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will be identified under the definition in the bill who have a somewhat similar relationship to the resource as individuals living in those areas and communities. Even if that is the case, specific assertions about particular individuals are not determinative in an equal protection analysis. As noted by the Alaska Supreme Court in Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 160 (Alaska 1982) "to require a reasonable nexus between legislative means and ends is not to demand perfection in classification." Similarly, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1257 (Alaska 1980), notes that equal protection does not demand absolute perfection in a classification system. Thus, it would be reasonable for participants in rural areas as defined in the bill to be eligible to participate in subsistence uses, no matter what a particular person's personal statistics may be, for it would be the reliance of the economic system of the area or community upon the personal and family consumption of fish and game resources that would be relevant.

It has also been suggested that the legislature could develop a list of communities and areas either included or excluded from eligibility for subsistence uses. The advantage of delegating to the boards the authority to identify rural areas and rural communities and to authorize customary and traditional uses of fish and game for the residents for those communities and areas is that modifications can be made relatively soon after available data shows the necessity. For example, if a community initially identified as a rural community grew substantially, hunting and fishing for personal or family consumption may no longer be a significant component of the economy of the community. The board could respond to that new information by modifying the appropriate regulations. On the other hand, if that community were contained on a list in the statute, subsistence uses would have to be continued to be authorized. Further, allowing the boards to apply the law on an area by area and community by community basis will insure that the evaluations will be based on information as it is available. Information may not presently be available for some communities, and it would be difficult at this point and time for the legislature to develop a comprehensive list which would treat similarly situated individuals the same.

Similarly, there could be equal protection problems in another suggested approach, defining "rural" by the use of an arbitrarily selected population level, unless that level were shown to correlate to differences in the use of fish and game for personal and family consumption. Those problems are also avoided by the delegation in the bill to the boards to identify rural

areas on an area by area and community by community basis.

Under the bill, Alaskans who do not live in rural areas or rural communities in the state "in which the taking of fish or wildlife for personal or family consumption is a significant characteristic of the economy of the community or area" are not precluded from harvesting fish and game. For example, the personal use fishing category which CSHB 288 (judiciary) would establish in statute would provide an opportunity for Alaskans to harvest fish by efficient methods such as gill or dip net, seine, fish wheel, or long line. Whenever the Board of Fisheries evaluates the the uses of an area or community, if it determines that the uses are not customary and traditional uses by residents "domiciled in a rural area of the state," the board could authorize personal use fishing instead of subsistence fishing.

In conclusion, the definitions of "subsistence uses" and "rural area" contained in CSHB 288 (judiciary) establish a classification of Alaskans eligible for subsistence hunting and fishing which is supported by available data, and which would be defensible against an equal protection challenge. The information demonstrating that the distinction is a reasonable one, related to differences in the situations of Alaskans living in those different areas and communities is summarized in the attached April 23, 1985, memorandum from Don W. Collinsworth, Commissioner of Fish and Game. If you have any further questions, please do not hesitate to contact this office or the Department of Fish and Game.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Larri Irene Spengler
Larri Irene Spengler
Assistant Attorney General

LIS:rm

Attachment

cc: w/attachment
Don Collinsworth
Dennis Kelso
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Beth Stewart

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Dept of Law

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Peter Goll

MEMORANDUM State of Alaska

TO: Larri Spendler
Assistant Attorney General
Department of Law

DATE: April 23, 1995

FILE NO:

TELEPHONE NO: 465-4100

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

SUBJECT: Fish and Wildlife Use and the Definition of "Rural Areas"

You have asked the department to examine the definition of "rural area" contained in CS HB 198 (judiciary) in relation to subsistence uses. The bill defines "subsistence uses" as "the customary and traditional noncommercial uses of wild, renewable resources by a resident domiciled in a rural area of the state" for certain specific purposes.

The bill defines "rural area" as:

> A community or area of the state in which the taking of fish or wildlife for personal or family consumption is a significant characteristic of the economy of the community or area.

You have asked for an assessment of whether the data available to the department indicate that fish and game have a different role in people's lives in rural areas, under the bill's definition, as opposed to other areas of the state. The Division of Subsistence has gathered information on use of fish and game in over 150 communities in Alaska and has compiled data from a variety of other sources. We have summarized here the major conclusions from that research in order to answer your question.

Alaska has a wide diversity in ways of life and types of communities. Most people in the state (about 62 percent) live in the three major population concentrations: Anchorage, Fairbanks, and Juneau. Most of the rest reside in approximately 389 smaller communities averaging fewer than 500 people each. Many of these places have fewer than 100. A relatively small number of people live dispersed outside these communities.

Research by the Division of Subsistence and other social scientists indicates that an individual's relationship to, and uses of, wild resources are typically part of a larger community pattern of wild resource use, which is determined by the community's history, customs, and socioeconomic conditions.

In many areas of Alaska, social and economic life centers on the use of wild resources. This dependence is most apparent in the less populated areas. In these areas communities are economically and socially dependent on hunting and fishing for local use.

These communities have what may be termed "mixed subsistence-cash economies" (Wolfe and Ellanna, 1983)*. In them, harvesting and processing of wild resources by families are an important component of the communities' economy, relative to other sectors such as wage employment. These are the areas to which CS HB 268 refers as rural.

In contrast to these places are large Alaskan cities which have economies and ways of life based on industry and capital rather than the use of fish and wildlife. These places are not economically or socially dependent on hunting and fishing for local uses in the same way as the areas described above. In this memorandum they will be referred to as <u>non-rural</u>, for the purposes of contrasting them with rural areas, as defined in the bill.

These non-rural places have economies similar to those of communities in the rest of the United States. The pattern of fish and wildlife use and its relationship to the community's economy and social structure differ significantly from those in the mixed subsistence-cash economy described above.

The following sections compare the roles fish and wildlife play in rural and nonrural areas:

The Social Organization of the Economy

- In rural areas, kinship groups (family units) are the major economic units. These units combine production, exchange, and consumption functions (a "domestic mode of production").

- In non-rural areas, corporate and other business structures are the basic units of the economy. Most economic production occurs outside the kinship unit, although families are important consumption units.

- In rural areas, economic activities, including hunting and fishing, are directed primarily toward family use and toward sustaining family relations and community stability.

- The economy of non-rural areas is organized around profit accumulation and earning cash to exchange for goods and services.

Economic Differentiation and Specialization

- In rural areas, there is a limited variety of economic opportunities, services, and goods available locally.

- The non-rural area's economy is much more differentiated and specialized, including well-developed private and public business sectors, and a broader variety of services and goods.

Wage Employment

- Generally, wage employment opportunities in rural communities with a mixed subsistence-cash economy are limited, seasonal, part-time, and in jobs in the commercial fisheries, other primary resource extraction, or in public sector employment. There usually is not a well-developed private wage sector.

- As a whole, wage employment opportunities are numerous in non-rural areas, and full-time wage employment is the norm for at least one person in a household.

Cash Income

- Average household and per capita cash incomes are lower in rural areas of the state than in non-rural areas.

- In the rural communities where detailed studies have been conducted, no simple relationship exists between level of monetary incomes and wild resource productivity and use, however. In fact, households with the highest monetary incomes within a rural community typically have been found to be the most productive fishers and hunters, and typically provide food for many other families through customary distribution and exchange of harvested fish and game.

Costs of Goods and Services

- Purchasing power is lower in rural areas than in non-rural areas because the costs of goods, including food and services, are significantly greater in rural areas. This is largely due to the smaller economies of scale and greater transportation costs in rural areas.

Variety of Fish and Wildlife Species Used

- In rural areas, most households use a wide range of the available fish and wildlife species.
- In non-rural areas, most households typically harvest few of the available species, and generally focus on those which have a high recreational value.

The Seasonal Cycle of Economic Activity

- In rural areas, the economy follows a regular yearly, community-wide cycle of activities based on the seasonal appearance of fish and game resources. Social groupings and economic pursuits are modified to accommodate natural cyclic changes in the biotic resources.
- In non-rural areas, the economy is not organized around seasonal appearance of fish and game resources (that is, there is no community-wide seasonal round of activities synchronized with cyclic changes in biotic resources). Hunting and fishing are performed on periodic breaks from regular work routines.

Participation in Hunting and Fishing or Using Wild Resources

- In rural areas, most households harvest or use fish and game.
- In non-rural areas, a smaller percentage of households harvest or use wild resources.

Harvest Levels

- Harvests of fish and wildlife can be substantial, though variable in rural areas: community averages fall between about 100 lbs to 1,400 lbs per person per year.
- In non-rural areas, average per capita harvests are significantly lower; less than 100 pounds annually.

Values Associated with Use of Fish and Game

- In rural areas, fishing, hunting, and processing have central social, economic, and cultural values to community members.
- In the non-rural economy, hunting and fishing are typically valued because they are a diversion from central work activities, but also because they have social significance and provide valued food.

Where Hunting and Fishing Occur

- In rural areas, fishing and hunting primarily occur within a relatively well-defined community territory contiguous to the community.
- By contrast, non-rural residents typically travel long distances to fishing and hunting areas. The "territory" of use of a non-rural community may include large regions of the state, rather than a discrete well-defined area.
- In rural areas, customary, unwritten community "rules" control access to traplines, fishcamps, set net sites, fishwheels sites, and hunting territories.
- In non-rural areas formal legal limitations and personal experience are more significant than community customs in influencing where people hunt and fish.

Sharing and Exchange of Fish and Game

- Sharing is a central feature of the economy of rural areas. Fish and game is distributed through kinship networks. Households with elderly or infirm members or large numbers of dependent children receive food through these networks. (These are called "non-commercial distribution and exchange networks" in the social science literature).
- While some sharing and exchange occurs in non-rural areas, this is not a central feature of their economy; relatively few people regularly distribute fish and game through social networks, although food is used for gifts.

In summary, existing data show that people living in rural areas--communities and areas in which the taking of fish or game for personal and family consumption constitutes a significant characteristic of the local economy--have in general a very different relationship to fish and game resources than people living in other parts of Alaska. That is not to say that people in other parts of Alaska do not value the harvest of fish and game; however, the role those resources play in their lives in general is quite different.

Wolfe, Dr. Robert J. and Linda J. Ellanna, et. al., March 1983. Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

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March 7, 1986

The Honorable Arliss Sturgulewski
Alaska State Legislature
P.O. Box V - State Capitol
Juneau, Alaska 99811

Re: Subsistence: Equal protection and the use of "road connected" in the definition of "rural area" in SCS CSHB 288 (res)
AG Files 663850375 and 773850176

Dear Senator Sturgulewski:

You have asked for an analysis under equal protection principles of including "road connected" as an exclusion in the definition of "rural area" contained in the proposed SCS CSHB 288 (res), an act relating to the taking of fish and game for subsistence and personal use. Experience with a definition of "rural" adopted by the joint Boards of Fisheries and Game in 1982 and repealed in 1983, and later board action based on information provided by the Department of Fish and Game indicates that a definition of "rural area" which incorporated an exclusion of road connected areas would be vulnerable to an equal protection challenge.

