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5. The History Of The Times During Which The Legislature Enacted 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).

The history of the times during which the legislature enacted a statute is relevant evidence of its intent in doing so. Northern Commercial Co. v. United States, 4 Alaska Fed. 245 (9th Cir. 1914). And the history of the times during which the legislature enacted 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).

At the same time that Fairbanks sportsmen were challenging the authority delegated to the Board of Game pursuant to A.S. 16.05.257, the United States Congress began consideration of legislation which three years later became the Alaska National Interest Lands Conservation Act (hereinafter "ANILCA").[55] Title VIII of ANILCA[56] establishes federal guidelines which control the Board's and the Board of Game's regulation of fishing and hunting on the public lands and in the navigable waters of Alaska.

A number of sections of the subsistence statute embody concepts and language drawn by the legislature from the version of title VIII of ANILCA passed by the United States House of Representatives in the spring of 1978. In particular, as Representative Cotton pointed out during the debate on the subsistence

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55/ Pub. L. No. 96-487 (1980).

56/ 16 U.S.C. 3111-3126.

statute,[57] the definition of "subsistence uses" in A.S. 16.05 940(26) is nearly identical to the definition of the same term in the then current version of ANILCA.[58]

When a statute is borrowed from another jurisdiction, the legislature is presumed to have intended to adopt the construction of the statute adopted by the original jurisdiction's highest court. Carver v. Gilbert, 387 P.2d 928 (Alaska 1963), Sekinoff v. United States, 283 F. 38 (Alaska 1922). AFN would urge this Court to consider extending that rule of statutory construction to the legislative history in the original jurisdiction as well.

With respect to ANILCA, the legislative history indicates clearly that the Congress intended its definition of "subsistence uses" to identify uses of fish stocks and game populations by residents of rural communities in which hunting and fishing is a significant characteristic of the economic and social life of the community.

For example, section 702 of the bill reported by the House

57/ MA File No. 3 (Exhibit "U", p. 8)("I want to point out that the legislation that recently passed Congress (sic), H.R. 39, does define "subsistence" (sic) in almost exactly the same way as HB 960 does. They do, in fact, use the words 'customary and traditional'. HR 39 goes quite a bit further in defining what subsistence means and they agree specifically in Title VII on subsistence.").

58/ Compare A.S. 16.05.940(26) with sec. 703, H.R. 39, 95th Cong., 2d Sess. (1978), reprinted in House Rept. No. 95-1045, Part I, 95th Cong., 2d Sess. 1978 (hereinafter "House Report"). This version of H.R. 39 was reported by the House Comm. on Interior and Insular Affairs on April 7, 1978. See also MA File No. 3 (Exhibit "V", sec. 703) and 16 U.S.C. 3113.

Committee on Interior and Insular Affairs during the spring of 1978 states that:

> It is hereby declared to be the policy of the Congress that -
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> (1) management policies on the public lands in Alaska are to cause the least adverse impact possible on rural people who traditionally and consistently depend upon subsistence uses of the resources of such lands... 59 (Emphasis added).

In pertinent part, the report filed by the Committee to explain its version of H.R. 39 states that:

> After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of Federal, State, academic and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. 60
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> ...
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> There are more than 200 rural communities throughout Alaska. In many, fresh meat, fish, and produce are unavailable except through the subsistence harvest. 61
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> ...
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> The rapid population growth of Alaska's urban centers has been a major factor threatening subsistence uses, along with inadequate State and Federal actions, declines in certain wildlife populations, and increasing accessibility of remote areas. Between 1965 and 1975, Alaska's population increased from 265,000 to 405,000 people and the number of resident hunting licenses almost doubled - from 93 000 to 170,350. Anchorage

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59/ House Report 27. See also 16 U.S.C. 3111-3112.

60/ Id. 181.

61/ Id. 182.

> presently is the third fastest growing city in the United States... As a result of such developments, pressure on many traditional subsistence resources has been unacceptably increased as urban hunters have intruded into more remote, subsistence-dependent areas of the State. 62 (Emphasis added).

Lastly, although his views were not available to the legislature at the time it drafted and debated the subsistence statute, the comments of Representative Morris K. Udall, the chief sponsor of H.R. 39 and the chairman of the Committee on Interior and Insular Affairs, are the definitive explanation of what the Congress intended to accomplish by including title VIII in ANILCA. His explanation of the operation of the federal and state subsistence management system is important in its entirety, but is too lengthy to reprint here.[63] However, his explanation of the manner in which "subsistence uses" of fish stocks and game populations are to be identified is particularly pertinent:

> "The subsistence preference applies to individual wildlife populations and fish (sic), and State regulation of each population and stock must be consistent with section 804. The State must first identify the customary and traditional uses of each population and stock by rural residents.
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> ...
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> It also should be noted that customary and traditional subsistence uses must be evaluated on a community or area basis rather than an individual basis." 64 (Emphasis added).

62/ Id. 184.

63/ 126 Cong. Rec. H10545 - H10547 (daily ed. November 12, 1980) (remarks of Representative Udall).

64/ Id. H10546.

6. Conclusion

In summary, the interpretation of the intent of A.S. 16.05.251(b), A.S. 16.05.255(b), and A.S. 16.05.940(26) adopted by the Board and the Board of Game, the legislative history of the subsustence statute, and the legislative history of the federal statute upon which the subsistence statute is based all support the decision of both the Madison and Gjosund Courts that when the legislature enacted the subsistence statute, it intended to protect hunting and fishing 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.

The criteria set forth in 5 A.A.C. 01.597 are consistent with that intent.

C. The Alaska Federation Of Natives Has Not Taken A Position On The Validity Of The Policy Adopted By The Board Of Fisheries At Its December 1980 And March 1981 Meetings.

The Madison plaintiffs second claim for relief alleges that the policy adopted by the Board at its December 1980 and March 1981 meetings to identify "subsistence uses" of Cook Inlet salmon stocks[65] is invalid because it was not adopted pursuant to the procedures set forth in the Administrative Procedure Act.

At its December 1981 meeting the Board adopted the policy as a regulation. 5 A.A.C. 01.597. The plaintiffs have not alleged that the regulation was adopted by the Board in an unlawful manner.

65/ MA File No. 3 (Exhibits "H" and "I").

Subsequent to the Board's adoption of 5 A.A.C. 01.597, the defendants moved to dismiss the second claim on the ground that it is moot and the plaintiffs resisted the motion. On March 5, 1982, the Madison Court granted the motion and dismissed the second claim.

During the Court's consideration of the merits of the motion, AFN took no position on the viability of the second claim subsequent to the Board's adoption of 5 A.A.C. 01.597.

D. Equal Protection

1. The Board's Determination That The Set Gill Net Fishery In Which The Plaintiffs Participated Prior To The Enactment Of The Subsistence Statute Is Not A "Subsistence Use" Fishery Did Not Violate The Plaintiffs' Right To Equal Protection.

The plaintiffs do not allege that the legislature's division of fishermen into two classes, i.e. those who engage in "subsistence uses" of fish stocks and those who do not, and then providing each class of fishermen disparate fishing opportunities violates their right to equal protection. Rather, they take issue with the Board's factual determination that they are members of the latter rather than the former class.

Consequently, although their brief mobilizes well-worn "equal protection" rhetoric and case law in support of the result they are prosecuting this appeal in an attempt to achieve,[66] the gravamen of their argument is actually the allegation that the Board's

66/ See Brief of Appellant/Cross Appellee, pp. 30-41.

factual determination that the plaintiffs do not engage in "subsistence uses" of Cook Inlet salmon stocks was arbitrary, capricious, and hence, a violation of the plaintiffs' right to due process.[67]

E. Due Process

1. The Superior Court Properly Remanded The Factual Question Of Whether The Set Gill Net Fishery In Which The Plaintiffs Participated Prior To The Enactment Of The Subsistence Statute Is A "Subsistence Use" Fishery.

The courts will consider a due process claim only in situations in which a plaintiff alleges a deprivation of liberty or property sufficient to warrent constitutional protection. Horowitz v. Alaska Bar Ass'n, 609 P.2d 39 (Alaska 1980). Although the Madison plaintiffs have no "right' to harvest Cook Inlet salmon stocks, their opportunity to do so is certainly a property interest of sufficient importance to warrent constitutional protection. See Herscher v. State, 568 P.2d 996 (Alaska 1977).

Whether the Board's factual determination that the set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute is not a "subsistence use"

67/ Assuming arguendo that 5 A.A.C. 01.597 correctly describes the class of fishermen who engage in "subsistence uses", then whether the class is a violation of equal protection is dependent upon whether providing disparate fishing opportunities to residents of rural communities in which hunting and fishing is a significant characteristic of the social and economic life of the community bears a fair and substantial relation to a legitimate governmental objective. Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). The governmental objective in this case is protection of the health, safety, and general welfare of citizens who reside in rural Alaska. sec. 1, ch. 269 SLA 1976. The presumption is that the classification does. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978). And the plaintiffs have presented no evidence to the contrary.

fishery violates the plaintiffs' right to due process of law depends on whether the determination violates fundamental principles of liberty and justice or is an arbitrary administrative action shocking to the universal sense of justice. See Green v. State, 462 P.2d 994 (Alaska 1969).

Although the question is a close one, the Board's determination probably does not violate due process. The criteria to identify "subsistence uses" of Cook Inlet salmon stocks were adopted by the Board in December 1980.[68] Although the Board did not provide an opportunity for the public to present oral testimony at its March 1981 meeting, it did provide the public, including the plaintiffs, an opportunity to submit written testimony on "subsistence uses" of Cook Inlet salmon stocks.

A considerable volume of oral and written testimony on "subsistence uses" of Cook Inlet salmon stocks was generated during the December and March meetings,[69] but the record is near devoid of information about the relationship of hunting and fishing to the economy of the area around the City of Kenai in which the plaintiffs reside.

Whether the economy of the Kenai Peninsula is more like the economy of Selawik than the economy of Anchorage is a question of fact. Based on a review of the record before the Board, it is difficult to conclude that on its face the Board's determination was

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68/ MA File No. 3 (Exhibit "H").

69/ See generally MA File No. 2.

so arbitrary as to violate the plaintiffs' right to due process of law.

However, because of the confusion surrounding the criteria pursuant to which the Board made its determination, the Madison Court correctly remanded the plaintiffs' fourth claim for relief to the Board to determine anew whether the set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute satisfies the requirements of 5 A.A.C. 01.597 and A.S. 16.05.940(26).

2. The Plaintiffs' Claim That The Board Of Fisheries Is Not An Impartial Tribunal Should Be Remanded To The Superior Court.

An impartial administrative decisionmaker is basic to a democratic society and representative government. Green v. State, supra. And every Alaskan, including the plaintiffs, who wishes to participate in the harvest of fish stocks is entitled to have his or her opportunity to do so considered by all seven members of the Board in a fair and impartial manner.

