

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672

4222.20 SRES SUBSISTENCE LEGAL QUESTIONS (file 1)

1201

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

March 6, 1985
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-- 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.

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III. Necessity for Governor's Briefing

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

IV. Background

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

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

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B. Madison. The court held with regard to the statutory and regulatory framework in Alaska:

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

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V. Relevant Laws

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

B. Federal law:

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

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

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

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

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VI. Alternatives

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

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

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

MEMORANDUM

State of Alaska

TO: 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 A; 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.

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Department of Fish and Game
166-423-83

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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 VIXI, 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 8, 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
Commissicner
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

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

377-176-85

referred in house = resources and judiciary

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE BILL NO. 231 (House bill 288)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

10 * Section 1. FINDINGS. The legislature finds that

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

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

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

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

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

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

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



- 1 size limitations on the taking of fish;
- 2 (4) establishing the means and methods employed in the
- 3 pursuit, capture and transport of fish;
- 4 (5) establishing marking and identification requirements
- 5 for means used in pursuit, capture and transport of fish;
- 6 (6) classifying as commercial fish, sport fish, personal
- 7 use fish, or predators or other categories essential for regulatory
- 8 purposes;
- 9 (7) watershed and habitat improvement, and management,
- 10 conservation, protection, use, disposal, propagation and stocking of
- 11 fish;
- 12 (8) investigating and determining the extent and effect of
- 13 disease, predation, and competition among fish in the state, exercis-
- 14 ing control measures considered necessary to the resources of the
- 15 state;
- 16 (9) prohibiting and regulating the live capture, posses-
- 17 sion, transport, or release of native or exotic fish or their eggs;
- 18 (10) establishing seasons, areas, quotas and methods of
- 19 harvest for aquatic plants;
- 20 (11) establishing the times and dates during which the
- 21 issuance of fishing licenses, permits and registrations and the trans-
- 22 fer of permits and registrations between registration areas is al-
- 23 lowed; however, this paragraph does not apply to permits issued or
- 24 transferred under AS 16.43;
- 25 (12) personal use fishing.

26 * Sec. 3. AS 16.05.940(23) is amended to read:

27 (23) "subsistence uses" means the customary and traditional

28 uses by rural [IN] Alaska residents of wild, renewable resources for

29 direct personal or family consumption as food, shelter, fuel,

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

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

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

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

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

THE SUPREME COURT OF THE STATE OF ALASKA

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

File Nos. 6824/
7181

Appellants,)

v.)

O P I N I O N

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

Appellees,)

and)

THE ALASKA FEDERATION OF NATIVES,)

Intervenor.)

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

File No. 7410

Appellants,)

v.)

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

Cross-Appellees.)

[No. 2911 - February 22, 1985

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

I. SUMMARY OF FACTS

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

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

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

CORRECTION

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

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THE SUPREME COURT OF THE STATE OF ALASKA

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

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

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ALASKA DEPARTMENT OF FISH AND GAME,)
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Appellants,)

v.)

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

Cross-Appellees.)

[No. 2911 - February 22, 1985

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

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

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

MOORE, Justice.

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

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

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

I. SUMMARY OF FACTS

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

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

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

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

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

2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

(Footnote Continued)

the Board of Fisheries.

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

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

5. AS 16.05.251(b) states:

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

(Footnote Continued)

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

(Footnote Continued)

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

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

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

6. AS 16.05.251(a) states:

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

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

(Footnote Continued)

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

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

(Footnote Continued)

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

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

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

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

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

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

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

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

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

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

CHARACTERISTICS OF SUBSISTENCE FISHERIES.

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

(Footnote Continued)

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

(Footnote Continued)

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

(Footnote Continued)

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

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

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

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

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

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

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

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

On appeal, Madison and Gjosund seek reversal of the two trial court decisions. They claim that the board did not act within the legislative authority granted by AS 16.05.251(b) and AS 16.05.940(22) and (23) when it adopted the ten characteristics ultimately codified as 5 AAC 01.597.¹⁰

II. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

III. LEGISLATIVE HISTORY OF THE 1978 SUBSISTENCE LAW

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

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

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

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

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

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

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

The House Special Committee on Subsistence drafted a letter of intent for House Bill 960¹¹ that supports our interpretation. With respect to AS 16.05.251(b) (which was § 6 of House Bill 960),¹² the letter of intent made clear the priority to be given subsistence uses in general over sport and commercial uses and explained the two-tier system among subsistence users.

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

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

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

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

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

(Emphasis added).

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

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

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

The board based its restrictive regulation, 5 AAC 01.597, on the words "customary and traditional." The legislature did not define these words in the 1978 subsistence law. In such a case, reference to legislative history may provide an insight into the legislature's intent and a statute's meaning. North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978). In the House floor debate on House Bill 960, Representative Cotton introduced an amendment to delete the words "customary and traditional" from the statute. The floor manager of the bill, Representative Anderson, opposed the amendment in the following speech:

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

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

(Emphasis added).

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

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

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

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

15. The board stipulated in 1982 that it violated

(Footnote Continued)

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

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

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

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

(Footnote Continued)

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

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

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

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

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

MEMORANDUM

State of Alaska

TO: Jim Ayers
Director of Legislative Relations
Office of the Governor

DATE: February 10, 1986

FILE NO: 366-375-85

TELEPHONE NO: 465-3600

FROM: Harold M. Brown
Attorney General

SUBJECT: SCS CSHB 288:
subsistence

By: Larri Irene Spengler
Assistant Attorney General
Department of Law

You have asked me to review the Senate committee substitute for House bill 288, on subsistence, dated February 5, 1986. You requested that I particularly focus on whether the bill would be constitutional, would be enforceable, would allow the state to continue managing fish and game on all land and water in Alaska, and would restore to the Boards of Fisheries and Game the regulatory authority and flexibility they had exercised before Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985) to provide for the uses of fish and game by all Alaskans. The bill may pose problems in each of those areas. This memorandum will discuss those possible difficulties, and will also touch on miscellaneous ambiguities and issues. The version of HB 288 which passed the House did not present these questions. It was designed only to solve the problems created by Madison. This Senate committee substitute addresses portions of the state subsistence law which were not affected by Madison.