The proposed committee substitute defines "subsistence uses" as the "noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state" for certain specified purposes. Further, the bill defines "rural area" as:

> a community or area of the state in which the noncommercial, customary, and traditional uses of fish or game for personal or family consumption is a significant characteristic of the economy of the community or the area....

These definitions establish a class of people eligible to participate in subsistence hunting and fishing. The definitions are very similar to the definitions incorporated in an earlier version of the bill considered by the House, CSHB 288 (jud). An analysis by this office based in part upon

information provided by the Department of Fish and Game concluded that the definitions in that version would be defensible against an equal protection challenge. You have inquired whether an amendment to the definition of "rural area" which would exclude those parts of the state connected by road would pose equal protection problems. 1/

The state equal protection test generally has been discussed in connection with Article I, section 1 of the Alaska Constitution, which provides in part that "all persons are equal and are entitled to equal rights." In addition, Article VIII, section 17, is in essence an equal protection guarantee with regard to natural resources:

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

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

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

The Alaska Supreme Court has developed a three part test in analyzing whether legislation offends the equal protection clause of the Alaska Constitution. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-270 (Alaska 1984). The first

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1/ Depending on how the term "road" was used and defined, problems of vagueness might also be presented by such an amendment.

inquiry involves what weight should be afforded the constitutional interest impaired by the challenged enactment. Depending on the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation. Next, the court looks at the purpose served by the challenged statute. Again, depending on the level of review determined, legitimate objectives may suffice, or compelling state interests may need to be demonstrated. Finally, and closely entwined with the proceding examination, the court evaluates the particular means employed to further the purported goals. Depending on the level of review, a substantial relationship may be constitutionally adequate, or closer fit between means and ends may be required.

Turning to the first step in the equal protection analysis, the Alaska Supreme Court has noted that commercial fishing does not involve a suspect classification nor a fundamental right so as to require a the application of the compelling state interest test. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). Therefore it would seem that the objectives of this bill, also relating to harvesting of resources, must be examined to see if they are legitimate, and the means employed to further those objectives must bear a substantial relationship to the ends.

Defining "subsistence uses" and "rural area" bears a fair and substantial relationship to a legitimate governmental objective, as required by the equal protection test. Id. at 1264. State v. Tanana Valley Sportsmen's Association, Inc., 583 P.2d 854, 859-860 n.18 (Alaska 1978), acknowledged the critical importance in Alaska of preserving and protecting subsistence uses, and in Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 903 (Alaska 1981), the court noted that the state subsistence statutes addressed that important issue on a statewide basis.

Your request regarding the equal protection ramifications of the addition of "road connected" as an exclusionary component of the definition of "rural area" in the proposed committee substitute in part relates to the definition of "rural" adopted by the joint Boards of Fisheries and Game in 1982 as 5 AAC 99.020. The boards defined "rural" to mean:

> outside the road connected area of a borough, municipality, or other community with a population of 7000 or more, as determined by the Alaska Department of Community and Regional Affairs.

This definition was never implemented, and a year after it was

adopted, the boards repealed it, based on the advice of the Department of Law that it appeared to violate equal protection. Information provided by the Department of Fish and Game had indicated that the factors employed in the definition did not correlate throughout the state to differences in use patterns of and reliance on fish and game resources by various communities and areas. 2/

After receiving your request for an analysis of possible consequences associated with the use of "road connected," I discussed with the Department of Fish and Game available information on the correlation of road connectedness to the use of fish and game. If a correlation could be shown, then presumably in general the use of the term in the definition would result in similar treatment for individuals situated similarly with regard to the use of fish and game. On the other hand, failing a correlation, equal protection problems are very likely.

The department data illustrate that some communities connected by road to major Alaskan cities have hunting and fishing patterns and reliance upon fish and game which are similar to those in small, remote communities off the road system. For example, the Board of Fisheries applied the eight criteria contained in 5 AAC 99.010 and determined that the Copper River basin area and certain upper Tanana communities qualified as being eligible for subsistence uses of Copper River salmon. (The Department of the Interior had certified that the method for identifying eligible rural communities and areas contained in 5 AAC 99.010 complied with the requirements of the Alaska National Interest Lands Conservation Act, Title 8.) The Department of Fish and Game had provided information to the board on the uses of fish and game in those areas. The board determined, based in part on that data, that the Copper River basin qualified, which encompassed road connected areas, 3/ and that some road connected upper Tanana communities qualified, including Tetlin,

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Northway, Tanacross, Tok, 4/ and Dot Lake. 5/ All these communities are "road connected," and the board's assessment of the uses of fish and game in those communities under standards which were consistent with ANILCA concluded that they were eligible for subsistence uses.

There are other communities in the state which are connected by the state's road system, about which research conducted by the Department of Fish and Game indicates that they are similarly situated to other communities not on the road system with regard to use patterns of and reliance upon fish and game resources. For example, the community of Klukwan is discussed in Technical Papers 69 and 95, Division of Subsistence, Department of Fish and Game, and the community of Minto, road connected and relatively close to Fairbanks, is covered by Technical Paper 122, Division of Subsistence, Department of Fish and Game.

It appears from these examples that road connectedness in itself does not mean that residents of certain communities or areas are differently situated with respect to the use of fish and game. Therefore, to insert "road connected" as an exclusionary factor in the definition of a "rural area" in which residents would be eligible to participate in subsistence uses could be vulnerable to an equal protection challenge. Of course, in a particular fact situation, the boards might conclude that roads were one factor which contributed to different patterns of use of fish and game resources, but as the examples above illustrate, such a factually specific determination could not be generalized to the entire state.

It appears, therefore, in answer to your question, that inserting "road connected" as an exclusionary component in the

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Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL

By: Larri Irene Spengler
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Jim Ayers
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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 7, 1986

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P.O. Box V - State Capitol
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Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL

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Art Peterson

THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. DAVID ELUSKA, Appellee.	File No. A-210
	OPINION
	[No. 456 - April 12, 1985]

Appeal from the District Court of the State of Alaska, Third Judicial District, Kodiak, Roy H. Madsen, Judge.

Appearances: Sarah Elizabeth McCracken, Assistant Attorney General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellant. Michael J. Wall, Assistant Public Defender, Kodiak, and Dana Fabe, Public Defender, Anchorage, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

The state appeals the district court's dismissal of misdemeanor charges against David Eluska. Eluska was charged with possessing illegally taken game in violation of 5 AAC 81.320(6)[1] and 5 AAC 81.140(a).[2]

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1. For the 1982-83 season, 5 AAC 81.320(6) limited the deer season in Game Unit 8 to the period between August 1 and January 31 and imposed the following bag limits:

(Footnote Continued)

Eluska sought dismissal of the charges on the ground that 5 AAC 81.320(6) was unenforceable against him because he was a subsistence hunter and the regulation failed to adequately provide for subsistence hunting. See AS 16.05.255(b); AS 11.81.220; AS 44.62.030.[3] Acting District Court Judge Roy H. Madsen found that the deer was taken to satisfy the subsistence needs of Eluska and his family and that the regulations which

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(Footnote 1 Continued)

Aug. 1 - Jan. 31	Seven deer; however, antlerless deer may be taken only from September 15 - January 31

2. 5 AAC 81.140(a) provides:

> Possession and Transportation. (a) No person may possess, transport, or place into the possession of another, any game or parts of game that the person has taken in violation of AS 16 or a regulation promulgated thereunder.

3. Alaska Statute 44.62.030 provides:

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

Alaska Statute 11.81.220 provides:

> All offenses defined by statute. No conduct constitutes an offense unless it is made an offense
> (1) by this title;
> (2) by a statute outside this title; or
> (3) by a regulation authorized by and lawfully adopted under a statute.

"Offense" is defined in AS 11.81.900(b)(33) as:

> conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation.

prohibited him from taking the deer failed to provide adequately for subsistence uses as required by the enabling statute. AS 16.05.255(b). Consequently he concluded that the regulation was invalid as applied to Eluska and dismissed the case. The state appeals, contending that (1) adequate regulations had been promulgated providing for subsistence use of game; (2) Eluska lacked standing to challenge state game regulations because his possession of game was unlawful even if taken for subsistence uses; and (3) Eluska lacked standing to challenge the state game laws because he had not exhausted his administrative remedies. (This last argument was first made during oral argument.) We agree with Judge Madsen's conclusion that the state regulations applicable to Game Unit 8 do not on their face make adequate provision for subsistence hunting. We therefore recognize "subsistence use" as a defense to the charges brought against Eluska. In light of the substantial uncertainty regarding the proper resolution of the issues presented in this case at the time it was argued to the trial court, we have decided to remand the case to the trial court to give the parties an opportunity to litigate Eluska's subsistence defense as we define it in this opinion.

DISCUSSION

In 1978 the legislature substantially amended several fish and game statutes to reflect a policy favorable to subsistence hunting. The substantive changes were prefaced by the following statement of intent:

> The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that those resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's

fish and game resources and to recognize the needs, customs and traditions of Alaskan residents. The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated, with as much input as possible from the affected users, so that the viability of fish and game resources is not threatened and so that resources are conserved in a manner consistent with the sustained-yield principle.

§ 1, Ch. 151, SLA 1978 (1978 Temporary and Special Acts and Resolutions).

Prior to the 1978 amendments, AS 16.05.255 did not mention subsistence, but provided in part:

> Regulations of the Board of Game. (a) The Board of Game may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for
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> . . . .
>
> (2) establishment of open and closed seasons and areas for the taking of game;
>
> (3) establishment of the means and methods employed in the pursuit, capture and transport of game;
>
> (4) setting quotas and bag limits on the taking of game . . . .

The statute was amended in 1978 by adding a new subsection:

> (b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:
>
> (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
>
> (2) local residency; and

(3) availability of alternative resources.[4]

On May 14, 1983, when the deer season in Game Unit 8 was completely closed, Eluska was found in possession of a freshly killed doe. He was prosecuted pursuant to 5 AAC 81.320(6) and 5 AAC 81.140(a). Eluska argued and the trial court found that application of 5 AAC 81.320(6) to Eluska would be inconsistent with the requirements of AS 16.05.255(b) because the regulations governing hunting in Game Unit 8 made no specific provision for subsistence use. Eluska argued that nothing short of regulations which expressly distinguish between subsistence and sport hunting will satisfy section (b) of AS 16.05.255. On appeal, the state argues that the regulation need not expressly provide for subsistence uses and that the regulation in this case makes adequate provision for subsistence hunters. The clear language of the statute, the state continues, provides that the Board shall adopt regulations "permitting" the taking of game for subsistence uses, not that it must adopt special "subsistence regulations." Thus, where a hunting season can accommodate hunting opportunities for all user groups without infringing upon the continuation of subsistence uses, that season is consistent with the state's subsistence law and need not be specially designated as a "subsistence" season. It was incumbent upon Eluska, the state concludes, to show that a six-month season and a seven deer limit was insufficient to

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4. The legislature also established a section on subsistence hunting and fishing within the Department of Fish and Game, and provided a procedure for creating "subsistence hunting areas," where subsistence is the only use. See AS 16.05.090(c) (creating a subsistence section within the Department of Fish and Game); AS 16.05.094 (defining the duties of the subsistence section); AS 16.05.257 (providing for the creation of "subsistence hunting areas"); AS 16.05.940(23) (defining "subsistence uses").

meet "subsistence uses" before he could prevail on his motion to dismiss.[5] Since there is nothing in the record indicating that there were insufficient deer in Game Unit 8 to meet all needs, including both sport hunting and subsistence uses, the state contends it was unnecessary for the Board to adopt any specific subsistence regulations, and therefore the trial court erred in finding that prosecution of Eluska under 5 AAC 81.320(6) and 5 AAC 81.140(a) was inconsistent with the enabling statute.

