

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672  
4222.10 SRES CORRESPONDENCE (file 1) 191



# KENAI RIVER SPORTFISHING ASSOCIATION

2819 Dawson  
Anchorage, Alaska 99503  
907-276-2222



October 31, 1985

Senator Mitch Abood  
1024 West 6th Avenue  
Anchorage, Alaska 99501

Dear Senator Abood:

The Kenai River Sportfishing Association wishes to go on record as being in support of the position put forth by the Alaska Sportfishing Association advocating six specific revisions to the subsistence statute. (see attached)

We feel these revisions are entirely reasonable and can be implemented in this legislature, if necessary. In most cases these suggested amendments are things the Board of Fisheries has attempted to implement during past regulatory meetings.

If we are to realistically manage and allocate our resources fairly among all Alaskans, the Boards of Fish & Game must have the power and flexibility to make realistic allocation decisions based on biological concerns.

Sincerely,

Robert C. Penney, Chairman  
Kenai River Sportfishing Association

cc: Alaska Sportfishing Association

November 5, 1985

Alaska Sportfishing Association  
Anchorage, Alaska

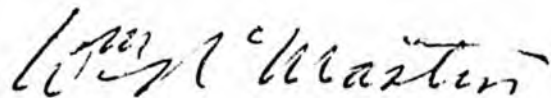
Att: Russ Redick

Dear Russ,

Thank you for attending the October 1985 meeting of Alaska Professional Sportfishing Association and explaining your organizations position on SUBSISTANCE USE in Alaska.

A.P.S.A. is in agreement with the six points of SUBSISTANCE USE pointed out in your position paper and give you our unanimous support in following this effort to resolve subsistence use in the State.

Sincerely,

A handwritten signature in cursive script that reads "William R. Martin".

William R. Martin, President  
Alaska Professional Sportfishing Association

(1) POSITION STATEMENT

Subsistence harvests should be based on meeting the protein needs and, in some cases, significant cultural needs of the harvesters. One species should be substitutable for another comparable species, and harvest should occur on those species that are most abundant and best able to withstand the harvest.

BACKGROUND

The need for the Board of Fisheries to be able to shift subsistence harvests to the most abundant species is statewide in application. However, it is most clearly demonstrated by the existing Cook Inlet situation. Current law stipulates that subsistence harvests are based on "customary and traditional" harvest patterns. The courts, as in the Tyonek case in Cook Inlet, ruled that harvests originally were a spring fishery on King Salmon, and thus the Board of Fisheries could not shift to a more abundant species of salmon for the Tyonek fishery.

The history of modern subsistence in Cook Inlet is that it was chiefly conducted by commercial fishermen who already owned gill nets. These people fished for subsistence early in the season until sufficient salmon were available to harvest commercially. They then fished commercially until the late fall, when they again subsistence fished for their winter food supply. In recent years the Board of Fisheries allocated early and late runs to sport fishermen and the large mid-season runs to commercial interests. The result, at least in Cook Inlet, was that subsistence fisheries are directed upon the small runs given to sport fishermen rather than the huge mid-season runs which have a commercial priority.

A classic example is the fall Kenai Silver run, which has a long-term average harvest of 13,200 fish. Currently, the subsistence allocation from this run is 13,000 Silvers...essentially the entire run.

(2) POSITION STATEMENT

Certain areas exist where the fishery resources are so sensitive that the efficient harvest methods associated with subsistence fishing (gill nets?) would destroy those resources. The Board of Fisheries must continue to have the authority, upon a formal finding of fact, to close such areas to subsistence fishing while still allowing less efficient methods, such as pole and line.

BACKGROUND

An example of this problem is the trophy Rainbow trout streams of the Illiamna Lake Drainage. Trout in these streams grow very slowly with some

large trout being over 10 years of age. These trout also occur in limited numbers. Counts by Alaska Department of Fish and Game personnel have, during some years and in some streams, found less than 1,000 adult trout. About 1975 one gill net, set illegally during one night, caught nearly ten percent of the adult Rainbow trout in Lower Talaric Creek. The Board of Fisheries has recognized the fragile state of the Rainbow trout resource in that area, and current regulations allow only one Rainbow trout to be taken per day; no bait or treble hooks are allowed to reduce incidental hooking mortality. Gill nets have been banned in and near these streams for approximately 10 years. However, since subsistence fisheries were allowed in these areas at one time, the Madison decision appears to grant priority to the use of subsistence gill nets over pole and line angling.

### (3) POSITION STATEMENT

That the definition of subsistence gear in AS 16.05.940(22) is proper and should not be amended. That definition does not normally allow pole and line to be used as subsistence gear.

### BACKGROUND

We strongly believe that pole and line should not be included for subsistence use for several reasons:

- (1) The present problem with subsistence is principally that one Alaskan has been given priority over another Alaskan based solely on where he lives. We disagree with that concept. Including pole and line users in subsistence would simply increase the problem by giving more people a priority. We call for a major reduction in the number of people having a priority or preference. We have, since 1978, disagreed with the concept of giving priority to one person over another. Adding pole and line would be nothing more than giving sport fishermen a priority over commercial users. We reject that premise.
- (2) Pole and line subsistence users would create an enforcement nightmare. How would we distinguish between subsistence harvesters and sport (non-resident?) fishermen?

### (4) POSITION STATEMENT

That a set of personal-use fishing regulations is needed to allow the harvest of fish, when they occur in numbers excess to escapement and commercial/consumptive needs.

### BACKGROUND

In many areas of the state, large numbers of fish (commonly salmon) occur which are excess to spawning needs and are not harvested by commercial, subsistence, or sport fishermen. Personal-use regulations may be an ideal tool for the Board of Fisheries to allow the harvest of the fish on an equal

priority basis with other user groups. Personal-use regulations were created by the Board of Fisheries for exactly this purpose. However, the Madison decision vastly expanded subsistence qualifications, and personal-use harvesters have now been included in subsistence with a priority over other users. The legislature should enact personal-use regulations, by statute, to permit harvest of fisheries resources on an equal priority basis.

#### (5) POSITION STATEMENT

Rainbow/Steelhead trout shall not be subject a subsistence priority. The Board of Fisheries shall continue to have the authority to allocate the harvest of this species to any user group without priority on a case by case basis.

#### BACKGROUND

Despite Alaska reputation as having some of the world's best Rainbow fishing, Rainbow trout in this state are limited both in number and location. Only in Bristol Bay and Cook Inlet do major numbers of Rainbow trout occur. For 1983, the latest year for which complete catch data exist, the entire statewide Rainbow harvest was less than 175,000 fish. Approximately 125,000 of these fish were from Cook Inlet waters, and over half of the statewide total were small stocked trout from lakes adjacent to urban centers.

Rainbow trout in Alaska are not only limited in number, they are slow-growing, and stocks are very easily damaged. In recognition of these facts, the Board of Fisheries regulates wild Rainbow stocks with very stringent bag limits, in many cases allowing only one trout per day.

#### (6) POSITION STATEMENT

Subsistence fishing in Cook Inlet waters should be limited to the areas adjacent to English Bay, Port Graham, and Tyonek, as previously designated by the Board of Fisheries. All other non-commercial net fishing in Cook Inlet should be conducted under personal-use regulations.

#### BACKGROUND

This is the only recommendation of the Alaska Sportfishing Association relating to a specific area of the state. We must face the fact that Cook Inlet is unique. Over half the state's population resides in this drainage. Most of these people have access only to Cook Inlet fishery stocks. According to Fish and Game data, approximately 140,000 sport fishermen and several thousand commercial fishermen utilize Cook Inlet fisheries, in addition to persons wishing subsistence fishing privileges.

Regulations promulgated by the Board of Fisheries, after passage of the 1978 subsistence law, restricted gill net subsistence fishing to remote villages of Cook Inlet. These regulations successfully avoided the intense conflict which resulted when priority mandated subsistence gill netting was opened in high-use waters accessible to the Cook Inlet highway systems.

We have no objection to continued subsistence harvests by any Alaskan in the three communities noted above. However, in basic fairness to all Alaskans living in Cook Inlet and to avoid the inevitable future chaotic controversy associated with priority mandated gill net fisheries, in the remainder of Cook Inlet subsistence fisheries should not be permitted. We wish to make clear that we believe that gill net, or dip net fisheries, may be desirable in certain times and for sites in Cook Inlet waters. However, it is critical that these fisheries be permitted on a non-priority basis by the Board of Fisheries under personal-use regulations.

# Alaska State Legislature



SENATOR  
**ARLISS STURGULEWSKI**

Chairman, Senate Resources Committee  
Vice Chairman, Senate Health, Education and Social Services Committee  
Member, Senate Community and Regional Affairs Committee

2957 SHELDON JACKSON STREET  
ANCHORAGE, ALASKA 99508

While in Juneau  
POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-3818

## Senate

The Editor  
The Anchorage Times  
Box 40  
Anchorage, Alaska 99510

May 2, 1986

Dear Sir:

One of the main reasons we fought to become a state was to control our own resources. We are now on the brink of giving that control away. If the Senate fails to pass a subsistence bill that complies with federal law by June 1, we will lose management of our own fish and game on public land.

Despite this, some legislators are determined to block passage of a subsistence bill or pass one that does not comply with federal law. They believe that out of the resulting political chaos a strong movement would develop to change federal law. Such an approach is playing Russian roulette with our resources.

Nothing in the passage of a bill precludes court challenges or legislative attempts to change federal law. These things, however, take long periods of time with doubtful results. It is not necessary to put our resources at risk to make a symbolic point.

The Senate Resources Committee Substitute for HB 288 is a good bill. It has widespread public acceptance, complies with federal law, and is a fair and workable solution for the subsistence issue. It is vital that this bill pass.

Sincerely yours,

Senator Arliss Sturgulewski  
Senate District F



DEPARTMENT OF THE ARMY  
HEADQUARTERS, 6th INFANTRY DIVISION (LIGHT)  
FORT RICHARDSON, ALASKA 99505-5000

April 15, 1986

REPLY TO  
ATTENTION OF:

Office of the Staff Judge Advocate

Mr. McKie Campbell, Senior Advisor  
Alaska State Legislature  
Senate Resources Committee  
Pouch V  
Juneau, Alaska 99811

Dear McKie:

I have finished my review of HB 288 and the Sectional as we discussed. As I told you, I am disappointed that the bill does not address military lands as a separate Federal issue as 10 USC 2671 dealing with military lands, predated ANILCA and as ANILCA by its terms, does not change existing Federal law on subsistence hunting issues. It is perhaps even more unfortunate that the Sectional refers throughout to "Federal law" (meaning ANILCA) and occasionally makes a statement which directly contradicts 10 USC 2671. You tell me that you don't see that as much of a problem, but I have spent a lot of time during the last year discussing this problem with State officials and their attorneys, and there is a tremendous amount of confusion in this area already. You tell me that HB 288 will return us to the pre-1985 status quo and since we had few problems then with our military hunts, we should have few in the future. The pre-1985 status quo is not a solution since it also provided for Tier I and Tier II subsistence hunts.

