

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672
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SUBSISTENCE

LEGAL

QUESTIONS

(FILE 1)

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. 2911 (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 (1983).

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

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 11, 1985

SUBJECT: Sectional analysis of SCS CSHB 288 (Res)

TO: Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

FROM: Edward H. Hein *EHA*
Legislative Counsel

Section 1. The legislative findings section finds that non-residents, unlike residents, take fish and game primarily for purposes other than personal or family consumption as food; that personal or family consumption of fish and game is important to residents; and that fishing and hunting by both residents and nonresidents are important to the economy of the state and of local communities; that customary and traditional use of fish and game in rural areas is a significant characteristic of many communities because it is cost-effective and important to health, safety, and well-being; and that commercial fishermen often use a portion of their catch for personal use.

Sec. 2. amends AS 16.05.251(a), which authorizes the Board of Fisheries to adopt fishing regulations. Paragraph (6) specifically allows the board to classify personal use fish and subsistence fish. New paragraphs (12) and (13) allow the board to adopt regulations for regulating selected stocks for catch-and-release sport fishing, and for regulating commercial, sport, personal use, and subsistence fishing generally.

Sec. 3. repeals and reenacts AS 16.05.251(b), which provides for the subsistence fishing priority. This section establishes fishing for personal and family consumption as a priority use of the harvestable surplus of a fish stock whenever it is necessary to restrict fishing of the stock to maintain sustained yield. To implement this priority, the Board of Fisheries is required to establish a mandatory allocation ensuring residents a reasonable opportunity for sport or personal use fishing in those types of established

fisheries. The board is required to adopt regulations allowing sport and personal use taking so long as the regulations do not jeopardize sustained yield or subsistence. Any harvestable surplus that exceeds the mandatory allocation must be allocated among users as the board finds appropriate. The board may reasonably regulate seasons, catch limits, and methods and means of sport and personal use fishing.

Sec. 4. amends AS 16.05.251 by adding new subsections. Subsection (d) requires the Board of Fisheries to adopt regulations providing for subsistence fishing, unless the regulations would jeopardize sustained-yield. If necessary to maintain sustained-yield or to protect subsistence fishing, a priority would take effect for subsistence. That much of the new subsection is identical to existing law. This subsection also specifies that the board may reasonably regulate seasons, bag limits, and methods and means of subsistence fishing. Subsection (e) provides that if the harvestable surplus of fish is not large enough to allow reasonable opportunity for subsistence fishing, the board must adopt regulations restricting subsistence on the basis of the three ANILCA or "second tier" criteria. Subsection (e) also allows the board to reasonably regulate seasons, bag limits, and methods and means of subsistence fishing.

Sec. 5. amends AS 16.05.255(a), which authorized the Board of Game to adopt game regulations. This section adds a new paragraph (10) specifying that the board may adopt regulations for sport hunting and subsistence hunting. The existing statutes do not use the term "sport hunting".

Sec. 6. repeals and reenacts AS 16.05.255(b), which establishes the subsistence hunting priority. This section requires the Board of Game to establish a mandatory allocation of game to allow residents a reasonable opportunity for personal or family consumption, and to adopt regulations that authorize hunting for personal and family consumption and that do not jeopardize sustained-yield. The board is authorized to reasonably regulate seasons, bag limits, and methods and means of hunting for personal and family consumption.

Sec. 7. adds two new subsections to AS 16.05.255. Subsection (d) requires the Board of Game to adopt subsistence hunting regulations, unless the regulations would jeopardize sustained-yield. The subsection also provides a priority

Senator Arliss Sturgulewski
May 11, 1985
page 3

for subsistence hunting when hunting must be restricted to maintain sustained-yield or to protect subsistence hunting. This much of the sub^t action is the same as existing law. The board is also authorized in this subsection to reasonably regulate seasons, bag limits, and methods and means of subsistence hunting. Subsection (e) requires the board to restrict subsistence hunting on the basis of the ANILCA criteria when there is not enough game available to allow a reasonable opportunity for subsistence hunting for all.

Sec. 8. amends AS 16.05.940(21), which defines "sport fishing" to provide that sport fishing includes fishing for personal or family consumption.

Sec. 9. changes the definition of "subsistence uses" in AS 16.05.940(23). This section limits subsistence to residents; the taking and use must be in a rural area and must be "customary, traditional, and cost-effective"; "rural area" is limited to the "historic hunting or fishing area associated with a community or area" in which subsistence is a significant part of the economy.

Sec. 10. adds a new definition at AS 16.05.940(28), defining "personal use fishing"; similar to subsistence fishing, but allowing the use of dip nets and pots.

Sec. 11. provides for an immediate effective date.

EHH:csh
c3/045

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

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

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

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

MEMORANDUM

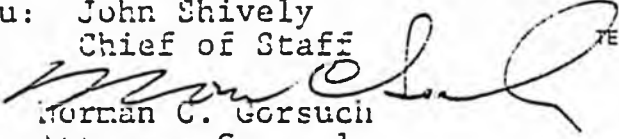
State of Alaska

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. Behnke, 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 S. Ly, 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.

Handwritten note: ANILCA defines subsistence uses as uses of fish and game by rural Alaska residents.

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

March 6, 1965
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 those uses a priority over sport and commercial fishing.

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

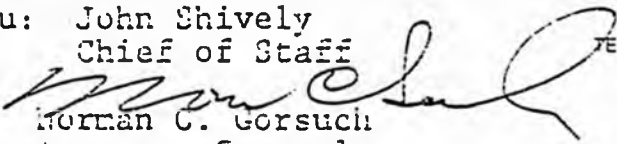
State of Alaska

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. Behnke, 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
366-373-85

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

2. 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
366-375-35

March 8, 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
Governor
Thru: John Shively, Chief of Staff
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.
3. Amend the current statutes to return the regulatory authority that the boards exercised before Madison.
Consequences:
 1. By inserting the words "rural Alaska residents" into the definition of subsistence uses, the scope of uses qualifying for the protection and priority of the subsistence law would be narrowed.
 2. By inserting the words "rural Alaska residents" into the definition of subsistence uses, compliance with ANILCA could be assured.
 3. By establishing the personal use fishing category in statute, harvest opportunities for people who do not qualify for subsistence uses could be protected, without giving those uses a priority over sport and commercial fishing.