Although they have not aggressively pursued the allegation in their brief, the plaintiffs claim that the Board itself is a violation of due process of law in that it is not an impartial tribunal.[70]

The plaintiffs' allegation in this regard raises a constitu-

70/ See Brief of Appellant/Cross Appellee, p. 47 ("Due process violations can ensue from cummulative patterns of behavior resulting in basic and intuitivly (sic) recognizable unfair actions. Madison alleges at the least that this is what has happened.").

tional question of both first impression and fundamental importance. However, the Record on Appeal is not adequate to decide the question in this appeal.

But because of the serious constitutional and public policy implications of the plaintiffs' claim, they should be afforded an opportunity to present evidence in the Superior Court in support of the argument that the composition of the Board violates the plaintiffs' right to due process of law. An argument which appears to have considerable merit.

The 1959 statute which established the Board of Fish and Game was not the first attempt to create an administrative agency to regulate hunting and fishing in Alaska. In 1957 the Territorial Legislature enacted a statute which established a seven member Fish and Game Commission. ch. 63 SLA 1957. By law the commission was required to be composed of three commercial fishermen representing specific geographical areas, one hunter, one trapper, and one sport fisherman. In other words, the legislature purposely delegated its authority over hunting and fishing to a group premeditatively composed of individuals with substantial vested interests in, and prejudgments about, the regulations they were empowered to adopt.

During its consideration of the Alaska Statehood Act,[71] the Congress determined that the Fish and Game Commission was unacceptable because it purposely delegated control of Alaska's fish stocks to the commercial fishing industry and because it excluded

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71/ Pub. L. No. 85-508 (1958).

Alaska Natives from participation in the regulatory process.[72] As a result, the Congress took the extraordinary step of including section 6(e) in the Statehood Act. In pertinent part, section 6(e) states:

> ... (T)he administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest.

On March 2, 1959, Secretary of the Interior Fred A. Seaton wrote Hugh J. Wade, Acting Governor of Alaska, and detailed the requirements imposed on the new state by section 6(e).[73] With respect to the composition of a new board of fish and game, the Secretary stated that:

> "...(T)he policy-making officials should be selected for their ability and their dedicated interest in the resource, and no identification should be made between a policy-making official and any particular segment of the population; likewise, no official should be bound to represent the interests of a specific geographical region."

On April 17, 1959, the legislature enacted ch. 94 SLA 1959.

72/ 104 Cong. Rec. 9747-9750 (May 28, 1958).

73/ Letter from Fred A. Seaton to Hugh J. Wade (March 2, 1959) reprinted in Hearings on H.R. 39 et al. Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Part XI 411-412 (1978) (hereinafter "House Hearings").

Section 6 of the 1959 statute established a Board of Fish and Game "composed of eight members having a general knowledge of the fish and game resources of the State and selected without regard to political affiliation or special interest".

On April 27, 1959, Secretary Seaton certified to the Congress that the State of Alaska was in compliance with section 6(e) of the Statehood Act,[74] and on January 5, 1960, President Eisenhower transferred the administration and management of fish and game from the federal government to the State.[75]

In 1975 the legislature split the Board of Fish and Game into a seven member Board of Fisheries and a seven member Board of Game. ch. 206 SLA 1975. The members of both boards are required to be appointed by the Governor and confirmed by the legislature "without regard to political affiliation or geographical location of residence". See sec. 3, ch. 206 SLA 1975.

However, what the Congress and the legislature prohibited by statute has been honored primarily in the breach. This Court may take judicial notice[76] of the fact that for almost a quarter of a century five Alaska governors have appointed persons to the Board because of their identification with particular fishing

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74/ Letter from Fred A. Seaton to Sam Rayburn (April 27, 1959) reprinted in House Hearings, Part XI 413.

75/ Executive Order No. 10857 (January 5, 1960).

76/ The Court may judicially notice a fact that is generally known within the state. Alaska Rule of Evidence 201(b).

groups, the geographical area of the state in which they reside, and their vested interest in particular fisheries. For example, during the 1983 session the legislature refused to confirm Governor Sheffield's appointments to the Board[77] because a majority of the members of the legislature were of the opinion that the Governor had not appointed an adequate number of persons to the Board who represented sport fishing groups. In response, the Governor has publicly promised to appoint a sport fisherman from Fairbanks to the Board.

In such a politicized environment for administrative rulemaking, it is small wonder that the plaintiffs argue that the Board was not impartial when it determined that the set gill net fishery in which the plaintiffs participated prior to the enactment of the subsistence statute does not satisfy the criteria set forth in 5 A.A.C. 01.597.

And the plaintiffs are correct that a delegation of regulatory authority to persons who individually or as members of a group have a direct interest in, or prejudgment about, the regulations they are empowered to adopt is a violation of due process of law. Particularly, when the legislature has not delegated such authority pursuant to clear standards to govern its exercise.[78]

For example in State Bd. of Dry Cleaners v. Thrift-D-Lux

77/ See 1983 Senate Journal, 13th Leg., 1st Sess. 1238, 1243-44.

78 Assuming that the fishery in which the plaintiffs desire to participate is not a "subsistence use" fishery regulated pursuant to A.S. 16.05.251(b), then the Board may adopt or not adopt whatever regulations "it considers advisable" authorizing or not authorizing the plaintiffs to harvest Cook Inlet salmon stocks. See A.S. 16.05.251(a).

Cleaners, 254 P.2d 29 (Calif. 1953), the California Supreme Court struck down a scheme for regulating the dry cleaning industry in California which was similar in many respects to the scheme employed by the Governor and the legislature to regulate fishing in Alaska.

Six of the seven members of the Board of Dry Cleaners were required to be members of the dry cleaning industry. The statute which established the board also included no standards to govern the board's exercise of regulatory authority. One of the grounds cited by the Court in support of its decision invalidating the board's authority to fix dry cleaning prices was that the regulatory scheme established by the legislature violated due process:

> "While the delegation of government authority to an administrative body is proper in some instances, the delegation of absolute legislative discretion is not. To avoid such a result it is necessary that a delegating statute establish an ascertainable standard to guide the administrative body. Here the statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule and its penal provisions with no guide for the exercise of the delegated authority." 254 P.2d at 36.

In support of that conclusion, the Court cited Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). Carter invalidated a section of the Bituminous Coal Conservation Act which delegated large coal producers authority to regulate wages paid by small producers and the number of hours small producers could require their employees to work. In doing so, the United States Supreme Court held:

> "The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is

> necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." 56 S.Ct. at 873 (Emphasis added).

Lastly, in Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), the United States Supreme Court upheld a lower court decision which held that the Alabama Board of Optometry was so biased by prejudgment and pecuniary interest that its members could not constitutionally conduct hearings on whether to revoke the licenses of a group of optometrists employed by a private company. Although the case turned on its own peculiar facts, the lower court opinion is instructive with respect to the plaintiffs' claim in the instant appeal in that it recognizes that due process is violated even in situations in which it is difficult to prove demonstrable bias with respect to a particular decision:

> "The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil, but the appearance thereof." Berryhill v. Gibson, 331 F. Supp. 122, 125 (D.C. Ala. 1971).

The plaintiffs' claim in the instant appeal is obviously dif-

ferent from Thrift-D-Lux Cleaners and Carter in that A.S. 16.05. 221(a) does not mandate the appointment of individuals to the Board who have a vested interest in the regulations they adopt. However, for almost a quarter of a century, tradition has produced the same result.

If the Governor were to appoint the counsel of the Chugach Electric Association to the attorney seat on the Alaska Public Utilities Commission, the public uproar would be deafening. But until the filing of this lawsuit, there has been little public outcry about the Board as five governors have appointed fish processors, commercial fishermen, sport fishing guides with a vested economic interest in the regulation of the Cook Inlet fishery, persons designated to represent the interests of fishermen in a particular geographic area of the state, or, most recently, an official of a southcentral Alaska sport fishing organization who shortly after his appointment to the Board appeared before the Kenai River Sport Fishing Association and, according to the Anchorage press, told a room full of sport fishermen:

> "Those 10,000 kings are worth more, to more people, than all those sockeyes. This group is headed to making the Kenai king the number one priority and to hell with the 4.4 million sockeyes.
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> ...
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> Let's get some more members in this Kenai River Sport Fishing Association and knock hell out of them (commercial fishermen). That's the only way it can be done. We've got to organize the 170,000 sports fishing

> people that live in Anchorage and on the Kenai Peninsula." 79

A regulatory scheme which purposely produces such prejudgment and bias is constitutionally flawed.

It also should be noted that in a related situation the legislature has recognized the problem and taken steps to eliminate it. The legislature has delegated the Board authority to regulate all aspects of fishing in Alaska with one exception: the regulation of entry into most commercial salmon fisheries. That responsibility has been delegated to the Alaska Commercial Fisheries Entry Commission. In recognition of possible bias, prejudgment, and conflict of interest, A.S. 16.43.050 establishes the following requirements for appointment to the Commission:

> The commission shall consist of three members with a broad range of professional experience, none of whom has a vested economic interest in an interim-use permit, entry permit, commercial fishing vessel or gear, or in any fishery resource processing or marketing business. (Emphasis added).

Why the legislature has purposely eliminated bias and conflict of interest in the regulation of who may participate in the commercial fishery while at the same time actively participating in the appointment of individuals to the Board because of their bias and conflict of interest is best explained by history and political tradition. But history and tradition are not adequate justification for denial of the plaintiffs' right to due

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79/ Chappell, Battle Over Kenai King Salmon Brews, Anchorage Daily News, July 29, 1983, at C1. The above-cited quotation is not a part of the Record on Appeal. It is, however, indicative of the type of record the plaintiffs may be able to develop if their due process claim is remanded to the Superior Court.

process of law.

The plaintiffs have raised a serious constitutional question of first impression which, because it involves a number of questions of fact, cannot be answered based on the record in this appeal. But fundamental fairness requires that the plaintiffs be afforded an opportunity to present evidence in support of their claim.

Consequently, the Court should consider articulating the constitutional standard pursuant to which the Governor is required to appoint persons to the Board, and then remand the plaintiffs' due process claim to the Superior Court for trial.

F. A.S. 16.05.251(a) Authorizes The Board Of Fisheries To Adopt A Regulation Establishing A "Personal Use Fishing" Category For Regulatory Purposes.

Pursuant to A.S. 16.05.251(a), at its March 1982 meeting the Board adopted a regulation which establishes a "personal use fishing" category for regulatory purposes. 5 A.A.C. 77.001.

The plaintiffs now argue that A.S. 16.05.251(a) does not delegate the Board authority to adopt 5 A.A.C. 77.001.[80] However, the plaintiffs are simply incorrect. This Court has already held that A.S. 16.05.251(a) is a broad delegation of authority to "make decisions affecting the utilization of fishery resources" which should be liberally construed to achieve its intended purpose. Kenai Peninsula Fisherman's Cooperative Ass'n v. State, supra at 903. As long as a particular method of regulation is based on

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80/ See Brief of Appellant/Cross Appellee, p. 47-51.

the need to conserve and develop a particular fishery, the Board is empowered by A.S. 16.05.251(a) to adopt it. Id. Consequently, it is difficult to identify even a scintilla of merit in the plaintiffs' argument to the contrary.