A. Possible constitutional problems:

made up problem

1. The bill in section 9, AS 16.05.940(28), in combination with section 8, would require that before being eligible to participate in subsistence uses, an individual must be domiciled in a rural area of the state. This may be proved by having lived there for the preceding 12 consecutive months, or by "other evidence acceptable to the Boards of Fisheries and Game." If the boards chose not to establish additional criteria, the section in effect establishes a durational residency requirement, which raises several possible constitutional problems. The Board of Fisheries has presently defined "domicile" in 5 AAC 39.975(30) as:

the location of a person's primary residence; evidence of domicile may include, but is not limited to, the following:

(A) statements made to obtain a license to drive, hunt, fish, or engage in an activity regulated by a government entity;

- (B) affidavit of a person, or of other persons who may know of that person's domicile;
- (C) place of voter registration;
- (D) location of residences owned, rented, or leased;
- (E) location of storage of household goods;
- (F) location of business owned or operated;
- (G) residence of spouse and minor children or dependents;
- (H) governments to which taxes are paid; and
- (I) whether the person has claimed residence in another location for the purpose of obtaining benefits provided by the governments in that location.

To require a person who moves to a rural area intending that to be his or her primary residence to wait 12 months before being able to participate in subsistence hunting and fishing may interfere with an individual's right to travel. Further, an equal protection challenge might succeed, based on the argument that individuals who move to communities and areas in rural Alaska in which people rely on fish and game harvests are not situated differently from their neighbors. See Isakson v. Rickey, 550 P.2d 359, 365 (Alaska 1976). If the durational residency requirement is intended to protect against some perceived abuse, the constitutionality of the requirement will hinge on the extent of the problem, the hardship imposed, and whether there are alternate, less severe mechanisms which could handle the problem. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982).

2. Section 4, AS 16.05.259(a), authorizes the boards to establish an administrative appeal procedure for persons aggrieved by the adoption or repeal of a subsistence or personal use regulation. ~~AS 16.05.259(b)~~ would require that an individual exhaust administrative remedies before proceeding to court to challenge subsistence or personal-use regulations. This could pose an equal protection problem if the authorizations and requirements are not also applied to commercial and sport regulations. Additionally, since the most likely entity to which board decisions might be appealed is the Office of the Commissioner of Fish and Game, this provision could pose separation of powers problems. That could occur if the commissioner (a part of the executive branch) were overruling regulations adopted by the boards (quasi-legislative entities). (Also see discussion at B.2., D.2., and E.6.)

3. Section 4, AS 16.05.258(b), establishes three separate standards which control whether the boards may authorize any harvest -- subsistence, sport, commercial, or personal use.

does not exist
S.A. repealed
was originally
in at request
of Dept of Law

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Director of Legislative Relations
Office of the Governor
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Remove

The standards are the sustained yield principle, "sound management," and "maintenance of healthy fish stocks" and game populations." Article VIII, Section 4, of the Alaska Constitution mandates that fish and game be utilized on "the sustained yield principle." The two new standards must mean something other than sustained yield, or they would not have been listed separately. The definition is left to the boards in section 4, AS 16.05-.258(i). Depending on the eventual content of those terms, authorization of harvest may be triggered by something other than sustained yield, the standard articulated by the Alaska Constitution. (Also see discussion at B.1., C.3., and E.6.)

B. Enforcement and implementation problems:

Several provisions in the bill would appear to be difficult to implement and may pose enforcement problems. These include:

1. As discussed in B. 3. above, section 4, AS 16.05-.258(i), requires the boards to define "sustained yield," "sound management," and "maintenance of healthy populations of fish and game." There is no indication of what the legislature intends be encompassed by the terms, nor how use of these new regulatory standards is to be reconciled with the use in Article VIII, Section 4, of the Alaska Constitution of "the sustained yield principle." If the legislature intends something other than "sustained yield" to control the taking of fish and game, it should spell out what factors it intends, and should describe how the new standards relate to sustained yield. Alternatively, if the legislature believes that "sustained yield" has several components, then it should set out those components in a definition of "sustained yield." As written, this provision gives no guidance on which of the three standards is to control, assuming they are different. (If they do not mean different things, there should not be three standards listed.) (Also see discussion at A.3., C.3., and E.6.)

2. Section 4, AS 16.05.259(a), would be extremely difficult to implement. It authorizes the boards to establish an appeal procedure for persons challenging a subsistence or personal use regulation. The boards already have the authority to reconsider regulatory decisions. In addition, anyone can petition the boards for regulatory change, at any time; this includes the ability to request emergency regulatory action, which could occur very quickly. AS 44.62.220 and AS 4462.230. The boards cannot delegate to a nongovernmental body a discretionary regulatory function. The only entity practically available to which a board decision could be appealed would be the Commissioner of

see above

strictly optional

not true ↑

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Fish and Game. However, for the boards to establish a procedure whereby the commissioner could overrule regulatory decisions would dramatically change the relationship between the department and the boards; currently, the boards adopt regulations, and the department implements them. (Also see discussion at A.2., D.2., and E.6.)

*Suggested
Removal*

3. Section 6, AS 16.05.330(d), requires the boards to give "reasonable public notice" of the terms of subsistence permits, above and beyond the Administrative Procedure Act notice, which may lead to questions (probably in lawsuits) about how much notice -- other than APA notice of the regulation adoption procedure -- is reasonable. Since it is always possible to do more than has been done, individuals in either civil suits or as defenses to criminal prosecutions may seek to use this provision to their advantage.

*defining
personal
use*

4. Section 2, AS 16.05.251(a)(13), authorizes the Board of Fisheries to regulate "commercial, sport, subsistence, and personal use fishing." "Commercial fishing" and "sport fishing" are defined in current statutes at AS 16.05.940(5) and (21). "Subsistence fishing" is defined currently at AS 16.05-.940(22), and that definition would be amended by this bill in section 7. However, neither current statute nor the bill provides a definition of "personal use fishing." Since "sport fishing" is defined as fishing with rod and reel "for personal use," this lack of a separate statutory definition based on gear type could cause some confusion in court cases.