MEMORANDUM

State of Alaska

TO: 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

BILL SHEFFIELD, GOVERNOR

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
Our 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. 2911 (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. 13, 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 (1983).

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

MEMORANDUM

State of Alaska

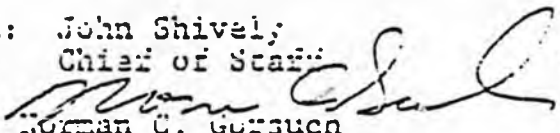
TO: Honorable Bill Sheffield
Governor

DATE: March 6, 1985

Thru: John Shively,
Chief of Staff

FILE NO: 366-375-85

TELEPHONE NO: 465-3600

FROM: 
Norman C. Gorsuch
Attorney General

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. Behnke, 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 Shivelj, Chief of Staff
366-373-85

March 6, 1985
Page 1

-- On February 12, 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.

Residency
not seasons
+ bag limits

-- 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 Chively, 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 coarcs 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 1976 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
366-375-65

March 6, 1978
Page 1

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
366-375-65

March 6, 1985
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, 1966
Page 3

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
Governor
Thru: John Shively, Chief of Staff
366-375-65

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.
3. Amend the current statutes to return the regulatory authority that the boards exercised before Madison.
Consequences:
 1. By inserting the words "rural Alaska residents" into the definition of subsistence uses, the scope of uses qualifying for the protection and priority of the subsistence law would be narrowed.
 2. By inserting the words "rural Alaska residents" into the definition of subsistence uses, compliance with ANILCA could be assured.
 3. By establishing the personal use fishing category in statute, harvest opportunities for people who do not qualify for subsistence uses could be protected, without giving those uses a priority over sport and commercial fishing.

MEMORANDUM

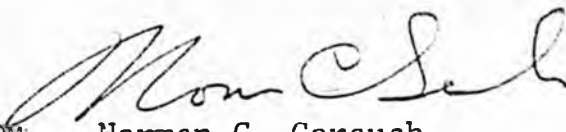
State of Alaska

TO: Hon Jolin, Chairman
Joint Boards of Fisheries and Game

DATE: March 11, 1985

FILE NO: 366-375-85

TELEPHONE NO: 465-3600

FROM: 
Norman C. Gorsuch
Attorney General

SUBJECT: Subsistence

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

The state statutes require:

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

Before Madison:

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

After Madison:

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

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

NCC/LIS:rn

Sec. 16.05.250. Regulations. [Repealed, § 40 ch 206 SLA 1975.]

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

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

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

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

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

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

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

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

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

(11) establishing seasons, areas, 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.

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

*based on the application
of the following criteria:*

(1)
(2)
(3)

- (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- (2) local residency; and
- (3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980)

Cross references. — For restriction on maximum area of land that may be closed to multiple uses without an act of the state legislature, see AS 38.05.300(a).

For validity of regulations of former Board of Fish and Game, see sec. 41, ch. 206, SLA 1975 in the Temporary and Special Acts.

Effect of amendments. — The 1980 amendment inserted "disease" near the middle of paragraph (8) of subsection (a), and inserted "and regulating" near the beginning of paragraph (10) of subsection (a).

Editor's notes. — As to legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Special Acts and Resolves.

Legislative history reports. — For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

Opinions of attorney general. — For discussion of compatibility of state subsistence-use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3115 et seq.), see 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Differential treatment not prohibited. — While Alaska Const., art. VIII, § 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Establishment of use priorities. — While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 — 44.62.650. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Cited in *Reynolds v. State*, Ct. App. Op. No. 182 (File No. 6432), 655 P.2d 1313 (1982).

Sec. 16.05.253. Operation of stationary fishing gear. (a) The Board of Fisheries may require a person who holds a limited entry permit or an interim-use permit under AS 16.43 to be physically present at a beach or riparian fishing site during the operation of net gear or other stationary fishing gear at the site, except when the permit holder is at or traveling to or from the location of

- (1) a sale of fish caught in the gear; or
- (2) other stationary gear of the permit holder.

(b) For purposes of this section, "fishing site" means fishing site as defined by the Board of Fisheries and includes any structure used for providing shelter in support of the operation of the net gear or other stationary fishing gear. (§ 1 ch 94 SLA 1982; am § 1 ch 19 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote the existing language of this section and designated that language subsection (a) and added subsection (b).

Sec. 16.05.255. Regulations of the Board of Game. (a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart game reserve areas, refuges and sanctuaries in the waters or on the lands 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 game;

(3) establishing the means and methods employed in the pursuit, capture and transport of game;

(4) setting quotas and bag limits on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;

(6) investigating and determining the extent and effect of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designating game management units or parts of game management units in which bounties for predatory animals shall be paid;

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

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

(9) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(10) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed.

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses. Unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis, Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources 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. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

Cross references. — For validity of regulations of former Board of Fish and Game, see sec. 41, ch. 206, SLA 1975 in the Temporary and Special Acts.

Editor's notes. — For legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Special Acts and Resolves.

Legislative history reports. — For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

Opinions of attorney general. — Neither the Board of Game nor the Department of Fish and Game has jurisdiction

over domestic animals. August 29, 1979, Op. Att'y Gen.

Permitting authority over live game, that is, nondomestic animals, rests with the Board of Game as implemented by the Department of Fish and Game. August 29, 1979, Op. Att'y Gen.