We believe that the parties' reliance on AS 44.62.030 obscures rather than illuminates the present controversy. The regulations in question are similar to regulations which were passed before the enactment of AS 16.05.255(b) and were apparently enacted under the authority granted in AS 16.05.255(a). They are clearly not inconsistent with the first subsection of the statute. Given the substantial burden that a party challenging an administrative regulation on inconsistency grounds must sustain, we are satisfied that Eluska has not proved that 5 AAC 81.320(6)

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5. The state finds support for its position in a series of attorney general opinions and in the legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) P.L. 96-487, 94 Stat. 2371 (1980), particularly in section 804 (codified at 16 U.S.C. § 3114 (1982)). The state points out that the federal statute was intentionally patterned after Alaska's subsistence law and provides virtually identical language to that found at AS 16.05.255(b). H.R. Rep. No. 96-97, Part 2, 96th Cong., 1st Sess. 191 (1980). The legislative history of section 804 specifies that:

> If a particular fish or wildlife population in a particular area is sufficient to sustain harvest by all persons engaged in subsistence and other uses, restrictions on taking for nonsubsistence uses are not required by this section.

Id. at 193. But see Madison v. Alaska Department of Fish and Game, ___ P.2d ___, ___ n.13, Op. No. 2911 at 23-24 n.13 (Alaska, February 22, 1985) (rejecting an interpretation of the terms "customary and traditional" derived from ANILCA).

and 5 AAC 81.140(a) are on their face necessarily inconsistent statutory requirements of subsection (a), since, as the state poi is at least conceivable that sufficient deer existed on Kodiak Island to meet all subsistence needs despite the bag limits, seasons and other restrictions set by the regulations. But cf. Madison v. Alaska Department of Fish and Game, ___ P.2d ___, ___ n.9, Op. No. 2911 at 12 n.9 (Alaska, February 22, 1985) (holding Board of Fisheries regulations defining subsistence fisheries inconsistent with AS 16.05.940(22), (23), and 16.05.-251(b), which define "subsistence fishing" and "subsistence uses," and require the Board to adopt regulations permitting subsistence fishing).

This conclusion does not resolve the case, however, because we agree with the trial court that a proper resolution of this case requires consideration of AS 16.05.255(b) as well as AS 16.05.255(a). We must determine what the 1978 legislative enactment required the Board to do and then determine whether the Board properly carried out the legislative mandate. Finally, if the Board has not followed the legislative directive, we must determine what effect its failure would have on Eluska's prosecution. Having considered the record and the parties' arguments, we conclude that by enacting subsection (b) of AS 16.05.255, the legislature required the Board of Game to adopt specific regulations "permitting"[6] the

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6. The state's suggestion that the regulations "permitted" subsistence hunting to the extent that they did not prohibit it outright exhibits a misunderstanding of the statute. As the supreme court pointed out in Madison, ___ P.2d at ___, Op. No. 2911 at 15-17 (in discussing the two-tier regulation established in the statute), the Board may not restrict subsistence hunting at all in an area in which sport or commercial hunting is permitted. Even if sport and commercial hunting are totally prohibited at all times in an area, the Board is still prohibited from restricting subsistence hunting unless the Board specifically finds that unrestricted

(Footnote Continued)

see page 16

"restriction" means "an ... significant impairment ... subsistence uses ..."

taking of game for subsistence uses. No such regulations were governing Game Unit 8. Consequently, we are required to recog. "subsistence" defense to prosecutions under regulations adopted in accordance with AS 16.05.255(a) in order to carry out the legislative intent.

(Footnote 6 Continued)

subsistence hunting would interfere with sustained yield. Id. In the absence of evidence that all other hunting was prohibited in an area and that in addition subsistence hunting was restricted solely for sustained-yield purposes, any attempt to punish a subsistence use as a violation of a hunting regulation is suspect.

In reaching these conclusions we stress that we do not decide nor do we read Madison as deciding bright line rules for differentiating between subsistence uses, sport uses, and commercial uses. In fact the supreme court pointed out that a commercial fisherman might well be a subsistence user when he fishes for personal consumption. By the same token many men and women who think of themselves as sport hunters may well find that their taking satisfies the statutory definition of a "subsistence use." AS 16.05.940(23). It may be that most "sport hunting" qualifies as "subsistence hunting." We express no opinion on this question. It was precisely because the legislature believed that the rights of the various groups could only be determined through an understanding of the history of hunting in Alaska that the Board was given the power to interpret the statute and to promulgate regulations establishing a reasoned basis for distinguishing subsistence uses from sport uses and commercial uses. The Board's default in meeting this obligation leaves us with the problem faced today.

Finally, we do not read the supreme court's discussion of the legislative history regarding the use of the term "customary and traditional" as constituting an implicit finding that the statute is somehow void as a discrimination against outsiders and newcomers. See Madison, ___ P.2d at ___, Op. No. 2911 at 20-21. We assume that the Board will be able to adopt regulations adequately answering the questions left open by this case and Madison without violating state and federal equal protection guarantees. See Zobel v. Williams, 457 U.S. 55, 60-61, 102 S. Ct. 2309, 2312-13, 72 L.Ed.2d 672, 677-78 (1982) (when a state distributes benefits unequally between past residents and newcomers the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment); cf. Alaska Constitution art. VIII (establishing limitations on state regulation of hunting and fishing).

I. Legislative Mandate

We believe the Board's duty to publish regulations pursuant to AS 16.05.255(b) to have been mandatory. See Sisters of Providence in Washington, Inc. v. Department of Health and Social Services, 648 P.2d 970, 977-78 (Alaska 1982); Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973); United States Smelting, Refining and Mining Company v. Local Boundary Commission, 489 P.2d 140 (Alaska 1971). Our conclusion that the legislature intended a mandatory responsibility is based on two factors. First, the legislature uses the word "shall" which is mandatory language. See 1A C. Sands, Sutherland Statutory Construction § 25.04 (4th ed. 1972); 2A C. Sands, Sutherland Statutory Construction § 57.03 (4th ed. 1973). Second, the language of the statute, construed in light of its legislative history, demonstrates a legislative intention to have the Board of Game pass meaningful subsistence regulations. While the statute does not specifically state whether the regulations must be separate and clearly distinguishable from the regulations adopted pursuant to AS 16.05.255(a), it does require that provision for subsistence hunting must be made somewhere in the regulations.[7]

When Chapter 151, SLA 1978 was being considered in the legislature, the Special Committee on Subsistence issued a letter of intent which provided in part:

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7. Cf. Madison, ___ P.2d at ___, Op. No. 2911 at 7, 16-17 (state may no longer allocate for subsistence uses at its discretion pursuant to AS 16.05.251(a), nor may state permit sport or commercial hunting in any area where subsistence hunting is restricted; even in those areas where sport and commercial hunting are totally prohibited, subsistence hunting may not be restricted unless the Board finds that

(Footnote Continued)

> This bill is intended to provide a coordinated plan for clarifying what subsistence use of fish and game is and for documenting subsistence uses so that they can be integrated into fish and game management planning. This bill also provides a legislative framework for the State's policy of recognizing subsistence as the priority use of fish and game.
>
> . . . .
>
> Sections six and seven: These two sections, [AS 16.05.251(b) and .255(b)] 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. While there are presently regulations for subsistence fishing, there is no mechanism for the promulgation of subsistence hunting regulations except with the creation of subsistence hunting areas pursuant to A.S. 16.05.257. Section seven would allow for these regulations so that subsistence hunting could be distinguished by separate regulations from sports hunting. 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 subsistence use. If these restrictions are inadequate, restriction 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. It is the intent of the Committee that decisions and determinations by the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act.

Letter of Intent, Special Committee on Subsistence, 2 House Journal 1154, 1155 (1978).

(Footnote 7 Continued)

limitation on subsistence hunting is necessary for sustained-yield purposes).

The Committee's letter is entitled to substantial weight in determining the legislative intent in enacting the statutes. See Madison, ___ P.2d at ___, Op. No. 2911 at 18-19; 2A C. Sands, Sutherland Statutory Construction § 48.07 (4th ed. 1973). It indicates that the legislature intended the statute to change the existing system which did not provide a mechanism for establishing separate subsistence regulations.

II. Board's Inaction

The Board of Game has not promulgated a specific regulation governing subsistence hunting in Game Unit 8, nor has it made specific provisions for a subsistence defense or exception to prosecutions under regulations adopted pursuant to AS 16.05.255(a). The time that has elapsed from 1973 to the present has provided more than adequate opportunity for the Board to carry out its statutory responsibility. Consequently, we conclude that the Board has failed to carry out its responsibilities and, under the authority of United States Smelting, 489 P.2d at 141-42, dismissal of Eluska's prosecution might have been justified. We believe the supreme court's comments regarding the Local Boundary Commission in United States Smelting are particularly appropriate to this situation:

> In our view the Local Boundary Commission has had sufficient time to discover sensible principles pertaining to the changing of local boundaries. Permitting continued failure on the commission's part to promulgate standards for changing local boundary lines can no longer be justified by the need for further experience. Since under AS 44.19.260(a) the legislature required the commission to develop standards in order to recommend boundary changes, and the commission had not developed standards prior to the Nome annexation proceedings, we hold that the commission lacked the power to recommend the Nome boundary changes in question. To do otherwise would be to condone the commission's nonobservance of a

> valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes.

489 P.2d at 142 (footnotes omitted).

III. "Subsistence" Defense

We decline to affirm the dismissal of the prosecution, however, because we believe the statute interpreted in light of its legislative history suggests an alternate remedy which adequately balances the rights of Eluska and those similarly situated to engage in subsistence hunting and the state's legitimate interest in protecting the fish and game resources of the state. In the absence of specific regulations governing subsistence hunting applicable to Game Unit 8, we hold that Eluska was entitled to rely on a "subsistence" defense to prosecution under regulations implementing AS 16.05.255(a). We are guided in this decision by our supreme court's decision in Frank v. State, 604 P.2d 1068 (Alaska 1979). Frank was convicted for illegally taking and transporting a moose. He defended on the ground that the moose was necessary for a funeral potlatch which was an expression of religious belief and that prosecution operated to abridge his freedom of religion. The supreme court agreed and ordered dismissal of the complaint. Having found that the use of moosemeat in funeral potlatches was a necessary requirement of Frank's religious beliefs and having concluded that the state failed to prove a countervailing public policy, the court adopted the exemption in question. While Eluska's rights are based on a statutory protection of subsistence hunting, rather than a constitutional protection of religious freedom, we believe the same approach is in order.

