21 to June 23 - August 15.<sup>9</sup> The effect of the latter change was to target the "subsistence" fishery on sockeye salmon (harvested primarily by commercial fishermen) rather than coho salmon (harvested primarily by sport fishermen).

At the same time the Board was responding to political pressures created by commercial and sport fishermen, the legislature enacted ch. 151 SLA 1978 (hereinafter "the subsistence statute"). The subsistence statute made a number of important changes to title 16 of the Alaska Statutes intended to identify and protect "subsistence uses" of fish stocks and game populations. Three important changes were:

1. The enactment of a definition of "subsistence uses" of fish stocks and game populations. A.S. 16.05.940(26).
2. The amendment of the definition of "subsistence fishing". A.S. 16.05.940(17).
3. The enactment of a statutory requirement that absent a showing that to do so would jeopardize sustained yield, the Board shall (as op-

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<sup>9/</sup> Id. 26-27.

posed to "may") adopt regulations authorizing "subsistence uses" of fish stocks, and, if necessary, afford such uses a priority over other uses. A.S. 16.05.251(b). See also A.S. 16.05.255(b).

The subsistence statute altered the Board's authority to regulate fishing for Cook Inlet salmon stocks in several significant ways. Although the original definition of "subsistence fishing" included any Alaskan who fished with a set gill net for "personal use", the amended definition limited the purview of "subsistence fishing" to fishing with a set gill net for "subsistence uses". The definition of "subsistence uses" is considerably more narrow than "personal use":

"Subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption... A.S. 16.05.940(26). (Emphasis added).

In other words, fishing with a gill net to obtain fish for personal use is no longer "subsistence fishing" unless the activity is also "customary and traditional". However, the subsistence statute does not define the phrase "customary and traditional" and during the 1979 and 1980 fishing seasons the Board did not attempt to do so.<sup>10</sup>

Prior to the opening of the 1980 season the Board did, how-

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<sup>10/</sup> Although the subsistence statute was enacted into law at the beginning of the 1978 fishing season, its effective date was October 10, 1978 - a month after the end of most fishing activity.

ever, renew its effort to restrict fishermen such as the plaintiffs who prior to the enactment of the subsistence statute had engaged in "subsistence fishing". The Board closed the entire shoreline of the Kenai Peninsula in the central district to "subsistence fishing" but opened a few miles of inaccessible, boulder strewn beach in the southern portion of the northern district which had not been used by commercial fishermen because among other reasons it was too dangerous to do so.<sup>11</sup> In the southern district the Board further reduced the length of gill nets and closed the Homer Spit and the shoreline immediately east of the Spit to "subsistence fishing".<sup>12</sup> The Board's actions produced two lawsuits.

The first was Gjosund v. Alaska Department of Fish and Game, 3HO 80-92 Civil, filed by Homer residents in an attempt to reopen the Homer Spit to "subsistence fishing" and to eliminate the restrictions on the length of gill nets. After a hearing, the Superior Court granted the requested relief.<sup>13</sup>

The second was Francis v. Alaska Department of Fish and Game, 3KN 80-546 Civil, filed by Kenai residents. Francis was settled out of court when ADF&G agreed to open several areas of shoreline in the central and northern districts for additional periods of

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11/ GJ File No. 4, p. 30.

12/ Id. 69.

13/ GJ File No. 2, pp. 185-186.

"subsistence fishing".

At its December 1980 meeting the Board for the first time began the work necessary to conform its regulation of "subsistence fishing" in Cook Inlet to the legislature's modification of that term in the subsistence statute. As part of that effort, the Board adopted a policy setting forth criteria for the identification of "subsistence uses" of Cook Inlet salmon stocks.<sup>14</sup> The criteria were intended to identify set gill net fisheries around Cook Inlet conducted by residents of rural communities in which the harvest of fish stocks and game populations for personal and family use is a significant part of the economy of the community.<sup>15</sup> Although the Board heard considerable testimony about the uses of Cook Inlet salmon stocks by residents of Kenai Peninsula communities, because the criteria were adopted at the same meeting during which the testimony was presented, residents of the Kenai Peninsula were not afforded a fair opportunity to present evidence that their communities satisfied the criteria.