For discussion of compatibility of state subsistence-use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3115 et seq.), see 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

Establishment of quotas must be in accordance with the Administrative Procedure Act (AS 44.82). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Applied in *Gottardi v. State*, Sup. Ct. Op. No. 2154 (File No. 4436), 615 P.2d 626 (1980).

Sec. 16.05.256. Nonresident and nonresident alien permits. Whenever it is necessary to restrict the taking of big game so that the opportunity for Alaska residents to take big game can be reasonably satisfied in accordance with sustained yield principles, the Board of Game may, through a permit system, limit the taking of big game by nonresidents and nonresident aliens to accomplish that purpose. (§ 3 ch 74 SLA 1982)

Sec. 16.05.257. Subsistence hunting regulations. (a) The Board of Game, at its regularly scheduled annual meeting and other meetings held under authority of AS 16.05.300(a), shall consider and may adopt regulations providing for subsistence hunting in a game management unit or subunit or a portion of a unit or subunit upon

- (1) recommendation of the department, based on biological evidence;
- (2) the recommendation of the active local advisory committees for that game management unit or subunit or a portion of a unit or subunit;
- (3) the written petition of not less than 100 interested residents of that game management unit or subunit; or
- (4) the written petition of not less than 25 interested residents of an area which is requested for establishment as a subsistence area within a game management unit or subunit.

- (b) ~~The regulations may include but are not limited to the following:~~
- ~~(1) the establishment of subsistence hunting areas;~~
 - ~~(2) the regulation of transportation methods and means to protect subsistence hunting within subsistence hunting areas, including the prohibition or limitation of pack animals, mechanized vehicles and aircraft, other than watercraft or wheeled vehicles operating on a road maintained by public funds;~~
 - ~~(3) the establishment of open and closed seasons and areas to protect subsistence hunting;~~
 - ~~(4) the limitation of hunting to only one sex of the animal.~~
- (c) ~~Regulations may not be adopted by the Board of Game under (a), (b) or (f) of this section unless, in addition to the requirements of AS 44.62.180 — 44.62.290, the department~~
- ~~(1) holds public hearings, after reasonable notice, at least 90 days before the meeting at which the regulation is to be adopted, with at least one of the hearings being held in close proximity to the area potentially affected;~~
 - ~~(2) presents at the hearings the information provided for in (e) of this section;~~
 - ~~(3) makes the information provided for in (e) of this section available to the appropriate advisory committees and to petitioners if consideration of adoption of regulations was prompted by petitions under (a)(3) or (4) of this section; comments shall be received by the board until 10 days before any adoption of regulations.~~
- (d) ~~A petition submitted under (a)(3) — (4) of this section shall contain a complete description of the area requested as a subsistence area and a specification of the species within the area considered necessary for subsistence use. A petition or recommendation made under (a)(2), (3) or (4) of this section must be filed with the department at least 75 days before the meeting of the board at which the petition or recommendation is to be considered.~~
- (e) ~~The department shall investigate, by collecting existing data, and, when necessary, conducting new studies, every petition or recommendation made under (a)(2), (3) or (4) of this section to the extent practicable within the time available and provide the following information:~~
- ~~(1) the concentration of the species to be affected and carrying capacity of the area to be affected;~~
 - ~~(2) the current hunting practices in the area, including numbers of animals taken and by what methods and means and whether the take is subsistence or recreational;~~
 - ~~(3) the dependence of persons in the area for subsistence use of a species;~~
 - ~~(4) the population trends of the affected fish and game in the area;~~
 - ~~(5) whether the affected fish and game population is able to support a nonsubsistence harvest; and~~

(6) other information considered necessary by the section of subsistence hunting and fishing.

(f) The Board of Game at any time may review and change the boundaries of a subsistence area upon

(1) the recommendation of the department, based on biological evidence;

(2) the written petition of not less than 25 interested residents of that area; or

(3) the majority vote of the active local advisory committees for that area.

(g) The department shall submit a report to the legislature during the first 10 days of each legislative session beginning after January 1, 1977. The report shall include, but is not limited to, a listing of the specific subsistence areas established or modified during the preceding year and the species subject to subsistence use within those areas.

(h) In this section

(1) "subsistence hunting" means the taking of game animals by a state resident for subsistence uses by means defined by the Board of Game;

(2) "subsistence hunting area" means an area in which only subsistence hunting of the affected species is permitted and which is managed for maximum food potential.

(i) The Board of Game may not make a decision denying, creating or changing a subsistence hunting area unless the decision is based on specific written findings of fact regarding all the information provided in accordance with (e) of this section. (§ 1 ch 199 SLA 1975; am § 2 ch 269 SLA 1976; am §§ 6-12 ch 151 SLA 1978)

Editor's notes. — As to the section of subsistence hunting and fishing, referred to in (e)(6) of this section, see the editor's note to AS 16.05.090.

For legislative intent, see § 1, ch. 151, SLA 1978, in the 1978 Temporary and Spe-

cial Acts and Resolves.

Legislative history reports. — For report on ch. 199, SLA 1975 (SCS HB 369 am S), see 1975 House Journal, p. 733.

For report on ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

NOTES TO DECISIONS

Regulations adopted under this section must be in accordance with the Administrative Procedure Act (AS 44.62). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

While this section, which authorizes the Board of Game to adopt regulations providing for subsistence hunting, does not specifically refer to the Administrative Procedure Act (AS 44.62), it appears clear that it merely sets forth an additional purpose for which regulations may be promulgated. State v. Tanana Valley

Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Issuance of permits based on verbal instructions to agents held improper. — The issuance of permits for the killing of caribou in certain specified areas of the state based on verbal instructions to the permit agents as to the need of individual applicants does not conform to requirements of the Administrative Procedure Act (AS 44.62). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

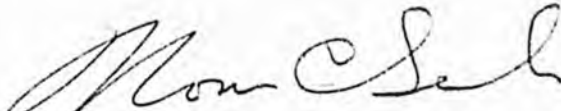
MEMORANDUM

State of Alaska

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

DATE: March 11, 1985

FILE NO: 366-375-85


FROM: Norman C. Gorsuch
Attorney General

TELEPHONE NO: 465-3600

SUBJECT: Subsistence

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

The state statutes require:

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

Before Madison:

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

After Madison:

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

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

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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

6 USC 3111.

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;

16 USC 1601
ite.

(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

USC 3112.