I am enclosing a copy of the letter from Mr. Johnson, Deputy Assistant Secretary of the Army, to Senator Stevens in the hope you can include it in the record with the documents accompanying HB 288. I also want to accept your offer to add some clarifying language to the record to indicate that the references to "Federal law" in the Sectional is a reference solely to ANILCA.

Thank you for your efforts to ameliorate some of the confusion in this area.

Sincerely,

Enclosure

C. W. Basham  
Lieutenant Colonel, Judge Advocate  
General's Corps  
Staff Judge Advocate

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DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
WASHINGTON, DC 20310-0103

13 MAR 1986

Honorable Ted Stevens  
United States Senate  
Washington, D. C. 20510

Dear Senator Stevens:

Reference is made to your request regarding Department of the Army hunting policy on military lands, specifically as it pertains to compliance with state fish and game laws.

The basic federal law regulating hunting on military reservations is 10 USC 2671. This is implemented by Army Regulation 420-74, Natural Resources Land, Forest and Wildlife Management. The policy as stated in Army Regulation 420-74 is that all hunting, fishing or trapping on a military installation or facility under the control of the Department of the Army will be in accordance with federal laws and the fish and game laws of the state in which it is located. Any individual who desires to hunt on a military reservation must obtain a license from the state in which the installation is located except when state laws do not recognize residency status of military personnel permanently assigned as specified in 10 USC 2671. The installation commander may then issue a permit to military personnel to hunt on the installation without securing an appropriate state license. This is the situation in Alaska since the state does not grant residency privileges to military personnel until they have resided within the state for twelve months. All other state game laws (e.g. bag limits, seasons, etc.) are still applicable.

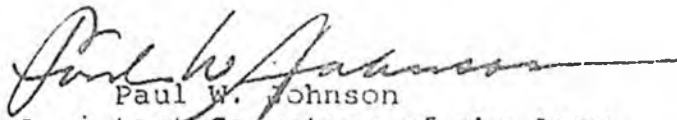
10 USC - Nat'l

-2-

It is the Army's policy to permit maximum public use of installations for hunting in keeping with safety, security and other management constraints and after the needs of the military are met. It is the installation commander's responsibility to determine the degree of public use which can be accommodated.

As you know, the Commanding General, 172nd Infantry Brigade (Alaska), chose to postpone scheduled subsistence hunts on military land until an agreement is reached ensuring that military personnel will not be subject to discrimination based on non-residency status. I have been advised that the Alaska Department of Fish and Game did not object to this decision and supports legislation to correct inconsistencies between the state and federal laws. We will advise the appropriate Army activities to work toward an early resolution of this matter so that subsistence hunting can be assured this next season. In the interim, our legal counsel will be asked to review the issue and advise, before the next hunting season, on how the legal inconsistencies can be corrected. Be assured our concerns are both for the people of Alaska and our military personnel. Your support is appreciated.

Sincerely,



Paul W. Johnson  
Deputy Assistant Secretary of the Army  
(Installations and Housing)  
OASA(I&L)

Hein ✓  
3/4/86  
            
          

Original sponsor: Rules/Governor

1 IN THE HOUSE BY THE RESOURCES COMMITTEE  
 2 SENATE CS FOR CS FOR HOUSE BILL NO. 288 (Resources)  
 3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
 4 FOURTEENTH LEGISLATURE - SECOND SESSION  
 5 A BILL

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

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

10 \* Section 1. AS 16.05.251(a)(6) is amended to read:

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

14 \* Sec. 2. AS 16.05.251(a) is amended by adding a new paragraph to read:

15 (12) regulating commercial, sport, subsistence, and personal  
 16 use fishing as needed for the conservation, development, and utiliza-  
 17 tion of fisheries.

18 \* Sec. 3. AS 16.05.255(a) is amended by adding a new paragraph to read:

19 (10) regulating sport hunting and subsistence hunting as  
 20 needed for the conservation, development, and utilization of game.

21 \* Sec. 4. AS 16.05 is amended by adding new sections to read:

22 Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME.

23 (a) The Board of Fisheries and the Board of Game shall identify the  
 24 fish stocks and game populations, or portions of stocks and popu-  
 25 lations, that are customarily and traditionally used for subsistence  
 26 in each rural area identified by the boards.

27 (b) The boards shall determine

28 (1) what portion, if any, of the stocks and populations  
 29 identified under (a) of this section can be harvested consistent with

1 sustained yield; and

2 (2) how much of the harvestable portion is needed to pro-  
3 vide a reasonable opportunity to satisfy the subsistence uses of those  
4 stocks and populations.

5 (c) The boards shall adopt subsistence fishing and subsistence  
6 hunting regulations for each stock and population for which a harvest-  
7 able portion is determined to exist under (b)(1) of this section. If  
8 the harvestable portion is not sufficient to accommodate all consump-  
9 tive uses of the stock or population, but is sufficient to accommodate  
10 subsistence uses of the stock or population, then nonwasteful subsis-  
11 tence uses shall be accorded a preference over other consumptive uses,  
12 and the regulations shall provide a reasonable opportunity to satisfy  
13 the subsistence uses. If the harvestable portion is sufficient to  
14 accommodate the subsistence uses of the stock or population, then the  
15 boards may provide for other consumptive uses of the remainder of the  
16 harvestable portion. If it is necessary to restrict subsistence  
17 fishing or subsistence hunting in order to assure sustained yield or  
18 continue subsistence uses, then the preference shall be limited, and  
19 the boards shall distinguish among subsistence users, by applying the  
20 following criteria:

21 (1) customary and direct dependence on the fish stock or  
22 game population as the mainstay of livelihood;

23 (2) local residency; and

24 (3) availability of alternative resources.

25 (d) The boards may adopt regulations consistent with this sec-  
26 tion that authorize taking for nonsubsistence uses a stock or popula-  
27 tion identified under (a) of this section.

28 (e) Fish stocks and game populations, or portions of fish  
29 stocks and game populations, not identified under (a) of this section

1 may be taken only under nonsubsistence regulations.

2 (f) Takings authorized under this section are subject to reason-  
3 able regulation of seasons, catch or bag limits, and methods and  
4 means. Takings and uses of resources authorized under this section  
5 are subject to AS 16.05.831 and AS 16.30.

6 Sec. 16.05.259. ADMINISTRATIVE APPEALS. The Board of Fisheries  
7 and the Board of Game, acting jointly, may establish by regulation an  
8 appeal procedure for persons aggrieved by the adoption or repeal of a  
9 regulation.

10 \* Sec. 5. AS 16.05 is amended by adding a new section to read:

11 Sec. 16.05.261. NO SUBSISTENCE DEFENSE. In a prosecution for  
12 the taking of fish or game in violation of a statute or regulation, it  
13 is not a defense that the taking was done for subsistence uses.

14 \* Sec. 6. AS 16.05.330 is amended by adding a new subsection to read:

15 (c) The Board of Fisheries and the Board of Game may adopt  
16 regulations providing for the issuance and expiration of subsistence  
17 permits for areas, villages, communities, groups, or individuals as  
18 needed for authorizing, regulating and monitoring the subsistence  
19 harvest of fish and game. The boards shall adopt these regulations  
20 when the subsistence preference requires a reduction in the harvest of  
21 a fish stock or game population by nonsubsistence users.

22 \* Sec. 7. AS 16.05.940(22) is amended to read:

23 (22) "subsistence fishing" means the taking of, fishing for,  
24 or possession of fish, shellfish, or other fisheries resources by a  
25 resident domiciled in a rural area of the state for subsistence uses  
26 with gill net, seine, fish wheel, long line, or other means defined by  
27 the Board of Fisheries;

28 \* Sec. 8. AS 16.05.940(23) is amended to read:

29 (23) "subsistence uses" means the noncommercial, customary

1 and traditional uses [IN ALASKA] of wild, renewable resources by a  
2 resident domiciled in a rural area of the state for direct personal or  
3 family consumption as food, shelter, fuel, clothing, tools, or trans-  
4 portation, for the making and selling of handicraft articles out of  
5 nonedible by-products of fish and wildlife resources taken for per-  
6 sonal or family consumption, and for the customary trade, barter, or  
7 sharing for personal or family consumption; in [FOR THE PURPOSES OF]  
8 this paragraph, "family" means [ALL] persons related by blood, mar-  
9 riage, or adoption, and a [ANY] person living in [WITHIN] the house-  
10 hold on a permanent basis;

11 \* Sec. 9. AS 16.05.940 is amended by adding new paragraphs to read:

12 (28) "domicile" means the true and permanent home of a  
13 person from which the person has no present intention of moving and to  
14 which the person intends to return whenever the person is away; domi-  
15 cile may be proved by presenting evidence acceptable to the boards of  
16 fisheries and game;

17 (29) "fish stock" means a species, subspecies, geographic  
18 grouping or other category of fish manageable as a unit;

19 (30) "game population" means a group of game animals of a  
20 single species or subgroup manageable as a unit;

21 (31) "personal use fishing" means the taking, fishing for,  
22 or possession of finfish, shellfish, or other fishery resources, by  
23 Alaska residents for personal use and not for sale or barter, with  
24 gill or dip net, seine, fish wheel, long line, or other means defined  
25 by the Board of Fisheries;

26 (32) "rural area" means a community or area of the state in  
27 which the noncommercial, customary, and traditional use of fish or  
28 game for personal or family consumption is a significant characteris-  
29 tic of the economy of the community or area;

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(33) "subsistence hunting" means the taking of, hunting for or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game.

\* Sec. 10. AS 16.05.251(b), 16.05.255(b), and 16.05.257 are repealed.

\* Sec. 11. This Act takes effect June 1, 1986.

# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
BETTYE FAHRENKAMP, Vice Chairman  
JACK COGHILL  
DICK ELIASON  
VIC FISCHER  
RICK HALFORD  
FRED ZHAROFF



POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-4907

## Senate Committee on Resources

TO: Senate Resource Committee Members

March 5, 1986

FROM: Senate Resources Committee Staff

MSK

RE: SCS for CS for HB 288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date."

### SECTION BY SECTION ANALYSIS

This legislation is designed to comply with Title VIII of Public Law 96-487, the Alaska National Interest Lands Conservation Act.

#### Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Small personal use fisheries exist on the Copper River and on some salmon stocks on the Kenai Peninsula, in Southeast Alaska, and on the Naknek River. In addition to areas where personal use fishing already occurs, it is envisioned that personal use fisheries would be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.

Because the first of these two new sections, AS 16.05.258, is important and long, the detailed analysis of AS 16.05.258 is by subsection. In brief, AS 16.05.258(a) provides for the identification of those fish stocks and game populations that are subject to subsistence uses. Subsection (b) provides for a determination of what portion of those stocks or populations can be harvested consistent with sustained yield and how much of that portion is needed to provide a reasonable opportunity for subsistence uses of the stocks and populations. AS 16.05.258(c) describes the preference that shall be accorded for nonwasteful subsistence uses.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are the subject of customary and traditional uses in each rural area.

In making these identifications, the boards should look at which fish stocks and game populations are normally used for subsistence in each rural area. The boards should consider the patterns of local use as established over time. It is not the intention of this bill to exclude from subsistence use any stock or population that is regularly used in that area, even if the level of use is small. It is the intention, however, to exclude from subsistence use those stocks and populations that are not normally used for subsistence and whose use is limited to an occasional individual animal.

The identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that use by those eligible for the subsistence preference is protected.

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
BETTYE FAHRENKAMP, Vice Chairman  
JACK COGHILL  
DICK ELIASON  
VIC FISCHER  
RICK HALFORD  
FRED ZHAROFF



POUCH ✓  
JUNEAU, ALASKA 99811  
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Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

#### Section 2

Section 2 adds a new paragraph to the authority of the Board of Fisheries.

This paragraph tracks the purposes of the Board of Fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

#### Section 3

Section 3 is identical to paragraph (13) in section 2 except that section 3 applies to game. Two minor drafting changes are suggested for this section. In Alaska statutes, "game" is defined to include all wild animals.

#### Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law. AS 16.05.259, is the second statute dealt with in this section. It addresses administrative appeals of decisions made by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the detailed analysis of AS 16.05.258 is by subsection. In brief, AS 16.05.258(a) provides for the identification of those fish stocks and game populations that are subject to subsistence uses. Subsection (b) provides for a determination of what portion of those stocks or populations can be harvested consistent with sustained yield and how much of that portion is needed to provide a reasonable opportunity for subsistence uses of the stocks and populations. AS 16.05.258(c) describes the preference that shall be accorded for nonwasteful subsistence uses.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are the subject of customary and traditional uses in each rural area.

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The identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that use by those eligible for the subsistence preference is protected.

The identification of customary and traditional stocks leaves those that are not identified to be harvested by all Alaskans under nonsubsistence regulations as specified in proposed subsection (e) of AS 16.05.258. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout stocks and brown bear populations.

Whether or not these are or are not subsistence stocks and populations is not decided by the proposed legislation. That matter should be left to factual determinations made by the boards. This bill gives them authority to make those determinations.

This section call for game populations and fish stocks to be identified in each rural area. Stocks and populations are geographically specific groups of animals and fish, as specified in the definition section of this bill. The identification of each stock or population subject to subsistence uses should be factually determined on a case by case basis.

Areas, as set by the board, should be large enough to include both where a particularly stock or population is normally taken and where it is normally used. As an example, the boundaries of areas should not pose a barrier to village residents who traditionally travel to a fish camp some distance from the village.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable portion exists and how much of that portion is necessary to provide a reasonable opportunity for subsistence. The determination of whether a harvestable portion exists must be consistent with sustained yield. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is a "reasonable opportunity to satisfy subsistence uses". Reasonable is a commonly accepted concept in law frequently used in statutes and applied by courts. Reasonable currently appears 1,356 times in the Alaska Statutes. The standard means that the boards' decisions should be based on available information, for example, a consideration of the customary and traditional levels of harvest. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

A "reasonable opportunity to satisfy subsistence uses" does not guarantee that every subsistence user will get every fish or animal he or she wants before any uses of lower priority are allowed. In hunting and fishing, that type of guarantee is impossible to provide. What this standard does provide is that every subsistence user, shall be able to hunt or fish with the reasonable expectation of taking the amount of fish and game needed.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with ~~Federal law.~~ <sup>ANILKA</sup> It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the ~~Federal law~~ <sup>ANILKA</sup> clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough of a harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough portion to allow a reasonable opportunity for subsistence. At Tier I, the preference allocates enough of the resource to provide that reasonable opportunity, with any surplus that is left going to other consumptive uses.

Tier II is when there is not enough of a harvestable portion to provide a reasonable opportunity for subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, almost all of the Tier II hunts that occurred after the Madison decision will be reopened by this bill. The Tier II hunts will be reopened by dramatically reducing the number of hunters eligible to participate in subsistence hunts. The effect of this will be to leave more game for sports hunters. Also, some hunts that are presently Tier II hunts are on game populations that will probably no longer be classified as subject to subsistence uses. Bison are an example.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal <sup>Amika</sup> law, as stated in the policy and intent sections of the Federal law. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks <sup>military reservation</sup> or other areas, and administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) authorizes the boards to adopt regulations for stocks and populations identified under (a) to provide for nonsubsistence harvest of that portion of the harvestable portion that is not needed for subsistence. This would be the normal state of affairs for almost all hunts and fisheries.

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations under (a) may only be harvested under nonsubsistence regulations. This section is previously discussed in more detail in the discussion of subsection (a).

AS 16.05.258(f)

Subsection (f) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, bag and catch limits, methods and means, and other such restrictions including prohibitions of wanton waste.

AS 16.05.259

This new section grants the boards authority to establish administrative appeal procedures. It should be emphasized that this ability to adopt an appeal procedure is strictly optional at the boards' discretion and that there are a variety of forms the appeal procedure could take.

Section 5

Section 5 amends AS 16.05 by adding a new section, AS 16.05.261, which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. This section requires a person who disagrees with a board action or statute to seek to correct that action or statute through appeal, petitions for reconsideration, court action, etc. rather than permitting the person to violate the statute or regulation and claim subsistence as a defense. This eliminates the "subsistence defense" as arose in the Eluska and Skuse cases.

This section does not effect AS 16.05.930 (b) which allows people to take fish and game in case of emergency.

Section 6

Section 6 amends AS 16 05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within a rural area, for rural communities or villages, or for groups or individuals in rural areas. The boards are required to adopt a permit program when the subsistence preference requires reductions in the harvest by nonsubsistence users. Such a reduction should only take place in case of a resource shortage compared to the number of users. When that situation exists, the Department and boards should have such a system in place so they can closely monitor the harvest and the demand on the resource.

### Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

### Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and traditional trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises. As specified in Section 2, it is understood that subsistence uses shall be nonwasteful. The definition of subsistence uses is also amended to make plain that subsistence uses have to be by a resident domiciled in a rural area of the state.

### Section 9

Section 9 addresses several other definitions. The first of these is "domicile" which is defined as a person's "true and permanent home...". The definition states that domicile may be proved by presenting evidence acceptable to the boards. The board of fisheries already has regulations on domicile and it is anticipated that the board of game would adopt similar regulations.

Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

A definition of personal use fishing is contained in this section. This definition is very similar to the definition in the House version of this bill. Neither sport, commercial, or personal use fishing is afforded any priority over any other type of fishing in this legislation. As indicated in section 1 it is envisioned that personal

use fishing may be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill. This legislation is not intended to statutorily increase or decrease existing personal use fishing. The scope of these fisheries is an allocation decision left to the board.

The bill adopts a definition of "rural area" similar to the definition added in the House. It is defined as a community or area of the State where the noncommercial, customary and traditional use of fish and game for personal and family consumption is a significant characteristic of the economy of the community or area. The definition is designed to mesh with the definition of subsistence uses. The definition is not meant to preclude an area from being rural simply because there may also be significant elements of the cash economy in the area, such as commercial fishing.

The focus in this bill on the significance of the noncommercial, customary and traditional harvest and use in a particular area is consistent with ANILCA and its legislative history. In that history, Congress indicated an intent to protect subsistence use in areas of Alaska where subsistence "...uses have played a long established and important role in the economy and culture of the community...". The legislative history lists several communities that were considered rural in 1979, but acknowledged that the economic development and rural character of such communities may change over time. It is expected that the boards would look at ANILCA's legislative history when establishing rural areas and would review areas as conditions change to assure a rural or nonrural classification is still appropriate. As mentioned earlier in this sectional, areas, as set by the board, should be large enough to include both where a particular stock or population is normally taken and where it is normally used.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above.

Section 10 .

Section 10 repeals three portions of subsistence law. AS 16.05.251(b) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

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Advance  
Courtesy  
Draft.

Please call me,  
McKie,  
Thanks  
Jill

March 2, 1986

Honorable Arliss Sturgulewski  
Chairman, Senate Resources Committee  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

re: Subsistence Bill;  
SCS CSHB 288(SA)

Dear Senator Sturgulewski:

This is to inform you that I am concerned that the Senate Resources Committee draft subsistence bill may soon face substantial opposition from the sport community of the nature that contributed to a stalemate over subsistence legislation last year. The environmental community may also take a closer look at the draft bill in light of recent changes affecting ANILCA compliance.

Over the past few days leaders of five sport organizations have asked my opinion of the legislation as it now stands. They are concerned that the draft bill is becoming unnecessarily rigid since leaving the Senate State Affairs Committee. I have told them my opinion that the bill, as amended by your committee, is less flexible than ANILCA, is less flexible than the Senate State Affairs bill, and is less flexible than the governor's bill. As such, I regret that I can not in good faith give leaders of the sport community firm arguments that they would be better off with your draft bill than they would with ANILCA and a temporary federal takeover of subsistence management on federal uplands on June 1, despite the implications of such a takeover. I also see problems with ANILCA compliance. I sincerely regret those conclusions, so I will state my grounds for them later in this letter.

First, let me state the deficiencies of the Resources Committee draft bill when compared to ANILCA, because identifying the deficiencies underlie my recommendations. The two greatest deficiencies which I have conveyed to sport leaders are:

- (1) the failure of Resources Committee draft bill to adopt authority, consistent with ANILCA, for the Board of Fisheries and the Board of Game to look at "alternative resources" when determining customary and traditional subsistence use, which is prior to Tier II situations in which alternative resources are also to be considered, and

(2) the failure of the Resources Committee draft bill to recognize ANILCA standards, which say that on federal lands subsistence must be consistent with "sound management principles" and "the conservation of healthy populations", and additionally that on National Park Service lands (including preserves open to sport hunting) subsistence must be consistent with the "conservation of healthy and natural populations". See ANILCA, sections 802, 805, 808, 810, 815.