C. Problems jeopardizing state fish and game management:

The bill contains several components which appear to be inconsistent with provisions of the Alaska National Interest Lands Conservation Act, Title 8 (ANILCA). If those are enacted into law, federal action under ANILCA, either volitionally or in response to a court mandate, would be a strong possibility. ANILCA provides that Alaska may retain its traditional management prerogatives on all land and water in the state if it enacts and implements "laws of general applicability" which provide for (1) the definition of subsistence uses, (2) the priority for those uses, and (3) the public participation system described in federal law. ANILCA § 805(d). The definition of "subsistence uses" in ANILCA § 803 includes a limitation to "customary and traditional uses by rural Alaskan residents." Before Madison, 5 AAC 99.010 satisfied this requirement by interpreting the state definition of "subsistence uses" in the same manner as the federal definition. Madison, however, held that the state statute was not intended to limit subsistence hunting and fishing

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Director of Legislative Relations
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to rural residents. With regard to the other two specifications of ANILCA, Madison did not affect the operation of the state priority, in AS 16.05.251(b) and AS 16.05.255(b), nor the regional council system, authorized by AS 16.05.260 and 5 AAC 96, which have been certified as complying with ANILCA.

1. The priority for subsistence uses in ANILCA is established in § 804; the federal priority requires that subsistence uses are not to be restricted (as opposed to reasonably regulated) unless nonsubsistence uses are first eliminated. 126 Cong. Rec. H. 10647 (Nov. 12, 1980). */ Section 4, AS 16.05-.258(c), states that if there is not sufficient harvestable surplus of a resource to "accommodate all consumptive uses," regulations shall provide "a reasonable opportunity to satisfy subsistence uses," and may provide "opportunities to satisfy other consumptive uses of the surplus." If that means that other uses may be satisfied at the expense of subsistence, then it is contrary to the ANILCA priority. The ambiguity is intensified because section 10 of the bill would repeal the existing state subsistence priority, AS 16.05.251(b) and AS 16.05.255(b), which has been determined to comply with ANILCA. (Also see discussion at C.2. and D.1.)

2. Section 4, AS 16.05.258(f), appears to authorize the boards to shift subsistence uses of a particular species, stock, or population to another species, stock, or population that is "similar and reasonably available." The authorization is not limited to situations in which a biological problem requires such action. The implication is that the boards may shift subsistence uses to other species, stocks, and populations in their discretion. However, Congress intended the subsistence

*/ Before Madison, the boards had interpreted the priority in the state statute to be the same as the priority in ANILCA § 804, and that interpretation was also articulated by Madison. However, the consequence of the absolute priority changed markedly when Madison expanded the definition of subsistence uses to include the uses by all Alaskans. When subsistence uses were confined to the narrower, rural category, the absolute nature of the priority had minimal effect, while after Madison, the absolute nature of the priority required application of tier two standards (customary and direct dependence on the resource as the mainstay of one's livelihood, local residency, and availability of alternative resources) in numerous hunts throughout the state, which led to major disruptions of hunting opportunity.

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authorization and priority to apply to each fish stock or game population which was the subject of subsistence uses. 126 Cong. Rec. H. 29279 (Nov. 12, 1980). Section 4 of the bill is inconsistent with this requirement. (Also see discussion at C.1. and D.1.)

3. Section 4, AS 16.05.258(b) and (c), incorporate as standards for board action the ~~sustained yield principle~~, "~~sound management~~," and the "~~maintenance of healthy~~" fish stocks or game populations. The boards are directed to define "sustained yield," "sound management principles," and "maintenance of healthy populations of fish and game" in (i). "Sound management" could be directed at a number of goals, for example, viewing, producing trophy sized animals or fish, increasing the base population, promoting "ethical" hunting or fishing practices, etc. Since under (b) "sound management" and "maintenance of healthy fish stocks and game populations" are criteria which must be satisfied before fish stocks or game populations can be harvested, and under (c) "sound management" is one of two reasons to go to tier two, depending on how those terms are defined by the board, there could be an ANILCA problem. Under ANILCA § 804, only the continued viability of the resource or the continuation of subsistence uses have a higher priority than authorizing subsistence uses. (Also see discussion at A.3., B.1., and E.6.)

4. Section 4, AS 16.05.258(a), requires the boards to identify stocks and populations "customarily and traditionally taken and used in the subsistence economy and culture of the area in which the stocks and populations are located." The restriction to the area in which the stocks and populations are located could pose an ANILCA problem for residents of rural communities who historically travel some distance to harvest fish and game. Further, the implication that fish and game are used for subsistence in the same location they are taken is not always correct. Additionally, the term "customary and traditional use" comes from the definition of "subsistence uses," but no where in present law or the bill is there a reference to "customary and traditional" taking, other than here and section 9, AS 16.05.940(31), the definition of "rural area." The intent of the phrase is not clear, and thus it is difficult to assess whether it poses ANILCA problems. Finally, if the intent is that the boards identify subsistence uses and use levels of fish stocks and game populations, after which no other uses or levels of use can be identified as subsistence, ANILCA problems may be presented. Congress commented on the fluctuations inherent in subsistence uses, and did not intend for the locations of use in one particular year or short period of years to be designated as the only available harvest. The time frame Congress was concerned with is a long

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one. It is acknowledged in legislative history that uses fluctuate "periodically" in "patterns," and are dependent often on the "sporadic movement" of game from year to year. S. Rep. No. 413, 96th Cong., 1st Sess. 147-148 (1979).
(Also see discussion at E.5)

5. Section 4, AS 16.05.258(c), limits the subsistence preference to a preference among consumptive uses. Thus presumably subsistence would not have a priority over nonconsumptive takings, such as catch-and-release fishing. This distinction is not found in ANILCA § 804, which describes the federal priority for taking fish and game for subsistence uses over takings of fish and game for other purposes. Catch-and-release fishing would constitute a taking for other purposes, since ANILCA § 102(18) defines "take" as

to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

6. Section 4, AS 16.05.258(c), states that three criteria are to be used to determine who is eligible for subsistence fishing or hunting if it is necessary to restrict subsistence in order to, among other things, "protect future" subsistence. This differs in what could be a substantive way from ANILCA § 804, which instead employs "in order to ... continue" subsistence uses as the standard. The current AS 16.05.251(b) and AS 16.05.255(b) use "to assure the continuation of subsistence uses," and had been certified as complying with ANILCA, but would be repealed by section 10.