In the absence of appropriate regulations,[8] we believe that the best way to accommodate Eluska's statutory right to subsistence hunting and the state's right to reasonably protect the state's game resources is to judicially recognize a defense for subsistence hunting. We therefore hold that when the trial court concludes, as a matter of law, that hunting occurs in an area in which the state has not adopted regulations pursuant to AS 16.05.255(b) providing for subsistence uses and recognizing the subsistence priority, conduct which would otherwise be a violation of a regulation adopted pursuant to AS 16.05.255(a) restricting hunting is justified as a "subsistence use" if the person whose conduct is alleged to have constituted hunting in violation of the regulation believed he or she was taking the game for subsistence uses (see AS 16.05.940(23)) and 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. (See AS 11.81.900(a)(3) defining the mental state "recklessly.") We use the term "defense" as it is defined in the revised criminal code, AS 11.81.900(b)(15):

> "defense", other than an affirmative defense, means that
>
> (A) some evidence must be admitted which places in issue the defense; and

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8. The defense recognized in this opinion exists only to the extent that the state has not adopted detailed regulations providing for subsistence hunting within an area. Such regulations when and if adopted would have the additional effect of guarding against abuses and would aid in record keeping to determine the true impact of subsistence hunting upon game management. See Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979). Where the state has adopted valid regulations recognizing the subsistence priority they would be controlling and the defense recognized here would no longer apply. Whether given regulations are valid is of course a question of administrative law for the court not a question of adjudicative fact for the jury. Cf. Madison, ____ P.2d at ____, Op. No. 2911 at 13-15; Kelly v. Zamarello, 486 P.2d 906, 917 (Alaska 1971).

(B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt.

In order to permit a pretrial dismissal of charges where appropriate[9] and avoid delay in presenting such a defense, we will require a

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9. We recognize that a statute which defines an offense in terms which require reasonable men and women to guess at its meaning is constitutionally invalid. State v. Rice, 626 P.2d 104, 109-10 (Alaska 1981). A statute which clearly defines an offense may nevertheless be constitutionally infirm, if exceptions or defenses are recognized but their scope is unclear. A potential subsistence user must be able to determine before he or she hunts whether the hunt will comply with the law before he or she can be subjected to criminal prosecution for his or her hunting. Uncertainty regarding a person's rights may discourage him or her from subsistence hunting thus indirectly accomplishing a result which the legislation sought to prevent. We address the problem of "fair notice" in three ways. (1) We depart from ordinary practice and permit a defendant to obtain a pretrial judgment of acquittal in an appropriate case. While summary judgments are recognized in the civil rules we have never recognized such a procedure before in criminal cases. Nevertheless, we believe it appropriate in this type of case to insure that subsistence hunters are not put to the cost and uncertainty of a jury trial in those cases in which the state will clearly be unable to disprove the subsistence defense. The pretrial judgment of acquittal will thus serve the screening function served by a grand jury proceeding or preliminary hearing in felony cases. (2) We establish a mens rea of recklessness to insure that only those who recklessly hunt in bad faith will be subject to prosecution. (3) Finally, we define the exception as a defense rather than an affirmative defense to insure that the state must prove guilt beyond reasonable doubt by convincing a jury that the hunting in question was not a subsistence use. We stress that our recognition of the defense is required by the state's failure to comply with the statutes by adopting appropriate regulations. Should the state remedy this deficiency then the defense would no longer be applicable.

We have considered making the defense one for the court by analogy to entrapment. See Yates v. State, 681 P.2d 1362, 1363-64 (Alaska App. 1984). Since the purpose of the defense is to substitute for regulations which would give guidance to those to be affected, a strong argument can be made for judicial decisions on a case-by-case basis that would have precedential value. See Yates at 1364, citing People v. Moran, 463 P.2d 763, 769 (Cal. 1970) (Traynor, C.J., dissenting). Nevertheless, we are satisfied that juries are in a particularly appropriate position to evaluate the subsistence defense. We have also considered and rejected making "subsistence use" an affirmative defense. AS 11.81.900(b)(1). We are satisfied that an affirmative defense would inappropriately distribute

(Footnote Continued)

party intending to rely upon a subsistence defense to make a preliminary showing a reasonable time before trial. In a pretrial order the court may establish procedures, including time limits, for raising the defense. Failure to give notice of the defense before trial or in the manner prescribed in the pretrial order may, unless excused for good cause, result in the forfeiture of the defense. See Alaska R. Crim. P. 12(b)(3), 12(e), and 16(f)(3). See also Davis v. United States, 411 U.S. 233, 93 S. Ct. 1577, 36 L.Ed.2d 216 (1973).

A defendant desiring a pretrial dismissal of the prosecution may make a preliminary showing which should consist of some evidence, which may be in affidavit form, that he believed in good faith that, under all of the circumstances which he understood to exist, his hunting constituted a subsistence use of the animal or animals taken.[10]

(Footnote 9 Continued)

the burden of proof in light of the Board's failure to enact regulations giving appropriate guidance as it was required to do by AS 16.05.255(b).

10. Subsistence use is defined in AS 16.05.940(23) as follows:

> "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.

"Customary" and "traditional" are not further defined in the statute and therefore must be given their common meanings. AS 01.10.040. "Customary" means according to custom, the usual way of doing something. See Oxford American Dictionary 156 (1980). "Traditional" means according to tradition, a custom handed down from generation to generation

(Footnote Continued)

The statute only requires the state to provide for subsistence hunting. If the state has enacted regulations making adequate provision for subsistence hunting then the defense we have recognized would not exist. Consequently, if the defendant has made his preliminary showing, then the state should be given an opportunity to establish, if possible, either that the regulations which defendant allegedly violated did not in fact "restrict" the taking of game, AS 16.05.255(b), because, e.g., it was a regulation of time, place and manner that did not significantly impact or impair subsistence use or, alternatively, that any restriction on subsistence u recognized subsistence priority and was intended to protect sustained yield. (We interpret the term "restriction" to mean any significant impairment of subsistence uses. AS 16.05.255(b).)

If, after hearing the evidence, the court is satisfied that a reasonable jury could not find guilt beyond reasonable doubt, i.e., there must be a reasonable doubt whether the defendant's taking constituted a subsistence use, the prosecution should be dismissed. If reasonable men and women could differ, the defense should be submitted to the trier of fact with appropriate instructions setting out the statutory definition of

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(Footnote 10 Continued)

especially without writing, a long established custom or method of procedure. Id. at 728. But see Madison, ___ P.2d at ___, Op. No. 2911 at 20: "customary and traditional" should be defined in accordance with legislative history. 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.

subsistence use,[11] the requisite mens rea,[12] and the appropriate burden of proof. AS 11.81.900(b)(15)(B).[13]

Since the issues presented by the defense of subsistence involve mixed questions of fact and law which have not been addressed by the trial court, it is necessary for us to remand this case for further proceedings.

This case is REMANDED to the superior court for trial of Eluska's subsistence defense.[14]

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11. See note 10 supra.

12. "Reckless." See note 9 supra.

13. See note 9 supra.

14. The opinion in this case was undergoing final editing at the time the supreme court issued its decision in Madison. The draft has been adapted to reflect our understanding of Madison. We recognize that future litigation will serve to clarify and refine both this decision and Madison.

What are the specifics on how the Governors bill will connect the Gluesha approach.

Is there anything in the constitution (state or fed) that prohibits treating persons who are situated differently

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska,	)
	)
Petitioner,	)
	)
vs.	)
	)
David Eluska,	)
	)
Respondent.	)
	)

REVISED

Dist. Ct. No. 3KO-83-465 Cr.
Ct. App. No. A-210
Supreme Ct. No. S-991

ON PETITION FOR HEARING FROM THE
COURT OF APPEALS

BRIEF OF APPELLANT

HAROLD M. BROWN
ATTORNEY GENERAL
STATE OF ALASKA

By:
Sarah Elizabeth McCracken
Assistant Attorney General

Filed August 26, 1985 in the
Supreme Court of the State
of Alaska

DAVID LAMPEN, Clerk

By: Peggy D. Lewis
Deputy Clerk

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ARTICLE VIII

NATURAL RESOURCES

Statement of Policy

SECTION 1. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

General Authority

SECTION 2. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Common Use

SECTION 3. Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use.

Sustained Yield

SECTION 4. 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.

AS 11.81.900(b)(b):

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

AS 16.05.094:

Sec. 16.05.094. Duties of section of subsi[illegible]nce hunting and fishing. The section of subsistence hunting and fishing shall

(1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;

(2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;

(3) make information gathered available to the public, appropriate agencies, and other organized bodies;

(4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;

(5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;

(6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;

(7) participate with other divisions in the preparation of statewide and regional management plans so that those plans reorganize and incorporate the needs of subsistence users of fish and game. (§ 3 ch 151 SLA 1978)

AS 16.05.255(b):

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

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

(2) local residency; and

(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980)

AS 16.05.920(a):

Sec. 16.05.920. Certain acts made unlawful. (a) Unless permitted by this chapter or by regulation adopted under this chapter, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

AS 16.05.920(23):

(23) "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 AAC 81.320(6):

HUNTING SEASONS AND BAG LIMITS (Continued)
DEER HUNTING

Species and Units	Open Seasons	Bag Limits
(6) DEER		
Units 1(A) and 2	Aug. 1 - Nov. 30	Three antlered deer
Unit 1(B)	Aug. 1 - Nov. 30	Two antlered deer
Unit 3, that portion south of Sumner Strait and Eastern Passage, including Level, Vank, Sokolof, Rynda and Kadin Islands	Aug. 1 - Nov. 30	One antlered deer
Remainder of Unit 3	No open season	
Unit 4, all drainages of Baranof Island north and west of the divide between North Cape and Portage Point and all drainages of Chichagof Island south of the divide between Point Leo and Point Hayes and all adjacent islands within this area including Kruzof and Catherine Islands	Aug. 1 - Dec. 15	Four deer; however antlerless deer may be taken only from Oct. 15 - Dec. 15 and the daily bag limit from Dec. 1 - Dec. 15 is one deer.
Unit 1(C) and the remainder of Unit 4	Aug. 1 - Dec. 31	Four deer; however antlerless deer may be taken only from Sept. 15 - Dec. 31.
Units 1(D) and 5	No open season	
Unit 6	Aug. 1 - Dec. 31	Five deer; however antlerless deer may be taken only from Sept. 15 - Dec. 31.
Unit 8, that portion of Kodiak Island draining into Ugak Bay west of Pasagshak Road, ending at the mouth of Pasagshak River, and east of a line from the mouth of Saltery Creek to Crag Point	Aug. 1 - Jan. 31	One deer; however antlerless deer may be taken only from Oct. 1 - Oct. 31.
Unit 8, that portion of Kodiak Island north of the access road from Port Lions to Crescent Lake, and east of a line from the outlet of Crescent Lake to Mount Ellison Peak and from Mount Ellison Peak to Pokati Point at Whale Passage, and the remainder of Kodiak Island east of the Saltery Creek-Crag Point line	Aug. 1 - Oct. 31	One deer; however antlerless deer may be taken only from Oct. 1 - Oct. 31.