Based on both of these shortcomings in the Senate Resource Committee draft bill, I believe that ANILCA and its legislative history are legally, biologically, and administratively preferable to the Resource Committee bill from the sport perspective, and ANILCA may end up being preferable from the environmental and non-consumptive perspectives as well. ANILCA is less restrictive of sport, commercial and nonconsumptive use than is the latest draft of the Resource Committee bill.

I hope you will not mistake my intentions, Senator. I do not want a federal takeover on federal uplands, for I view that as creating problems for the boards, the biologists and the public. I want a good, flexible law that is consistent with ANILCA and the flexibility in it. Presently, the Resource Committee draft bill does not achieve that.

Before focusing on the need for flexibility and consistency with ANILCA, I will touch briefly on what might happen if there is a "federal takeover." The Department of the Interior is most likely to simply adopt state regulations for subsistence on federal uplands and the few federal waters that exist. The Department has authority to do so. The Department would then allow only rural people to subsistence hunt on federal uplands and subsistence fish in federal waters. State sport regulations are currently adopted this way by the federal government. When the Assistant Secretary of the Interior, William P. Horn, testifies before your committee, I suggest that you inquire if this is how the Department is likely to proceed in the event of federal involvement.

The consequences of a federal takeover would be that Tier II hunts closed to sport on federal lands would pop open. Tier II hunts closed to sport on state lands would remain a problem, unless the Office of the Attorney General changed its advice, as it should, that all Alaskans are qualified for subsistence under the Madison decision. What that advice ignored was the Board's Joint Policy Statement, 5 AAC 99.010, listing criteria for determining whether a use was customary and traditional. Those criteria would have excluded almost all urban Alaskans. The advice ignored common sense, for almost every urban Alaskan knows he or she is not a customary and traditional subsistence user. The consequences of a federal takeover could become more difficult over time if state and federal wildlife

regulations pursued divergent paths so as to stain biologically against each other or if the federal government eventually sought to expand its authority over nonfederal lands. But, those are more distant possibilities and in the near term they are unlikely.

Russ Redick of the Alaska Sportfishing Association said before your committee that subsistence legislation must be flexible to allow the boards appropriate authority to allocate subsistence to alternative stocks in some situations and deal with mixed stock issues in some fisheries. Such flexibility is clearly appropriate and consistent with ANILCA when it is not a significant detriment to subsistence use. The Resource Committee draft bill does not contain that flexibility. It does not contain authority, as does ANILCA, to look at alternative resources prior to Tier II situations, at which point nonsubsistence consumptive uses have already been eliminated and nonconsumptive uses have already been diminished. It also does not contain authority to address problems of mixed stocks.

In contrast, the Senate State Affairs bill contains those authorities in three places and is consistent with ANILCA.

First, the section-by-section analysis of the Senate State Affairs bill said that alternative resources are one of several factors to be considered in identifying customary and traditional subsistence uses as well as in Tier II management. ANILCA legislative history concurs on this point and is quoted in full below. That portion of the section-by-section analysis of the Senate State Affairs bill was a vehicle for addressing mixed stock problems in fisheries, and it was a basis for fully accommodating subsistence needs while at least partially accommodating consumptive and nonconsumptive concerns that might conflict with subsistence. To the detriment of the Senate Resources Committee draft bill, the reference to this authority has been deleted from the section-by-section analysis.

Second, the Senate State Affairs bill contained authority to apportion subsistence use among similar, available stocks. That is consistent with ANILCA's recognition of "sound management principles" and ANILCA's recognition that alternative stocks may be considered in identifying subsistence uses. This authority in the Senate State Affairs bill was also a flexible mechanism for addressing mixed stock problems in fisheries and for fully accommodating subsistence needs and partially accommodating consumptive and nonconsumptive desires that may conflict with subsistence use. This authority has been deleted from the Senate Resources Committee draft bill.

Third, the Senate State Affairs bill recognized, as does ANILCA, that subsistence must be consistent on all federal lands with "sound management principles" and "conservation of healthy populations", and that as stated in the section-by-section analysis of the Senate State Affairs bill, subsistence on national

parks and preserves must be consistent with "conservation of natural and healthy populations". Based on discussions with Assistant Attorney General Larri Spengler, I understand the term "sound management principles" includes social and political considerations in making allocation decisions for particular types of management, such as trophy management for hunting or fishing, catch and release fishing, and wildlife viewing. I believe that such management regimes may effectively be diminished or prohibited in many instances throughout the state by the Resources Committee draft bill, because, unlike ANILCA, the Senate Resources draft requires only that subsistence be consistent with "sustained yield." "Sustained yield" usually reflects only biological considerations. Therefore, I conclude that the Resource Committee draft is more harmful to the interests of sport and non-consumptive users than is ANILCA or the Senate State Affairs bill.

Most people conversant with subsistence issues understand that at Tier II, under sec. 804 of ANILCA and AS 16.05.251(b), 16.05.255(b) of current state law, the boards are to consider the factors of dependency on the resource, local residency and availability of alternative resources in allocating subsistence use. These are the criteria upon which subsistence use is restricted when there is not enough of a resource to accommodate all subsistence demand. However, what is often not understood is that, under ANILCA, the boards also can and should apply those same factors, along with others, in determining what uses are "customary and traditional subsistence uses," even before the boards are faced with Tier I or Tier II situations. Thus, the three criteria play a dual role.

The dual role for these criteria is clear from the legislative history of ANILCA. It says:

"However, the phrase 'customary and traditional' is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources ... in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation. The factors of local residency, economic dependence, and availability of alternative resources have been included in section 804 [the preference at Tier II] rather than the definition [of subsistence use]. Although a truly comprehensive definition of 'subsistence uses' must include a mix of those factors, the committee has determined that they should be incorporated through appropriate action by the

State rulemaking authority [i.e. the boards] in conjunction with recommendations of regional councils established pursuant to section 805 to implement the subsistence preference set forth in section 804. Sections 803-805 are intended to establish a dynamic process for the regulation of subsistence resources and uses which will enable rural people to participate in the decisionmaking process of the State rulemaking authority in the inclusion of the local residency, economic dependence, and availability of alternative resources factors into the definition of "subsistence uses" on a case-by-case basis to meet the needs of a particular management situation in a particular area."

Sen. Rept. No. 96-413, 96th Cong., 1st Sess, at p. 269, emphasis added.

A fair analysis of this legislative history is that the boards, in conjunction with regional councils, are to determine customary and traditional subsistence use by considering: (1) whether the use is long established and important, (2) whether it is accompanied by customs and beliefs, (3) dependency on the resource, (4) local residency, and (5) availability of alternative resources. As a matter of policy, three other considerations might be worth adding to this list, even though they are not required by ANILCA or its legislative history. Those are: (6) the season at which the resource in question is harvested since many subsistence harvests are important in an opportunistic and temporal context, (7) the relation the resource has to other subsistence resources that are also harvested, and (8) the cultural values associated with the resource. As I recall, Steve Benhke, the Director of the Subsistence Division, suggested these last three factors to me in our discussions. His suggestion is good.

The problem that now confronts your committee is (as it always has been throughout this issue) a drafting problem. It is not whether to hurt or help subsistence or nonsubsistence people. It is how to draft language that allows flexibility to address alternative stocks and flexibility to undertake sound management without having that language become a vehicle for the boards to deny satisfaction of subsistence use. However, as Don Mitchell, counsel for the Alaska Federation of Natives (AFN), correctly points out, the boards unfortunately do not have a perfect track record on this matter. Therefore, I make the following suggestion.

I assume, perhaps naively, that a successful law should foster trust between subsistence and nonsubsistence users and that generosity should prevail over avarice and fear. Therefore, section 16.05.258 in the draft bill, which involves identifications of customary and traditional subsistence stocks

Letter to Sen. Sturgulewski,  
Mar. 2, 1986, page 5 of 13.

and determinations of how much of a harvest is needed to reasonably satisfy subsistence use, should be amended to involve advice from regional councils and to give the boards and the councils the flexibility to look to alternative stocks in allocating fish and game and in dealing with mixed stock problems, so long as subsistence needs are met and the preference is fulfilled. I suggest the following language:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME.

(a) The Board of Fisheries and the Board of Game, after consultation with the appropriate regional advisory councils, shall identify customary and traditional subsistence uses of fish stocks and game populations in each rural area identified by the boards.

(b) Consistent with satisfaction of subsistence uses, sustained yield, sound management principles, the maintenance of healthy populations, and federal law, the boards shall determine after consultation with appropriate regional advisory councils:

(1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested; and

(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses.

(c) In making the decisions under (a) and (b) of this section, the boards may consider factors including but not limited to: (1) whether the harvest and use is long established and important, (2) whether the use incorporates custom, tradition and belief, (3) dependency on the resource, (4) local residency, (5) availability of alternative resources, (6) the season at which the resource is harvested or used, (7) the relation the resource and its use have to other resources used for subsistence, and (8) cultural values associated with the resource.

I would thereafter reletter the existing subsections (c) through (g).

The section-by-section analyses of both the Senate State Affairs bill and the Senate Resources draft bill recognize the role of the regional councils in identifying subsistence use and making allocation decisions. However, because the AFN has fought the notion of addressing alternative stocks in the context of identifying and allocating to subsistence use, I have therefore suggested the above amended subsections in order to specifically involve the regional councils and assure satisfaction of subsistence uses. I hope this, in conjunction with the existing authority of the councils (5 AAC ----), would assure sensitivity on the part of the boards and the councils when they look to alternative stocks, are confronted with mixed stock problems, or seek to apportion use between similar, available stocks. I hope

this would also reduce the perception on the part of some rural people that the boards are distant and insensitive. The regional councils have not been fully staffed or funded, so they have not been as successful as possible in dispelling perceptions of the boards as dominated by hostile urban sport interests. Legislative recognition of the regional councils would foster trust between rural people, urban people, and the boards.

I think that if you made this suggested change you would have a bill that would be acceptable. I understand that McKie Campbell of your staff believes it would be more convenient to address these matters in legislative history. That will not work well under the current Resource Committee draft bill, given the proposed AS 16.05.258(a) and (b), their interplay with recent court decisions in Eluska and Skuse, and the deletion of apportioning authority. Changes in the legislative history of the current Resource Committee draft would be legally meaningless in the face of the plain language of the draft. It is important to understand that Eluska and Skuse stand for two propositions: (1) the "subsistence defense," and (2) a requirement that the boards adopt subsistence regulations for all subsistence stocks. The Senate State Affairs bill dealt with both aspects of these cases; the Senate Resources draft bill deals only the defense.