D. Problems of board authority and flexibility:

1. In some ways, the bill can be characterized as delegating too much regulatory flexibility to the boards. The bill, in section 4, AS 16.05.258(f), allows subsistence uses of particular species, stocks and populations to be shifted to other species, stocks and populations and thus dissolves the subsistence priority established by the legislature in 1978, returning the boards authority to the pre-1978 situation, when allocations were left to the boards' discretion. Other policy considerations aside, restoring complete discretion to the boards with regard to which fish stocks and game populations are to be the subject of subsistence fishing and hunting appears to be inconsistent with the mandate of ANILCA that subsistence be authorized on every stock and population which has been the subject of such uses unless the resource would be harmed, and that it have a priority over nonsubsistence uses. (Also see discussion at C.1. and C.2.)

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*Section 1
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2. Section 4, AS 16.05.259, discussed in A. 2. above, authorizes the boards to establish an appeal procedure. Presumably, an appeal procedure would provide that the boards' decisions could be overthrown by whatever entity is given the appeal, which would reduce the flexibility of the boards to the extent it was implemented. (Also see discussion at A.2., B.2., and E.6.)

it should

3. Section 6, AS 16.05.330, authorizes the boards to require subsistence hunting and fishing permits, an authority they already have. However, (c) of that section mandates that the boards require subsistence permits if a reduction of nonsubsistence harvest is needed to protect subsistence. The section requires subsistence permits to be issued regardless of whether or not the boards thought that they would be at all useful or necessary. Further, (c) indicates that the boards may issue subsistence permits for entire areas, villages, communities, or groups, as well as individuals. Under (d), the boards are mandated to provide "reasonable public notice" of the terms of those umbrella permits, the fish stocks and game populations authorized to be taken, and the areas covered by the permit. This will place an extra burden on the boards, because in order to require a permit, and establish its terms, the board will have to in any event first adopt regulations under the Administrative Procedure Act provisions, including notice.

E. Miscellaneous problems:

ditto question?

1. Section 2, AS 16.05.251(a)(12), specifies that the Board of Fisheries has the authority to designate and regulate special fishing areas. In the existing AS 16.05.251(2) the board already has the authority to establish open and closed seasons and areas for the taking of fish, so most of this subsection is redundant. However, there is an implication in AS 16.05.251(a)(12) that the board could authorize fisheries for particular age groups (children are listed), an authority that the board does not currently have. If the legislature wishes to give the boards power to authorize fishing for particular groups such as senior citizens or children, it would be best to do so in a separate section quite clearly. The remainder of this provision is redundant to authorities already held. (Also see discussion at E.6.)

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2. Section 3, AS 16.05.255(a)(10), uses the term "nongame." Currently, AS 16.05.940(14) defines "game" as all non-domestic reptiles, mammals, and birds, so this term is confusing and imprecise. (Also see discussion at E.4.)

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change
3. Section 3, AS 16.05.255(a)(10), uses the terms "sport hunts" and "subsistence hunts". "Subsistence hunting" is defined, not "subsistence hunts," and neither "sport hunts" nor "sport hunting" is defined anywhere. The parallel provision for the Board of Fisheries speaks of "fishing," not "fisheries."

change
4. Section 9, AS 16.05.940(30) and (32), are definitions which employ the term "game animals." This is redundant, since "game" is defined currently in AS 16.05.940(14) as meaning any species of non-domestic bird, reptile, and mammal. Thus, the sections could be reworded and the word "animals" deleted. (Also see discussion at E.2.)

rural circle
5. Section 9, AS 16.05.940(31), defines "rural area," a component of the definition of "subsistence uses" found in section 8. Taken together, the two definitions are circular, since "subsistence uses" means the "noncommercial, customary and traditional uses of wild renewable resources by a resident domiciled in a rural area of the state" for certain purposes, and "rural area" would mean a community or area of the state in which the "noncommercial, customary and traditional taking and use of fish or game" is a significant characteristic of the economy. The definition of "rural area" found in version of HB 288 that passed the house did not create this circle. (Also see discussion at C.4.)

Bill get file memo
6. Several provisions of the bill do not relate to "the taking of fish and game for subsistence and personal use," the description in the bill title. Those include section 2, AS 16.05.251(a)(12), providing that the Board of Fisheries may authorize particular age groups to fish, and section 4, AS 16.05.258(h), reiterating the current legal status of military personnel with regard to hunting and fishing. This problem also involves section 4, AS 16.05.259, authorizing an appeal procedure and requiring exhaustion of remedies, if that provision is broadened to encompass all regulations, thus avoiding the equal protection problem discussed in A. 2. above. In addition, the requirements relating to "sound management" and "maintenance of healthy fish stocks and game populations" in section 4, AS 16.05.258(b), as thresholds for any allocation may exceed the scope of the bill title, since they will have such an impact on harvests other than subsistence and personal use. (Also see discussion at A.2., A.3., B.1., B.2., C.3., D.2., and E.1.)

LIS:rn

cc: Commissioner Collinworth, ADF&G
Art Peterson, Dept of Law

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

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

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 12, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V - State Capitol
Juneau, Alaska 99811

Re: SCS CSHB 288 (res):
Subsistence;
AG Files 663850375

Dear Senator Fischer:

You and Representative Sam Cotten ~~have~~ both inquired whether the ~~Senate Resources Committee substitute~~ for House bill 288, relating to subsistence uses, ~~offends article VIII, section 4, of the Alaska Constitution.~~ It appears that the provisions of the bill relating to subsistence could be successfully defended against such a challenge.

Article VIII, section 4, provides:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

(Emphasis added.) Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 904 (Alaska 1981), affirmed the authority of the Board of Fisheries to provide for "different treatment to such diverse user groups as commercial, sports, and subsistence."

Your question focuses on section 4 of the bill, the proposed AS 16.05.258(c). That provision first accords subsistence uses a preference over other uses, mandating nonsubsistence uses may not be authorized unless the "harvestable portion" of a fish stock or game population is "sufficient to accommodate the subsistence uses of the stock or population." That preference is clearly consistent with the authorization in article VIII, section 4, to establish preferences among uses.