At its March 1981 meeting the Board received written testimony from the public about "subsistence uses" of Cook Inlet salmon stocks, but limited oral testimony.<sup>16</sup> The Board then adopted a slightly revised version of the criteria<sup>17</sup> and written findings

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<sup>14/</sup> GJ File No. 2, pp. 30-31.

<sup>15/</sup> See GJ File No. 2, p. 258 (Paragraph No. 18); MA File No. 1, p. 56 (Paragraph No. 10).

<sup>16/</sup> GJ File No. 1, pp. 227-2784.

<sup>17/</sup> MA File No. 3 (Exhibit "I").

which stated that no communities on the Kenai Peninsula satisfied the criteria.<sup>18</sup> The findings meant that none of the personal use set gill net fisheries on the Kenai Peninsula authorized by the Board prior to 1980 were "subsistence use" fisheries which the Board was compelled to authorize pursuant to A.S. 16.05.251(b). After arriving at that conclusion, the members of the Board then voted to eliminate all fishing with set gill nets for personal use on the Kenai Peninsula; a decision which resulted in a flurry of new lawsuits.

On May 29, 1981, the Gjosund plaintiffs filed a pleading in the Superior Court in Homer entitled a "petition" which requested injunctive and declaratory relief and an order holding the Board in contempt of the 1980 injunction.<sup>19</sup> On August 4, 1981, the Superior Court issued a preliminary injunction compelling the defendants to authorize "subsistence fishing" in areas along the shoreline of the southern district which had been open to such fishing during 1980.

On August 13, 1981, ten residents of the central district filed Madison v. Alaska Department of Fish and Game<sup>20</sup> in the

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<sup>18/</sup> MA File No. 2, pp. 32-41. The Board did, however, determine that set gill net fishing for personal use by residents of the communities of Tyonek, English Bay, and Port Graham are "subsistence uses" of Cook Inlet salmon stocks. The validity of that determination is not at issue in this appeal.

<sup>19/</sup> GJ File No. 2, pp. 1-9.

<sup>20/</sup> MA File No. 1, pp. 40-43.

Superior Court in Kenai. The plaintiffs' first claim for relief alleged that the criteria adopted by the Board to identify "subsistence uses" of Cook Inlet salmon stocks were inconsistent with the intent of the statutory definition of "subsistence uses". The second claim alleged procedural irregularities in the Board's adoption of the criteria. The third claim alleged that the Board's decision to close the central district to fishing with set gill nets for personal use violated the plaintiffs' rights to equal protection and due process. And the fourth claim alleged that the closure violated the subsistence statute and several sections of the Alaska Constitution.

On August 19, 1983, the Superior Court issued a preliminary injunction which ordered the defendants to open a "non-commercial" set gill net personal use fishery in the central district.<sup>21</sup> Although it was requested by the plaintiffs to do so, the Court specifically refused to characterize the fishery which it had ordered opened as a "subsistence use" fishery.

The Alaska Federation of Natives (hereinafter "AFN") intervened as a party<sup>22</sup> and joined with the defendants in filing a motion for summary judgment on the first claim for relief. The plaintiffs responded by filing a motion for summary judgment on all four of their claims. On December 10, 1981, the Superior Court granted AFN's and the defendants' motions for summary judgment on the first

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<sup>21</sup>/ MA File No. 1, pp. 40-43.

<sup>22</sup>/ AFN's motion to intervene and the order granting the motion are not a part of the Record on Appeal.

claim.<sup>23</sup> The Court determined that the criteria were consistent with the intent of A.S. 16.05.251(b) and A.S. 16.05.940(26). The Court later adopted a Conclusion of Law which states that:

The intent of A.S. 16.05.251(b) and .940(26) is to provide for and protect personal use, primarily net, 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. 24

Shortly thereafter at its December 1981 meeting, the Board adopted the criteria as a regulation. 5 A.A.C. 01.597.