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—

16 USC 3113.

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

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

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

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

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:

16 USC 3114.

Priority 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.

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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.

Implementation.

(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 on 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.

Reimbursement to States.

(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.

Report to Congress.

(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.

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

Civil actions.
16 USC 3117.

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.

Hearing.

(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

16 USC 3118.

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

subsistence
hunting pro-
gram.

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.

Program and
recommendation
implementation.

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.

16 USC 3119.

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—

16 USC 3120.

(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

Hearing.

(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.

3 USC note rec. 21.
4 USC 1601 etc.

(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

5 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

6 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

7 USC 3123.
8 USC 3123.
9 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

1126.

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

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 9, 1985

SUBJECT: Comparative analysis of subsistence bill drafts (SCS CSHB 288 (Res), W.O. 14-1188, and draft by Senator Halford) (Revised)

TO: Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

FROM: Edward H. Hein *EHA*
Legislative Counsel

You have asked for a comparative sectional analysis of three subsistence bill drafts: (1) your version, SCS CSHB 288 (Resources); (2) Senator Victor Fischer's draft, our work order No. 14-1188; and (3) a draft by Senator Halford. In this analysis, in each bill section I will refer first to your version, then to Sen. Fischer's version, then to Sen. Halford's version.

Section 1. The legislative findings section is essentially the same in all three versions. All find that nonresidents, unlike residents, take fish and game primarily for purposes other than personal or family consumption as food; that personal or family consumption of fish and game is important to residents; and that fishing and hunting by both residents and nonresidents are important to the economy of the state and of local communities. The Resources version finds in paragraph (3) that customary and traditional use of fish and game in rural areas is a significant characteristic of many communities because it is cost-effective and important to health, safety, and well-being; the Fischer and Halford versions in paragraph (3) find that, for three reasons, personal and family consumption of fish and game is essential to the health, safety, and well-being of residents domiciled in communities in which such taking in a cost-effective way is a significant characteristic of the economy. The Resources and Halford versions add a fifth finding, that commercial fishermen often use a portion of their catch for personal use.

Sec. 2. of the Resources and Fischer versions amend AS 16.05.251(a), which authorizes the Board of Fisheries to adopt fishing regulations. The Resources version in paragraph (6) specifically allows the board to classify personal use fish and subsistence fish; and adds new paragraphs (12) and (13) allowing the board to adopt regulations for regulating selected stocks for catch-and-release sport fishing in both rural and nonrural areas and for subsistence fishing in rural areas, and for regulating commercial, sport, personal use, and subsistence fishing generally. The Fischer version allows the board to classify resident net-fish in paragraph (6), and adds a new paragraph (12) allowing adoption of regulations for regulation of resident net, sport, and commercial fishing. The Halford version does not amend AS 16.05.251(a).

Sec. 3. of the Resources and Fischer versions and sec. 2 of the Halford version amend AS 16.05.251(b), which provides for the subsistence fishing priority. The three versions are quite different from each other. The Resources version completely rewrites this subsection; requires the Board of Fisheries to establish a mandatory allocation ensuring residents a reasonable opportunity for sport or personal use fishing; requires adoption of regulations that allow sport and personal use taking and do not jeopardize sustained-yield or subsistence; and specifies that the board may reasonably regulate seasons, catch limits, and methods and means of sport and personal use fishing. The Fischer version merely amends the existing law by specifying that the board may reasonably regulate seasons, harvest levels, and methods and means of subsistence fishing. Section 2 of the Halford version completely rewrites this subsection and provides (I think) that personal and family consumption of fish by residents is to be the priority use, and requires the board to adopt regulations for that use, if fishing must be restricted to maintain sustained-yield and to assure a reasonable opportunity for personal and family consumption by residents.

Sec. 4. of the Resources and Fischer versions and sec. 3 of the Halford version amend AS 16.05.251 by adding new subsections. The Resources version adds two subsections. Subsection (d) requires the Board of Fisheries to adopt regulations providing for subsistence fishing, unless the regulations would jeopardize sustained-yield. If necessary to maintain sustained-yield or to protect subsistence fishing, a priority would take effect for subsistence. That much of

the new subsection is identical to existing law. This subsection also specifies that the board may reasonably regulate seasons, bag limits, and methods and means of subsistence fishing. Subsection (e) provides that if the harvestable surplus of fish is not large enough to allow reasonable opportunity for subsistence fishing, the board must adopt regulations restricting subsistence on the basis of the three ANILCA or "second tier" criteria. Subsection (e) also allows the board to reasonably regulate seasons, bag limits, and methods and means of subsistence fishing.

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Sec. 5. of the Resources version amends AS 16.05.255(a), which authorized the Board of Game to adopt game regulations. This version adds a new paragraph (10) specifying that the board may adopt regulations for sport hunting and subsistence hunting. The existing statutes do not use the term "sport hunting". The Fischer version does not amend AS 16.05.255(a). Section 4 of the Halford version is a repeal and reenactment of AS 16.05.255. It does not change the language of AS 16.05.255(a), however, and therefore that subsection should be deleted from this version.