Board of Game Policy Statement on Subsistence (1979):

POLICY STATEMENT ON THE SUBSISTENCE UTILIZATION OF FISH AND GAME

The Board of Fisheries and the Board of Game recognize that existing cultures and life styles in Alaska are of great value and should be preserved. Accordingly, customary and traditional subsistence uses of fish and game are assigned a priority among beneficial uses.

The use of fish and game for subsistence is vital to the existence of many Alaskans, although limitations on the productivity of fish and game stocks may limit continued increases in the number of subsistence users.

Beyond directly satisfying food requirements, home consumption of fish and game tends to preserve cultures and traditions and gives gratification to a strong desire possessed by many Alaskans to harvest their own food. The latter functions seem genuinely important to the physical and psychological well-being of a large number of Alaskans.

In some circumstances, subsistence users may also be participants in sports or commercial harvesting. Where subsistence users can satisfy their harvest by commercial or sports methods, special regulations for the subsistence priority may not be needed. Where regulations are needed, commercial and sports uses may not need to be totally eliminated prior to restrictions on subsistence uses, but traditional and customary subsistence uses will receive a priority harvest opportunity in the Boards' regulatory systems.

Whenever possible, the subsistence priority should be achieved by existing regulatory techniques, such as open and closed seasons, bag limits, control of methods and means of take, and controlled use areas. When a resource is plentiful enough to accommodate all uses, the Boards may not need to distinguish between different types of use. Special regulations such as designation of a subsistence hunting or fishing area to allocate a subsistence resource to local subsistence users may be enacted if the above approach is inappropriate or ineffective.

If further restriction is necessary, priority among subsistence users will be based on (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 Boards will depend heavily on data gathered by the Subsistence Section in achieving priority for subsistence and in considering the three factors above.

Implicit in the two criteria of "direct dependence" and "availability of alternative resources" is the idea that a subsistence priority is based to some extent on the actual needs of people. Subsistence needs of individuals, families, and cultural groups may differ in type and degree. It is recognized that judgement will be an unavoidable necessity in weighing actual need. Elements to consider in establishing the level of subsistence need include location, local cultures, traditions, customs, and alternative resources.

The Boards recognize the need for regional differences in the approach to fish and game management and they will maintain flexibility by periodically examining social and economic conditions, as well as biological conditions which may warrant a change in subsistence uses and the Boards' regulations.

Adopted March 28, 1979
Anchorage, Alaska

STATEMENT OF JURISDICTION

On April 12, 1985, the Alaska Court of Appeals issued its decision in State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985), on appeal by the State from dismissal of charges in Dist. Ct. No. 3KO-83-465 Cr. The opinion remanded the case to the district court. On June 18, 1985, this Court granted a stay of the Court of Appeals' decision.

On July 31, 1985, this Court granted the State of Alaska's Petition for Hearing, filed under Alaska Rule of Appellate Procedure 302(a).

This Court has jurisdiction to hear this petition under AS 22.05.020(b), AS 22.07.030, and Alaska Rule of Appellate Procedure 302(a).

ISSUES PRESENTED FOR REVIEW

1. Does the new judicially-created "subsistence" defense in State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985) impermissibly contradict the legislative mandate of AS 16.05.920(a)?
2. Does AS 16.05.255(b) require the Board of Game to adopt separate "subsistence" seasons and bag limits rather than provide subsistence hunting opportunities within the context of general hunting regulations?
3. Does the new judicially-created "subsistence" defense in State v. Eluska, 698 P.2d 174 (Alaska Ct. App. 1985) deviate from the well-established burden of proof placed on a defendant who challenges an administrative regulation?
4. Should a person who illegally kills game in Alaska be allowed to raise a criminal defense of "subsistence" taking without first exhausting available administrative remedies?
5. Does AS 16.05.255(b) require the elimination of all hunting by non-Alaska residents before any restrictions may be imposed on residents taking game for food or other subsistence uses?
6. Should a "subsistence" defense, if allowed by this Court, operate prospectively only?

STATEMENT OF THE CASE

This case involves the closed season taking of game and raises the question whether a defendant is entitled to a criminal defense of "subsistence take" as articulated by the Court of Appeals.

A. Statement of Fact.

On May 14, 1983, State Fish and Wildlife Protection officers observed David Eluska in possession of a freshly killed doe deer at Olga Bay, on the southern tip of Kodiak Island. Court of Appeals Record, "R." 1. The officers charged Eluska with illegal possession of game. Eluska, a state resident, filed a motion to dismiss, alleging failure of the deer hunting regulations to expressly address subsistence uses, and submitted an affidavit asserting that he took the doe for subsistence. R. 2--19. The court, upon review of the motion and written opposition, and without hearing evidence, dismissed, holding that the deer regulations applicable to Kodiak Island were unenforceable because they did not specifically provide for subsistence uses, as required by the state's subsistence law, AS 16.05.255(b). R. 78--87.

The 1982--83 deer season for Kodiak Island was six months long (August 1 through January 31), with a seven deer bag limit; antlerless deer (including does) could only be taken from September 15 through January 31. 5 AAC 81.320(6). Before Eluska took the doe, neither he, the local fish and game advisory committee for Kodiak Island, the southwest regional council, nor

the subsistence division of the Department of Fish and Game had suggested to the board of game that the hunting season or bag limit for deer on Kodiak Island failed to accommodate subsistence uses. R. 31. Eluska's own affidavit did not indicate that he had made any effort to hunt for subsistence or other uses during the open season; however, his affidavit did indicate that during the previous year, his take of five or six deer, which were customarily shared in the village, satisfied his family's needs. R.9

The 1982--83 Kodiak Island deer regulations were typical of hunting seasons and bag limits adopted by the board of game after enactment of the 1978 subsistence law, Ch. 151, SLA 1978. The Board of Game's response to that law had been, where possible, to incorporate into the general hunting regulations (5 AAC 81) management mechanisms such as winter seasons, overlapping seasons for different species, transportation limitations, and harvest method restrictions designed to recognize, and to give a priority to, subsistence uses. See Policy Statement on the Subsistence Utilization of Fish and Game, adopted by the Board of Game on March 28, 1979, printed in Alaska Hunting Regulations Booklet No. 21 (1980--81) p.8. Also, see generally 5 AAC 81 (1984) and 5 AAC 99.010. 1/ Accordingly, there were no

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1/ 5 AAC 81 was largely repealed and replaced by emergency regulations adopted in June, 1985. See n.2, infra.

separate, "specific" subsistence regulations, labeled as such, for Kodiak Island. 2/

B. Statement of Proceedings.

On April 12, 1985, the Court of Appeals issued Opinion No. 456 (698 P.2d 174 (Alaska Ct. App. 1985)), in which the court held that the board of game is required by AS 16.05.255(b) to adopt "specific regulations 'permitting' the taking of game for subsistence uses," and that "[n]o such regulations were adopted governing Game Unit 8 [Kodiak]." 698 P.2d at 178 (footnote omitted.) The court also ruled, citing Madison v. Department of Fish and Game, 696 P.2d 168 (Alaska 1985), that even if sport and commercial hunting are totally prohibited at all times in an area, the board is still prohibited from restricting subsistence hunting unless it specifically finds that subsistence hunting would interfere with sustained yield. 698 P.2d at 178, n.6. The court ruled that a defendant is entitled to a "subsistence"

2/ After the Eluska district court decision, the Department of Fish and Game provided express notice, in the game regulation pamphlets, clarifying that those regulations governed, inter alia, subsistence uses. Also, in certain instances the Board had established separate subsistence permit hunts where special harvest restrictions were necessary, (e.g. Nelchina caribou, Unit 12 moose, Unit 23 sheep.) As a result of the Court of Appeals' decision in this case, the Board of Game adopted emergency regulations in June, 1985, governing all hunting in Alaska, creating separate subsistence seasons and bag limits, eliminating non-resident (non-subsistence) hunting where restrictions on subsistence hunters applied, and creating "tier II" subsistence permit hunts based on the three criteria in AS 16.05.255(b) in situations where not all Alaska resident "subsistence" hunters could be accommodated.

defense if the trial court concludes that the State has not adopted regulations under AS 16.05.255(b) "specifically" providing for subsistence uses and recognizing the subsistence priority. The court noted that the State has the burden of disproving the existence of the defense beyond a reasonable doubt. 698 P.2d at 180.

On April 22, 1985, the State field a timely petition for rehearing. On May 8, 1985, the Court of Appeals denied the petition. 3/

On May 23, 1985, the State filed a motion for stay in the Court of Appeals, which was denied on May 28, 1985.

On June 3, 1985, the State filed a motion for stay of the Court of Appeals' decision as to persons other than Eluska, which this Court denied on June 5, 1985, without prejudice to the State to file a motion for stay as to Eluska. On June 5, 1985, the State filed a motion to stay the decision as to Eluska, which this Court granted on June 18, 1985.

On June 10, 1985, the State filed a timely Petition for Hearing, and motion for expedited review. 4/ On June 14, this Court granted the State's motion for expedited review, and on

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3/ Counsel for the State did not receive notice of that denial until May 20, 1985, during a telephone conversation with opposing counsel.

4/ This Court granted the State's request for an extension of time until June 10 to file its petition.

July 31, 1985, this Court granted the State's petition for hearing and set a schedule for filing formal briefs. 5/

SUMMARY OF ARGUMENT

This case involves issues central to the enforceability and vitality of fisheries and wildlife conservation and management regulations. The Court of Appeals' creation, out of whole cloth, of a new "subsistence" defense to criminal fish and game charges, casts serious doubt on the State's ability to prosecute a wide array of fish and game offenses. This novel defense, premised on the court's assumption that AS 16.05.255(b) requires separate or "specific" subsistence regulations, flatly ignores the prohibition established in AS 16.05.920(a) that no hunting is allowed unless properly authorized by AS 16.05 -- AS 16.40 or by regulation.

Moreover, by shifting the burden of proof to the State, the Court of Appeals' decision misapplies well-established burden of proof principles set out in United States v. Boyd, 491 F.2d 1163 (9th Cir. 1973); Union Oil Co. v. State, Department of Natural Resources, 574 P.2d 1266 (Alaska 1978), and other cases cited infra at 17.

5/ This Court's July 31 order was evidently mailed to the Attorney General's Office on August 1, 1985, but this office did not receive the order until August 7, 1985. Although this fact reduced the State's time to prepare this brief, the State did not seek an extension, since time is of the essence in resolving the issues in this case. A motion for expedited review of this case
(Footnote continued)

In creating this new defense (which had not been the subject of briefing by the parties), the court ignored the fact that the defendant had made no effort to exhaust his administrative remedies, which should have been a prerequisite to raising the defense.