On March 8, 1982, the Gjosund Court issued an opinion which also upheld the validity of the criteria.<sup>25</sup> But the Court then inexplicably concluded that the Board can not apply the criteria to determine whether the personal use set gill net fishery in the southern district is a "subsistence use" fishery unless it first determines that the biological condition of the salmon stocks which are the target of the fishery requires it to do so. The Court also characterized the Gjosund plaintiffs' harvest activities as "subsistence fishing".

At its March 1982 meeting the Board recognized the unfairness of eliminating all personal use set gill net fishing on the Kena Peninsula merely because such fishing may no longer be "subsist-

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23/ MA File No. 1, pp. 45-49.

24/ Id. 57 (Paragraph No. 4).

25/ GJ File No. 2, pp. 221-245.

ence fishing". But such fishing also is not "sport fishing" or "commercial fishing".

To alleviate the effects of that legislative oversight, the Board established a new category for regulatory purposes entitled "personal use fishing". 5 A.A.C. 77.001. The Board also adopted regulations authorizing "personal use fishing" on the Kenai Peninsula for sockeye salmon in the central district and coho salmon in the southern district. 5 A.A.C. 77.547 and 77.546.

The Board also met in joint session with the Board of Game and adopted a comprehensive joint regulation which establishes criteria for the identification of "subsistence uses" of all fish stocks and game populations in the state. 5 A.A.C. 99.010. The criteria were drawn in large measure from the criteria developed by the Board in 5 A.A.C. 01.597.

On March 5, 1982, the Madison Court dismissed the plaintiffs' second claim for relief as moot.<sup>26</sup> On August 30, 1982, the Court issued its decision, and later Findings of Fact and Conclusions of Law, relating to the third and fourth claims.<sup>27</sup> The Court inter alia determined that A.S. 16.05.251(a) delegates the Board authority to establish a "personal use fishing" category, that the Board's allocation of salmon stocks among personal use, sport, and commercial fishermen must be done in a manner consistent with due process considerations of fundamental fairness, that the

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<sup>26/</sup> MA File No. 4, p. 256.

<sup>27/</sup> MA File No. 6, pp. 361-369.

Board's decision not to authorize any "personal use fishing" in the central district during the 1981 fishing season was fundamentally unfair and a violation of the plaintiffs' right to due process of law, but that the Board's decision to authorize "personal use fishing" in the central district during the 1982 season for sockeye salmon rather than coho salmon was not fundamentally unfair and not a violation of the plaintiffs' right to due process of law. The Court remanded the fourth claim to the Board with instructions to consider any regulatory proposals, and any evidence presented by the plaintiffs, that persons who fish in the central district with set gill nets for personal use are engaged in "subsistence uses" of Cook Inlet salmon stocks.<sup>28</sup>

## II.

### THE COURSE OF PROCEEDINGS IN THE TRIAL COURT

#### A. Madison v. Alaska Department of Fish and Game

On August 13, 1981, the plaintiffs filed a complaint in the Superior Court in Kenai setting forth four claims for relief.<sup>29</sup> After a hearing on the same day, the Court issued a preliminary injunction which ordered the opening of a "non-commercial" set gill net fishery in the central district of the Kenai Peninsula.<sup>30</sup> AFN participated as amicus curiae in the hearing on the injunction and later intervened as a party.

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<sup>28</sup>/ MA File No. 4, p. 293.

<sup>29</sup>/ MA File No. 1, pp. 1-5.

<sup>30</sup>/ Id. 40-43.

On September 18, 1981, AFN and the defendants filed motions for summary judgment on the first claim for relief. The plaintiffs then filed a motion for summary judgment on all four of their claims. On October 28, 1981, the Court heard oral argument on the cross-motions for summary judgment on the first claim.