Sec. 6. of the Resources version, sec. 5 of the Fischer version, and sec. 4 of the Halford version repeal and reenact AS 16.05.255(b), which establishes the subsistence hunting priority. The Resources version requires the Board of Game to establish a mandatory allocation of game to allow residents a reasonable opportunity for personal or family consumption, and to adopt regulations that authorize hunting for personal and family consumption and that do not jeopardize sustained-yield. The board is authorized to reasonably regulate seasons, bag limits, and methods and means of hunting for personal and family consumption. The Fischer and Halford versions establish a priority for, and require the adoption of regulations for, hunting for personal and family consumption whenever restrictions on hunting are necessary to maintain sustained-yield.

Sec. 7. of the Resources version, sec. 6 of the Fischer version, and sec. 4 of the Halford version add new subsections to AS 16.05.255. The Resources version adds two subsections. Subsection (d) requires the Board of Game to adopt subsistence hunting regulations, unless the regulations would jeopardize sustained-yield. The subsection also provides a priority for subsistence hunting when hunting must be restricted to maintain sustained-yield or to protect subsistence hunting. This much of the subsection is the same as existing law. The board is also authorized in this subsection to reasonably regulate seasons, bag limits, and methods and means of subsistence hunting. Subsection (e) requires the board to restrict subsistence hunting on the basis of the ANILCA criteria when there is not enough game available to allow a reasonable opportunity for subsistence hunting for all. The Fischer version adds one new subsection (d), requiring adoption of regulations that create a priority for subsistence hunting when the harvestable surplus of game is not large enough to allow a reasonable opportunity for all types of hunting. The board is authorized to reasonably regulate seasons, bag limits, and means and methods of hunting. It also requires the board to restrict subsistence hunting on the basis of the ANILCA criteria when there is not enough game to provide a reasonable opportunity for all subsistence hunters to take game. The Halford version is identical in substance to the Fischer version, but is divided into two subsections, (c) and (d). (These should be re-lettered (d) and (e). Subsection (e) is identical to existing law in AS 16.05.255(c) and should be deleted from the draft).

CORRESPONDING SECTIONS OF SUBSISTENCE BILL DRAFTS

RESOURCES	FISCHER	HALFORD
Sec. 1	Sec. 1	Sec. 1
2	2	-
3	3	2
4	4	3
5	-	-
6	5	4
7	6	4
8	7	5
9	8	"4" (p. 6)
10	9	6
11	10	7

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 9, 1985

SUBJECT: Comparative analysis of subsistence bill drafts (SCS CS HB 288 (Res), W.O. 14-1188, and draft by Senator Halford)

TO: Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

FROM: Edward H. Hein *EHH LMB*
Legislative Counsel

You have asked for a comparative sectional analysis of three subsistence bill drafts: (1) your version, SCS CS HB 288 (5/6/85) (Resources); (2) Senator Victor Fischer's draft, our work order No. 14-1188; and (3) a draft by Senator Halford. In this analysis, in each bill section I will refer first to your version, then to Sen. Fischer's version, then to Sen. Halford's version.

Section 1. The legislative findings section is essentially the same in all three versions. All find that nonresidents, unlike residents, take fish and game primarily for purposes other than personal or family consumption as food; that personal or family consumption of fish and game is important to residents; and that fishing and hunting by both residents and nonresidents are important to the economy of the state and of local communities. The Resources version finds in paragraph (3) that customary and traditional use of fish and game in rural areas is a significant characteristic of many communities because it is cost-effective and important to health, safety, and well-being; the Fischer and Halford versions in paragraph (3) find that, for three reasons, personal and family consumption of fish and game is essential to the health, safety, and well-being of residents domiciled in communities in which such taking in a cost-effective way is a significant characteristic of the economy. The Resources and Halford versions add a fifth finding, that commercial fishermen often use a portion of their catch for personal use.

Sec. 2. of the Resources and Fischer versions amend AS 16.05.251(a), which authorizes the Board of Fisheries to adopt fishing regulations. The Resources version in paragraph (6) specifically allows the board to classify personal use fish and subsistence fish; and adds new paragraphs (12) and (13) allowing the board to adopt regulations for regulating selected stocks for catch-and-release sport fishing in both rural and nonrural areas and for subsistence fishing in rural areas, and for regulating commercial, sport, personal use, and subsistence fishing generally. The Fischer version allows the board to classify resident net-fish in paragraph (6), and adds a new paragraph (12) allowing adoption of regulations for regulation of resident net, sport, and commercial fishing. The Halford version does not amend AS 16.05.251(a).

Sec. 3. of the Resources and Fischer versions and sec. 2 of the Halford version amend AS 16.05.251(b), which provides for the subsistence fishing priority. The three versions are quite different from each other. The Resources version completely rewrites this subsection; requires the Board of Fisheries to establish a mandatory allocation ensuring residents a reasonable opportunity for sport or personal use fishing; requires adoption of regulations that allow sport and personal use taking and do not jeopardize sustained-yield or subsistence; and specifies that the board may reasonably regulate seasons, catch limits, and methods and means of sport and personal use fishing. The Fischer version merely amends the existing law by specifying that the board may reasonably regulate seasons, harvest levels, and methods and means of subsistence fishing. Section 2 of the Halford version completely rewrites this subsection and provides (I think) that personal and family consumption of fish by residents is to be the priority use, and requires the board to adopt regulations for that use, if fishing must be restricted to maintain sustained-yield and to assure a reasonable opportunity for personal and family consumption by residents.

Sec. 4. of the Resources and Fischer versions and sec. 3 of the Halford version amend AS 16.05.251 by adding new subsections. The Resources version adds two subsections. Subsection (d) requires the Board of Fisheries to adopt regulations providing for subsistence fishing, unless the regulations would jeopardize sustained-yield. If necessary to maintain sustained-yield or to protect subsistence fishing, a priority would take effect for subsistence. That much of

the new subsection is identical to existing law. This subsection also specifies that the board may reasonably regulate seasons, bag limits, and methods and means of subsistence fishing. Subsection (e) provides that if the harvestable surplus of fish is not large enough to allow reasonable opportunity for subsistence fishing, the board must adopt regulations restricting subsistence on the basis of the three ANILCA or "second tier" criteria. Subsection (e) also allows the board to reasonably regulate seasons, bag limits, and methods and means of subsistence fishing.