The final sentence of the proposed AS 16.05.258(c) would become operative in situations where the harvestable portion of a fish stock or game population is not sufficient to

Honorable Vic Fischer
Alaska State Legislature
P.O. Box V, Juneau, AK 99811
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provide a "reasonable opportunity to satisfy the subsistence uses." In that case:

the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria:

- (1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood;
- (2) local residency; and
- (3) availability of alternative resources.

In this situation, only subsistence uses are being authorized; there will be no commercial, sport, or personal use of the fish stock or game population. The legislature is supplying criteria for the boards to use in determining which persons eligible for subsistence uses may engage in subsistence fishing or subsistence hunting if a reasonable opportunity cannot be provided for all of them. Depending on the available harvestable portion of the stock or population, a certain number of people will be allowed to harvest, those with the most dependence, living in closest proximity, with fewest available alternatives. This direction by the legislature to the boards on how to accommodate subsistence uses when the harvestable portion of a fish stock or game population is not sufficient to accommodate all subsistence uses does not appear to be inconsistent with article I, section 4. In fact, such direction seems quite consistent with the legislature determining how in that situation the stock or population is to be "utilized... on the sustained yield principle."

In a decision analyzing the state subsistence law as it was implemented before Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985), state Superior Court Judge Douglas Serdahely ruled that identifying subsistence uses on a community or area basis did not violate article VIII, sections 2, (maximum benefit of the people), 3 (common use), and 15 (no exclusive right of fishery), of the Alaska Constitution. McDowell v. Collinsworth, 3AN 83-1592 civil, October 23, 1984, order. The judge's decision referenced the state's arguments, which in part relied upon the authorization in article VIII, section 4, of "preferences among beneficial uses." The precise issue of the use of the three criteria to distinguish among those eligible for subsistence uses when insufficient fish or game are available to provide for all subsistence uses of a stock or population was not before the court. However, it appears likely

Honorable Vic Fischer
Alaska State Legislature
P.O. Box V, Juneau, AK 99811
AG File No. 663850375

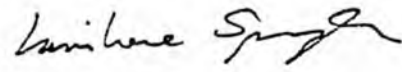
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that direction by the legislature to the boards on how to identify which persons eligible for subsistence uses are to be authorized -- those most dependent, living in closest proximity, with the least alternative resources -- would be defensible against an article VIII, section 4 challenge.

If a more detailed analysis on this question is necessary, please do not hesitate to contact me.

Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL

By: 
Larri Irene Spengler
Assistant Attorney General

LIS:rn

cc: Representative Cotten

Don Collinsworth
Dennis Kelso
Steve Behnke

Jim Ayers

Art Peterson
Liza McCracken

STATE OF ALASKA
THE LEGISLATURE

RECEIVED
AUG 23 1985

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

August 20, 1985

SUBJECT: Comparative sectional analysis of subsistence bills -- CSHB 288 (Jud) am and SB 231.

TO: Senator Mitchell Abood
Chairman, Senate State Affairs Committee

FROM: Edward H. Hein *EHA*
Legislative Counsel

You have asked for a sectional analysis of two subsistence bills that are in your committee: CSHB 288 (Jud) am and SB 231. In addressing each section, I will refer first to the House bill, then to the Senate bill.

Section 1 of both bills are identical. They look slightly different at first glance because the text is indented differently along the left-hand margin. The section states legislative findings regarding the importance of the taking of fish and game for personal consumption by Alaskans in certain rural areas, and for personal, sport and commercial purposes by all Alaskans.

Sec. 2 is identical in both bills. This section authorizes the Board of Fisheries to adopt regulations for personal use fishing, including the classification of fish as personal use fish.

Sec. 3 amends the definition of "subsistence uses" for purposes of fishing and hunting under AS 16.05. The House bill limits subsistence to noncommercial uses by Alaska residents living in rural areas, i.e., those areas in which subsistence is a significant characteristic of the local economy. The Senate bill uses the existing definition, but limits subsistence to "rural Alaska residents."

Sec. 4 is identical in both bills. This section adds a definition of "personal use fishing" for purposes of AS 16.05. Personal use fishing is limited to Alaska residents taking

Senator Mitchell Abood

Page 2

August 20, 1985

fish for personal use, not for sale or barter, with certain specified gear.

Sec. 5 of the House bill "requires" the legislature to (1) assess the impacts of the bill during the interim following the 1985 legislative session to determine whether the definitions of "subsistence uses" or "rural areas" results in disruption of the lawful taking of fish and game by residents and (2) take "corrective action" to address any such disruptions before May 15, 1986. The section also requires the Department of Fish and Game to submit to the legislature by January 1, 1986, a written report of the effects of the bill.

Sec. 6 of the House bill and sec. 5 of the Senate bill both provide for an immediate effective date.

EHH:lmb
J16/037

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." *SIB*

TO: Senator Mitchell Abood *330*
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

Senator Mitch Abood
May 9, 1985
Page 3

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 hunting 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

STATE OF ALASKA THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 19, 1986

SUBJECT: Bill title and definition of "reasonable"
in SCS CSHB288 (State Affairs), relating to
subsistence

TO: Senator Arliss Sturgulewski
Chairman, Senate Resources Committee

FPOM: Edward H. Hein *EHS*
Legislative Counsel

You have asked two questions with regard to the subsistence bill, SCS CSHB 288 (State Affairs). (1) Does the bill title encompass all the provisions of the bill? (2) What is the meaning of "reasonable" as used at page 2, lines 9 - 10, in the context of "reasonable opportunity to satisfy the subsistence uses" of certain fish stocks and game populations?

(1) There are a few provisions in the bill that are arguably not encompassed by the bill title. Section 2 of the bill adds paragraphs (12) and (13) to AS 16.05.251(a), relating to the authority of the Board of Fisheries to adopt regulations. To the extent that these two paragraphs authorize the board to adopt regulations that are not necessary, helpful, or related to implementing the taking of fish and game for subsistence or personal use, this section goes beyond the description of the title.