To the extent they offer one, it appears to be that the plaintiffs do not believe that the establishment of a "personal use fishing" category is "essential" for regulatory purposes. See A.S. 16.05.251(a)(6). However, the Board, and not the plaintiffs, is the best judge of what is or is not "essential" to the discharge of its statutory responsibilities. A question of fact within the Board's regulatory expertise.

And the plaintiffs' argument is meritless on an even more obvious ground. What could be more "essential" than establishing a regulatory category to enable the Board to adopt regulations authorizing the plaintiffs to continue to harvest Cook Inlet salmon stocks?

The subsistence statute narrowed the statutory definition of "subsistence fishing" to exclude fishing with a set gill net for personal use by residents of communities in which hunting and fishing is not a significant characteristic of the social and economic life of the community.[81] Consequently, absent the "personal use fishing" category, the Board is without a methodology pursuant to which to continue to authorize fishing with set gill nets by residents of such communities. Assuming arguendo

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81/ See MA File No. 1, pp. 54-57 (Findings of Fact and Conclusions of Law relating to the plaintiffs' first claim).

that the plaintiffs' fishing activities are no longer "subsistence fishing", the "personal use fishing" category is "essential" to provide the plaintiffs an opportunity to continue to harvest Cook Inlet salmon stocks.

G. The Board of Fisheries' Decision To Authorize A "Personal Use" Fishery In The Central District Of Cook Inlet Which Targets On Sockeye Salmon Rather Than Coho Salmon Did Not Violate The Plaintiffs' Right To Due Process Of Law.

The legislature has near plenary authority to regulate the utilization of Cook Inlet salmon stocks. Alaska Const. art. VIII, sec. 2. Prior to the enactment of the subsistence statute, the legislature delegated the Board its entire regulatory authority subject only to the requirement that the Board exercise that authority in a manner consistent with recognized due process standards. See Herscher v. State, supra. Assuming arguendo that the plaintiffs' fishing activities are "personal use fishing" rather than "subsistence fishing", they continue to be regulated by the Board pursuant to A.S. 16.05.251(a) and due process limitations.

In 1979 the Board adopted regulations which moved fishing in the central district with set gill nets for personal use from August 1 - September 21 to June 23 - August 15.[82] The purpose of the change was to move the fishery off coho salmon stocks and onto sockeye salmon stocks. Regulations adopted by the Board which authorize "personal use fishing" in the central district during the middle, rather than the end, of the summer[83] are con-

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82/ GJ File No. 4, pp. 26-27.

83/ 5 A.A.C. 77.547.

sistent with the 1979 regulations. The Board's decision to adopt such regulations was not so totally arbitrary as to violate due process standards[84] and the plaintiffs do not challenge that decision in this appeal.

H. With Respect To The Personal Use Set Gill Net Fishery Which The Board Of Fisheries Authorized In The Southern District Of Cook Inlet Prior To The Enactment Of The Subsistence Statute, The Board Is Authorized To Determine Whether The Fishery Is Or Is Not A "Subsistence Use" Fishery, Regardless Of Whether The Biological Status Of The Salmon Stocks Which Are The Target Of The Fishery Does Or Does Not Require It To Do So.

The Gjosund Court upheld the validity of the criteria adopted by the Board to identify "subsistence uses" of Cook Inlet salmon stocks, but then inexplicably held that the Board is prohibited from applying the criteria to the personal use set gill net fishery which it authorized prior to the enactment of the subsistence statute until such time as it is required to do so to prevent overfishing of the salmon stocks which are the target of the fishery. However, such a result misconstrues the nature of the Gjosund plaintiffs' interest in Cook Inlet salmon stocks and sets a dangerous precedent for the regulation of hunting and fishing in Alaska.

The Court's decision implicitly assumes that "conservation" is the sole purpose of the Board's regulation of the harvest of Alaska's fishery resources. The Court ignores the Board's co-equal

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84/ In reaching this result, it is important to differentiate between unfairness and "fundamental" unfairness. Only the latter is a constitutional violation. Because many questions of fact relating to fishery management are so close and so complex, it is particularly important that the Board be composed of seven truly impartial persons. It is extremely difficult for this or any other Court to substitute its judgment for that of the Board with respect to most decisions involving questions of fact.

responsibilities to facilitate the "utilization" and "development" of fish stocks. A.S. 16.05.221(a). See also Kenai Peninsula Fisherman's Cooperative Ass'n v. State, supra.

The allocation of the harvestable surplus of fish stocks among competing groups of fishermen can have a profound social and economic effect. As population growth, new settlement, and economic change occurs, whether a particular allocation of the harvestable surplus of a particular fish stock does or does not provide the "maximum benefit"[85] to all the people of Alaska may also change. And for better or for worse, the legislature has delegated responsibility for making such important decisions to the Board.

But the Court's decision assumes that once the Board has allocated the harvestable surplus of a particular fish stock to a particular group of fishermen, those fishermen acquire some type of vested interest in the harvest of the stock which can be reduced or eliminated only if "conservation" considerations so require. Such a result ignores two important decisions by this Court. And if affirmed in this appeal, will wreck havoc on the legislature's and the Board's responsibility to advance the "utilization" and "development" of Alaska's fishery resources.[86]

85/ Alaska Const. art. VIII, sec. 2 (The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State...for the maximum benefit of its people.).

86/ The legislature's and the Board of Game's responsibility to advance the "utilization" and "development" of Alaska's game populations would also be similarly compromised. Compare A.S. 16.05.221(a) and .251(a) with A.S. 16.05.221(b) and .255(a).

The decision of the Gjosund Court is squarely opposed to the opinion of this Court in Herscher v. State, supra, that the only limitation on the legislature's authority to regulate (or eliminate) the harvest of a fish stock or game population is that imposed by due process:

> "It is true that the state has the right to direct the use of its natural resources, including fish and game. We recognize that there is a difference between the state's plenary control over the natural resources and the taking away of a formerly granted state license. The state's power over natural resources is such that it could entirely eliminate the role of hunting guides, and no problem of due process would arise. However, when the state decides to permit the harvesting of its fish and game, and in so doing so permits the issuance of hunting guide licenses, then problems of due process do arise when the individual, rather than the group as a whole, is affected. At that point the consideration is whether the state's procedures in taking the property right in the individual's guide license comported with due process requirements." 568 P.2d at 1003. (Emphasis added).

Similarly, in Kenai Peninsula Fisherman's Cooperative, Ass'n v. State, supra, this Court upheld the Board's authority to reallocate certain Cook Inlet salmon stocks from commercial to sport fishermen. The decision of the Gjosund Court precludes that result absent a showing of necessity related solely to "conservation".

The Gjosund holding is bad law, worse public policy, and, consequently, the Superior Court's decision should be reversed.

V.

CONCLUSION

The Madison and Gjosund plaintiffs initiated this litigation because they want to harvest the same Cook Inlet salmon stocks in the same manner and in the same places along the shoreline of the central and southern districts of the Kenai Peninsula as they did prior to the enactment of the subsistence statute. Although AFN is sympathetic to the plaintiffs' goal, AFN intervened in Madison because of its concern about the public policy implications of the issues raised in the plaintiffs' pleadings and requested this Court for an opportunity to participate as amicus curiae in the Gjosund appeal because of its concern about the public policy implications of the portion of the Superior Court's decision now under review. Tens of thousands of Alaskans who live in the bush will be effected by the Court's decision in this case.

Because the issues raised in this consolidated appeal are so important, this Court should be careful to differentiate between the governmental objective the legislature intended to achieve when it enacted the subsistence statute, and the Board's implementation of the statute. Although the criteria developed by the Board to identify "subsistence uses" of Cook Inlet salmon stocks are consistent with A.S. 16.05.251(b) and A.S. 16.05.940 (26), the Board's application of the criteria to the fishery in which the Madison plaintiffs participated prior to the enactment of the subsistence statute may or may not have been made in a

manner consistent with due process requirements. If it was not, the reason may not be the fundamental unfairness of any particular Board decision as much as the lack of impartiality by the members of the Board as a whole which the legislature and five Alaska governors have purposely encouraged.

For all the reasons set forth above, the Alaska Federation of Natives respectfully 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 Madison plaintiffs' claim that the composition of the Board of Fisheries violates their right to due process of law be remanded to the Superior Court for trial.

DATED: December 27, 1983

Donald C. Mitchell
Attorney for Intervenor/
Amicus Curiae

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GENE MADISON, LUCY CASEY, KEN McGAHAN, SR., ANDY JOHNSON, MARGIE KIVI, J.W. WARE, DICK FRANCIS, DON GROLESKE, KEN JORDON and SHIRLEY DEVAULT, Appellant, vs ALASKA DEPARTMENT OF FISH AND GAME and ALASKA BOARD OF FISHERIES, Appellees, and THE ALASKA FEDERATION OF NATIVES, Intervenors.	Supreme Court Nos. 6824/7181 Superior Court No. 3 KN 81-542 Civil
ALASKA DEPARTMENT OF FISH AND GAME, RONALD SKOOG, ALASKA BOARD OF FISHERIES Appellants, vs LOUIS GJOSUND, DORA MULCH, and KACHEMAK BAY SUBSISTENCE GROUP, INC., Cross-Appellees.	Supreme Court No. 7410 Superior Court Nos. 3HO-80-92 Civil 3HO-77-11014 Homer

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

BRIEF OF APPELLANT/CROSS APPELLEE

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Filed in the Supreme Court in Anchorage of the State of Alaska this 3RD day of OCTOBER, 1983.

ROBERT B. BACON
Clerk of Court

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS RELIED UPON

Constitutional Provisions

U.S. Constitution, Fourteenth Amendment, Section 1, provides:

> "...nor shall any state deprive any person of life, liberty, or property without due pr cess of law..."

Alaska Constitution, Article 1, Section 1, provides:

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

Alaska Constitution, Article 1, Section 7, provides:

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

Statutes

Alaska Statute 16.05.050 (9) reads:

> "Powers and duties of the commissioner: The Commissioner has, but not by way of limitation, the following powers and duties:
>
> (9) Administrative, budgeting, and fiscal powers;

AS 16.05.090 states:

> (a) The commissioner may, with the approval of the governor, establish a departmental division of commercial fishe ies, a departmental division of sport fisheries, a departmental division of game, and other departmental divisions as are necessary.
>
> (b) The commissioner shall establish a departmental division of fisheries rehabilitation, enhanc ment and development
>
> (c) There is established in the Department of Fish and Game a section of subsistence hunting and fishing.

AS 16.05.094 states:

AS 16.05.094 states:

> Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall
>
> (1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;
>
> (2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;
>
> (3) make information gathered available to the public, appropriate agencies, and other organized bodies;
>
> (4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;
>
> (5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;
>
> (6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;
>
> (7) participate with other divisions in the preparation of statewide and regional management plans so that those plans reorganize and incorporate the needs of subsistence users of fish and game.