The court also read Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985) overbroadly to mean that "subsistence uses," as defined in AS 16.05.940(23), include the take of game by any resident for food, fuel, clothing, etc., and that all non-subsistence (which, as the court suggests, means all non-resident) uses must be completely eliminated before any restrictions may be imposed on "subsistence" users. 698 P.2d at 178, n.6.

Alternatively, if this Court upholds the new "subsistence" defense, this Court should modify the decision to clarify that the defense applies prospectively only, in accordance with State v. Glass, 596 P.2d 10 (Alaska 1979).

Most importantly, however, the Court of Appeals' treatment of the subsistence issue raised in Eluska, including the Court's creation of a new criminal defense, and its criticism of the Board of Game for, in the court's view, failing to do its duty under the state subsistence law, does violence to the overall framework and unique characteristics of natural resources

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(Footnote continued)
will be forthcoming.

conservation measures. The Court of Appeals' decision gives no recognition at all to the special importance that wildlife and fisheries resources have to Alaska, and the unique considerations which apply to wildlife and fisheries enforcement. See, e.g., Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191, 1194 (Alaska 1981); F/V American Eagle v. State, 620 P.2d 657, 672 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 102 S.Ct. 985 (1982); Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979).

Fisheries and wildlife violations often occur in remote areas, and are difficult to detect. Prosecutions often occur in small communities scattered throughout the state. See generally, Alaska Judicial Council, Alaska Fish and Game Sentences: 1980--81 (April 1983), pp. 17, 37, passim. State prosecutors rarely have the time, expertise, or data available to prove, as a routine precondition to prosecuting misdemeanor citations, that the record supporting the underlying regulations shows "adequate" consideration of "subsistence uses." 6/ Yet that is precisely the result of the court's decision, since it shifts the burden of justifying the regulations onto the State whenever a defendant files a self-serving subsistence affidavit. Particularly in the area of subsistence hunting and fishing, which involves complex,

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6/ The record supporting most game and fisheries board decisions consists of tapes of board proceedings, on file in Juneau. Because of the hundreds of proposals considered at each board meeting, the boards are unable to provide written findings for each of their decisions.

subjective decisions regarding social and biological evidence, the presumption of validity should be a strong one; it should not lightly become the province of the judiciary -- or the jury -- to second guess those rulemakers who have special expertise in this area.

ARGUMENT

I.

This Court Should Apply The "Substitution of Judgment" Standard of Review.

The Court of Appeals' decision in this case was based upon that court's interpretation of law; accordingly, this Court should apply the "substitution of judgment" standard of review in deciding this case. State v. Fairbanks North Star Borough School District, 621 P.2d 1329, 1331 n.5 (Alaska 1981); Osness v. Dimond Estates, Inc., 615 P.2d 605, 610 (Alaska 1980); State, Commercial Fisheries Entry Commission v. Templeton, 598 P.2d 77, 80 (Alaska 1979); Guin v. Ha, 591 P.2d 1281, 1283 n.6 (Alaska 1979). This Court should independently consider the lower court's ruling and adopt the rule of law that is most appropriate in light of precedent, reason, and policy. Id.

II.

The New Judicially-Created "Subsistence" Defense Contradicts the Clear Legislative Mandate of AS 16.05.920(a).

The Court of Appeals' creation of a criminal defense to illegal hunting stems from the court's assumption, discussed infra, that AS 16.05.255(b) requires the Board of Game to adopt

separate or "specific" subsistence regulations, and that the Board has not done so. The "subsistence" defense, which sanctions hunting not otherwise authorized by law or by regulation, ignores the clear legislative mandate of AS 16.05.920(a), and undermines the viability of hunting laws, as discussed below.

The Court of Appeals' new criminal defense of "subsistence taking" is without precedent in natural resources law, and no such defense was adopted or mandated by the Alaska legislature. Had the legislature intended to create a "subsistence" defense, it would presumably have done so. Compare, for example, AS 16.30.017, which expressly establishes a criminal defense to wanton waste of big game animals, otherwise prohibited by AS 16.30.010. See also Jordan v. State, 681 P.2d 346 (Alaska Ct. App. 1984), holding that the Board of Game's affirmative defense of taking in defense of life or property "establishes the only circumstances under which a defense of necessity can be interposed to a claim that game was illegally taken." Id. at 348 (emphasis supplied.) 7/ This defense is not premised on any requirement of the Alaska or United States

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7/ The affirmative defense of dire emergency, 5 AAC 92.400, should also have been included by the court.

constitutions, and violates fundamental principles of natural resource conservation and management. 8/

The need for viable, enforceable hunting and fishing rules flows from the mandates in Article VIII of the Alaska Constitution, which provides special directives for managing Alaska's natural resources on a sustained yield basis. Alaska Const. art. VIII, §§ 1-4. In fulfillment of these responsibilities, the legislature created the Boards of Fisheries and Game (AS 16.05.221), delegated to them broad regulatory authority (including the duty to adopt subsistence regulations under AS 16.05.251(b) and AS 16.05.255(b)), and adopted the fundamental law that no taking of the state's fish and wildlife resources may occur outside laws enacted by the legislature or regulations adopted by the respective Boards. 9/ AS 16.05.920(a) provides:

> Unless permitted by AS 16.05 - AS 16.40 or by regulation adopted under AS 16.05-16.40, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game.

8/ Cf. Frank v. State, 604 P.2d 1068 (Alaska 1979), holding hunting laws that violate first amendment rights to be unenforceable.

9/ The legislature has adopted other laws specifically limiting the board of game's authority to allow hunting. For example, AS 16.05.780 prohibits adoption of any season for cow (antlerless) moose unless the season is affirmatively approved by vote of the local advisory committees.

It follows that unless a hunting season has been properly authorized by state law or by the Board of Game (whether for subsistence or not), the legislature has dictated in AS 16.05.920(a) that no hunting may occur. If a court determines that the game board has adopted a regulation which fails to comply with the subsistence law, then under AS 16.05.920(a) no hunting should be authorized until the game board acts to open a valid hunting season. The result mandated by the Eluska decision -- creation of a "subsistence" hunting defense to prosecution for hunting not expressly authorized by statute or game board regulation -- flatly contradicts the legislative mandate of AS 16.05.920(a).

To allow an individual to take game management law into his own hands by "declaring" an open season based on the hunter's belief that he is entitled to the animal for his own subsistence goes against fundamental principles of fish and game conservation and management. Season restrictions, for example, serve many purposes, such as protecting game during critical periods. 10/ Game managers also require information regarding numbers of hunters and animals, which necessitates, as a practical matter, establishment of seasons, bag limits, and related reporting

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10/ Moses decreed, for example, that "thou shalt not take the dam with the young ..." Deuteronomy 22:6. Season and sex restrictions have been law in the United States since colonial days. See T. Lund, American Wildlife Law (1980), p.66.

requirements. See generally, T. Lund, American Wildlife Law, (1980), p.66, passim. Continuous hunting throughout the year without opportunity to gather data, would hinder the managers' ability to assess population levels, and could lead to hunting in excess of sustained yield levels. See generally, A. Leopold, Principles of Wildlife Management (1933), p. 208, passim; see also A. Geis, "Population and Harvest Surveys," in A Manual Of Wildlife Conservation (R. Teague, ed. 1971), p.67. As discussed more fully below, the new judicially created "subsistence" defense is based on the court's erroneous assumption that the Board of Game must adopt separate or "specific" subsistence regulations, and is wrong as a matter of law and policy. The decision should be reversed, and this case remanded for trial.

III.

The Eluska Decision Provides An Overly Broad Interpretation of this Court's Madison Opinion.

The Eluska decision holds that AS 16.05.255(b) requires the Board of Game to adopt "specific" regulations permitting the taking of game for subsistence uses, and that "[n]o such regulations were adopted governing Game Unit 8 [Kodiak Island]." 698 P.2d 178. The court notes that "[w]hile the statute does not specifically state whether the regulations must be separate and clearly distinguishable from the regulations adopted pursuant to AS 16.05.255(a), it does require that provision for subsistence hunting must be made somewhere in the regulations." 698 P.2d at 178 (referencing Madison, 696 P.2d 168.)

The Eluska court's interpretation of AS 16.05.255(b) and of Madison is overly broad, and undermines the approach, discussed above at p.4, taken by the Board of Game, whereby the board incorporated management mechanisms into general game hunting seasons and bag limits so as to ensure a reasonable opportunity for the continuation of subsistence uses, and to give subsistence uses a priority where restrictions apply. The Court of Appeals erroneously concludes as a matter of law that the Board of Game has failed to act to implement the requirements of Ch. 151, SLA 1978. (See 698 P.2d at 179). This assumption provides the major policy reason for the Court's creation of the "subsistence" defense. (See 698 P.2d at 181 n.9) Nothing in the record supports the court's conclusion; the issue was not directly briefed below, and in fact, a review of hunting regulations, and justifications for them evident from tapes of board proceedings, would show a considerable effort by the board to comply with the law, and substantial success in crafting regulations throughout the state that do comply with the law. Neither Madison nor AS 16.05.255(b) require the Board of Game to adopt "specific" subsistence regulations, so long as subsistence uses by all Alaska residents are protected, and given the requisite priority where necessary. 11/ The Court of Appeals'

11/ See e.g., H.R. Rep. No. 96-97, Part 2, 96th Cong., 1st Sess. 191 (1980), quoted in n.5 of the Eluska opinion.

decision should be reversed, or modified to clarify that separate subsistence regulations are not required, and that so long as a reasonable opportunity exists for subsistence hunting by all Alaska residents, non-subsistence uses need not be completely eliminated.

IV.

The "Subsistence" Defense Created By the Court of Appeals Deviates From The Burden of Proof Standard For Challenging Administrative Regulations.

Not only does the subsistence defense do violence to AS 16.05.920(a), but it is inconsistent with well established burden of proof standards for challenging administrative regulations.

The procedure for raising and establishing the defense, as articulated at 698 P.2d at 180-82, is, at best, subject to differing interpretations. It appears that if a defendant files an affidavit or presents some other minimal evidence indicating he believed in good faith that his hunting was for "subsistence" (as defined broadly in AS 16.05.940(23)), then the State has the burden of proving that the applicable hunting regulations did not in fact restrict subsistence uses, or were necessary for maintenance of the wildlife resource on a sustained yield basis. Whether the State's burden of proof at this point is "beyond a reasonable doubt," or by a "preponderance of evidence," is unclear. In any event, if the court decides that the State has not met its burden of showing that the relevant hunting regulation "adequately" provides for subsistence in accordance

with the subsistence law, but concludes that reasonable minds could differ regarding the defendant's sincerity in believing he took the game for subsistence purposes, that issue would go to the jury, and the State would have to show, beyond a reasonable doubt, that the defendant did not take the game with a good faith belief that it was for subsistence. Regardless of how one interprets the opinion, it cannot be reconciled with well established law regarding burden of proof.