In section 4 of the bill, proposed AS 16.05.258(i) requires the Board of Fisheries and the Board of Game to adopt regulations defining certain terms and phrases. If these definitions would be applicable to the regulation of fish and game for other than subsistence or personal use, then subsection (i) goes beyond the description of the bill title. This may be corrected, however, by adding the limiting language, "for purposes of this section" at the end of the sentence.

Section 4 also contains a proposed AS 16.05.259, which authorizes the Board of Fisheries and the Board of Game to

establish an appeal procedure for persons aggrieved by adoption or repeal of a subsistence or personal use regulation. If this section were changed to apply to all of the boards' regulations, as is apparently being considered, then it would go beyond the description of the bill title.

The remainder of the provisions of the bill appear to be encompassed by the bill title.

(2) The word "reasonable" as it appears in section 4 of the bill does not have a special or unusual meaning. Webster's New World Dictionary of the American Language (Second College Edition) includes this definition of "reasonable": "not extreme, immoderate, or excessive." Black's Law Dictionary (Revised Fourth Edition) defines reasonable as follows: "Ordinary or usual. Fit and appropriate to the end in view. . . . Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. . . . Thinking, speaking, or acting according to the dictates of reason; not immoderate or excessive, being synonymous with rational; honest; equitable; fair; suitable; moderate; tolerable. . . ."

In section 4 of the bill, proposed AS 16.05.258(b) requires the Board of Fisheries and the Board of Game to determine how much of the surplus of certain fish stocks and game populations is needed to provide a reasonable opportunity to satisfy subsistence uses of those stocks and populations. "Reasonable" in this context means fair, adequate, or sufficient in the judgment of the boards. Obviously, "reasonable" is a flexible standard, enabling the board to vary the opportunity provided as dictated by the particular circumstances of each stock, population, and user group.

"Reasonable" is a subjective word, but ultimately must have a factual basis or, like the question of whether an amendment to a bill is germane, is so if enough people agree that it is so. "Reasonable" is probably the lawyer's favorite word, and that is reflected by the fact that it appears 1,356 times in the Alaska Statutes.

EHH:csh
c6/001

STATE OF ALASKA
THE LEGISLATURE

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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)

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 CSHB 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).

ed to maintain sustained yield
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.

EHH:ojb
J14/113

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

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

May 22, 1985

REPLY TO:

OFFICE OF THE CHIEF PROSECUTOR
POUCH KC
JUNEAU, ALASKA 99811
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

M E M O R A N D U M

TO: Robert Sundberg
Commissioner
Department of Public Safety

Don W. Collinsworth
Commissioner
Department of Fish & Game

All Criminal Division Offices
Department of Law

FROM: Daniel W. Hickey *DW91*
Chief Prosecutor

SUBJECT: Subsistence Defense for Fish and Game Violations -
Enforcement Criteria in Light of State v. Eluska

The purpose of this memorandum is to provide enforcement personnel and prosecuting attorneys with a set of guidelines that will have to be followed in fish and game prosecutions in light of the subsistence defense created by the Alaska Court of Appeals in State v. Eluska, ___ P.2d ___, Op. No. 210 (Alaska App. April 12, 1985).

A. The Court Decision

In Eluska, the court of appeals ruled that the Board of Game had failed to comply with the legislative mandate set out in AS 16.05.255(b) that specific regulations be adopted providing for subsistence uses and a subsistence priority for the taking of game. As a result, the court established a "subsistence defense" meaning that in areas where specific subsistence regulations have not been adopted conduct that would otherwise involve the illegal taking or possession of game is justified as a "subsistence use" if: (1) the person believed that he or she was taking the game in question for subsistence uses; and (2) the person was not aware of and did not consciously disregard a substantial and unjustifiable risk that his or her taking was not a subsistence use of the game taken.

Because of the Board's failure to adopt regulations, the court was unwilling to make the defense an affirmative defense which would put the burden of proving it on the

- (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 note. — 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 44.62). *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3432), 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.

defendant. Instead, the court held that once the defense is raised (and that it may be raised prior to trial), the state has the burden of proving beyond a reasonable doubt that the taking or possession was not a subsistence use. Given the fact that neither the board nor the legislature has come up with a workable definition of subsistence, this will be virtually an impossible burden to meet. What this means in effect is that a resident of the state who asserts that his or her taking or possession involves a subsistence use cannot be convicted unless the state can prove beyond a reasonable doubt that either (1) the regulation allegedly violated did not restrict the taking of game, or (2) any such restriction placed an absolute priority on subsistence uses and was necessary to protect sustained yield.

Prior to the court of appeals decision in Eluska, the Alaska Supreme Court in Madison v. Department of Fish and Game, ___ P.2d ___, Op. NO. 2911 (Alaska February 22, 1985), struck down a regulatory scheme designed to identify eligibility for subsistence fishing in Cook Inlet and to allocate fish resources among subsistence, commercial, personal use and sport fishermen. The court held that under AS 16.05.940(23), which defines "subsistence uses," all Alaskans were initially eligible for all subsistence hunting and fishing. The court additionally held that AS 16.05.251(b) establishes a priority for subsistence use over all others. In other words, to the extent that an insufficient number of fish exist to accommodate all potential users, subsistence use is to be allowed at the expense of sport, personal or commercial use. Governor Sheffield introduced a bill in response to the Madison decision that would have clarified and restricted subsistence taking. That bill was passed by the House of Representatives but not by the Senate and remains pending before the legislature.

AS 16.05.251(b), pertaining to fish, and AS 16.05.255(b), pertaining to game, are parallel provisions. Considering Eluska and Madison together, the conclusion to be drawn is that a "subsistence use" defense is now available for many hunting and subsistence fishing violations committed by Alaska residents.

Any Alaska resident, whether from a rural or urban area, can potentially and successfully assert a "subsistence defense" if the State has not adopted specific subsistence regulations consistent with Madison and Eluska and if the person reasonably believed he took the fish or game for "customary" or "traditional" uses. Unless and until remedial regulatory or legislative action is taken, a serious enforcement problem exists, and it is likely that there will be a significant increase in fish and game harvests, particularly around urban areas.