AS 16.05.221 states:

> Boards of Fisheries and Game.
>
> (a) For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven member 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 or residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

AS 16.05.241 states:

"Powers excluded. The boards have regulation making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers.'

Alaska Statute 16.05.251, which states:

"(a) The Board of Fisheries may make regulations it considers advisable in accordance with the Administrative Procedures Act 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 opena dn 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 trasport 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, amangement, 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 AS 16.43.010 - 16.43.380.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62.010 - AS 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 priorites for the consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources.

AS 16.05.940 (17) states:

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

AS 16.05.940.(26) states:

(26) "subsistence uses" means <u>the customary and traditional uses</u> 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.

AS 16.20.010 states:

> The legislature recognized that
>
> (1) the state has jurisdiction over all fish and game in the state except in those areas where it has assented to federal control;
>
> (2) the state ahs not assented to federal control of fish and game in those areas which were set apart as National Bird and Wildlife Refuges while the state was a United States territory;
>
> (3) special recognition of the value to the state and the nation of areas of unspoiled habitat and the game characteristic to it will be demonstrated by designating as state game refuges those federal lands whcih were National Bird and Wildlife Refuges or Ranges at the time that Alaska achieved statehood.

AS 16.20.020 states:

> Purpose. The purpose of this chapter is to protect and preserve the natural habitat and game population in certain designated areas of the state.

AS 62.020 states:

> Authority to adopt, administer, or enforce regulations. Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - AS 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

AS 44.62.030 states:

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

AS 44.62.310 states:

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

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

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

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

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

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

(d) This section does not apply to
(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; of

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

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

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

AS 44.62.312 states:
State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) It is the intent of the law that actions of these units be taken openly and that the deliberations be conducted openly;

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

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

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

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

Regulations

5 AAC 01.597 states:
CHARACTERISTICS OF SUBSISTENCE FISHERIES. (a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identificatior 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 AAC 77.001 states:

INTENT AND APPLICATION OF THIS CHAPTER.

(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 fulfull his personal use needs for fish under subsistence fishing regulations;

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

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

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

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

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

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

(b) It is the intent of the board that the taking of fish under a 5 AAC 77 will be allowed when that taking

does not jeopardize the sustained yield of a resource and either does not negatively impact an existing resource use or is in the broad public interest.

(c) Regulations in 5 AAC 77 apply to the taking of finfish, shellfish and aquatic plants fof personal use. The regulations in 5 AAC 77.001 - 5 AAC 77.049 apply to the taking of finfish, shellfish and aquatic plants in all waters of Alaska.

(d) The regulations in 5 AAC 77 do not prohibit the personal use of finfish, shellfish or aquatic plants legally taken under the subsistence, commercial and sport fishing regulations in 5 AAC 01 - 5 AAC 75.

(e) The definitions of legal gear in 5 AAC 35.105(d). escape mechanisms for pots in 5 AAC 39.145, unlawful possession of fish in 5 AAC 39.197, definitions in 5 AAC 39.975, and abbreviations and symbols in 5 AAC 39.997 apply to the regulations in 5 AAC 77.

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

FINDINGS AND POLICY REGARDING SUBSISTENCE USE OF COOK INLET SALMON #80-79-FB states:

The Board of Fisheries finds that the past and current permitting system and regulations governing Subsistence fishing in Cook Inlet do not necessarily reflect and protect the customary and traditional use of salmon resources in the area. Evidence presented to the Board at its fall 1980 meeting described certain customary and traditional practices and procedures of utilizing fish in Cook Inlet. This evidence described and established a basis for allowing those persons who engage in the uses to be given a reasonable opportunity to harvest fish in the historically established places, manners, times and quantities.

The evidence suggests that Customary and Traditional uses continue to be nutritionally, economically, and socially important, particularly in the non-road-connected villages of Cook Inlet. These uses may be recognized by the following characteristics:

(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 communal and family basis (including trade, bartering, sharing, and gift-giving).

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

Evidence indicates that these use patterns may occur in road-connected communities as well as in the non-road connected areas. The Board intends that these use patterns be identified and acknowledged in regulations. The Board will adopt a set of criteria drawn from the characteristics noted above and apply these criteria to communities, subcommunities, groups, and individuals who wish to continue to participate in an established customary and traditional fishing effort in Cook Inlet. Those who fail to meet the criteria may request the Commissioner of the Department of Fish and Game to review evidence establishing their claim in an expeditious amnner.

ADOPTED: Anchorage, Alaska
December 21, 1980

VOTE: 7-0

/S/ Nick Szabo, Chairman

AMENDED FINDINGS AND POLICY REGARDING SUBSISTENCE USE OF COOK INLET SALMON #80-79-FB

The Board of Fisheries finds that the past and current permitting system and regulations governing subsistence fishing in Cook Inlet do not necessarily reflect and protect the customary and traditional use of salmon resources in the area. Evidence presented to the Board at its fall 1980 meeting described certain customary and traditional practices and procedures of utilizing fish in Cook Inlet. This evidence described and established a basis for allowing those persons who engage in the uses to be given a reasonable opportunity to harvest fish in the historically established places, manners, times, and quantities.

The evidence suggests that customary and traditional uses continue to be nutritionally, economically, and socially important, particularly in the non-road-connected villages of Cook Inlet. These uses shall be identified by applying all of the following characteristics:

(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 howing 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

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

Evidence indicates that these use patterns may occur in road-connected communities as well as in the non-road-connected areas. The Board intends that these use patterns be identified and acknowledged in regulations. The Board will apply all of the above-described characteristics to communites, subcommunities, groups, and individuals in order to determine which uses are customary and traditional and therefore are eligible for the subsistence priority.

ADOPTED: Anchorage, Alaska
April 6, 1981

VOTE: 7-0

/S/ Nick Szabl, Chairman.

STATEMENT OF JURISDICTION

This is an appeal from the judgments and findings of Superior Court Judge Victor Carlson, State of Alaska, Third Judicial District in the case of Gene Madison et al, vs The Alaska Department of Fish and Game and Alaska Board of Fisheries , #3KN 81-532 Civil, entered on March 5, 1982, August 30, 1982, November 9, 1982, and January 26, 1983. This is a consolidated appeal with Gjosund et. al., 3HO-80-92 Civil and 3HO-77-11014 Homer. This court has jurisdiction to consider this appeal pursuant to Appellate Rule 202 and Alaska Statute 22.05.010

STATEMENT OF THE ISSUES *

1. Was the Board of Fisheries, (hereinafter Board), acting within their legislative and statutory authority granted by Alaska Statute 16.05.251(b) and 940(17) & (26), in adopting the 10 characteristics ultimately codified at 5AAC 01.597? ('M' file #1, pages 58, 59)

2. Did the trial court err in applying the 'judicial deference' standard to the Board's actions and upholding the regulatory scheme adopted under AS 16.051(b) and 940(17) and (26)? ('M' File #1, pages 58,59)

3. Did the trial court err in determining that questions of violation of the Administrative Procedures Act, AS

*This case is a consolidated appeal. Most of the issues in both cases are identical and rely on the same record. Citations to the record in Appellant's opening brief will refer to the record in both Madison and Gjosund to avoid unnecessary duplication and repetition in Appellant Cross-/ Appellee's brief in Madison and his Appellees brief in Gjosund . Also the appendices and exhibits are substantially the same in both cases. References to the record in Madison will be preceeded by the letter 'M' and to the record in Gjosund by a 'G'.

.310, 312 were moot? ('M' File #4, page 296)

4. Did the trial court err in finding that the actions of ard eliminating and excluding Plaintiffs as subsistence of the fish stocks moving through Cook Inlet did not te Plaintiff's rights to equal protection of the law? ('M' #4, page 295)

5. Were the characteristics of 5 AAC.01.597 overly ctive and exclusive on their face and do they result in g and discrimating against Plaintiff's class without a d substantial connection to the purposes of the tence Bill, (AS 16.05.251(b))? ('M' File #4, page 295)

6. Have the Defendant's violated the Due Process rights ntiffs by:

a. excluding them from the fishery in an arbitrary, and capricious manner;

b. improper administrative proceeding;

c. failing to provide an impartial hearing;

d. failing to comply with the directions and purposes .05.094;

e. failing to hold public meetings when formulating ssing basic policy affecting Plaintiffs in violation 62.312? ('M' File #1 & #4, pages 1-36, 92, 94)

Is creation of a 'personal use fishery', 5 AAC 77.001 yond the statutory authority of the Board? ('M' File 2)

STATEMENT OF FACTS

This appeal in its most general perspective is about fish. More particularly about those fish which move in and through the waters of Cook Inlet. The Plaintiffs in both cases under review have harvested and used those fish for their family and personal consumption for up to 50 years. ('G' File #2; App M p.13-221; 'M' File #1, Affidavits to Complaint pages 1-36) This fishery has been identified and regulated as a subsistence fishery since 1959 by the state and prior to that time by the federal government. ('G' File #2, p 13 et seq; Appendix R. Braund Subsistence Report). The Plaintiffs have participated in this subsistence fishery subject to those regulations which regulations have been generally consistent over the years.

The Plaintiffs' long term and continued participation in the subsistence fishery as well as their dependency upon the salmon moving through Cook Inlet has been documented and established. The recognition of the importance of subsistence uses and the consumption of fish and game for personal and family use was formally set out by the State of Alaska in 1973. (ADF&G Game Management Policy , 'G' File #2, pages 13 - 221, Appendix. S, page 4)

In 1978, The Alaska legislature enacted CH. 151 SLA 1978. These statutes mandated that the taking of fish for subsistence uses was no longer a matter of discretion of the Board of

Fisheries. The legislation also established a priority of use for subsistence whenever it was necessary to restrict the taking of fish because of sustained yield shortages, (AS 16.05.251(b)),and set up criteria for priorities for the 'consumptive uses' if further shortages existed.(AS 16.05.261(b)(1), (2) & (3)).

The subsistence bill was passed in part to codify the 1973 policy statement of the commissioner of the Department of Fish and Game and, in part, to correct the Board's failure to protect the subsistence uses especially where there was competition with sports or commercial uses. (Draft- Report of the Special Committee on Subsistence , pages 44-45, 'G' File #2, pages 13-221, Appendix BB).

The Board's action or inaction regarding subsistence, both prior and subsequent to, the enactment of the subsistence bill has generated a great deal of litigation and controversy.[eg's State v Tanana Valley Sportsman's Association 583 P2d 854 (Alaska 1978); Superior Court Orders 1977, 1980, 1981; 'G' File #2, page 13 et seq, Appendix O, P, and Q; Tyonek v Alaska Board of Fisheries, 3 AN 80-3073; and the 1982 Initiative Repeal aimed at the subsistence bill.