On November 9, 1981, the defendants moved to dismiss the second claim as moot.<sup>31</sup>

On December 10, 1981, the Court granted AFN's and the defendants' motions for summary judgment on the first claim.<sup>32</sup> On March 5, 1982, the Court entered Findings of Fact and Conclusions of Law relating to the first claim and dismissed the second claim as moot.<sup>33</sup>

*Final J M # 1, p 57*

On June 21, 1982, the defendants filed a motion to remand the fourth claim to the Board.<sup>34</sup> On August 30, 1982, the Court denied the plaintiffs' motion for summary judgment on the third and fourth claims and granted the defendants' motion to remand the fourth claim.<sup>35</sup>

*Final Findings - Jun 26, 1983 File 6 361-369*

The plaintiffs timely filed Notices of Appeal.<sup>36</sup>

*Final J -  
M # 5-322*

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31/ MA File No. 4, p. 296.

32/ MA File No. 1, pp. 45-48.

33/ MA Files No. 1, pp. 54-57, and No. 4, p. 296.

34/ MA File No. 4, p. 293.

35/ Id. 293-295.

36/ MA Files No. 1, p. 50, and No. 4, p. 297.

B. Alaska Department of Fish and Game v. Gjosund

On May 29, 1981, the plaintiffs filed a pleading entitled a "petition" in the Superior Court in Homer.<sup>37</sup> On August 4, 1981, the Court issued a preliminary injunction which ordered the opening of a personal use set gill net fishery in the southern district. On March 8, 1982, the Court issued a decision and a permanent injunction requiring the defendants not to interfere with the fishery.<sup>38</sup>

The defendants timely filed a Notice of Appeal.<sup>39</sup>

C. Consolidation

On January 21, 1983, the Alaska Supreme Court ordered the consolidation of all appeals pending in the two above-described cases. On April 1, 1983, the Court granted AFN's motion to participate as amicus curiae in Alaska Department of Fish and Game v. Gjosund.

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37/ File No. 2, pp. 1-9.

38/ Id. 221-245.

39/ Id. 262.

III.

ISSUES PRESENTED FOR REVIEW

A. Madison v. Alaska Department of Fish and Game

1. What is the proper standard of judicial review of the validity of 5 A.A.C. 01.597?

2. Are the criteria in 5 A.A.C. 01.597 for the identification of "subsistence uses" of Cook Inlet salmon stocks consistent with the intent of A.S. 16.05.251(b) and A.S. 16.05.940(26)?

3. Did the Board's adoption of 5 A.A.C. 01.597 moot the plaintiffs' second claim for relief?

4. Were the plaintiffs denied their rights to equal protection and due process of law when the Board determined that the personal use set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute is not a "subsistence use" fishery as defined by A.S. 16.05.940(26)?

5. Does A.S. 16.05.251(a) authorize the Board to adopt a regulation establishing a "personal use fishing" category for regulatory purposes?

6. Were the plaintiffs denied their right to due process of law when the Board decided to authorize a personal use fishery in the central district which targets on sockeye salmon rather than coho salmon?

B. Alaska Department of Fish and Game v. Gjosund

1. With respect to a personal use set gill net fishery which prior to the enactment of the subsistence statute fell within the

purview of the statutory definition of "subsistence fishing", is the Board precluded from determining whether the fishery is or is not a "subsistence use" fishery until such time as it is compelled to do so in order to protect fish stocks which are the target of the fishery from overharvest?

#### IV.

#### ARGUMENT

##### A. Introduction

For residents of rural Alaska, the subsistence statute is possibly the most important legislation enacted by the legislature since statehood. The statute recognizes that the economy of several hundred rural communities continues to be based in large measure on the harvest of fish stocks and game populations for personal and family consumption. Prohibiting hunting and fishing by residents of Anchorage or Juneau would engender considerable inconvenience and occasional personal hardship, but would hardly threaten the economy of either community or the health, safety, or general welfare of their residents. However, prohibiting hunting and fishing by residents of Selawik or Anaktuvuk Pass or English Bay would have devastating social and economic consequences. The legislature enacted the subsistence statute to prevent the latter result.