The Madison and Eluska decisions have had a serious effect on the State's ability to enforce fish and game violations under circumstances where someone can assert a subsistence use defense. The State has filed a Petition for Rehearing in Eluska seeking to have the court's opinion modified. That petition has recently been denied and we are now preparing a petition to the Supreme Court. However, unless the court reverses the decision or until the situation is addressed by the boards or the legislature, the guidelines described below are required.

B. Fisheries Violations

Throughout most of the state, the Board of Fisheries has already authorized subsistence fishing by regulation. The Department of Law has advised the Commissioner of Fish and Game to exercise his authority under 5 AAC 01.015 and the authority delegated to him by the Board of Fisheries to issue subsistence permits for taking salmon in areas where subsistence harvests have been historically authorized and conducted. If that is done and announced publicly, Fish and Wildlife officers and prosecutors will enforce all fishing regulations relating to taking or possessing salmon and other species.

Until that announcement is made, enforcement of fishing regulations relating to taking or possessing salmon will be limited to sport fishing violations,¹ violations committed in subsistence fisheries currently authorized in regulations and commercial fishing violations.

C. Game Violations

Until regulations are adopted which comply with Eluska, the following guidelines will apply to all game violations:

1. Violations Occurring in National Parks and Monuments

All game violations occurring in national parks and monuments should be referred to appropriate federal authorities (U.S. Fish and Wildlife Service and the United States Attorney's

1/ It is important to note that "sport fishing" is defined in AS 16.05.940(21) as fishing primarily by rod and reel for personal use, while "subsistence fishing" is defined in AS 16.05.940(22) as fishing primarily by nets and other efficient methods. It is subsistence fishing that is given special protection in AS 16.05.251(b).

Office). We have been advised that the Division of Fish and Wildlife Protection in the Department of Public Safety have worked out arrangements with federal authorities to refer such cases and to act as special federal enforcement agents.

2. Violations Occurring on All Other Lands

(a) Violations involving the following offenses are to be handled in accordance with normal procedures with respect to the issuance of citations and the seizure of appropriation evidence:

(1) All game violations committed by nonresidents or commercial operators;

(2) All non-possessory game violations, such as "wanton waste" and "hunting same day airborne";

(3) Any violations involving the illegal taking or possession of game when the taking occurred in an area totally closed year round or closed by an emergency order containing specific findings that the resource would be jeopardized by any further harvest including subsistence taking;

(4) Any violations involving the illegal taking or possession of game when the taking occurs in an area totally closed to the particular species in question or in an area totally closed to the taking of a particular sex of a species or closed to any harvest during a particular critical period such as the calving season; or

(5) Any violation involving illegal taking or possession when the taking is clearly not for personal use such as wolves.

(b) Violations involving the taking or possession of game taken for consumption are to be investigated, documented and referred to local district attorney offices at the discretion of enforcement personnel. No citations are to be issued, no evidence seized and no search warrants obtained, except at the direction of the district attorney, whenever the following circumstances are present:

(1) the game has been taken in an area open during any part of the year to the taking of that species, unless the animal taken is of a sex specifically prohibited from being taken;

(2) the game has been taken by a resident who asserts that his or her taking is for personal use; and

(3) the game has been taken in a game management area which is not covered by existing regulations that specifically provide for subsistence hunting.

Whenever a subsistence use defense is asserted in any case that has been filed, Assistant Attorneys General Larri Spengler (Juneau) or Liza McCracken (Anchorage) should be contacted for advice and assistance in preparing the state's response and handling any evidentiary hearing that may become necessary.

DWH/gb-10

cc: Larri Spengler
Assistant Attorney General
Juneau AGO

Liza McCracken
Assistant Attorney General
Anchorage AGO

MEMORANDUM

State of Alaska

COMMISSIONER'S C

RECEIVED
MAY 30 1985

TO: Hon. Don W. Collinsworth,
Commissioner
Department of Fish and Game

DATE: May 23, 1985

FILE NO: 322-375-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Requirements
Madison and Eluska

PUBLIC COMMUNICATIONS
RECEIVED
MAY 30 1985

By: Larri Irene Spengler
Assistant Attorney General
Department of Law

DEPARTMENT OF FISH & GAME

You have asked for an assessment of the requirements of Madison v. Alaska Department of Fish and Game, P.2d _____, Op. No. 2911 (Alaska Feb. 22, 1985) and State v. Eluska, P.2d _____, Op. No. 210 (Alaska App. April 12, 1985), and how those requirements should be met for the approaching fishing and hunting seasons. In brief, there is nothing the Department or the Boards of Fish and Game can do to alter the statutory interpretation in Madison which mandates some allocation shifts away from sport and commercial uses and to subsistence uses -- a category much broader after Madison.

Madison in combination with Eluska requires generally that for this season unless subsistence fishing permits are issued for areas where subsistence fishing had been authorized and conducted in the past, no effective enforcement can occur against subsistence fishing in those areas, unless all fishing on the particular stock is closed. Eluska requires generally that the Board of Game adopt, consistent with Madison, subsistence hunting regulations separate from the general hunting regulations. If that is not done, a number of hunting regulations cannot be enforced effectively. (See the May 22, 1985, memorandum from Daniel Hickey, Chief Prosecutor, to Commissioner Sundberg, Department of Public Safety, Commissioner Collinsworth, Department of Fish and Game, and all Criminal Division offices of the Department of Law.)

The Cases

In Madison, the supreme court overturned the interpretation of the boards in 5 AAC 99.010 of "subsistence uses" as being the customary and traditional uses of fish and game by rural Alaska residents, identifiable by eight criteria. The court examined the definition in AS 16.05.940(23) and the legislative history, and determined that the boards had no authority to identify subsistence uses either as rural, or in terms of the uses by a community or area. Further, the court said that the boards had no authority to identify subsistence uses initially in terms of individuals.

Thus, any fish stock subject to subsistence fishing in the past, and any game population hunted in the past for food by Alaska residents must be opened to subsistence fishing */ or hunting. All Alaskans are initially eligible to participate in the harvest, and although subsistence fishing and hunting may be regulated as to bag limits, etc, it cannot be restricted or closed until all non-subsistence uses are eliminated.