The subsistence bill also established a special Section (now a Division) of subsistence hunting and fishing within the Department of Fish and Game. The duties of the Subsistence Hunting and Fishing Section were very particularly spelled out and the Section was created to raise the subsistence fishery to

created b/c no date (?)

the same level as the commercial and sports fisheries. (See AS 16.05.090 & .094).

The Board, in 1980, took action under the subsistence bill. That action precipitated these lawsuits. At the December 1980 Board hearings, the Board adopted Findings And Policy Regarding Subsistence , #80-79-FB. ('G' File #2, page 13-221, Appendix A-1). These Findings and Policy , with some refinements, are the substance of 5 AAC 01.597. The refinements, (5 AAC .01.597(b) & (c)), were developed in part at the Board's hearings concerning Knik subsistence use on December 14, 1981. (Proceedings December 14, 1981, Knik Discussions, page 126, 'M' file #4, Exhibits EE, page 70-292). The Board of Fisheries in April, 1981, adopted 80-79 FB which was an Amended Findings and Policy Regarding Cook Inlet ('G' file #2, page 13 et. seq. Appendix A) which contained the same 10 criteria as 80-79 FB from the December 1980 meeting. They also applied those 10 criteria to Cook Inlet. (Findings of Fact , 81-92 FB, 'G' File #2, pages 13-221, Appendix B).

The December 1980 meetings, out of which the 10 criteria were created and enunciated, violated the public meeting provision of AS 44.62.310,312 (See Amended Findings of Fact and Conclusions of Law , November 12, 1982, Finding of Fact #23, 'G' File #2, page 254,).On June 22, 1982, the Board through their counsel, signed a stipulation admitting a violation of AS 44.62.310, 312 at the December 1980 Board meeting.

The Board of Fishery regulations ('G' Appendices A, A-1, & B supra) in their adoption and application excluded the Plaintiffs from harvesting salmon in the manner, by the means and at the times, they had historically subsistence fished. The Board determined that Plaintiffs' subsistence uses were not intended to be permitted uses pursuant to AS 16.05.251 (b). Their fishing was no longer subsistence fishing nor was their use a subsistence use under AS 16.05.940(17) & (26).

This lawsuit was filed by the Plaintiffs on August 13, 1981, and Judge Carlson granted preliminary relief opening a set gill net fishery in the Central and Northern District of Cook Inlet similar to the fishery that was in effect during and prior to the 1980 subsistence fishing season.

On December 10, Judge Carlson in his Memorandum of Decision granted Defendant's motion for summary judgment on the Plaintiff's first claim for relief. In April 1982, the Board adopted regulations establishing a personal use fishery. 5 AAC 77.001 et. seq. The personal use fishery was adopted pursuant to AS 16.05.251(a)(6) and is generally an excess fishery only permissible after the subsistence, commercial and sports users harvest has been guaranteed or established. 5 AAC 77.001 (a)(3) & (b). The personal use fishery in Cook Inlet has recently been successfully attacked preliminarily in Kenai River Sport's Fishing Association v Alaska Department of Fish and Game, Alaska Board of Fisheries , # _____ , September 15, 1983). Superior Court Judge Cranston issued a

preliminary injunction severely restricting the 1983 Cook Inlet personal use fishery established at 5 AAC 77.548. The Board created the fishery as an excess fishery to satisfy Judge Carlson's Findings of Fact and Conclusion of Law #11, signed on January 26, 1983. Judge Carlson denied Plaintiff's request for summary judgement on counts II, III, and IV and granted Defendant's request for summary judgment on Plaintiff's count I. This appeal proceeded from these actions.

One other factual precondition should be established. The subsistence harvest of salmon in Cook Inlet, since data has been available, has never exceeded one half of one percent of the total harvest taken by sport and commercial users. As an example, on a four year average annual harvest, including the years 1977 through 1980, of an average annual harvest of 3,807,406 fish by commercial users and 255,884 fish by sports fisherman, the subsistence average has been 7,198 fish. There has never been, nor is there anticipated to be, any jeopardy to the sustained yield of the fish stocks running in and through Cook Inlet. In fact, the 1983 commercial season in Cook Inlet has been one of the largest in recorded history.(Braund Report ,page 15, 'G' File #2, page 13-221, Appendix R and 'M' File #3, exhibit T.)

INTRODUCTION TO ARGUMENT

The Plaintiffs have brought this action to affirm their right to harvest fish by the use of set gill nets on the eastern shore of Cook Inlet. The Plaintiffs, consistent with state and federal subsistence fishing regulations, have for many years fished for Cook Inlet salmon as a means of feeding themselves and their families. The season's weekly fishing periods, gear, bag limits, and permits per person have remained generally the same during that period of time. Changes in 1979 and 1980 moved the seasons to June through August, reduced the actual fishing time within that period to one 12 hour period per week and changed the bag limits. The gear length was also reduced in 1979 and 1980, from an original 35 fathom set net to a 10 fathom net. (Braund Report 'G', Appendix R, supra, page 30). The Plaintiffs have subsistence fished in conjunction with their other subsistence activities.e.g. coal/wood gathering, gardening, berry picking, logging, hunting, etc. Subsistence fishing has provided a good part of their dietary and protein needs and has been an integral part of the natural pattern and rhythm of their lives for a considerable length of time. (Affidavits of Plaintiffs,'G' and 'M' supra)

The Board of Fisheries, in December of 1980, (80-79 FB, 'G', Appendix A-1, supra) and in March and April of 1981, (Amended 80-79 FB; 81-92 FB, 'G' Appendix A and Appendix B, supra) adopted regulations which systematically and immutably

eliminated the Plaintiffs from their customary and traditional manner of obtaining salmon for their family and personal consumption. This action was taken by the Board under their interpretation and implementation of the subsistence bill. AS 16.05.251(b)(1), (2) & (3), AS 16.05.940 (17) & (26).

5 AAC 01.597(b)(c) is the latest regulation incorporating all of the 10 criteria plus the additional community criteria refinements.

The Board interpreted the purposes of the subsistence statutes to be restrictive and exclusive, and developed the 10 criteria as a tool of elimination for all individuals, families, or groups residing on the Eastern shores of Cook Inlet and the Northern shores of Kachemak Bay. When the Board was finished the only individuals qualifying as subsistence users were residents of the villages of English Bay, Port Graham, and through judicial intervention, Tyonek. The action to permit the three named villages was taken reluctantly and only after the Tyonek decision. Statements of the Board indicate that even these three communities were "dangerously on the borderline" of not being considered as subsistence users. ('M' File #2, Volumes 27, 28, page 37).

Plaintiffs' ask judicial assistance to restore what they believe are their rights to participate in a subsistence fishery in the general manner and for the particular purposes they have in the past. The Board's enactment of an exclusive and restrictive policy was an incorrect interpretation of the

intent and purposes of the statutes.

The Board also misintrepretated the subsistence statute as authorizing them to administer their policy and regulations, a power which they are precluded by AS 16.05.241 from doing. Plaintiffs' position is that this court should independently review the regulatory scheme, including the formulated policy for its application. They should substitute their judgement and independently examine the meaning of the statute because the impetus for the Board's action required interpretation of the intent of the subsistence legislation.

Contrarily, even under a more inhibited review of agency actions the regulation is not consistent with, nor reasonably necessary to carry out the purposes of, the statute and is ultimately unreasonable and arbitrary.

Plaintiffs also contend that the matrix for the ten characteristics i.e. the regulation and application thereof, was adopted in violation of an APA regulation requiring public meetings. The Board may have readopted the 10 characteristics in April, 1981, that originated in the December 1980 Board meeting, but they did not recreate or reenact their closed meeting activity that resulted in selecting and developing those criteria.

Plaintiffs also contend that they were denied equal protection of law under the State and Federal Constitution. The Board of Fisheries has created two clasess. One is an idealized model pictured as a 'pure native rural village

community' whose members have particular ethnic and racial characteristics. The members of this class are subsistence users. All other individuals or families not satisfying all of these virtues are excluded.

This scheme does not fairly and substantially further the purposes of providing for, and permitting, the taking of fish for subsistence uses for all Alaskan residence and therefore the class is under-inclusive and does not bear a substantial relationship to the purposes of the legislation.

Plaintiffs also seek recognition of their rights to harvest fish for their personal and family consumption under the due process clauses of the State and Federal Constitution. The actions of the Board in certain individual aspects and cumulatively have violated traditional concepts of fair play and substantial justice in the exclusion of Plaintiffs from parity, much less priority, participation with sports and commercial users of Cook Inlet.

Finally, the case law applicable to this appeal is basically uncontested. The threshold analysis on almost all issues should deal with the application of that law to the vast array and morass of reports, papers, documents and exhibits evidencing the intentions and actions of the Board of Fisheries.

ARGUMENT

I

DID THE BOARD EXCEED ITS LEGISLATIVE AUTHORITY IN ADOPTING AND APPLYING THE 10 CHARACTERISTICS .

A. APPLICABLE LAW

An analysis of the manner and scope of judicial review of administrative actions circles Kelly v Zamarello , 486 Pd2d 906, (Alaska 1971). Kelly involved a complex fact situation and a circuitous path to conclusion. This Court decided that the highest bids for oil leases, which included a cash plus bonus royality in excess of the fixed 12 1/2% could have been superfluous and rejected for being non-responsive to the sale notice. They were in fact rejected because of higher cash only bids and may not have been the high bid. Policy considerations set out in the regulation dictated that the bids should be final and that drilling should proceed. The Court in Kelly deferred to the administrative interpretation since the expertize of the agency would be of "material assistance to the court". The Court went on to state at page 916:

> "the amount of deference varies depending upon the apparent degree of reasonableness of the administrative decision and the degree to which the problem involves knowledge peculiar to an industry, business, etc." Kelly 916 citing Rogers Construction Company v Hill ,384 P2d 219, 222, (Oregon 1963)).

This analysis, in conjunction with AS 44.62.020 which reads:

> "To be effective, each regulation adopted must be within the scope of authority conferred in accordance with standards prescribed by other provisions of law."

and AS 44.62.030:

> "[NO] regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purposes of the statute".

led the Kelly decision to formulate the most oft quoted review standard for administrative actions.

> "First, we will ascertain whether the regulations are consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary." Kelly , at 911

Kelly also set out the second standard for appellate review of administrative regulations. Where there is a question of statutory interpretation or where the agency was not acting within its ambiance of specialized knowledge, the court has applied a much broader standard of review and in these cases has substituted its own judgment for the agency's. Kelly , at 917; also see Hood v State , 574 P2d 811, 813. Thus the second standard for review, generally considered the 'substituted judgment', was formulated although not applied.

The Kelly decision was bedded on policies necessitating predictability in bidding procedures and carefully delineating public competitive bidding standards.(Also see Stevenson v

Burgess , 570 P2d 728, (Alaska 1977), substitution of judgment in interpretation of taxing statute because no special competency was required. Reversed on other grounds); and State of Alaska v Bowers Office Products Inc. , 621 P2d 11, (Alaska 1980).