The foundation of the regulatory system established by the subsistence statute is the identification of "subsistence uses" of fish stocks and game populations around the state. Unfortun-

ately, as this litigation well illustrates, the development of criteria to identify "subsistence uses" has become intertwined with the politics of the Cook Inlet salmon fishery and the Board's institutional collapse in the face of escalating demands by competing fishing groups. A review of the transcripts which are a part of the Record on Appeal will indicate that the plaintiffs' contention that some members of the Board may have used the subsistence statute as a pretext to restrict the fishery in which the plaintiffs participated to placate more numerous and politically powerful sport and commercial fishermen is not without some basis in fact.

But that regrettable reality is unrelated to the validity of the criteria developed by the Board to identify "subsistence uses" or to the Board's authority to establish a "personal use fishing" category to provide Alaskans whose fishing activities are not "subsistence uses" with an opportunity to obtain salmon with set gill nets for personal use.

Consequently, while AFN strongly supports the plaintiffs' efforts to obtain a reasonable opportunity to harvest Cook Inlet salmon stocks, AFN has just as strongly disagreed with the plaintiffs as to why they should be afforded an opportunity to fish.

For the reasons set forth below, AFN believes that the plaintiffs should be afforded a reasonable opportunity to harvest Cook Inlet salmon stocks in the central district with set gill nets, that 5 A.A.C. 01.597 is consistent with the intent of the legislature when it enacted the subsistence statute, that the plain-

tiffs should be afforded an opportunity to present evidence to the Board that the communities in which they reside satisfy the criteria for the identification of "subsistence uses" set forth in 5 A.A.C. 01.597, that A.S. 16.05.251(a) authorizes the Board to establish a "personal use fishing" category, and that if the Board determines that the plaintiffs' fishing activities are not "subsistence uses" and that they are no longer "subsistence fishing", then fundamental fairness requires the Board to adopt "personal use fishing" regulations to provide the plaintiffs a reasonable opportunity to harvest Cook Inlet salmon stocks.

With respect to the Gjosund appeal, AFN believes that no group of Alaskans, including the plaintiffs, have a "right" to harvest any fish stock or game population. The legislature and the Board may alter, restrict, or even eliminate, previously authorized harvest opportunities, so long as they do so in a manner consistent with recognized constitutional principles.

B. The Criteria Adopted By The Board Of Fisheries To Identify "Subsistence Uses" Of Cook Inlet Salmon Stocks Are Consistent With The Intent Of A.S. 16.05.251(b) And A.S. 16.05.940(26).

1. Introduction

5 A.A.C. 01.597 sets forth criteria for identifying "subsistence uses" of Cook Inlet salmon stocks. 5 A.A.C. 99.010 sets forth similar criteria for identifying "subsistence uses" of all fish stocks and game populations in the state.

Application of the criteria has the effect of restricting

the identification of "subsistence uses" of Cook Inlet salmon stocks to fishing with set gill nets for personal use by residents of 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.<sup>40</sup>

One of the most important issues presented in this appeal is whether that is the result the legislature intended to achieve when it enacted A.S. 16.05.251(b) and A.S. 16.05.940(26)? The Madison and Gjosund Courts, the defendants, and AFN are of the opinion that it was.

2. In Determining Whether 5 A.A.C. 01.597 Is Consistent With The Legislature's Intent When It Enacted A.S. 16.05.251(b) And A.S. 16.05.940(26), This Court May Substitute Its Own Judgment For That Of The Board Of Fisheries.

During the proceedings before the Madison Court, there was considerable confusion among the parties as to the proper standard of judicial review of the criteria developed by the Board to identify "subsistence uses" of Cook Inlet salmon stocks. Although the Board first adopted the criteria as a policy,<sup>41</sup> it later adopted the policy as a regulation. 5 A.A.C. 01.597.

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<sup>40/</sup> See the Findings of Fact entered by both the Madison and Gjosund Courts. MA File No. 1, pp. 54-57 (Paragraph No. 10). GJ File No. 2, p. 258 (Paragraph No. 18). Significantly, neither the Madison nor the Gjosund plaintiffs challenge the validity of those important findings.