The Fischer version also adds two new subsections. Subsection (d) provides that nonsubsistence fishing regulations must, consistent with subsistence regulations, allow a "fair and reasonable opportunity" for resident-net, sport and commercial fishing, and must maintain a priority for resident personal and family consumption. Subsection (e) lists seven factors the board must consider when allocating fish among nonsubsistence users. Section 3 of the Halford version adds three new subsections to AS 16.05.251. Subsection (c) requires the board to adopt regulations that establish a subsistence priority when there are not enough fish to allow a reasonable opportunity for all types of fishing. The subsection specifies that the board may reasonably regulate seasons, bag limits, and methods and means for fishing. Subsection (d) requires the board to adopt regulations restricting subsistence fishing on the basis of the ANILCA criteria if there are not enough fish to allow reasonable opportunity for subsistence fishing for all. Again, these regulations may include reasonable regulation of seasons, bag limits, and methods and means of subsistence fishing. Subsection (e) is identical to existing law in AS 16.05.251(c) and therefore should be deleted from the bill draft. Subsections (c) and (d) in this version should be re-lettered as (d) and (e).

Sec. 5. of the Resources version amends AS 16.05.255(a), which authorized the Board of Game to adopt game regulations. This version adds a new paragraph (10) specifying that the board may adopt regulations for sport hunting and subsistence hunting. The existing statutes do not use the term "sport hunting". The Fischer version does not amend AS 16.05.255(a). Section 4 of the Halford version is a repeal and reenactment of AS 16.05.255. It does not change the language of AS 16.05.255(a), however, and therefore that subsection should be deleted from this version.

Sec. 6. of the Resources version, sec. 5 of the Fischer version, and sec. 4 of the Halford version repeal and reenact AS 16.05.255(b), which establishes the subsistence hunting priority. The Resources version requires the Board of Game to establish a mandatory allocation of game to allow residents a reasonable opportunity for personal or family consumption, and to adopt regulations that authorize hunting for personal and family consumption and that do not jeopardize sustained-yield. The board is authorized to reasonably regulate seasons, bag limits, and methods and means of hunting for personal and family consumption. The Fischer and Halford versions establish a priority for, and require the adoption of regulations for, hunting for personal and family consumption whenever restrictions on hunting are necessary to maintain sustained-yield.

Sec. 7. of the Resources version, sec. 6 of the Fischer version, and sec. 4 of the Halford version add new subsections to AS 16.05.255. The Resources version adds two subsections. Subsection (d) requires the Board of Game to adopt subsistence hunting regulations, unless the regulations would jeopardize sustained-yield. The subsection also provides a priority for subsistence hunting when hunting must be restricted to maintain sustained-yield or to protect subsistence hunting. This much of the subsection is the same as existing law. The board is also authorized in this subsection to reasonably regulate seasons, bag limits, and methods and means of subsistence hunting. Subsection (e) requires the board to restrict subsistence hunting on the basis of the ANILCA criteria when there is not enough game available to allow a reasonable opportunity for subsistence hunting for all. The Fischer version adds one new subsection (d), requiring adoption of regulations that create a priority for subsistence hunting when the harvestable surplus of game is not large enough to allow a reasonable opportunity for all types of hunting. The board is authorized to reasonably regulate seasons, bag limits, and means and methods of hunting. It also requires the board to restrict subsistence hunting on the basis of the ANILCA criteria when there is not enough game to provide a reasonable opportunity for all subsistence hunters to take game. The Halford version is identical in substance to the Fischer version, but is divided into two subsections, (c) and (d). (These should be re-lettered (d) and (e). Subsection (e) is identical to existing law in AS 16.05.255(c) and should be deleted from the draft).

Sec. 8. of the Resources version, sec. 7 of the Fischer version, and sec. 5 of the Halford version all amend AS 16.05.940(21), which defines "sport fishing". All three versions are the same. They all provide that sport fishing includes fishing for personal or family consumption.

Sec. 9. of the Resources version, sec. 8 of the Fischer version, and a section mistakenly numbered sec. 4 on page 6 of the Halford version all change the definition of "subsistence uses" in AS 16.05.940(23). The Resources version limits subsistence to residents; the taking and use must be in a rural area and must be "customary, traditional, and cost-effective"; "rural area" is limited to the "historic hunting or fishing area associated with a community or area" in which subsistence is a significant part of the economy. The Fischer version limits subsistence to residents "domiciled" in rural areas of the state; the taking and use must be customary, traditional, and noncommercial; "rural area" includes an entire community or area in which subsistence is a significant part of the economy. The Halford version uses the Resources concept of requiring only residency, not domicile, and requiring "cost-effective" taking and use; in a rural area but it uses the Fischer version of "rural area", not limited to the "historic hunting or fishing area".

Sec. 10. of the Resources version, sec. 9 of the Fischer version, and sec. 6 of the Halford version all add a new definition at AS 16.05.940(28). The three versions are identical, except that the Resources version uses the term "personal use fishing"; the Fischer and Halford versions use the term "resident net fishing".

Sec. 11. of the Resources version, sec. 10 of the Fischer version, and sec. 7 of the Halford version all provide for an immediate effective date.

CORRESPONDING SECTIONS OF SUBSISTENCE BILL DRAFTS

RESOURCES	FISCHER	HALFORD
Sec. 1	Sec. 1	Sec. 1
2	2	-
3	3	2
4	4	3
5	-	-
6	5	4
7	6	4
8	7	5
9	8	"4" (p. 6)
10	9	6
11	10	7

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

LEGISLATIVE AFFAIRS AGENCY.