Therefore, attempting to hone the focus of the applicable standards to the case at hand, the threshold question is whether the subsistence statutes authorized the Board to formulate fundamental policy for subsistence use and users, (as Plaintiffs claim the Board interpreted the statutes to do) or whether the statute is clear on its face and does not authorize the regulatory scheme and its application adopted and administered by the Board. This is the decision which should decide the standard to apply in this case.

Counsel's instincts sense a conclusion oriented test in this area. Even though certain of the factual situations in the cases considered aren't clearly drawn, there are many where the determinatation of which standard applies, results in reversal in 'substituted judgment cases', and affirmation in 'deference cases'. *

*The same conclusion oriented analysis was recognized as a problem in equal protection analysis i.e. strict scrutiny versus the rational basis test. See generally, Gunther G, Harvard Law Review , (November 1972), page 1. This theory was a bit diluted in the case of Castner v City of Homer , 598 P2d 95, (Alaska 1979) where a strict scrutiny of fundamental rights analysis was used and yet the local ordinance was upheld under the compelling interest standard.

Plaintiffs assert that under either standard a rigorous and critical analysis should result in reversal of the Superior Court's affirmation of the Board's actions.

B. ARGUMENT

ADMINISTRATIVE REVIEW

Plaintiffs aver that the regulations promulgated under the ostensible authority of the subsistence statute together with the Board's explicit policy evident in the application and effect of these regulations represents a formulation of fundamental policy in conflict with, and outside the scope of, the regulatory authority set out in the subsistence statutes. In other-words, the Board is interpreting the statutory scheme. Under this analysis the court can subsitute its judgment for that of the Board's. The above analysis depends in part on whether authority exists in the statute for the Board to formulate fundamental policy. Obviously if this court determines that the intent and authority is inherent in the statute then the inquiry moves to the regulations and policy i.e. whether the regulation and policy is reasonable and not arbitrary in light of the purposes and intent.

If there is a question of statutory interpretation, then the courts are uniquely qualified to examine and interpert the statutes independent of the Board.

The regulations under consideration here are #80-79 FB

('G', Appendix A-1 supra) and its ultimate successor, 5 AAC 01.597 (a)(b) and (c).

The significant changes to the 10 criteria since the December 1980 Board meetings are (b) and (c):

> (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 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 are because of common interests.

The legislative source of authority to adopt regulations is in AS 16.05.251(b) and the Legislative Intent preamble:

> LEGISLATIVE INTENT. The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that those resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents . The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated with as much input as possible from the affected users, so that the viability of fish and game recources is not threatened and so that resources are conserved in a manner consistent with the sustained yield principle.(emphasis added).

AS 16.05.251(b):

> REGULATIONS OF THE BOARD OF FISHERIES. (b) The Board

of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of 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. (emphasis added)

The legislature defined subsistence uses in AS 16.05.940.(26):

(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. (emphasis added).

and subsistence fishing is defined in AS 16.05.940 (17):

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

The intention of the Subsistence Bill was to codify the state's 1973 policy statement of the Commissioner and Board of Fish and Game ('G', File #2, Appendix S, page 4, supra) and to overcome the failure of the Board to protect subsistence use in light of competiting uses. The Report of the Special Legislative Committee on Subsistence states:

> "the subsistence law was passed to enable the Board to provide for subsistence use during times of resource shortage and intense competition, and to make certain that the Boards took care of subsistence use prior to allowing other uses of these important economic resources.
>
> "...Be that as it may, what the subsistence law did was to codify this policy (the 1973 Commissioner's Policy) in order that its intent be enforceable rather than subject to the whims of the resource managers." ('G' File #2, pages 13-221, Appendix LL, page 44)

The intent was to be protective of, and provide for subsistence uses, most particularly during times of resource shortage and competition. The pre-1978 statute, AS 16.05.940(17) defined subsistence fishing as:

> "[S]ubsistence fishing" means 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 defined by the Board of Fishery.

The 1978 Amendment substituted "subsistence uses" for "personal uses not for sale or barter."

Relying on the amended definition of subsistence fishing and the added definition of subsistence uses as customary and traditional uses, the Board adopted regulations 80-79 FB and Amended 80-79 FB (supra) and ultimately 5 AAC 01.597.

The Board interpreted the statutes as almost being absolutely exclusive and adopted regulations consistent with

this interpretation.

Plaintiffs and every other person and family in the area of Cook Inlet other than those persons residing in the villages of Port Graham, English Bay, and Tyonek have been segregated from subsistence participation. This interpretation ignores the permissive nature of the statute and elevates 'customary and traditional' to such complexity and mystery that it requires ph.d.'s in metaphyics to unravel the meaning.

The definition of customary and traditional is secondary to the primary purpose of the subsistence bill which is to:

> "clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs, and traditions of Alaskan residents"; and to "permit the taking of fish unless....[it] will jeopardize or interfere with the maintenance of fish stocks on a sustained yield basis,"; AS 16.05.251(b) and Legislative Intent and preamble
>
> and to "set forth a priority of users if restrictions are needed because of unavailability of resources...to insure that those with the most dependence upon the fish and game resources are the last to be restricted." House Journal, May 13, 1978, page 1155, ('G' File #2, pages 13-22, Appendix N)

The Board's interpretation of the legislature's meaning of customary and traditional overlooks the manifest ambition of the legislation to provide for and permit, and to protect, when there is a resource shortage.

Customary and traditional are not words of art or mystery. Representative Gruening, in the House debate on an amendment to eliminate the words customary and traditional states in part:

> "I think that the meaning of customary and traditional applying to use is...not that confusing. After all,

> this bill is to establish a framework in which these can be developed. And I don't think we need a definition of words that have a common dictionary meaning . But just so the members don't confuse, there are two questions here, one is traditional methods of taking and one is traditional and customary uses. And that is what we are talking about. Uses here in this amendment. I oppose it. It don't think it is necessary to take these words out. I think that really gives a better handle for the Board to work for in defining the range of subsistence." (House Debate on House Bill 960, Tenth Legislature, Second Session, March 26, 1978. ('M' file #3, Exhibit U) (emphasis added)

Customary and traditional should be used in the general dictionary sense having a similar context as 'historical' or 'of having some past'. Subsistence uses and users have been defined at least since 1959 by the legislature. One doesn't read the regulations to learn how to fish or what to do with the fish. One obviously learns from neighbors, friends, or family h ow to fish. What one does with the fish other than immediately eat it is also a skill acquired from others and refined by resources available. e.g. electricity for freezing, wood for smoking, salt for salting. etc.

The statutes indicate subsistence fishing has two components. One is a means or method of harvest, the other is the use to which the resource is put. Since 1959, the legislature has defined the means and methods of harvest. In Cook Inlet, those means of taking subsistence fish has been primarily with set gill net. Plaintiffs have been using gill

nets as a means to harvest their subsistence salmon for food for many years.

From 1959 to 1978, the legislature defined subsistence uses as "personal use, not for sale or barter." Personal use as defined and allowed by statute was for the direct personal or family consumpion of fish as food. Plaintiffs have historically consumed their gill net caught salmon on a direct personal and family basis for food.

To adopt a regulatory policy and scheme that excludes the Plaintiff's 1978 personal use of Cook Inlet Salmon as food from inclusion as a subsistence use because it is not a customary and traditional use raises the art of linguistic analysis to a high science. The fact of consistent use prior to 1978 is precisely why the legislature defined it as a customary and traditional use. The use does not require a complexly conceived, idealized, rural, native village as a model community to recognize customary and traditional uses of salmon in Cook Inlet. This is in fact what the Board has done. They have failed to provide any means or method whereby an Alaskan resident or family, or a small group of families can take fish for subsistence uses. The community requirements of the regulatory scheme are absolute prohibitions consistent with the Board's historical attitudes. They have now attributed those attitudes to the legislature.

The transcript of the Knik Board hearing of December 14, 1981, ('M' File #4, pages 70-272, Appendix EE) and the hearings

of March and April 1981 resulting in the adoption of 81-92 FB, ('G' File #2, pages 13-221, appendix B) indicates the Board's policy inherent in the 10 criteria and the interpretation and administration the Board has endowed on the subsistence bill. The Knik discussion neglects referrence to 'permitting subsistence uses' or 'maintainence of fish stock on a sustained yield basis' or 'protection of or continuation of subsistence uses'. These are the impetus for and the stated intent of the legislature in adopting and enacting the subsistence bill. The transcript shows why the Board developed the community criteria as a pre-condition. It was to exclude Knik. Since Knik had already satisfied the 10 criteria, the Board raised the 'community criteria' to an insurmountable prerequisite.

At the Knik hearing, the Board was presented with a subsistence report by James Fall of the South Central Region, Division of Subsistence, essentially establishing that Knik residents were subsistence users ('G' File #2, page 13- 221, Appendix GG). The community criteria became a means of enforcing the Board's exclusionary policy. They interpreted the statutes as authorizing them to not only define community in such a specially and narrow sense but also to administer and apply their regulations and policy.

On page 126 of the Knik proceedings ('M' File #4, Appendix EE):

Szabo (Board chairman):...We decide, is that an actual community or not? And if we do look at it, then we look at little groups like neighborhoods and little

enclaves, we look at individuals and so forth and see if, you know, 70% of the individuals are doing this, two or three of the groups are doing that and so forth and if they exhibit all these qualities then we say, o.k. this community meets the ten criteria. But first you have to have a community there . I think that what we did here, we said, well, obviously this whole area doesn't meet the ten criteria and then we start looking at well, just these two acres that one household was on. And we said, well, maybe those two acres and one household. If you viewed them as a community would meet those ten criteria, we don't think they should be viewed as a community ."

Chris Goll, (Board member), page 126, 127, supra:"Yeah. Just one comment, Mr. Chairman, and that is I think, perhaps, some people are under the false impression that the ten criteria is the only thing , the only latitude that the Board has, and that's not in fact. the case . Not the way that I understand it. It's part, we can go beyond that too, it's only ten points. There are many other things that we may wish to consider also. Am I not correct in that? (emphasis added)

Szabo, page 127: "Well,I think there's other things. But I think that the key to this thing is that before you know you have to determine if something is actually a community before you apply the 10 criteria to it. And I think that was a decision that we made last year, was we were gonna identify communities and then apply the ten criteria. " (emphasis added)

The Board's prepossessed responses to subsistence uses in Cook Inlet jaded their interpretation of the subsistence statutes. Their proclivities for exclusion and elimination of subsistence uses in Cook Inlet as well as their inability to control themselves is well documented. It has kept the

State's attorneys busy representing and trying to civilize the Board. The Tyonek case and the two southern district cases (77-22014, Homer and 3HO-80-92)* occurred prior to the Board's formal consideration of the subsistence statute although after its 1978 enactment.

The Board begrudgingly 'allowed' subsistence uses in Port Graham, English Bay and Tyonek, and only after judicial intervention in Tyonek. The Board doles out, almost as a matter of charity, subsistence use largess, and even this is done reluctantly. In the April 1, 1981 meeting ('G' File #1, volume 27 page 37).