<sup>41/</sup> MA File No. 3 (Exhibits "H" and "I").

The standard for determining the validity of a regulation is the test enunciated by this Court in Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971). See also A.S. 44.62.030. To be valid, a regulation must be consistent with the statute pursuant to which it was adopted and it must be reasonably necessary to carry out the purpose of the statute.

Whether adoption of a regulation which establishes criteria for the identification of "subsistence uses" is reasonably necessary to carry out the purpose of A.S. 16.05.251(b) involves questions of fact about the regulation of the Cook Inlet salmon fishery which the Board, rather than the Court, is probably best able to judge. And the Madison Court correctly deferred to the judgment of the Board on that question.

However, the Board has no particular expertise to determine the intent of the Legislature when it enacted A.S. 16.05.251(b) and A.S. 16.05.940(26). The final construction of a statute enacted by the Alaska legislature rests with this Court, not the Board. Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1097 (Alaska 1982). Consequently, the Madison Court incorrectly refused to substitute its judgment on the question of whether the criteria adopted by the Board are consistent with A.S. 16.05.251(b) and A.S. 16.05.940(26).

3. Although The Court May Substitute Its Judgment For The Judgment Of The Board, The Board's Interpretation Of A.S. 16.05.940(26) Is A Valuable Aid Which Should Be Afforded Considerable Deference.

A.S. 16.05.940(26) states that "subsistence uses" are "cus-

tomary and traditional" uses of fish stocks and game populations for personal and family consumption and other specified purposes. The statute does not define the phrase "customary and traditional". The criteria set forth in 5 A.A.C. 01.597 reflect the Board's interpretation of the phrase.

Although the Court may substitute its judgment for the judgment of the Board that the criteria are consistent with the legislature's intent when it enacted A.S. 16.05.251(b) and A.S. 16.05.940(26), the Board's interpretation of the latter statute is a valuable aid which the Court should afford considerable deference. See Wien Air Alaska, Inc. v. Department of Revenue, supra. See also Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). The Board's interpretation supports the opinion of the Madison Court that the criteria are consistent with the statute pursuant to which they were adopted.

4. The Legislative History Of The Subsistence Statute And Of Earlier Statutes Which Are In Pari Materia With The Subsistence Statute Indicates That 5 A.A.C. 01.597 Is Consistent With The Intent Of A.S. 16.05.251(b) And A.S. 16.05.940(26).

In determining legislative intent, the Court should investigate a statute's legislative history. North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978). The legislative history of the subsistence statute supports the Madison Court's opinion that 5 A.A.C. 01.597 is consistent with A.S. 16.05.251(b) and A.S. 16.05.940(26).

The subsistence statute was reported to the Alaska House of

Representatives by the Special Committee on Subsistence as HB 960.<sup>42</sup> The Special Committee was chaired by Representative Nels Anderson<sup>43</sup> who was also the manager of HB 960 during the floor debate.

During the debate Representative Sam Cotton offered an amendment to A.S. 16.05.940(26) to strike the phrase "customary and traditional" from the definition of "subsistence uses". He did so because like both the Madison and Gjosund plaintiffs, he was of the opinion that any person who hunts and fishes for personal or family consumption should be considered to be engaging in "subsistence uses" regardless of whether they live in Selawik, Anchorage, or Kenai:

"Mr. Speaker, I think the reason I introduced this amendment was to raise a point of confusion on my part. I don't know what 'customary and traditional' means? I think that when we talk about subsistence use, we are talking about uses of wild resources for direct personal or family consumption." 44

The Cotton amendment was defeated. In speaking against the amendment, Representative Anderson explained that the intent of the Special Committee when it drafted the definition of "subsistence

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<sup>42</sup>/ The legislative history of HB 960 is set forth in Alaska House of Representatives, Bill History and Journal Index, Tenth Legislature 1977-78, p. 336.

<sup>43</sup>/ Id. xii.