MEMORANDUM

May 9, 1985

SUBJECT: Sectional analysis of a draft bill entitled
"An Act relating to fishing and hunting."

TO: Senator Mitchell Abood
Chairman, Senate State Affairs Committee

FROM: Edward H. Hein *EH*
Legislative Counsel

Section 1 amends AS 16.05.251(b), which establishes the subsistence fishing priority and requires the Board of Fisheries to adopt subsistence fishing regulations. This bill section would allow the board to provide for the issuance of and set fees for subsistence fishing licenses and would make the adoption of subsistence regulations discretionary, rather than mandatory. Only those subsistence uses specified in statute or regulation would be allowed. The board would be allowed to determine allocations and regulate seasons, catch limits, methods and means of taking, quotas, etc. Fish taken by a subsistence licensee's dependents, as well as by the licensee, would be counted toward the catch limit established by the board. This bill section deletes the ANILCA or "second-tier" criteria for distinguishing among subsistence users.

Sec. 2 amends AS 16.05.255(b), which establishes the subsistence hunting priority and requires the Board of Game to adopt subsistence hunting regulations. This bill section does to subsistence hunting precisely what section 1 does to subsistence fishing.

Sec. 3 amends the definition of "subsistence fishing" to allow the use of hook and line, and rod and reel gear. It also limits subsistence fishing statutorily to state residents. Subsistence hunting is already limited to residents by statute at AS 16.05.257.

Sec. 4 establishes a system for licensing subsistence fishermen and hunters and their dependents. Proposed

AS 16.05.258(a) requires the boards of fisheries and game to provide for the issuance of three types of subsistence licenses: fishing, hunting, and combination. Subsection (b) provides that an applicant for a subsistence license must be a state resident 16 years of age or older; has to claim as dependents all those living in the applicant's household and also all those who depend on the applicant to provide fish or game, which constitutes a minimum part of the dependent's diet; cannot be claimed as a dependent by another applicant; must prove that the applicant and all of the applicant's dependents rely on subsistence-caught fish or game for their diet and don't have access to alternative food resources for any of four reasons; and must notify everyone claimed as a dependent that they cannot apply for a subsistence license.

Subsection (c) establishes new "second-tier" criteria for distinguishing among subsistence users. If a shortage of fish or game necessitated it, the Department of Fish and Game could require that subsistence license applicants also meet maximum income requirements set jointly by the boards of fisheries and game. Subsection (d) requires the boards to establish income limits for subsistence license applicants, based on the cost of living in the applicant's home community or area. Subsection (e) requires applicants to use forms provided by the department.

Subsection (f) prohibits a person from holding both a subsistence license and a sport or commercial or guiding license for taking the same kind of resource. The subsection also applies to dependents of the license holder. E.g.: a person could not hold both a limited entry permit and a subsistence fishing permit, but could hold a limited entry permit and a sport hunting license. Likewise, a person could not obtain a subsistence fishing license if someone the person claims as a dependent holds a sport or commercial fishing license or permit. Subsection (g) prohibits a person from subsistence fishing or hunting unless the person has a current subsistence license in possession or is a dependent hunting or fishing with the license holder. Subsection (h) makes subsistence licenses nontransferable.

Proposed AS 16.05.259(a) provides for expiration of subsistence licenses five years after issuance. Subsection (b) requires annual validation of subsistence licenses by a fish and game employee or agent to assure that license holders

continue to meet qualifications for the license. Subsection (c) requires the department to revoke all subsistence licenses of a person who is convicted of a fish or game violation, who makes a false statement on a subsistence license applications, who holds two or more licenses impermissibly, or who alter or lends a subsistence license. Subsection (d) makes persons whose licenses are subject to revocation under subsection (c), and persons convicted of subsistence fishing or hurting without a license, ineligible to apply for a subsistence license, with length of the the period of ineligibility varying with the number of convictions.

Sec. 5 makes it a class B misdemeanor to hold two licenses impermissibly, to subsistence fish or hunt without a license, or to alter or lend a subsistence license.

Sec. 6 excludes subsistence hunting from the provisions of AS 16.05.330 - 16.05.430, which currently govern sport fishing, hunting, and trapping.

EHH:ojb
J15/002

*Section 4. AS 16.05.251 (b) is repealed and reenacted to read:

Whenever it is necessary to restrict the taking of a fish stock to assure the maintenance of such stock on a sustained yield basis, the reasonable opportunity for the taking of such stock by Alaska residents for personal and family consumption, shall be a priority use of the harvestable surplus of such stock. To implement this priority, the Board of Fisheries shall establish a mandatory allocation that ensures all Alaskan residents a reasonable opportunity for sport or personal use fishing in all established sport and personal use fisheries, and shall adopt regulations authorizing such taking in accordance with the Administrative Procedure Act (AS 44.62), unless such regulations will jeopardize or interfere with the maintenance of a fish stock on a sustained yield basis or with the continuance of subsistence. The harvestable surplus of fish stocks above this mandatory allocation shall be allocated among uses by the board as found appropriate. Takings authorized pursuant to this subsection shall be subject to reasonable regulations as to seasons, catch limits, and methods and means.

MEMORANDUM

State of Alaska

TO: Jim Ayers, Deputy Commissioner
Department of Fish and Game

DATE: April 30, 1985

FILE NO: 366-375-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Draft senate
subsistence bill

By: Larri Irene Spengler
Assistant Attorney General
Department of Law

LIS

You asked me to examine the definition of "subsistence uses" in a draft senate bill. That bill defines "subsistence uses" to mean the

"customary, traditional and cost effective taking and use by Alaska residents in rural areas of [fish and game for certain purposes]. Wild and renewable resources taken for subsistence must be used in the same area in which they are taken.

A definition of "rural area" is also included.

This definition of "subsistence uses" raises several legal problems, which I will outline briefly below, as you requested.