I will now turn to demonstrating why this alternative language is necessary, rather than just an abstract point.

Don Michell has long spoken of an error by the Board of Fisheries several years ago that demonstrates erroneous shifting of Tyonek subsistence to an alternative stock. I have always agreed with him that the boards should not be allowed to shift subsistence to alternative resources when doing so is in any significant way to the detriment of subsistence use. However, the rule against shifting to alternative resources should not be so hard and fast as to deny the boards flexibility when it is reasonable. I hope that four examples will flesh out the problem, and I recommend that you utilize them in the section-by-section analysis to facilitate understanding of how alternative resources might be looked to without detriment to subsistence needs. I will stick mostly to fishery examples, because I am a dabbling dilettante in fisheries management and ignorant in game. However, the principles suggested by these examples apply to both fish and game.

**Example #1: Tyonek King Salmon.**

The first fresh meat on the beaches at Tyonek is the Susitna bound king salmon. Several years ago the Board of Fisheries did not allow subsistence harvest of these fish when they were migrating past the Tyonek beaches but did allow sport harvest of these fish when they reached the Susitna tributaries. The subsistence take is and would have been small in relation to the size of the run. The board's decision was improper because it forced Tyonek people to stand and wait for later and less

accessible stocks -- chum, sockeye and silver salmon -- while urban sport people, less in need, fished. Therefore, the Board of Fisheries should not be allowed to shift the Tyonek subsistence harvest of king salmon to a later stock of salmon. Subsequent litigation overturned the board's decision of allowing sport and disallowing subsistence in this case, and few who try to deal fairly with the subsistence issue argue that the result should have been otherwise. Dependency on the resource and lack of alternatives were demonstrable. Therefore, when AFN gives the Tyonek case as an example of why alternative resources should not be considered, AFN is putting forward a "straw man" argument. No sensible person would suggest any shifting in the Tyonek situation, and no legislation has ever been drafted to allow that sort of a shift.

#### Example #2: Late Kenai River Coho.

The late Kenai River coho demonstrates that any rule on alternative stocks should be flexible and fair. This fish runs along the east beaches of Cook Inlet in late August and through September. It is a small run that is highly valued by sport anglers. Non-commercial harvests (at various times called "subsistence" harvests) have harvested upwards of 13,000 of these fish annually. Although runs for the past two years have been much larger than the recent average, this level of harvest has led in some recent years to closing the sport fishery in the river. I would have no objection to this closing, but for the fact that from late June till early August the same beaches are packed with hundreds of thousands to millions of sockeye salmon that are catchable with the same gear and are recognized by the market and the public generally as a more desirable fish. The Board of Fisheries has at various times sought to fully or partially shift the noncommercial fishery for late Kenai cohos to the more abundant sockeye running a few weeks earlier. The Senate State Affairs bill would allow a shift, at least in part. The Senate Resources draft bill does not to allow it.

#### Example 3: Mixed Stocks

Mixed stocks also demonstrate the any rule on alternative stocks should be flexible and fair. On the same east beaches of Cook Inlet there are several mixed stock fisheries conducted by gill nets. Kenai king salmon run contemporaneously with sockeye. Several coho stocks are contemporaneous with sockeye, pinks, chum and even some of the second Kenai king run. These mixed stock fisheries have produced substantial conflicts between sport and commercial fishermen. If portions of the Kenai Peninsula qualify for subsistence, then a rigid state subsistence law that does not allow the Board of Fisheries the flexibility to apportion subsistence between stocks or to focus it on some stocks in a reasonable manner will simply add to these conflicts. Acceptance of the subsistence law by the sport community would inevitably be less than it has been to date. This problem could be compounded by subsistence nets displacing some commercial set

nets to a limited extent, because the beaches would have to accommodate additional nets and subsistence could be entitled to the best sites. The Senate State Affairs bill could deal with this problem, by giving the boards some flexibility to apportion use between stocks and to focus on some stocks more than others. The only flexibility in the Senate Resource draft bill is found in the words "reasonable opportunity". That is a frail hook upon which to hang a heavy hat.

Example 4: Non-target, Minimal Target, and Incidental Target Stocks.

A potential problem of non-target, minimal target and incidental target stocks also demonstrates the need for flexibility to address alternative stocks. If we have a rigid bill we may end up with the boards having little ability to minimize impacts on rainbow trout and steelhead trout stocks, or other highly sensitive stocks, in several situations around the state.

Numerous Federal and State reports (eg., USDOl, FWS, Subsistence Management and Use, 1985; USDOl, FWS, Kodiak Refuge Comprehensive Management Plan, 1986; USDOl, FWS & BLM, Burger, et al, 1983, on Copper River steelhead; USDOl, BIA, Worl, 1982, "Synopsis of Alaska Native Subsistence Economies and Projection of Research Needs: Subsistence Data Base Phase II"; ADF&G, Subs. Div., Stanek, 1982, Report No. 32; ADF&G, Subs. Div., Fall, Report No. 74) document subsistence harvest of rainbow and steelhead trout. I have had no great problem with this because I do not know of many demonstrable impacts. However, the Attorney General and the Board of Fisheries might have a problem because current state regulations, 5 AAC 99.\_\_\_\_, prohibit subsistence harvest of rainbow trout and steelhead. I have always wondered whether that regulation would survive a subsistence challenge. Eluska and Skuse indicate the regulation would fall, based on the court's requirement that the boards adopt subsistence regulations for every subsistence stock. Whether the regulation would stand or fall is, I believe, an important question to the sport community because the regulation helps sustain a strong recreational interest and a multi-million dollar sport, guide and lodge industry that are focusing increasingly on catch and release of older age, world class trophy rainbows and steelhead.

Based on State estimates in the Bristol Bay Regional Plan and the Kenai River studies, the sport fishing industry in the Bristol Bay drainages, in which world class rainbows play a very significant role, is far more important economically than the Kenai River guide industry. If low levels of subsistence targeted on rainbow or subsistence targeted primarily on other stocks significantly impact over time the prevalence of the relatively scarce older age fish, then we will suffer a loss of international interest to anglers. Perhaps we should suffer that loss, but I don't think the law does or should require it. There are only three world class rainbow fisheries in the world. Alaska,

Letter to Sen. Sturgulewski,  
Mar. 2, 1986, page 9 of 13.

primarily in the Bristol Bay drainages, is the best, and the other two are in Patagonia and New Zealand.

Several sport regulations, involving special management regimes for rainbow trout, could eventually lose much of their effectiveness in providing quality sport fisheries if the boards are without flexibility in providing for subsistence. Talchalitna River rainbows are managed for catch and release. Bristol Bay drainage rainbows are managed primarily for trophy. Kenai River rainbows are managed for trophy. The draft Cook Inlet Rainbow Trout Management Plan proposes increasing the number of trophy and catch and release streams and prohibiting the taking of rainbows through the ice on several west side Susitna River tributaries. These decisions are currently or will be based fully or partly on "sound management principles" involving social allocations of older age fish, rather than biological considerations under "sustained yield." I doubt that the present sport size limitations, bag limits, and methods and means restrictions could legally be applied to subsistence. The best alternative is flexibility in targeting and apportioning subsistence use among stocks.

The Senate State Affairs bill, like ANILCA, is capable of addressing these potential problems, because it allows flexibility to address alternative resources, apportion subsistence between resources, and requires that subsistence be consistent with "sound management principles" and the "maintenance of healthy populations." The Senate Resources draft does not do that.

I will close with a brief discussion of how five hypothetical law suits would fare under the Senate State Affairs bill and the Senate Resources draft. For the most part all five hypotheticals involve real issues or situations that have confronted the State. The fifth hypothetical demonstrates that the Resource Committee draft will not be in compliance with ANILCA if challenged by a well put together set of facts and legal arguments. My hypothetical plaintiffs are thinly disguised, so as not to imply intentions.

Case #1:

My first hypothetical suit involves that fountain of controversy: Wolf Control!

Suppose the Alaska Wolf Alliance alleges and proves that wolf control programs involve subsistence use of moose and are based on "sound management principles" reflecting attempts to create and allocate more moose, rather than on "sustained yield principles." To prove that, the Wolf Alliance could prove the following three points: (1) that wolf control, aerial trapping, and trapper education programs are designed to temporarily reduce wolf populations in order to increase moose populations (Board of Game records will prove this), and (2) that depressed moose

populations have resulted in part from subsistence harvest of cows often contrary to regulations (deposition of present and former Game Board members and ADF&G officials I believe would prove this), and (3) that none of the moose populations are below sustained yield if unhunted or if hunted only for subsistence (easily provable). The Wolf Alliance would then argue that wolf control programs are essentially ways of avoiding implementing the Tier I and Tier II subsistence priority and that nonsubsistence harvest must cease, and that wolf control programs must cease because they are based on social allocation considerations underlying "sound management", rather than the biological considerations of "sustained yield."

Under the Senate State Affairs bill, the Wolf Alliance loses, because "sound management principles" are recognized. Therefore, the flyboys fly, the subsistence and sport hunters hunt, and the trappers trap. However, under the Resources Committee draft, the Wolf Alliance wins. The flyboys, the hunters, and the trappers take a walk. The irony is that rural subsistence and urban sport hunters have both supported wolf control programs. Therefore, both interests are hurt by the Resource Committee draft. To compound the irony, though, the nonconsumptive interests of the Wolf Alliance are also hurt by the failure of the Resource Committee draft to afford flexibility and recognizing wildlife viewing interests through the social allocation underpinning of "sound management principles." Thus, the Wolf Alliance wins on wolves and loses on other matters under the Resource Committee draft.

#### Case #2:

Suppose the following happens. The Alaska Union of Natives sues to stop sport hunting of moose on lands east and west of Fairbanks, where moose populations are depressed, and in the Nushagak drainage. The Union alleges and proves that subsistence hunters are having to hunt vastly larger areas to get moose. (The Bristol Bay Regional Plan and depositions of ADF&G officials might prove this.) The Union asks that the preference be implemented.

How this hypothetical case would fare under the Senate State Affairs bill and the Senate Resources draft is difficult to say. I know too few facts. However, the State would have a better chance of prevailing under the State Affairs bill than under the Resources draft, because the flexibility in the State Affairs draft allows the Board to reasonably apportion subsistence use of red meat between moose and caribou so long as the preference is retained on both.

#### Case #3:

Suppose the following happens. George is apprehended for gill netting rainbow trout in Lower Talatik Creek 25 miles west of his home in Iliamna. The State prosecutes George for violation of

the subsistence ban on rainbow trout. George challenges the validity of the regulation.