<sup>44</sup>/ MA File No. 3 (Exhibit "U", p. 8).

uses" was to delegate the Board and the Board of Game authority to protect traditional uses of fish stocks and game populations from being overrun by new hunters and fishermen who are a by-product of Alaska's rapid urban population growth:

"The two words are used in this context to put some guidelines around the uses of Alaska's freedom of resources. What we were afraid of, it was brought to our attention by people who were concerned that this would leave the field of the definition wide open. That newcomers just coming to the State of Alaska would automatically be able to establish not only residency in thirty days, but be able to go out and state they have a customary and traditional use of Alaska's fish and game resources. The use of 'customary and traditional' use also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with aboriginal uses, but also those that have come in, those who come in later. They have...the non-native people in the State of Alaska have established customary and traditional uses of Alaska's fish and game resources for subsistence purposes. And in order to give the Board of Fish and Game (sic) more clarification in the area, we have come up with the (inaudible) of 'customary and traditional' rather than leaving the section wide open. The design is not to be restrictive but to provide guidelines and that is basically what I feel and many...many members felt it was necessary in retaining those two words 'customary and traditional'." 45 (Emphasis added).

The debate on the Cotton amendment is clear evidence that the legislature did not intend mere hunting and fishing for personal uses

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45/ Id. 9-10. It also is important to note that 5 A.A.C. 01.597 does not identify "subsistence uses" on a racial basis (all residents of a community which meets the criteria can participate in "subsistence uses") or establish any type of durational residency requirement (all residents of a community which meets the criteria can participate in "subsistence uses" regardless of the length of their residency. But if they move to an urban area they may no longer participate regardless of the length of their residency in the state).

to be "subsistence uses".

But what uses of fish stocks and game populations was the legislature trying to protect? The legislative history of two earlier statutes which are in pari materia with the subsistence statute indicates that the intent of the legislature was to keep the rural Alaska hunting and fishing economy from being overwhelmed by tens of thousands of urban sport hunters and fishermen.<sup>46</sup>

The first statute was ch. 199 SLA 1975 sponsored by Representative Jimmy Huntington, a rural legislator from the Interior.<sup>47</sup> The statute authorized, but did not require, the Board of Game to adopt regulations inter alia establishing "subsistence hunting areas". See A.S. 16.05.257. The next year ch. 269 SLA 1976 was enacted to provide greater local participation in decisions by the Board of Game relating to the implementation of the 1975 statute. Section 1, ch. 269 SLA 1976 is a legislative finding which explains the goal both statutes were enacted to achieve:

The legislature finds that traditional dependence on fish and game resources is a continuing and necessary way of life in many areas of the state and that protection of subsistence usage of these resources is essential to the health, safety, and general welfare of the citizens of the state in those areas. (Emphasis added).

Although the location of the "many areas of the state" where dependence on fish stocks and game populations is "a continuing

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<sup>46/</sup> State v. Buncrant, 546 P.2d 530, 545 (Alaska 1976) ("The general rule is that a statute in pari materia with a subsequent, but approximately contemporaneous, measure is a proper source of evidence of legislative intent in the second measure.")

<sup>47/</sup> 1975 House Journal, 9th Leg., 1st Sess. 625.

and necessary way of life" is not identified, it is reasonable to assume that the legislature's concern was directed toward rural Alaska where the local economy is grounded on hunting and fishing, rather than urban Alaska where hunting and fishing is a de minimus part of the local economy.<sup>48</sup>

Chapter 269 SLA 1976 was introduced as HB 804<sup>49</sup> by Representative Philip Guy, a rural legislator from Kwethluk.<sup>50</sup> During the debate on HB 804, Representative Keith Specking opposed the bill on the theory that all hunting in Alaska is subsistence hunting. Speaking in opposition to Representative Specking, Representative Mike Miller, himself an urban legislator from Juneau, indicated that the purpose of the bill was to protect "subsistence hunting" by residents of rural Alaska from being overwhelmed by competition from urban hunters:

"I think when we say that all hunting in Alaska is subsistence hunting because of the provision that the meat be used, I think that's kind of stretching it a little bit. Mr. Speaker, I enjoy hunting a little bit and I fly up to Yakutat and certainly I used every ounce of meat, but to say that I depend on that meat on a subsistence basis to feed my family and clothe my family, to - you know, it's a little bit - well it's a joke.