1. ANILCA problems.

a. The definition would potentially allow all Alaskans to harvest resources for subsistence, and that is inconsistent with the requirement in ANILCA that subsistence uses be limited to rural Alaska residents. This was recently emphasized strongly in the April 18, 1985 letter from William Horn, Deputy Undersecretary, Department of the Interior, to Representative Peter Goll.

b. ANILCA requires implementation on a community or area basis, and this definition hinges on individuals -- where they ultimately use the fish or game.

c. ANILCA does not contain the restriction "cost effective" as a part of the definition of "subsistence uses". It is not clear what is intended by that adjective, and if it precluded customary and traditional harvests which would otherwise be permissible under federal law.

2. Equal protection problems. This definition would give campers a priority over other personal use or sport

Jim Ayers, Dep. Commissioner
Department of Fish and Game
File No. 366-375-25

April 30, 1985
Page 2

fishermen or sport hunters, which could result in equal protection problems.

a. The bill establishes a class of persons eligible for subsistence hunting and fishing made up of any Alaska resident who goes to a "rural area", takes fish or game, and uses it there.

b. Equal protection prohibits treating individuals similarly situated with respect to the subject matter of a statute or regulation differently.

c. It is hard to see how long term campers are similarly situated to residents living in rural communities or areas. (Please see my April 24, 1985 letter to Representative John Sund which concludes that equal protection would not be violated by identifying subsistence uses as uses by rural Alaska residents.)

d. People from outside of the rural area in which the hunting or fishing occurs may very well be situated similarly to each other, and whether or not they stay in the area long enough to consume the resource harvested may not be a difference relevant for equal protection purposes.

3. Enforcement problems. Enforcement will be extremely difficult, since whether subsistence fishing or personal use fishing regulations apply to an individual is dependent on where the individual intends to make use of the fish caught. Likewise, whether sport or subsistence hunting regulations apply depends on where the individual intends to use the game taken. This will probably make enforcement quite confusing.

If you have any further questions, please do not hesitate to call.

LIS:rn

Attachment

cc: Dennis Kelso
Steve Behnke

Sec. 3 AS 16.05.251 (b) is repealed and reenacted to read:

(b) The Board of Fisheries shall allocate harvestable surpluses of fish stocks in a manner that ensures Alaska residents are afforded a reasonable opportunity for sport ~~and~~ ^{OT} personal use fishing, and shall adopt regulations authorizing these types of takings in accordance with the Administrative Procedures Act (AS 44.62), unless the regulations will jeopardize or interfere with the maintenance of a fish stock on a sustained-yield basis or with the continuance of subsistence uses. Takings authorized under this subsection are subject to reasonable regulation of seasons, catch limits, and methods and means.

Letter of Intent

The Legislature recognizes that personal use of fish and wildlife is a valuable part of Alaskan life. Although sport, commercial and personal use hunting or fishing are not afforded a statutory priority over each other, the boards must establish allocations that ensure all Alaskans have a reasonable opportunity for sport or personal use fishing or hunting, unless such regulations would jeopardize or interfere with the maintenance of a fish stock or game population or with the continuance of subsistence. The allocation process shall be designed to ensure that these user groups are treated fairly overall.

SPORT FISHING IN COOK INLET

Sport fishing opportunities in the state are becoming intensely popular with both residents and non-residents actively pursuing this hobby. The facts and figures presented below are presented in the 1983 Statewide Sport Fish Harvest Survey. All figures represent record highs and reflect an increase of 6% in anglers and 7% increase in angler days over 1982. 1984 figures are presently unavailable but reflect a similar increase over 1983.

STATEWIDE FISHING PRESSURE

- 309,998 anglers fished statewide
- 72% resident - 28% non-resident
- 1,732,528 angler days were fished in 1983

RECREATION IN UPPER COOK INLET IS BIG BUSINESS

- A total of 948,330 angler days (55% of state total) was spent fishing in Upper Cook Inlet in 1983 (Kenai and Susitna)
- 20% of the Cook Inlet anglers are non-resident; 80% are residents. The statewide average is 28% non-resident consequently this fishery supports a strong resident use pattern.
- We estimate well over 100 million dollars a year are spent by the angling public in pursuit of fishing in Upper Cook Inlet.
- The Southcentral Economic Survey is designed to provide revenue projections that will estimate the contribution of sport fishing to local and regional economies.
- Fisheries are almost totally limited to existing roads - creates very intensive fisheries.
- Excellent opportunity to provide a long-term permanent land and water base for the greatly expanding recreational public.

KENAI PENINSULA

- The Kenai Peninsula supports the largest sport fishery in the state with 34% of the statewide effort located here. (592,846 angler days)
- The Russian River sockeye fishery generates a tremendous interest on the part of sport anglers with 35,018 angler days fished.
- The Kenai River alone had 229,228 angler days of use representing 13% of the statewide total.
- The trophy king salmon fishery in the Kenai River is by far the most popular in the state. Kings weighing 80 pounds or more are harvested each year.

SPORT FISHING IN COOK INLET (Continued)

SUSITNA, LITTLE SUSITNA AND KNIK FISHERIES

- These fisheries collectively provide 280,512 angler days of fishing opportunities.
- The Susitna drainage offers a largely untapped sport fish resource north of Anchorage as access is limited to the road system.
- Even with very limited access to westside Susitna tributaries the following streams provided excellent sport fish opportunities (all westside systems provide 74,652 angler days of opportunity).

Deshka	23,174 angler days
Alexander	9,425 angler days
Lake Creek	14,749 angler days
Talachulitna	4,566 angler days

- Willow Creek access will greatly enhance the public's ability to get to these fisheries.
- The Little Susitna River is the fastest growing fishery in the state with over 35,000 angler days of effort. Camping development, parking and launch ramps slow this fishery's growth.

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.