> Beaton, (a Board member): " I've really felt that even Tyonek in my own mind and English Bay and Port Graham are dangerously on the borderline , but I certainly think that Kenaitze---everything I heard up until now led me to believe that just maybe they'd want, you know, into that new world there or whatever they're really overwhelmed by..."(emphasis added)

*3HO-80-92 Civil was filed in the Superior Court and heard without a jury on June 16, 1980 and the Superior Court entered a permanent injunction against the Defendants. In May of 1981, Plaintiffs, under the same case heading and number, filed a Petition for Imposition of Sanctions for Contempt, Request of Preliminary Permanent and Declaratory Relief , which was again ruled on favorably to the Plaintiffs and which is under appeal by the state in Supreme Court No. 7410. Also see Frances et. al. v Alaska Department of Fish and Game, 3KN 80-546.

It is somewhat ironic that of all Cook Inlet subsistence users, the users in the three native villages participated the least in the permitted subsistence fishery while most other Cook Inlet users excluded after 1979 complied with the regulations.

> "In all communities [Cook Inlet] there are families who have participated in the subsistence salmon fishery for a long time (generally without permits) and have received social, economic and nutritional benefits from the harvest of this resource. Although this pattern of use is often most visible in the relatively isolated communities (English Bay , Port Graham , Tyonek , and Seldovia) it is not restricted to these places. Rural food connected communities...and more urban centers...all have residents who have trationally subsistence fished for Cook Inlet Salmon." (Braund Report-next to last page , (unnumbered) ('G' File #2, Appendix R. supra).

Plaintiff's offer that under either administrative review standard, the regulations and policy adopted are inconsistent with and outside the authority of the legislative enactment. The statute is clear in terms of its intent. It is meant to include individuals as Alaskan residents,as families, and as community members. It tells the Board to adopt regulations permitting subsistence uses and that these uses shall be a priority when certain preconditions exist. It also sets out the criteria for imposing restrictions and limitations among subsistence users.

The Board did not have any authority to formulate fundamental policy. For purposes of argument, even if it did, that authorization did not designate the Board to administer

that policy. Under any conditions the regulations and policy adopted and used in this case are not reasonably related to nor consistent with the purposes of the subsistence statutes and are capricious acts beyond the scope and intent of these statutes.

II

DID THE BOARD VIOLATE AS 44.62.310, 312; THE PUBLIC MEETINGS PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT AND WAS JUDGE CARLSON'S RULING THAT THIS ISSUE WAS MOOT IN ERROR

Judge Carlson held that Plaintiff's Count II was moot. Count II alleged violations of the Administrative Procedures Act, particularly the notice and public meetings provisions of Title 44. Plaintiffs, in this brief, will deal with the public meetings provision.

AS 44.62.312 states:

State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) It is the intent of the law that actions of these units be taken openly and that the deliberations be conducted openly;

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

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

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

(b) AS 42.62.310(c)(1) shall be contrued narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

Plaintiffs claim that in December, 1980, the Board held closed meetings in violation of Alaska Statute 44.62.310 and 312. During these closed meetings it appears that the Board discussed, analyzed, and developed strategic findings which affected the public and its use of Cook Inlet salmon resources. These meetings designedly formulated and led to the adoption of the 10 criteria which are the nucleus for all subsistence action taken by the Board since that meeting. As a result of those secret meetings, the Board adopted 80-79 FB ('G', Appendix A-1, supra) (See Affidavit of Larry Smith , "G" file #2, page 13-221, Appendix L., paragraphs 4, 5, 7, 8, 9; also Affidavit of Arthur S. Robinson , 'G' file #2, page 13-221, Appendix MM, paragraphs 3, 4, 5, 6, & 8; and transcript of Board meetings December 15, 1980. 'G' file #1, volume 3, pages 122, 124, 126 and volumne 8, pages 101, 115, 117).

When the subsistence bill was enacted, the legislature independently emphasized the importance of public meetings on all actions affecting subsistence issues.

> "...it is the intent of this committee that the decisions and determinations of the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act. May 12, House Journal, page 1155, Session 697, ('G' Appendix N, supra). (emphasis added)

Defendants have acknowledged that during the 1980 Board meetings they violated AS 44.66.310 and 312. On June 22, 1982, Defendants stipulated to Entry of Judgment against them on Count II of Plaintiffs' complaint in Gjosund et al v Alaska Department of Fish and Game et al , 3HO 80-92 Civil and 77-11014, Homer. Count II in Gjosund is identical to Count II in Madison. It alleges that the Board violated AS 44.66.310. The parties stipulated that:

> "It is the agreement and the stipulation of the parties to this action that, the defendants having examined the evidence available to them in light of the public meetings law, entry of judgment can be had against the defendants on the second part of plaintiffs count two alleging violations of the public meeting provisions of AS 44.62.310, and 312 and therefore judgment can be entered against the defendant on all parts of count two of plaintiffs complaint."

Stipulation Relating To Counts Two, Three and Five of Plaintiffs' Complaint was filed and the Order signed November 12, 1982, by Judge Paul Jones (also see Findings of Fact and Conclusions of Law in Support of Declaratory Judgment and Permanent Injunctive Relief dated November 12, 1982, signed by Judge Paul Jones in Gjosund . Findings of Fact #23 'G' file #2 at 254 et seq) and the Order of Judge Jones of Declaratory Judgment and Permanent Injunctive Relief , Order #3, signed November 12, 1982, Judge Paul Jones.

Judge Carlson ruled that Plaintiffs' count II was moot, however, he apparently only considered AS 44.62.180-290 which deals principally with the procedural aspects of the Administrative Procedures Act. Although Judge Carlson's ruling

claims to decide all the issues raised in Count II, i.e. public notice and public meetings, and moots Count II on this ground, neither the record nor his Findings and Conclusions support his Judgment of January 26, 1983. (See Findings of Fact and Conclusion of Law on Counts II and III , Judge Victor Carlson, January 26, 1983.

Plaintiffs' position is that the closed meeting issue has been incorrectly resolved and is not moot. All of the subsistence use criteria were apparently discussed, analyzed, compromised and effectively agreed to in the closed meetings of December 1980 in violation of the public meeting provisions of the Administrative Procedures Act. Immediately after the closed meetings, the Board adopted regulation #80-79 FB.

AS 44.62.310 and 312 combined with the legislature's particular proscription against anything less than 'complete public scrutiny' compels a substantive right to public meetings. Therefore since the ten criteria creation process took place in violation of the Plaintiffs' right to observe and be informed of the conduct of business relating to them; and since the subsequent public notices and hearings only attempted to correct what had previously been done in public without proper notice; then the ten criteria and all subsequent regulations and measures incorporating those criteria are void.

The open meeting and public scrutiny policy statement of AS 44.62.312 are so forceful that even a questionable deviation must nullify the resultant actions. In this case the

violations are considerably deviant.

III

DID THE SUPERIOR COURT ERR IN FAILING TO FIND THAT THE ACTIONS OF THE BOARD OF FISHERIES VIOLATED THE PLAINTIFFS RIGHTS TO EQUAL PROTECTION OF LAW UNDER THE FEDERAL AND STATE CONSTITUTION

Equal protection rights are set out in the U. S. Constitution, Amendment 14, Section 1 and in the Alaska Consitution at Article 1, Section 1.

Article 8 Section 17 of the Alaska Constitution states:

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

No cases have really distinguished the natural resources constitutional equal protection provision from Article 1, Section 1. Plaintiffs offer that the equal protection restatment for natural resources requires an even more diligent and sensitive approach to equal protection analysis than areas not doubly protected.

The standards to be applied in equal protection challenges under the Alaska constitution have been developed and enunciated in Isakson v Rickey ., 550 P2d 359 (Alaska 1976); State v Erickson , 574 P2d 1, (Alaska 1978) and Commercial Fisheries Entry Commission v Apokedak , 606 P2d 1255, (Alaska 1980). The test to be applied can be stated as follows:

Initially, we must look to the purpose of the statute,

> viewing the legislation as a whole on the circumstances surrounding it. It must be determined that its purposes are legitimate, that it falls under the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced, therefore, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved." Erickson , supra, page 12

The equal protection test has also been stated in Isakson , supra, at 362,

> "In order for a classification to survive judicial scrutiny, the classification must be reasonable, not arbitrary and must rest on some grounded difference having a substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Plaintiffs allege that the Board of Fisheries through regulation, policy and application established a screening model for subsistence use inclusion which is unrelated to the intent of AS 16.05.251(b) and which discriminates against and amongst subsistence users unreasonably.

As a preamble to the equal protection analysis, we offer that the Board has done two things. Firstly, they have created a set of 10 criteria using as a paradigm an ethnically pure rural native village community to screen all applications for subsistence users. In conjunction with this they have adopted a policy and precedent requiring conformance to this model prior to evaluating whether or not an applicant satisfies all of the 10 criteria.

The Board has then gone one step further, apparently assuming that 16.05.251(b), granted them administrative powers enabling the Board to apply the regulations they enacted.

What has in effect occurred is that the Board has interpreted the legislation, enacted regulations, and then applied those regulations to restrict the taking of fish for subsistence uses from all Alaskan residents unless they reside in an established geographic community precisely mirroring an idealized rural native village community. This is not a legitimate purpose of the statute.(*)

It also unfairly discriminates against all excluded Alaskan residents who are and have been subsistence users without any rational connection to the statute's legitimate purposes.

Examples describing how the Board deliberates, decides, creates, and applies their regulations is critical to understanding Plaintiffs' arguments in this brief. Since 1977, the Board has actively attempted, due to their personal philosophies and bias, to exclude all subsistence uses in Cook Inlet.

At the December, 1976 meetings, the Board eliminated subsistence fishing in the Southern District of Cook Inlet. The record of proceedings illustrated that there were no legitimate or supportable biological concerns. It was a 'shoot from the lip' decision that subsistence use no longer existed in the Southern

*To avoid repetition, Plaintiffs incorporate in this equal protection argument their analysis of legislative intent from Argument I, A & B Administrative Review.

District of Cook Inlet. Judge Lewis in June of 1977, entered a preliminary injunction reinstating the regulations that had existed prior to 1977. (See 'G' File #2, Appendices Q, M, supra).

Over the next three years the Board reduced the area, catch per permit, and size of gear for subsistence fishing to where the fishery was effectively eliminated. On June 16, 1980, the Superior Court was called upon again, and entered a permanent injunction reinstating the subsistence fishery as it had been in effect prior to 1978. ('G', file #2, Appendix O, supra).

Part of the record in Gjosund upon which Judge Jones made his decision was the Board's discussion of gear length reduction for subsistence fishing from 35 to 20 fathoms.