Where a statute (such as AS 16.05.255) specifically delegates to an administrative agency the power to make rules, those rules are entitled to a presumption of procedural and substantive validity. AS 44.62.100; Alaska International Industries, Inc. v. Musarra, 602 P.2d 1245 (Alaska 1979). The burden of rebutting this presumption, whether in a civil or a criminal context, is on the person challenging the rule. Alaska International Industries, Inc. v. Musarra, 602 P.2d 1245 (Alaska 1979); Pacific States Box and Basket Co. v. White, 296 U.S. 176, 185 (1935); United States v. Boyd, 491 F.2d 1163, 1167 (9th Cir. 1973); Union Oil Co. v. State, Department of Natural Resources, 574 P.2d 1266 (Alaska 1978); Langesater v. State, 668 P.2d 1359, 1361 (Alaska Ct. App. 1983). The Boyd case is particularly instructive, since it arose in the context of a criminal prosecution of a vessel captain for failure to provide notice of an oil spill, under the 1970 Water Quality and Improvement Act, 33 U.S.C. § 1161. The court noted that the presumption of

validity of a regulation is a strong one, and does not require special findings by the administrative agency:

> Where a statute specifically delegates to an administrative agency the power to make rules, courts recognize a presumption that such rules, when duly noticed, are valid .... The presumed validity of a general regulation, in contrast to that of an individual adjudication, does not require special findings .... This presumption is rebuttable, particularly where the governing statute is penal, upon a showing that the challenged regulation is an unreasonable exercise of the delegated power - i.e. inconsistent with the statute .... The burden placed on Captain Boyd is thus a heavy one for he must show that the sheen test determination of harmfulness cannot be considered a reasonable expression of the Congressional will, even though Congress has given the Executive broad authority to make that determination. [Citations and footnotes omitted, emphasis added.]

Id. at 1167.

The Eluska opinion, in establishing a criminal defense by judicial fiat, impermissibly shifts the burden of proof of establishing the validity of a game regulation onto the State upon the mere presentation of a self serving affidavit. 12/ The decision requires the State to show affirmatively (either by a preponderance of the evidence or beyond a reascnable doubt, depending on how you read the opinion), that the hunting regulation either does not restrict subsistence uses, or that any

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12/ Had the Court of Appeals construed the "subsistence" defense as an affirmative defense (defined in AS 11.81.900(b)(1)), the result would have been more in line with established case law. The Court of Appeals' policy reasons for rejecting this approach are set out at 698 P.2d at 181, n.9.

restriction placed on subsistence uses is necessary for sustained yield management of the resource. Requiring State prosecutors to prove these complex, subjective issues for the hundreds of fisheries and wildlife regulations in 5 AAC in virtually any poaching case imposes an overwhelming burden on the State. It is for good reason that under well established law, the burden of demonstrating illegality rests on the challenger of a regulation. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 161 (Alaska 1982); Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 906 (Alaska 1981); Kingery v. Chapple, 504 P.2d 831, 835 (Alaska 1971). 13/

When an administrative regulation has been adopted in accordance with the procedural requirement of the Alaska Administrative Procedures Act, AS 44.62, and the legislature intended to commit to the agency discretion over the subject matter of the regulation, a court looks only at whether the regulation is consistent with and reasonably necessary to carry out the statutory authority, and whether the regulation is

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13/ The Court of Appeals in Langesater v. State, 668 P.2d 1359, 1361 (Alaska Ct. App. 1983) specifically noted that unlike challenges of public protection regulations discussed in Kingery v. Chapple, 504 P.2d at 836, which require the State to come forward with "at least prima facie evidence that a reasonable relation to purpose exists before the burden shifts to the complainant," fish and game regulations can be successfully challenged only if the complainant meets the burden of showing lack of a rational basis between the regulation and public policy. The Langesater and Eluska decisions are irreconcilable.

reasonable and not arbitrary. Chevron U.S.A., Inc. v. Le Resche, 663 P.2d 923 (Alaska 1983); Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 161 (Alaska 1982); Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 906 (Alaska 1981); Kingery v. Chapple, 504 P.2d 831, 835 (Alaska 1971); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). A reviewing court need not agree with the particular wisdom of the regulation, so long as it is satisfied that the regulation is not arbitrary and capricious. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

It is particularly important not to deviate from the above burden of proof allocation in the context of natural resources conservation and management regulations. This Court has in the past consistently recognized that regulation of hunting and fishing activities involves important public policy concerns in which the State has a strong interest. Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191 (Alaska 1981); Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979). This Court has also recognized that the State's authority to adopt regulations controlling fishing and hunting should be broadly construed. Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897 (Alaska 1981); Herscher v. State, Department of Commerce, 568 P.2d 996 (Alaska 1977).

In summary, the Eluska opinion constitutes a radical departure from the appropriate standard of proof for challenges to regulations adopted by an agency vested with discretionary

authority and expertise. The subsistence defense has particularly significant ramifications because it affects the wild, renewable resources of the State, which are subject to special considerations both in our constitution and in state law. This Court should accordingly reverse the Court of Appeals' decision, or modify it to specify that the defendant has the burden of proving illegality of a hunting regulation, and then only if he has first exhausted his administrative remedies, discussed below.

V.

The Court of Appeals Erred In Creating A Subsistence Defense Absent A Showing That A Defendant Has Exhausted His Administrative Remedies.

The Eluska "subsistence" defense is, by its terms, available to any defendant without any showing that he has first requested the game or fisheries board to amend the challenged regulation. This result, in the context of subsistence regulations, deviates from principles supporting exhaustion of administrative remedies, and is inconsistent with the public process established by the legislature for identifying and authorizing subsistence hunting. Although in most criminal contexts there are sound policy reasons for allowing a defendant to argue that the law or regulation with which he is charged is invalid, without proving exhaustion of administrative remedies, this principle does not apply universally, and should not apply

to subsistence hunting and fishing regulations, for the reasons discussed below.

It is well established that the doctrine of exhaustion of administrative remedies may apply in the criminal arena, particularly when strong governmental interests are involved. Moore v. City of East Cleveland, 431 U.S. 494, 521-529, 97 S. Ct. 1932, 1946--50 (1977) (Burger dissenting), McGee v. United States, 402 U.S. 479, 91 S. Ct. 1565 (1971); McKart v. United States, 395 U.S. 185, 197-199, 89 S.Ct. 1657, 1664--65 (1969). In cases where exhaustion of administrative remedies is not statutorily mandated, its application is in the discretion of the courts. Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496, 500 (9th Cir. 1980), citing Eluska v. Andrus, 587 F.2d 996, 999 (9th Cir. 1978).

In a plurality decision in Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977), the Court noted that the doctrine should not apply to bar a criminal defendant from asserting constitutional invalidity of the statute under which he is charged (which is not the issue in the instant case), but recognized that the doctrine may be applied in criminal cases, particularly where a statute implicitly or explicitly requires exhaustion of administrative remedies. Id. 431 U.S. at 497 n.5, 97 S. Ct. at 1934 n.5.

In deciding whether to apply the doctrine, the courts weigh the litigant's need for judicial resolution against the agency's interests in creating a record, exercising its

discretion without threat of litigious interruption, discouraging frequent flouting of the administrative process, and correcting mistakes. Aleknagik Natives, Ltd., 648 F.2d at 500. As noted above, courts have required exhaustion of administrative remedies as a prerequisite to raising defenses in a number of criminal and civil penalty contexts. See cases cited in Chief Justice Burger's dissent in Moore v. City of East Cleveland, 431 U.S. at 529--530, 97 S. Ct. at 1951, and cases cited in McKart v. United States, 395 U.S. 197, 89 S. Ct. 1657, passim. See also McGee v. United States, 402 U.S. 479, 91 S. Ct. 1565 (1971) (selective service); Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3rd Cir. 1982) (EPA standards); Hawthorne Oil & Gas Corp. v. Department of Energy, 647 F.2d 1107 (Temp.Em.Ct.App. 1981) (petroleum price regulations); Sanders v. McCrady, 537 F.2d 1199 (4th Cir.1976) (expulsion from National Guard); Donaldson v. United States, 264 F.2d 804 (6th Cir. 1959) (civil penality for overproduction of wheat); Continental Research Corp. v. Train, 426 F.Supp. 713 (D. Md. 1976) (civil penalty for unmarked pesticides); United States v. La Froscia, 354 F. Supp. 1338 (D.N.Y. 1973) (marijuana prosecution).

In United States v. LaFroscia, 354 F.Supp. at 1341, the court recognized that use of the exhaustion doctrine in criminal cases should not be used absent a strong governmental interest, but noted that such an interest exists "where the function of the administrative agency involves 'The exercise of discretionary

powers granted the agency by Congress, or requiring the application of special expertise.'" (Citing McKart). Id. The same reasoning applies to the Board of Game.

In People v. Calvar Corp., 36 N.E. 2d 644 (N.Y. 1941) the New York court refused to allow defendants, convicted of violating a zoning ordinance, to argue that the ordinance was an unconstitutional taking of property, absent a showing that they had first sought a zoning variance. See also Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582 (1931), where the Court, in dicta, reiterated the principle that if a statute, valid on its face, requires issuance of a license, the doctrine of exhaustion of administrative remedies applies to a person who fails to obtain a permit. Id. at 562, 51 S.Ct. at 585. See also ICC v. Appleyard, 513 F.2d 575 (4th Cir. 1975) (requiring exhaustion of permit application procedure before raising permit statute defense).

Eluska presents a situation where the doctrine of exhaustion should be applied, because the State's interest in resource management outweighs the minimal burden on a defendant to first seek regulatory adjustment before flouting the law, and because the statutes and regulations implementing the subsistence law provide for ample administrative review and relief, and impliedly, if not expressly, require application to the appropriate agency for review before violating the law.

The legislature, in enacting the subsistence law, created a comprehensive structure designed to channel information about subsistence uses to the Boards of Fisheries and Game, so

that they can adopt regulations recognizing those uses. The legislature created a new division of subsistence within the Department of Fish and Game, and charged that division with gathering data on subsistence uses and making recommendations to the boards for regulations recognizing those uses. Sec. 3 Ch. 151, SLA 1978, codified at AS 16.05.094. That division's ability to gather data and information depends in large part on public cooperation. The legislature also had, before 1978, authorized creation of local fish and game advisory committees (Sec. I Ch. 94, SLA 1959; am Sec. 4 Ch. 206, SLA 1975, codified at AS 16.05.260), which now number approximately 74; in addition, the joint Board of Fisheries and Game adopted regulations (required for compliance with title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA") P.L. 96-487, 94 Stat. 2371, codified in pertinent part at 16 U.S.C. § 3115), establishing regional advisory councils, providing staff assistance to the councils and committees, and specifying that the Boards of Fisheries and Game may not reject a subsistence regulation proposal from a council except under certain limited circumstances. 5 AAC 96.250; 5 AAC 96.610(e); 16 U.S.C. § 3115(c). 14/

14/ Sec. 807 of ANILCA, 16 U.S.C. §3117, for example, requires exhaustion of state administrative remedies before a person may file an action in U.S. District Court to enforce the subsistence provisions of title VIII of ANILCA.