As discussed previously, the regulation falls under the Senate Resource Committee draft. Under the Senate State Affairs bill, the regulation might prevail if the board has been reasonable in not depriving George of satisfying his subsistence needs. Flexibility and reasonableness are the key to the Senate State Affairs bill. However, the breadth of this regulation makes it vulnerable under either bill.

Case #4:

Suppose Cooper Landing on the Kenai Peninsula qualifies as rural for purposes of subsistence. Helen of Cooper Landing puts her motor boat in either the permanent non-motorized zone downstream from Russian River or the seasonal non-motorized zone downstream from Skilak Lake. Both zones were established in January by the Department of Natural Resources. Helen engages in subsistence fishing for rainbow trout and is apprehended for using a motor. She alleges that the Kenai River rainbow trout stock is most prevalent in the non-motorized zones and that the non-motorized regulation is invalid with respect to subsistence use.

Under the Resources Committee draft bill, Helen wins, subsistence boats motor, nonsubsistence boats don't motor, state troopers are perplexed by the horrible enforcement problem of having to figure out who qualifies for a motor. Under the Senate State Affairs bill, the Department of Natural Resources wins if the Board of Fisheries has provided reasonable alternative trout or other fish stocks in the Cooper Landing area.

Case #5:

Suppose the Board of Game authorizes subsistence hunting of moose in the ANILCA additions to Denali National Park and authorizes sport and subsistence hunting in the Denali National Park/Preserve, and that the board does so based on "sustained yield." Suppose further that the American Professional Hunting Association, Denali Tours (a hypothetical association of Denali tourist hotel, guide and service companies), and Defenders of Moose for Tourists jointly sue the board on the following grounds: (1) American Professional Hunting and Denali Tours acknowledge that there should be a preference on moose in the Preserve for subsistence, but that the board's allocation of moose in the Preserve between sport and subsistence hunters violates federal law because the board failed to look to alternative stocks (eg. caribou) and "sound management principles," to more appropriately fulfill consumptive interests in making the allocation and in implementing the subsistence preference, and (2) Denali Tours and Defenders of Moose for Tourists allege that the level of subsistence moose hunting allowed by the board in the ANILCA additions to the Denali National Park violates "sound management principles" and the "conservation of natural and healthy

populations," which protect nonconsumptive interests, and (3) American Professional Hunting, Denali Tours and Defenders all allege that the State subsistence law therefore is not in compliance with sections 802, 803, 804, and 815 of ANILCA as they relate to alternative stocks, the identification of subsistence use, allocation between sport, subsistence and nonconsumptive interests, the subsistence preference, the relation between consumptive (subsistence and sport) and nonconsumptive uses, the social allocation underpinnings of sound management principles, and conservation natural and healthy populations.

I think the State is likely to loose on all counts under the Senate Resources bill. The State subsistence law will fall. Alaska will be out of compliance. We will be right back where we are now. Under the Senate State Affairs bill the board would presumably have reached different allocation decisions initially, and if those decisions were reasonable, then these issues would not even arise under the State Affairs bill.

I hope these five hypothetical cases demonstrate the differences between the bills. I am not trying to be for or against wolf control, subsistence, sport use, commercial use, nonconsumptive use, or even my finny friends -- rainbow trout. I am only concerned with getting a good bill. When I started working on this issue last October, I believed then that there are two measures of a good bill. First, it should change the nature of future subsistence debates from the present unproductive conceptual debate to factually oriented debates over whether particular stocks are subsistence stocks, whether particular areas or communities qualify, and how much of a stock is necessary to satisfy subsistence. Such factual questions are always worth pursuing. Second, the legislature will have succeeded if no one can say in the coming elections that he or she "did this for you on subsistence" or he or she "did this to you on subsistence." Such statements will be a sign of failure, because one side of the issue will have prevailed more than it should. It will mean that the generalized, divisive, and unproductive debate will still be with us.

A good subsistence bill will make the general subsistence debate go away. The Resource Committee draft can still do that if something like the amendments I have suggested is adopted. They stay close to and do not wander from ANILCA. They provide needed flexibility and fairness.

I wish you the best in dealing with these matters.

Sincerely,

Geoffrey Y. Parker



NATIONAL RIFLE ASSOCIATION OF AMERICA  
INCORPORATED 1871

1600 RHODE ISLAND AVENUE, N.W.  
WASHINGTON, D.C. 20036

RUPE ANDREWS  
FIELD REPRESENTATIVE  
ALASKA

9416 LONGRUN DRIVE  
JUNEAU AK 99801  
907/789-7422

March 12, 1986

Senator Arliss Sturgulski  
Chairman, Senate Resources Committee  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Dear Arliss:

I hope that this letter helps to 'make your day'. Permit me to take this means rather than intrude on your busy schedule to say that I believe that yourself and staff, and members of the Senate Resources Committee have worked long and hard to put before the Alaska public a very much improved subsistence bill over that received from the House. A great number of improvements were incorporated which we in the outdoor user community recommended last summer. We didn't hit one hundred per cent but four out of five will win ballgames every day of the week.

I have no way of knowing whether the Legislature will indeed approve this bill or even a subsistence bill but the Senate Resources bill is a workable document and a much fairer bill than we have had to date. If I may-- the Alaska public needs to know why a preference is provided to a certain segment of the Alaska public of a common property resource. I believe that Alaskans will accept, as they have in the past, a preference that is based on sustenance.

On another subject, many thanks for voting for the resolution to urge the House of Representatives to adopt the McLure-Volmer Bill that reforms the Federal Firearm Act. I know that you had questions and a short lead time to consider the material. I take this as a vote of confidence in myself which I deeply appreciate. S-49 is a good bill and we can talk later about this.

Please pass on to McKie Campbell that I think he does a Trojan job for you and your Resources committee.

Best regards,



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Best regards,

# MEMORANDUM

State of Alaska

TO: Ron Jolin, Chairman  
Joint Boards of Fish and Game

DATE: March 15, 1985

FILE NO:

TELEPHONE NO: 465-4100

FROM: Don W. Collinsworth *DWC*  
Commissioner  
Department of Fish and Game

SUBJECT: Management Issues  
Arising From the  
Madison Decision

## INITIAL ASSESSMENT

As you requested, my staff has completed an initial assessment of the Madison decision's implications for fish and wildlife management. This memorandum uses the Cook Inlet, Naknek River, and Copper River fisheries as examples, but Madison also affects existing Board of Fisheries regulations for Angoon and Lake Iliamna-Lake Clark and existing Game Board regulations for permit hunts.

Although the Game Board has not applied the eight criteria in the same way the Board of Fisheries has, Department of Law has said that the Game Board may be unable to continue providing permit hunts restricted to particular communities unless guided hunting and hunting by non-residents have already been eliminated. Further the legal analysis concludes that Madison may require the Game Board to discontinue non-state-resident and guided hunting for all permit hunts.

Department of Law and the management divisions are continuing to analyze Madison impacts and more information will be developed. However, this memorandum is intended to alert you to some of the anticipated area impacts.

## COOK INLET/KENAI RIVER/SUSITNA RIVER SALMON

Testimony and data presented to the Board of Fisheries indicate that within the last 20-30 years, almost every part of Cook Inlet, including Knik Arm and Turnagain Arm, has been open to subsistence set-net fishing for salmon (Braund, 1980). The open season for fishing varied from location to location, as well as through time, but included the period May through September. Until 1978, 50 fathoms of net could be used in many areas. Species harvested in these set-net fisheries included primarily kings, sockeye, and coho.

As Anchorage and the Kenai Peninsula grew, subsistence salmon seasons were gradually restricted until only small areas remained open for very short periods with limited gear. Since 1980, subsistence fisheries have been authorized in very limited areas for residents of Tyonek, English Bay, and Port Graham only.

The impacts of the Madison decision on existing Cook Inlet fisheries depend on how many people decide to participate, and where and when they

fish, which makes it difficult for us to precisely assess immediate or long term effects. At a minimum, however, we would expect to see an increase in the gill net harvest of west side and Susitna River king salmon, since any Alaskan will be able to participate in the Tyonek district subsistence king fishery. This fishery begins in May, and has limits of 70 kings per household. Presently, this fishery is restricted to persons domiciled in Tyonek, and on average, 2,000 kings have been harvested annually.

It is impossible to predict how much new effort would occur, but any significant increase in this fishery will require compensating reductions in the expanding sport fishery of the Susitna drainage. This, of course, would mean reductions in seasons, bag limits, or even closures of certain areas to fishing if the subsistence harvest grows substantially.

In addition, the Kenai Peninsula subsistence net fisheries which existed in the late 1970s, and which have been closed since 1980, may have to be reopened to all Alaskans. This would include set net fisheries on king, sockeye, and coho stocks which enter all of the Kenai Peninsula drainages. King and coho stocks, which are already the focus of major allocation conflicts between sport and commercial users, will now have to be shared with another user group, which will have a priority. Additional harvest restrictions on sport and commercial fisheries in Cook Inlet may have to be imposed either before the fishing season or in-season as we determine whether escapements are being achieved.

Because of recent regulatory constraints, past harvests are a poor indicator of the potential demand for subsistence fishing in Cook Inlet. Further, recorded harvests probably underestimate the actual historical subsistence harvest due to inadequate catch reporting systems. If accessible beach areas are opened to net fishing, we would expect a substantial interest, similar to that in the Copper River dip net fishery. One indicator of this demand is the fact that participation in the Cook Inlet subsistence fishery increased from less than 100 people to more than 1,300 between 1977 and 1980, before the Board adopted the regulations restricting subsistence use. An additional indicator of demand are the requests the Fisheries Board has received from people wanting to fish with nets in Knik Arm and other parts of Cook Inlet.

In an extreme scenario, the Board could be required by a court to authorize subsistence fishing wherever it has occurred in Cook Inlet, Turnagain Arm, and Knik Arm, throughout the summer, by any Alaskan. The Madison decision clearly states that sport and commercial uses must be eliminated before subsistence uses can be restricted. Therefore, it seems unlikely that the Board or department could impose subsistence harvest limits or quotas to ensure that commercial and sport uses could continue.

In summary, we see major demands being imposed upon the department for in-season monitoring and management of all harvests to ensure adequate escapements in Cook Inlet. We also see the potential for confusion and controversy over Cook Inlet salmon management escalating and making it more complex.