> Beaton, (Board member): Mr. Chairman, I'd like to amend it to read "Southern District set gill Nets 20 fathoms". I don't see any reason they need 35... I think 20 would be plenty. I think there is a problem of wastage.* Got to be something reasonable. I'd like to get down to 5 to 10 but I know you couldn't catch anything then . (Big laugh)...
>
> Szabo: Is there a second to that motion,...(Motion and Amendment seconded and passed)
>
> Beaton : They might have beat us but we got our little licks at them ...(laugh) (emphasis added)

The Board has now discovered that the subsistence bill provides them with a more sophisticated tool to fulfil their purposes. Neither the body of the subsistence legislation nor the statments of intent offer indications, implications, or

*No evidence was ever presented to the Board showing that wastage existed or was a noteable problem.

hints of racial or ethnic considerations. However, the Board has consistently referred to race and ethnicity in their discussions and have fashioned a community prerequisite to subsistence inclusion based upon an ethnically pure rural native village community.

The effect of this has been two fold. It has made it impossible for any individual, family or small community Native or non-Native, to be considered a Cook Inlet subsistence user and has also excluded all Natives living on Cook Inlet (except those in Port Graham, English Bay, and Tyonek) due to their lact of 'ethnic purity'.

Following are excepts from the Board's hearings of April 1, 1981, discussing the qualities and characteristics of subsistence in Cook Inlet in regard to the Kenaitze Indians. ('G' file #1, volume 27, 28).

Beaton, (Board member):---that the Kenaitzes fall somewhere in between, <u>obviously the blood/cultural thing is there,</u> but it is not there to the degree that it was in the three villages. (line 23, page 19, 20) (<u>emphasis added</u>)

Beaton: Well what I'm saying there, I guess, essentially is that the three villages, ---- there have been some inroads made by some outsiders, you know, intermarriage, a few school teachers, things in that nature, but small--- in comparison to the over-all population is. But in the Kenaitze, it really gets down to where it is really a lot harder to identify them as an entity, and that is probably the best proof it that is in these land claims and I think that under ---- these land claims <u>they couldn't clearly identify them as a village</u> ; (line 15, page 21, 22) (<u>emphasis added</u>)

Beaton: ...But, in other places,---alluding to there such as Anchorage and everything, it literally over whelmed that culture. I mean, you know, for whatever reason, either they didn't have enough (indiscernible) of the culture, and you know, the people weren't purist enough , or whatever, but they really just kind of got steamrolled over that their culture really did change.(line 16, page 36) (emphasis added)

...And that gets dangerously close to that if not that in the case of the Kenaitze. You know, that's what I'm concerned about. It may not be the case, but it certainly is on that really borderline area there. I really felt that even Tyonek in my own mind, English Bay and Port Graham are dangerouly on the borderline, but I certainly think that the Kenaitze...everything I've heard until now led me to believe that just maybe they'd want, you know, into that new world there whatever they are really overwhelmed by... (line 6, page 37) (emphasis added)

Beaton: But, nevertheless I can see why they did check out the Kenaitze because that is where all the pressure is coming from. They claim they are a native village , they claim all of these things.(line 6, page 43) (emphasis added)

But at best they are not meeting all of the same criteria such I think it is to the discretion of the Board whether the Kenaitze have been maybe classified as a village or, you know, as one that was subsistence type rights and...of the three. (line 22, page 43, 44) (emphasis added)

Quintin: Mr. Chairman, I'll just get back to the same subsistence thing here again that without a real definite interpretation of subsistence I would submit that 99 percent of the people are not subsistence users. Now, the reason that I say that is simply the fact that a 100 years ago now, the ethnic people --- the native people or whoever lived here were truely subsistence users. (line 13, page 50) (emphasis added)

Beaton: ... why the Kenaitzes seem to be almost singled out is, I guess that they made a real allegation that they are one in the same as those three villages, and I

don't think anyone else on that list, or anybody else, has really come forward with positions papers and the rest of it that they are asserting that they are one and the same as those three villages. (line 15, page 42) (emphasis added)

The following excerpts are from the Board's consideration of the Homer area for subsistence use. ('G' file #2, April 1, 1981, volume 28)

Huntington: Homer is a fishing community.

Szabo: Well, yeah but... I don't even think it has its roots as far as being a native village or anything. I mean...I don't even know what the history of Homer was. Maybe...maybe Grif knows better what existed in Homer back 70 years ago when you...(line 20, page 10)

Quinton: It was never a native community. Never was. (line 10, page 10)

Beaton: Seldovia was at one time a native village .....Then later became a logging area which it is now. Logging and fishing area. But it was originally a native village. However, there are an awful lot of people in Seldovia today...I've lived there three years myself, Johnnie---- and there are of mixed blood there ... and particularlly all of the natives that were, you know, ---really oriented to the native lifestyle pretty well moved back into Port Graham and English Bay. T ones that essentially don't like all of this change, so to speak. And, now you have a lot of progressive Natives like Pete Alsaut (Ph) is part native ---and, you know, he is a real time - big time, big crabber, big fisherman, and the rest of it....But they, the rest of them kind of moved back over into the Port Graham and English Bay part ....part of the native community. (line 25, page 11, 12)

Beaton: ...for a lack of a better term, (the term used was 'pseudo subsistence users') I mean in otherwords,...you know they really did just run in there and kind of (indiscernible) it up in anyway. They decided that they are going to emmulate the three villages but they are really not true subsistence users. (line 16, page 18)

Szabo: I think if they had come here, you---say, several hundred years ago and started this same thing that he is doing now...you could certainly make the same case for them as you are making for these other villages. But, the fact that this group, you know, arrives new on the scene with no---you know cultural ties, no family ties or anything else. And that they all just appear and then they set up, you know, something that mimics what subsistence means then...

Beaton: It's almost like (indiscernible) blue blood, (ph) or something. I mean you just...just money alone doesn't really get you into this thing anyway. (line 7, page 19)

Szabo: But, you know, as far as any---they still don't have---all of them aren't fourth --- fourth generation people, you know. whereas like Tyonek you can trace their existence back for many generations, the same with English Bay and Port Graham. (line 22, page 20) (emphasis added)

An example of the Board discussing Ninilchik:

Beaton: I think the key component...you would have a hard time dealing with Ninilchik---like you said Mr. Glosslein, (ph) who was causing the problem and super siener there, Jerry (indiscernible) in Ninilchik. I mean, it is just a tremendous variation of guys from Ninilchik that are up on there. ---you know--- and there's some Native involvment there, and there is all these others. And certainly Gloslein is about as different from a Native as anybody (indiscernible voice drops)--- you know, I mean as far as his background and stuff. (line 12, page 22) (emphasis added)

The Board also shows particular prejudice and cynicism towards subsistence reports which contradict their desires and beliefs. At the March 20, 1981, hearings ('G' file #1 volumes 19-22) the chairman of the Board inquires about a subsistence report from the Subsistence Division and continually infers,

without any substantiation, that the people who filled out the questionaire were liars. On page 88 Mr. Szabo says in response to certain charts presented to him.

Szabo: ...or else, how many liars you had...

Szabo: Yeah, but that's assuming that the people didn't lie about their family size...also didn't lie about anything else. (page 92)

Mr. Szabo's cynicism towards the information provided by the subsistence section comesout again when he questions their information:

Szabo: The information coming out is only as good as the information going in." (page 93)

Szabo: I mean we found two hundred and thirty liars yesterday...now we don't know how many other liars we have... (page 270)

At the March 23, 1981, meetings Mr. Kelso of the Subsistence Section and Mr. Szabo have a dialogue. Mr. Szabo attempts to pressure Mr. Kelso to write supportive findings for the Board's conclusions when the Subsistence Section's data regarding subsistence users leads to a contrary conclusion. Mr. Kelso advises Mr. Szabo of this information and advises him that the Subsistence Section is not in the business of "creative writing" ('G' File #1, volumes 24, 24, 26, pages 58-68, see page 63)

In the December, 1981 proceedings the Board first receives a report from James Fall of the Subsistence Division. ('G' File #2, Appendix GG, Traditional Resource Uses in the Knik

Arm Area by James Fall, December 1981). The report and testimony establish that Knik satisfies the 10 criteria. As the Board realizes this they adjourn and upon returning they developed the new idealized community definition which must be satisfied before the Board will apply the 10 criteria. They then also formulate the policy requiring conformity with all 10 criteria after satisfying the community requirement.

The Board then reevaluates Knik with the community definition and finds that Knik is not a community and therefore the 10 criteria are now inapplicable. Conclusion: No one in Knik is a subsistence user.

Referring to Knik: ('M' File #4, Exhibit EE supra)

Szabo: ...And we said well, maybe that two acres and that one household. If you viewed them as a community would meet those ten criteria, but we don't think they could be viewed as a community. (page 126)

Goll: Yeah. Just one comment, Mr. Chairman...some people are under the false impression that the ten criteria is the only think, the only latitude the Board has, and that's not, in fact, the case...It's part of it, but we can go beyond that too...Am I correct in that?

Szabo: Well, I think there's other things... (page 126, 127)

The Board also shows a patronizing and often cynical view of Native activities. For example see pages 5, 6, 12, and 13.

To clarify Plaintiffs' position in light of the above referred to record with one final example: The Board

effectively set up two classes. One results from 5 AAC 01.597(b and (c) requiring that one belong to "the community" (See proceedings, Knik, 'M' , Appendix EE, supra) before requiring satisfaction of all ten criteria. The community includes the class that lives in an established geographic community, which may be participating in a subsistence system, with at least several households of full time residents who reside in a specific geographical area because of common interests and who look like a pure native village and then satisfy all ten of the criteria.(5 AAC 01.597(b)(c). The excluded class is made up of all other Alaskan residents either as individuals, families, groups or communties who have a history of use of set gill nets and use of salmon for their family and personal consumption consistent with all subsistence regulations in effect prior to 1979 and who otherwise may satify some or all of the ten criteria but are not considered subsistence users because they are not members of the idealized community.

Although the class descriptions are a bit wordy they do describe what the Board has done. It is incredible that this scheme and all of the hearings and litigation spring from the Board's belief that the legislature in 16.05.940(26) intended the term customary and traditional to proscribe all Alaskans but those in the 'perfect idealized native community' category. Plaintiffs submit that this scheme does not further the purposes of "permitting the taking of fish for subsistence uses", "of recognizing the needs, customs and traditions of

all Alaskans" and of maintaining fish stock on a sustained yield basis." Further that the class system set up discriminates against Plaintiffs and persons similarly situated without any rational basis.

IV

HAS THE BOARD OF FISHERIES VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS OF LAW?

Plaintiffs claim that they have a right to fish, minimally, on a parity basis with all other user groups. This claim is based upon their prior continued and long term use of the salmon moving through Cook Inlet. The method used has primarily been with set gill nets in particular areas on the east shores of Cook Inlet. The salmon have been used for their personal and family consumption. The Fourteenth Amendment to the U.S. Constitution, Section 1, provides as follows:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law..."

The Consitution of the State of Alaska, Article 1, Section 7, provides:

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

The allegations in this section include cummulative violations, some of which alone are sufficient to support due process violation.

(A) Due process - Arbitrary Exclusion/Biased Hearing