Eluska created a "subsistence defense" and held that it is available only when subsistence hunting regulations have not been adopted. In those instances, an individual can assert that he was engaging in subsistence hunting and that there are no applicable regulations. Then the state would have the burden to show that the existing regulations do not substantially impair subsistence uses, or are necessary to protect sustained yield. The same principles apply to subsistence fishing that the Board of Fisheries will have to authorize under Madison, but which has not yet been done, such as in Cook Inlet at certain times and in certain places. Thus, in some respects, the court in Eluska waived the exhaustion of remedies principle, which would normally have required people to ask the boards to authorize harvests before they could legally fish or hunt.

As a consequence of these cases, the department and the boards will need to take some action with regard to both fish and game in order to ensure maximum effective enforcement.

Fish

Under the department's authority in 5 AAC 01.015 and the authority delegated by the Board of Fisheries, subsistence fishing permits must be issued in 1985 for Alaska residents to take fish stocks in areas where fishing with nets has been established historically. The legal requirements for 1985 will be satisfied if permit decisions are based upon the following criteria:

*/ Sport fishing is not subsistence fishing. They have different definitions in statute; "sport fishing" is fishing by rod and reel. AS 16.05.940(21). "Subsistence fishing" is fishing by net and other efficient gear types. AS 16.05.940(22). The subsistence statute mandates that subsistence fishing be authorized, unless the sustained yield of the resource is likely to be hurt, not that sport fishing must be authorized. AS 16.05.251(b).

1. No permit will be issued if it is likely to result in conservation problems; however other uses must not be allowed if subsistence uses are not allowed.
2. Applications for permits will be considered only for stocks and areas which had been authorized under regulations since statehood.
3. Permits will be issued only for stocks and specific areas which actually had been fished under the regulations to which criterion 2 refers; this can be documented by department records, including simply whether permits had been issued in the past.
4. The Department of Fish and Game must make management adjustments as necessary to provide reasonable opportunity to harvest fish for the uses meeting criteria 1-3. In making these adjustments, the department will employ measures which have the following characteristics in the priority order listed below:
 - a. Most effectively protects sustained yield of the resource and provides for other management requirements such as catch data reporting, field monitoring, and orderly harvesting.
 - b. Maintains enforceability of the regulations;
 - c. Results in the least total harvest opportunity foregone by sport and commercial uses.

The Department of Fish and Game must apply these criteria even though sport and commercial fisheries may be affected.

5. If an application for a permit is received too late to allow orderly management adjustments in accordance with criterion 4, no permit will be issued this season. In such circumstances, the department should attempt to direct the applicant to other comparable areas and stocks for subsistence fishing.
6. The department must set permit conditions (including harvest limits) which provide

reasonable opportunity to fish for subsistence uses. This does not mean guaranteed harvest. When reasonable catch limits previously have been set for subsistence fisheries in the same area or nearby areas, the 1985 permits should reflect these limits. In the absence of previously established limits, permit conditions should provide opportunities comparable to those applicable in similar fisheries. If no meaningful comparison is available, reasonable limits should be set in the department's discretion based upon available data on past harvests.

7. All applicable statewide regulations and other subsistence regulations continue to apply to permits issued under these guidelines.
8. Permit conditions must be enforced as in any other fishery.

The fact that permits in particular areas and at particular times may be issued for this season by the department under these guidelines does not bind the Board of Fisheries to authorize subsistence fishing in the future for those areas and at those times. The board should -- as it already has announced that it will -- accept proposals regarding subsistence fishing statewide, and at the fall 1985 meeting evaluate whether the fisheries requested have been authorized and conducted in the past, and whether they should be authorized under Madison. One reason the board will not be bound by what occurs this summer is that the department may need to rely upon the fact that permits have been issued in the past as a basis for issuing them this summer, perhaps without knowing whether the permits had actually been fished. As always, the board should evaluate all information available to it presented by the department, the advisory system, and the public, when acting on proposals.

Game

The Board of Game must meet and adopt subsistence hunting regulations separate from the general hunting regulations, in order to ensure that all the hunting regulations are enforceable, instead of only some existing regulations. (See the Hickey memorandum.) The board already has scheduled a session beginning on June 10 to accomplish that task.

Under Madison, if a game population has been hunted for food in the past by Alaska residents, subsistence hunting must be authorized by subsistence hunting regulations unless sustained

yield of the resource is likely to be harmed.

If all hunters cannot be given the same legal opportunity to hunt while maintaining sustained yield, or if subsistence hunting by Alaskans must be restricted -- significantly impaired, as Eluska defined the term -- non-subsistence hunting opportunities must be reduced or, if necessary, precluded. This would include hunting by non-state residents as well as sport hunting and commercial hunting by both residents and non-state residents.

If non-subsistence uses have been eliminated, and subsistence hunting by Alaska residents is still significantly impaired, either through short seasons or by permit drawing hunts, for example, the subsistence hunting regulations must be based upon the "tier 2" criteria in determining how subsistence hunting opportunities are distributed. Those criteria are found in AS 16.05.255(b), and are

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

In situations where all Alaskans cannot be allowed to hunt, enforcement of the regulations will be vulnerable under Eluska if the board has not at least taken all feasible steps to apply the three criteria. I shall be available to work with the board at its June meeting to assist in identifying appropriate steps as necessary under "tier 2". The subsistence defense created by Eluska after the Game Board adjourned in April has dramatically altered the consequences of not applying the three "tier 2" criteria.

Conclusion

In summary, in order to ensure that all - rather than just some - fishing and hunting regulations are enforceable under Madison and Eluska subsistence fishing permits must be issued for this summer in areas and at times where subsistence fishing was authorized and conducted in the past. Further, subsistence hunting regulations consistent with Madison, and the "tier 2" criteria where appropriate, must be adopted.

If you have any questions, please contact me.

Hon. Don Collinsworth, Commissioner
Department of Fish and Game
File No. 366-375-85

May 23, 1985
Page 6

cc: Steve Pennoyer
Dennis Kelso
Jim Ayers
Lew Pamplin
Steve Behnke
Beth Stewart
Dick Logan
Ken Parker
ADF&G

Norman Gorsuch
Ron Lorensen
Dan Hickey
Liza McCracken
Department of Law