NAKNEK RIVER SALMON

The Naknek River is currently open to subsistence fishing only by residents of the Naknek and Kvichak river drainages. This regulation was adopted in 1981 because of concern about growth in the Naknek subsistence salmon fishery by other Alaskans. From 1976 to 1980, participation and king harvests in the Naknek subsistence fishery doubled as more people learned about the fishery and came to the Naknek-King Salmon area to take part in it.

The Board, local residents, and sport fishermen all became concerned that this growing harvest was beginning to affect the allocation of the Naknek River's limited king salmon stocks. By restricting the fishery to local residents, the Board of Fisheries was able to allow continued development of the Naknek sport fishery on kings, which has become increasingly significant to guides and transportation services. By creating a personal use sockeye fishery on the Naknek, the Board was able to accommodate non-local fishing demand and shift it to more abundant species.

The Madison decision appears to open the Naknek net subsistence fishery again to all residents of the state. If significant effort occurs, it seems quite likely that restrictions will have to be imposed on the sport fishery in order to ensure king salmon escapement.

COPPER RIVER/PRINCE WILLIAM SOUND SALMON

Historically, Copper River sockeye have been harvested by commercial fishermen in Prince William Sound, residents of the Copper Basin and other interior communities, as well as Fairbanks and Anchorage residents. With population growth and increased publicity, the Chitina dip net fishery grew dramatically; harvests more than tripled from 1980 to 1983. Additionally, many urban dip net fishermen preferred to fish the early portion of the Copper River run, which posed potentially severe management problems for early run sockeye. About 50 percent of the Copper River run passes through the commercial fishery district in the first two to three weeks of the season, which means any management decisions to restrict the fishery must be made on very short notice.

As subsistence harvests increased in the 1970s, the board began restricting fishwheel and dip net harvests in the Copper River. In 1984, the board examined subsistence dip net and fishwheel fisheries in the Copper River. It authorized subsistence fishing for Copper Basin residents. Harvest by the subsistence fishery was predicted to be approximately 20,000 salmon and individual bag limits could go as high as 500. The board then established a personal use fishery for people who did not reside in the communities identified as having subsistence uses. The personal use fishery had bag limits of 15 salmon for individuals and 30 for households. The total catch was limited to 60,000 sockeye plus twenty-five percent of any excess escapement. The in-river sport fishery was predicted to harvest approximately 5,000 sockeye and the Prince William Sound commercial drift gill net fishery was managed to provide for these known harvest and escapement levels.

Under Madison, the Fisheries Board may have difficulty in predicting harvest levels for the Copper River fishwheel and dip net fishery, due to uncertainty about how many people will participate and how many fish they will take. Additional management problems are posed by the timing of the sockeye run and the heavy dip net harvest, which occurs on the early part of the run. These considerations seem to require more conservative management of the Prince William Sound commercial fishery.

In summary, we see a number of complex management issues arising from the Madison decision. Regulation specialists for Commercial Fisheries and Game Divisions are presently identifying the specific regulatory options which the Boards could address for the upcoming season.

# MEMORANDUM

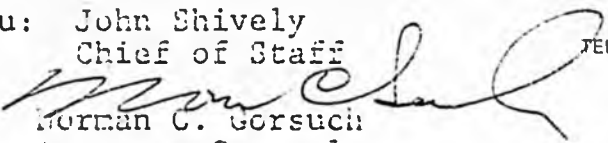
State of Alaska

TO: Honorable Bill Sheffield  
Governor

DATE: March 6, 1985

Thru: John Shively  
Chief of Staff

FILE NO: 366-375-85

FROM:  Norman C. Gorsuch  
Attorney General

TELEPHONE NO: 465-3600

SUBJECT: Briefing memorandum:  
subsistence

## I. Suggested Attendees

- A. Governor Sheffield and appropriate staff
- B. Department of Fish and Game
  - 1. Don W. Collinsworth, Commissioner
  - 2. Dennis D. Kelso, Deputy Commissioner
  - 3. Steven R. Behrke, Director, Division of Subsistence
- C. Department of Law
  - 1. Norman Gorsuch, Attorney General
  - 2. Larri Irene Spengler, Assistant Attorney General

## II. Issue Summary

- For several years, the Boards of Fisheries and Game have implemented the state subsistence law in a way which protected fishing and hunting by rural Alaskans.
- At the same time, the boards provided reasonably for other uses, such as personal use net fishing by non-rural Alaskans, sport fishing, and commercial fishing.
- This exercise of regulatory authority had been certified as complying with the federal subsistence law, ANILCA.

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

March 6, 1985  
Page 2

- On February 22, 1985, the Alaska Supreme Court declared that the boards lacked statutory authority for the regulatory approach used in implementing the subsistence law. Madison v. Alaska Department of Fish and Game, No. 7410.
  
- Madison means that all Alaskans may participate in subsistence uses, and that those uses cannot be restricted until sport and commercial fishing, and non-resident hunting and big game guiding are eliminated.
  - Example: The Prince William Sound commercial fishery may need to be restricted or even closed if necessary to accommodate the dip net fishery in the Copper River.
  
  - Example: The Kenai River and Susitna drainage sport fisheries may need to be restricted or even closed if "subsistence fishing" by gill net must be allowed in large areas of Cook Inlet closed in recent years.
  
- If the boards cannot protect fishing and hunting by rural Alaska residents under the state statutes, non-compliance with ANILCA could mandate some federal action.

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

March 6, 1985  
Page 3

### III. Necessity for Governor's Briefing

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

### IV. Background

A. Pre-Madison: The state's position on the Alaska statutory and regulatory framework before this court decision was:

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

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

March 6, 1985  
Page 4

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

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

March 6, 1965  
Page 3

V. Relevant Laws

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

B. Federal law:

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

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

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

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

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

March 6, 1985  
Page 6

VI. Alternatives

A. Implement the current statutes as interpreted by the court. Consequences:

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

Honorable Bill Sheffield  
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366-375-85

March 6, 1985  
Page 7

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

# MEMORANDUM

# State of Alaska

TO: Don Collinsworth, Commissioner  
Department of Fish and Game

DATE: March 8, 1983

FILE NO: 166-423-83

TELEPHONE NO:

FROM: Norman C. Gorsuch  
Attorney General

By: Larri I. Spengler  
Assistant Attorney General  
Natural Resources-Anchorage

SUBJECT: Relative resource  
shortage activating  
the priority in the  
subsistence law

During the meeting of the Joint Boards of Fisheries and Game which began in Anchorage on November 30, 1982, several board members requested clarification regarding how and when a priority applies under the subsistence law. Under AS 16.05.251(b) and .255(b), the priority becomes active only when a relative resource shortage occurs, caused, for example, by increase in competition or decrease in harvestable surplus. The following diagram might aid in applying the subsistence law.

---

Relative abundance of resource	Board action	Priority status
1. No shortage*	Regulations allowable (for example, setting areas and seasons)	Subsistence uses must be allowed, but priority inactive; other uses may be allowed
2. Shortage*	Restrictions necessary	Subsistence uses must be allowed, with a priority over other uses which are allowed
3. Greater Shortage*	Further restrictions necessary	Only subsistence uses are allowed, with priority distin- guishing among subsistence users.

4. Critical Shortage*	Total closure necessary	No uses may be allowed
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\* Shortage means relative resource shortage, when restrictions on non-subsistence uses must be imposed because harvest competition among user groups or decline in numbers of fish or game would jeopardize sustained yield of the resource or subsistence uses of the resource.

---

The diagram is based upon the first sentence of AS 16.05.251(b) and 255(b):

The Board . . . shall adopt regulations . . .  
permitting . . . subsistence uses unless . . .  
such regulations will jeopardize . . . the . . .  
sustained yield. . . .

Part 1 of the diagram reflects that when there is no relative shortage of fish or game, the boards are required by these statutes to allow opportunities for subsistence uses and may under AS 16.05.251(a) and .255(a) allow opportunities for non-subsistence uses. Subsistence uses are identified by the eight criteria which the boards established in 5 AAC 99.010(b). In a non-shortage situation the priority is not active under state law, nor under the federal Alaska National Interest Lands Conservation Act, Title VIII (ANILCA). The ANILCA provision, which parallels AS 16.05.251(b) and 255(b) is §804. Regarding that provision, the Senate committee report states:

If a particular fish or wildlife population . . .  
in a particular area is sufficient to sustain a  
harvest by all persons engaged in subsistence and  
other uses, the implementation of restrictions on  
taking set forth in this section need not be  
imposed by the state rulemaking authority.

S.Rep.No. 413, 96th Cong., 1st Sess. 269 (1979).

As with other uses, regulation of subsistence uses even when there is no relative shortage is authorized. Regulations should be structured to provide opportunities for customary and traditional uses (for example, through the setting of areas and seasons); unconstrained harvests were not contemplated by the legislature. Indeed, regulation of subsistence uses on a case by case basis has been and is part of sound resource management, and was expected by the legislature. For example, the introduction

to Alaska's subsistence law, SLA 1978, Chapter 151, Section 1, states that beneficial use of Alaska's fish and game resources by all state residents "should be carefully monitored and regulated . . . ." The Board of Fisheries has adopted regulations called "subsistence fishing regulations." The Board of Game has generally regulated subsistence uses without designating the regulations as "subsistence regulations." The fact that subsistence uses are to be allowed by the boards does not amount to a guarantee that each participant will achieve a particular harvest. Rather, it is the opportunity to engage in customary and traditional uses which is assured, as long as sustained yield of the resource is not thereby jeopardized. 5 AAC 99.010(c).

Part 2 of the diagram is based upon the second sentence of AS 16.05.251(b) and 255(b):

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

If increase in competition or decrease in harvestable surplus result in a relative resource shortage, restriction of some harvest opportunities may be necessary, and, if so, the priority for subsistence uses comes into play. The boards can use any of the many management options available to them in imposing the needed restrictions on non-subsistence uses and in continuing to regulate subsistence uses in a way that protects the opportunity for subsistence harvests. For example, seasons could be altered, or the use of aircraft prohibited. Of course, in extreme cases the option of precluding non-subsistence harvests remains available.

Part 3 of the diagram is based upon the third sentence of AS 16.05.251(b) and 255(b):

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.

Don Collinsworth, Commissioner,  
Department of Fish and Game  
166-423-83

March 8, 1983  
Page 4

A more serious resource shortage resulting from greater increase in competition or decrease in harvestable surplus may require still further restriction of harvest opportunities. If so, subsistence uses will be the last to be precluded. At the point that only subsistence uses remain, the criteria listed in the statute would form a basis for distributing the allowable harvest among subsistence users. This is the only point at which the boards may make distinctions among users based upon their individual characteristics, rather than distinguishing among uses by examining the characteristics of those uses.