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<sup>48/</sup> In Alvarado v. State, 486 P.2d 891, 894 (Alaska 1971), this Court recognized that the economy of most rural communities is organized around hunting and fishing. Similarly, in Hicklin v. Orbeck, 565 P.2d 159, 164 (Alaska 1977), the Court recognized that the cash economy provides few employment opportunities in rural communities.

<sup>49/</sup> 1976 House Journal, 9th Leg., 2d Sess. 340.

<sup>50/</sup> Id. iii.

I don't have to go up there and hunt. I enjoy doing it and as long as the game is available and it's not depriving people who depend on that meat for subsistence, you know, for their real food and bread for the table, so to speak, I don't see anything wrong with me going up there and hunting. But on the other hand, if there's an area where people literally are going to be denied the food they need to live because of pressure from outside sportsmen like myself, then, Mr. Speaker, I just question very seriously whether I should be in that area at all." 51 (Emphasis added).

The debate on HB 804 was concluded by Representative Huntington, the sponsor of the 1975 statute, who made the implicit point that the legislature's intent was to protect the hunting economy of rural communities:

"And this bill here I went along with because I think it's a good bill and it adds to the possibility of people having some say in the area where they live. And let's just take a little coincidence. Now the Nowitna River on the Yukon River above Ruby, thirty miles above Ruby, has been hunted for many years. It was one of the finest hunting rivers in the area, and it was destroyed by hunting, there's no doubt about that. The people were flown in from airplanes and they cut the moose down to practically zero in two years time. The people of Ruby, the people of Tanana hollered their head off trying to get them (i.e. the Board of Game) to set that aside as a subsistence area, just for the purpose of letting the herd build up again. That was the only purpose behind it and we couldn't do it. Now maybe under this bill an advisory board could advise Fish and Game and that part could be carried out." 52 (Emphasis added).

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51/ Recording of Proceedings, 9th Leg., 2<sup>d</sup> Sess., Tape 130 H, Meter Nos. 527-1208 (1976) (On file at Anchorage State Law Library). The tape index is inadequate to cite to meter numbers more specific than those defining the parameter of the debate. See also Timperley v. Jeffries, Alaska Supreme Court No. 2765, p. 12 (December 16, 1983) (Tapes of legislative proceedings are evidence of legislative intent).

52/ Id.

In 1977 the authority of the Board of Game to adopt regulations pursuant to the 1975 statute to limit hunting of the western arctic caribou herd to residents of rural northwest Alaska communities was challenged by Fairbanks sportsmen in litigation which culminated in State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978). The uncertainty which that litigation created as to the scope of authority which had been delegated to the Board of Game was a significant factor in the legislature's decision to enact the subsistence statute.<sup>53</sup>

The purpose of the subsistence statute was inter alia to delegate the Board and the Board of Game adequate regulatory authority to enable each to better achieve the governmental objective set forth in sec. 1, ch. 269 SLA 1976. And that is precisely the same objective the Madison and Gjosund Courts determined is the factual result of applying the criteria in 5 A.A.C. 01.597 to fishing for Cook Inlet salmon stocks.<sup>54</sup>

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<sup>53/</sup> See Report of the Special Committee on Subsistence, Alaska House of Representatives, 12th Leg., 1st Sess. 14 (1981).

<sup>54/</sup> It should again be emphasized that the consistency of the criteria in 5 A.A.C. 01.597 with the intent of the legislature when it enacted the subsistence statute is unrelated to the question of whether the fishery in which the plaintiffs participated prior to the enactment of the statute satisfies the criteria. The former is a question of law of considerable importance to all Alaskans who reside in rural communities around the state whose local economies are dependent on hunting and fishing. The latter is a somewhat more parochial question of fact.