The State is committed to ensuring that the mechanisms for public input, described above, function effectively. The division of subsistence and the division of boards' fiscal year 1985 budgets, for example, included approximately $3.1 million for the subsistence division and $1.3 million for the division of boards, including funding for those agencys' expenditures for information gathering, research, local meetings, and administrative support for local committees and regional councils. 15/ The procedures by which the boards gather and analyze data on subsistence are set out at 5 AAC 99.010 and 5 AAC 96.610.

In short, the legislature created a statewide network by which subsistence users could give the boards information regarding subsistence uses, so that the boards could provide for those uses. As a matter of public policy, the actions of the legislature and the boards should be viewed as vesting potential subsistence users (and other hunters) with the duty to first seek a permit, or other regulatory change, before engaging in otherwise illegal hunting. 16/

15/ Data provided by Steve Behnke, Director, Division of Subsistence, Department of Fish and Game. The Court may take judicial notice of this as a public record under Alaska Rule of Evidence 201.

16/ In addition, AS 44.62.220 provides the opportunity to petition the board even outside the normal regulatory meeting time.

To allow a person to ignore the readily available opportunity to request regulatory amendments, and simply to kill animals at will and then claim a "subsistence" defense, is totally incompatible with the carefully craft regulatory process established by the legislature, and with sound resource conservation. Requiring exhaustion of administrative remedies may be the only way to insure that the boards will be made aware of all subsistence uses, and is the best way to provide an adequate record of the boards' decisions.

In deciding whether to apply the doctrine of exhaustion of administrative remedies to challenges to subsistence hunting and fishing violations, this Court should consider the particular facts and administrative system involved in regulating subsistence hunting and fishing described above. See Stratman v. Watt, 656 F.2d 1321 (9th Cir. 1980). In this regard, the Illinois Supreme Court's reasoning in County of Lake v. MacNeal, 181 N.E. 2d 85, 89-98 (Ill. 1962) is useful; although that court rejected application of the doctrine of exhaustion of administrative remedies under the particular facts before it, it did acknowledge that the doctrine of exhaustion of remedies may be applied in the criminal arena. In that case, a municipality had filed a zoning violation complaint, and the court reasoned that the mere filing of a complaint indicated the city's prejudgment that the zoning ordinance in question, as applied to the property concerned, was valid and did not create a hardship. Therefore, it would have been a "patently useless step" to require the

property owner to first seek administrative relief. Id. at 90.

Unlike the zoning situation in MacNeal, the absence of specific subsistence hunting regulations in a particular area does not reflect a prejudgment by the Board of Game that subsistence provisions are adequate, but rather indicates a lack of complete information about what subsistence uses are and where they exist. Only through the administrative process can the board have an opportunity to correct any deficiency. See, e.g., Provo City v. Claudin, 63 P.2d 570, 574-75 (Utah 1936). The Eluska decision makes no provision for exhaustion of administrative remedies, and on that basis should be reversed. 17/

17/ Although the exhaustion of remedies issue was not specifically covered in the state's Court of Appeals brief, the issue was briefed in the district court (R. 31), was raised in the State's points on appeal (R. 89), and was discussed at oral argument in the Court of Appeals. 698 P.2d at 175. This court may, and should, consider and rule upon this important issue. See Ratcliff v. Security National Bank, 670 P.2d 1139, 1141--42, n.4 (Alaska 1983); see also Northern Corp. v. Chugach Electric Ass'n, 523 P.2d 1243, 1245, n.4 (Alaska 1974). Not only has the State not intended to waive the argument, but because the subsistence defense as articulated by the Court of Appeals was not contemplated by the parties or specifically briefed, the parties should be allowed to raise pertinent arguments even if not addressed previously. Exhaustion of administrative remedies should have been an integral part of the Court of Appeals' newly-fashioned defense.

VI.

The Eluska Decision Should Not Apply Retroactively.

The Court of Appeals' decision failed to address the critical issue of retroactivity of its novel "subsistence" defense. Although the State's position is that the judicial creation of a subsistence defense to criminal charges is fundamentally flawed, if this Court should, arguendo, decline to reverse the appellate court, at the very least this Court must limit the Eluska defense to prospective cases only.

This Court, in State v. Glass, 596 P.2d 10 (Alaska 1979) and Judd v. State, 482 P.2d 273 (Alaska 1971), articulated criteria to be used in determining whether to retroactively apply a new rule of law announced by the judiciary. These criteria include: (1) whether the purpose of the new rule of law is primarily related to the integrity of the verdict (which would favor retroactive application) or whether the purpose is to further other ends (such as deterring unconstitutional police conduct, which would favor prospective application); (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. State v. Glass, 596 P.2d at 13, 14.

The three guidelines for deciding retroactivity set out in Glass dictate that the new subsistence defense be applied only in a prospective fashion. First, the Court of Appeals' purpose

in establishing the "subsistence" defense was to ensure that the Board of Game would comply with what the Court of Appeals believed AS 16.05.255(b) required (i.e., adoption of "specific" subsistence regulations); the purpose was not related to "minimizing arbitrary fact finding." Id. at 13. Second, state enforcement officials have uniformly relied on "previous standards," i.e. on the validity of previously existing hunting regulations. Third, if the defense were applied retroactively, it would have a grave effect on the administration of justice, requiring review of all cases in which a conviction may arguably have involved "subsistence" uses. The principle of non-retroactivity is particularly important in the context of subsistence regulations, because this Court's recent ruling in Madison has necessitated some changes in the criteria used to identify subsistence uses of fish and game. It will take some time to ensure that all fisheries and game regulations statewide comply with Madison.

VII.

This Case Is Not Moot.

This case has not become moot by virtue of the Board of Game's June, 1985, emergency action in which it adopted separate subsistence seasons and established subsistence and "tier II" subsistence permit hunts. Although the Court of Appeals indicates that "[i]f the State has enacted regulations making adequate provision for subsistence hunting then the defense we have recognized would not exist[,]" (698 P.2d at 181-182) the

determination of what is "adequate" remains a subjective one, to be decided within the context of the criminal defense to the challenged regulation. Thus, the mere adoption of separate subsistence regulations does not extinguish the defense. The State will still have the burden of proving, routinely, the subjective "adequacy" of the subsistence regulations.

Moreover, the Boards of Fisheries and Game still need this Court's guidance on how to adopt permanent regulations that comply with state law in light of both the Eluska and Madison rulings. As discussed above, the issues in this case are not moot, but even if, arguendo, they were held to be technically moot, this case falls within the public interest exception to the mootness doctrine. In Rutter v. State, 668 P.2d 1343 (Alaska 1983), this court applied the public interest exception to the mootness doctrine in the context of commercial fisheries regulations, where a decision of the Court would aid the agency in formulating new regulations and applying the old, and where non-parties were interested in the outcome of the suit. Id. at 1346. That is patently the case here.

VIII.

CONCLUSION

For the reasons articulated above, the State respectfully requests this Court to reverse the decision of the Court of Appeals, or, in the alternative, to modify and limit the decision to specify that a person charged with illegal hunting may not challenge the hunting regulations without first having

exhausted administrative remedies, and must bear the burden of proving any alleged illegality of the regulations.

DATED at Anchorage, Alaska this 4th day of September, 1985.

HAROLD M. BROWN
ATTORNEY GENERAL

By: Sarah Elizabeth McCracken
Sarah Elizabeth McCracken
Assistant Attorney General

1013

MEMORANDUM State of Alaska

TO: Daniel W. Hickey
Chief Prosecutor
Juneau

DATE: April 26, 1985

FILE NO:

TELEPHONE NO: 277-8622

FROM: Victor C. Krumm VCK
District Attorney
Anchorage

SUBJECT: Dept. of Fish and Game
Subsistence Hunting/Fishing
Regulation Legislation

Madison v. Department of Fish & Game and State v. Eluska

At your request, a number of department lawyers and fish and wildlife officers met on April 24 to discuss enforcement ramifications of the two recent appellate rulings involving subsistence rights.

On February 22, 1985, the supreme court struck down a regulation designed to identify eligibility for subsistence fishing in Cook Inlet. Madison v. Department of Fish & Game, ____ P.2d ____ (Alaska, No. 2911).

The Board of Fish attempted to allocate fish resources among three user groups: sports, commercial, and subsistence fishermen. This allocation was done after a substantial number of hearings. Madison and other persons challenged the allocation regulation on the basis that it exceeded the scope of the state's subsistence law, AS 16.05.251(b).

Two superior court judges ruled that the allocation had a rational basis and denied the challenge. The supreme court reversed, holding that the issue was merely one of statutory construction and that the proper test was "substitution of judgment," not "rational basis."

The high court concluded that section .251(b) establishes priority for subsistence users over all others. If inadequate fish exist to accommodate all potential users, subsistence claimants are to be allowed use at the expense of others.

In response, on April 4, 1985, the Board adopted a resolution (attached), recommending passage of SB 231 and HB 288, i.e., the Governor's subsistence bills.

Shortly after the resolution was passed, the Court of Appeals issued its opinion in State v. Eluska, ____ P.2d ____, (Ct. App. No 456, April 12, 1985).

Eluska had been charged with possessing game taken illegally out of season. He challenged the charge, arguing that

he was a subsistence hunter and that game regulations failed to adequately provide for subsistence hunting. Judge Roy Madsen agreed with Eluska, ruling that AS 16.05.0255(b) required the adoption of adequate subsistence regulations, and held that the Board of Game had not done this.

The Court of Appeals affirmed the dismissal, holding that AS 16.05.255(b) mandated specific subsistence game regulations. Because there are no such regulations, the appellate court announced a judicially created "subsistence use" defense.

Though Eluska addressed only a subsistence defense to game violations, and construed only AS 16.05.255(b), it appears that the same judicially-created subsistence use defense will now surface in the face of a challenge to AS 16.05.251(b).

These two provisions, i.e., .251(b) [fish] and .255(b) [game], are parallel provisions.

Considering Eluska and Madison together, the conclusion to be drawn is that a "subsistence use" defense is now available for all noncommercial fish or game violations residents.

Noncommercial, resident fish or game violators trigger the defense by filing an affidavit asserting that the fish or game was taken in a good faith belief that it was for a "subsistence use." If this preliminary showing is made, the state has the opportunity to establish, if possible, that (1) the regulation allegedly violated did not restrict the taking of game, or (2) that the restriction was necessary to protect sustained yield.

These court decisions, in the face of the present regulatory scheme, seem to make enforcement of poaching laws impossible. It will be impossible to show that there is no restriction of resident subsistence taking as long as nonresidents or commercial fishing or hunting activities are allowed. In addition, we can never show that the restriction is necessary to protect sustained yield.

FISH

There are a number of alternations to the problems in the fisheries.