Part 4 of the diagram reflects the underlying constitutional and statutory mandate that sustained yield is always the paramount concern. Alaska Constitution, Article VIII, Section 4; AS 16.05.251(b) and .255(b). If the status of a fish or game resource is such that maintenance of sustained yield requires that all harvest cease, no use (including subsistence) may be allowed.

We hope this diagram and explanation clarify that under the subsistence law, the priority becomes active only in times of relative resource shortage.

LIS/jmo

DEPARTMENT OF LAW

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

OFFICE OF THE ATTORNEY GENERAL

March 3, 1985

M E M O R A N D U M

TO: Honorable Bill Sheffield  
Governor

FROM: Norman C. Gorsuch  
Attorney General

RE: Attached bill regarding the  
taking of fish and game for  
subsistence and personal use  
Cur File: 377-176-85

Attached is a bill regarding the taking of fish and game for subsistence and personal use. It was requested in order to return to the Boards of Fisheries and Game the regulatory authority they had exercised before Madison v. Alaska Department of Fish and Game, Supreme Court Opin. No. 1911 (Alaska, February 22, 1985).

This bill would allow the boards to continue implementing the law as they had before Madison, by (1) specifying that subsistence uses are customary and traditional uses of fish and game by rural Alaska residents, and (2) statutorily establishing personal use fishing as a means for the Board of Fisheries to provide access to fish by nets or other means for personal use for Alaskans throughout the state. The combination of these two amendments would return fish and game regulatory authority to its pre-Madison status.

A draft transmittal letter to the legislature, explaining the bill in more detail, is also attached.

NCG:LIS:dln

cc w/enc.: Honorable Don Collinsworth  
Commissioner  
Department of Fish and Game

D R A F T

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill regarding the taking of fish and game for subsistence and personal uses. The purpose of this bill is to amend AS 16 to delegate to the Alaska Board of Fisheries and Alaska Board of Game the same authority to regulate the taking of fish stocks and game populations that the boards exercised before the recent decision of the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game, Supreme Court Opin. No. 2911 (February 22, 1985).

The bill does so in two ways. First, the bill would amend AS 16.05.940(23) to limit the identification of "subsistence uses" of fish stocks and game populations to hunting and fishing for personal and family consumption and related uses by residents of rural communities or rural areas, where the taking of fish and game for such uses is a significant part of the economy of the community or area. This change recognizes that in rural Alaska the taking of fish and wildlife is essential to the health, safety, and general welfare of Alaskans domiciled in many of the rural communities and rural areas of our state and to the economy of the community or area in which they reside. As the Alaska Department of Fish and Game has determined from its research on this subject:

Alaska is characterized by a diversity of socioeconomic systems and patterns of resource use. ... It seems clear that the economic and social stability of many communities depend upon access to and utilization of renewable fish and wildlife resources. Disruptions of the relationships between the community and the resource base may affect the viability of these ways of life.

Alaska Department of Fish and Game, Division of Subsistence, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, technical paper No. 61, 274 (1963).

Second, the bill would establish a statutory definition of the term "personal use fishing" (proposed AS 16.05.940(28)). The Alaska Board of Fisheries has already established this category by regulation. This category of harvest, though not subsistence fishing, is important to Alaska residents. After the board has identified the "subsistence uses," if any, of particular fish stocks, AS 16.05.940(28) and the amendment to AS 16.05.251(a)(6) and addition of AS 16.05.251(a)(12), in sec. 2 of the bill, would authorize the board to adopt regulations allocating access to those stocks for the purposes of personal use, sport, and commercial fishing in a fair and reasonable manner consistent with its constitutional responsibility to adopt regulations to use, develop, and

conserve fish stocks for the maximum benefit of all Alaskans.

As previously mentioned, this legislation is intended only to provide the boards the same regulatory authority which they exercised before Madison v. Alaska Department of Fish and Game. Consequently, I urge your expeditious consideration of this bill, since its enactment is essential to provide the boards sufficient regulatory flexibility to ensure that Alaskans are provided fair and reasonable access to our fish stocks and game populations. Enactment will also ensure that the State of Alaska remains in compliance with the provisions of Title VIII of the Alaska National Interest Lands Conservation Act and, consequently, retains full authority to regulate the taking of fish and game on all land and in all water of the state.

Sincerely,

Bill Sheffield  
Governor

Introduced: 3/13/85  
Referred: State Affairs, Resources,  
Judiciary and Finance

377-176-85

*referred in house = resources and judiciary*

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE BILL NO. 231 (*House bill 238*)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

10 \* Section 1. FINDINGS. The legislature finds that

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

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

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

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

24 (1) setting apart fish reserve areas, refuges and sanctu-  
25 aries in the waters of the state over which it has jurisdiction,  
26 subject to the approval of the legislature;

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

29 (3) setting quotas, bag limits, harvest levels, and sex and

1 clothing, tools, or transportation, for the making and selling of  
2 handicraft articles out of nonedible by-products of fish and wildlife  
3 resources taken for personal or family consumption, and for the cus-  
4 tomary trade, barter, or sharing for personal or family consumption;  
5 for the purposes of this paragraph, "family" means all persons related  
6 by blood, marriage, or adoption, and any person living within the  
7 household on a permanent basis;

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

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

14 \* Sec. 5. This Act takes effect immediately in accordance with AS 01.-  
15 10.070(c).

16

managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans; and

(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

## TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

### FINDINGS

Sec. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

### POLICY

Sec. 802. It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized

scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

### DEFINITIONS

Sec. 803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term—

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

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

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

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

### PREFERENCE FOR SUBSISTENCE USES

Sec. 804. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

Ante, p. 2377.

16 USC 3113.

16 USC 3114.

Priority criteria.

16 USC 3111.

16 USC 1601.

16 USC 3112.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

SEC. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

Annual report to Secretary.

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported

by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife or the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

Implementation.

(e)(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

Reimbursement to States.

(2) Total payments to the State under this subsection shall not exceed the sum of \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

Report to Congress.

FEDERAL MONITORING

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as

Report to congressional committees. 16 USC 3116.

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

#### JUDICIAL ENFORCEMENT

SEC. 807. (a) Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

(b) A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

(c) This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.

#### PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or

investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

#### COOPERATIVE AGREEMENTS

SEC. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.

#### SUBSISTENCE AND LAND USE DECISIONS

SEC. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

Program and recommendation implementation.

16 USC 3119.

16 USC 3120.

Hearing.

Civil actions.  
16 USC 3117.

hearing.

16 USC 3118.

subsistence  
hunting program.

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Notice and hearings.

2 USC 4332.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

5 USC note rec. 21.

1 USC 1601 ete.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

1 USC 3121.

Sec. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

USC 3122.

Sec. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

Submission to Speaker of House and President of Senate. USC 3123.

Sec. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

- (1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;
- (2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;
- (3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

Publication in Federal Register.

REGULATIONS

Sec. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title.

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

Sec. 815. Nothing in this title shall be construed as—

16 USC 3125.

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

3126.

SEC. 816 (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

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TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

SUBMERGED LANDS STATUTE OF LIMITATION

1631. SEC. 901. (a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this

1601

subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action.

(b) No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to the date of enactment of this Act. The execution of an interim conveyance or patent (whichever is executed first) by the Bureau of Land Management conveying a parcel of submerged land to a Native Corporation or Native Group shall be the final agency action with respect to a decision by the Secretary of the Interior that the water covering such parcel is not navigable, unless such decision was validly appealed prior to the date of enactment of this Act to an agency or board of the Department of the Interior other than the Bureau of Land Management.

43 USC 1601  
note.

(c) If the court determines that a parcel of submerged land which is the subject of a civil action described in subsection (a) is owned by the Native Corporation or Native Group to which it was conveyed pursuant to the Alaska Native Claims Settlement Act or this Act, each defendant Native Corporation and Native Group shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal.

Costs and  
attorney fees.

43 USC 1601  
note.

(d) No Native Corporation or Native Group shall be determined to have been conveyed its acreage entitlement under the Alaska Native Claims Settlement Act until—

(1) the statutes of limitation set forth in subsection (a) have expired with respect to every parcel of submerged land conveyed to such Corporation or Group; and

(2) a final judgment or order not subject to an appeal has been obtained in every civil action filed pursuant to subsection (a).

(e)(1) Whenever a parcel of submerged land to be conveyed to a Native Corporation or Native Group is located outside the boundaries of a conservation system unit such Corporation or Group and the State of Alaska may mutually agree that such parcel may be selected by and conveyed to the State under the provisions of section 6(b) of the Alaska Statehood Act.

Agreements or  
reconveyances  
with State.

(2) In any instance in which the State could have selected a parcel of submerged land pursuant to an agreement between the State and a Native Corporation or Native Group pursuant to paragraph (1) if such parcel had not previously been conveyed to such Corporation or Group, such Corporation or Group is authorized to reconvey such parcel to the Secretary, and the Secretary shall accept such reconveyance. If the surface estate and subsurface estate of such parcel are owned by different Native Corporations or Native Groups, every Corporation and Group with an interest in such parcel shall reconvey its entire interest in such parcel to the Secretary.

48 USC note  
prec. 21.

(3) In any agreement made between a Native Corporation or Native Group and the State of Alaska pursuant to paragraph (1), and in any reconveyance executed by a Native Corporation or Native Group pursuant to paragraph (2), each affected Corporation or Group shall disclaim its interest in the parcel which is the subject of the agreement or reconveyance. If such parcel underlies a lake having a surface area of fifty acres or greater or a stream having a width of three chains or greater, the Secretary shall determine the acreage

✓ 104 ✓

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

THE SUPREME COURT OF THE STATE OF ALASKA

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

File Nos. 6824/  
7181

Appellants,

v.

O P I N I O N

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

Appellees,

and

THE ALASKA FEDERATION OF NATIVES,

Intervenor.

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

File No. 7410

Appellants,

v.

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

Cross-Appellees.

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[No. 2911 - February 22, 1985

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

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

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

MOORE, Justice.

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

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

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

#### I. SUMMARY OF FACTS

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

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

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

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

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

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2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

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(Footnote Continued)

the Board of Fisheries.

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

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

5. AS 16.05.251(b) states:

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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

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6. AS 16.05.251(a) states:

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

- (1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;
- (2) establishing open and closed seasons and areas for the taking of fish;
- (3) setting quotas and bag limits on the taking of fish;
- (4) establishing the means and methods employed in the pursuit, capture and transport of fish;
- (5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;
- (6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;
- (7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;
- (8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(Footnote Continued)

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

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

CHARACTERISTICS OF SUBSISTENCE FISHERIES.

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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

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

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

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