

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986  
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The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

### Section 2

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

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

### Section 3

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

### Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law.

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations by looking at patterns of local use as established over time.

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional to be harvested by all Alaskans under nonsubsistence regulations as specified in proposed subsection (e) of AS 16.05.258.

This section call for game populations and fish stocks to be identified in each rural area. Stocks and populations are geographically specific groups of animals and fish, as specified in the definition section of this bill. The identification of each stock or population as subject to subsistence uses should be factually determined on a case by case basis. Areas, as set by the board, should be large enough to include both where a particularly stock or population is normally taken and where it is normally used. As an example, the boundaries of areas should not pose a barrier to a village that traditionally travels to a fish camp some distance from the village.

This identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentially win. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations. Whether or not these are or are not customary and traditional subsistence stocks is not decided by the proposed legislation. That matter should be left to factual determinations made by the boards. This bill gives them authority to make those determinations.

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

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable portion

exists and how much of that portion is necessary to provide a reasonable opportunity for subsistence. The determination of whether a harvestable portion exists must be consistent with sustained yield. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution.

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

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

#### AS 16.05.258(c)

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

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

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

Several additional points need to be made about this subsection. First, almost all of the Tier II hunts that have been closed to sport hunters will be reopened by this bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some hunts that are presently open only to Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the animals are not customarily and traditionally taken for subsistence. Bison are an example.

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

administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient. This would be the normal state of affairs for almost all hunts and fisheries.

AS 16.05.258(e)

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

AS 16.05.258(g)

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

AS 16.05.258(h)

Subsection (h) is a response to the military's decision to close their land to hunting if the ability of military personnel to hunt on military land was limited by subsistence.

AS 16.05.259

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

## Section 5

Section 5 amends AS 16.05 by adding a new section, AS 16.05.261, which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct board decisions they disagree with through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

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

## Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where it can support a wider group of users.

## Section 7

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

## Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and traditional trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

#### Section 9

Section 9 addresses several other definitions. The first of these is "domicile" which is defined as a person's "true and permanent home...". The definition states that domicile may be proved by presenting evidence of having had a permanent home in a particular location for the preceding 12 consecutive months or by "other evidence acceptable to the boards". The board of fisheries already has regulations on domicile and it is anticipated that the board of game would adopt similar regulations.

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

A definition of personal use fishing is contained in this section. This definition is very similar to the definition in the House version of this bill. Neither sport, commercial, or personal use fishing is afforded any priority over any other type of fishing in this legislation. As indicated in section 1 it is envisioned that personal use fishing may be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill. This legislation is not intended to statutorily increase or decrease existing personal use fishing. The scope of these fisheries is an allocation decision left to the board.

The bill adopts a definition of "rural area" similar to the House definition. It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or

area. The definition is designed to mesh with the definition of subsistence uses. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the cash economy in the area, such as commercial fishing.

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

#### Section 10

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

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

#### Section 11

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

# Alaska State Legislature

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## Senate Committee on Resources

TO: Senate Resource Committee Members

February 19, 1986

FROM: Senate Resources Committee Staff

*MEL*

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

### SECTION BY SECTION ANALYSIS

The following sectional is an amended and edited version of the section prepared for the Senate State Affairs Committee. Changes that are suggested in the attached Senate Resource Committee Work Draft are discussed in this sectional.

#### Section 1

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

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management

*Subsistence  
Personal use*

concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.

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

### Section 2

Section 2 adds two new paragraphs to the authority of the Board of Fisheries.

The first section lists a number of general powers for the fish board. The board already has the power to do all of these things except the establishment of childrens' fishing areas. Removal of this section is suggested because the powers listed do not conform to the title of the bill. It is believed that the remainder of the bill does conform to the title.

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

### Section 3

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

#### Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law.

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

#### AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations by looking at local use patterns.

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used

for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional to be harvested by all Alaskans under nonsubsistence regulations as specified in proposed subsection (e) of AS 16.05.258.

This identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentially win because some of the fish and animals most important to sportsmen are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations. Whether or not these are or are not customary and traditional subsistence stocks is not decided by the proposed legislation. That matter should be left to factual determinations made by the boards. This bill gives them authority to make those determinations.

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

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of that surplus is necessary to provide a reasonable opportunity for subsistence. Because of concern from the National Park Service, whose employees have indicated that national parks never have such a thing as "surplus" animals a small drafting change is recommended in subsections (b) & (c) to substitute "harvestable portion" for "surplus".

In SCS for CS HB 288 (State Affairs), the determination of whether a harvestable surplus exists must be consistent with sustained yield, sound management principles, and the maintenance of healthy fish stocks and game populations. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution. Because the terms "sound management" and "maintenance of healthy populations" are undefined and introduce new standards into the law, they have aroused a good deal of controversy. The Department of Fish and Game has indicated that the principals the drafters of the State Affairs CS were trying to embody in these terms, such as the slow expansion of a herd to its area's carrying capacity, are entirely proper within a definition of sustained yield. Because of this, it is recommended that the terms "sound management" and "maintenance of healthy populations" be deleted and a definition of - sustained yield" be added to the bill.

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

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

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

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

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

Several additional points need to be made about this subsection. First, almost all of the Tier II hunts that have been closed to sport hunters will be reopened by this bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some hunts that are presently open only to Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the animals are not customarily and traditionally taken for subsistence. Bison are an example.

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

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient, this would be the normal state of affairs for almost all hunts and fisheries.

AS 16.05.258(e)

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

AS 16.05.258(f)

There are substantial doubts about the ability of this section to comply with ANILCA and its removal is recommended.

AS 16.05.258(g)

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

AS 16.05.258(h)

Subsection (h) was intended as a response to the military's decision to close their land to hunting if the ability of military personnel to hunt on military land was limited by subsistence. Through a drafting change, this section was changed to simply state the existing situation. The original language to prevent closure of the bases is attached.

AS 16.05.258(i)

Earlier changes have eliminated the need or purpose for this section.

AS 16.05.259

This new section grants to the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration. The State Affairs Committee eliminated a second section of this section which would require an appellant to exhaust administrative remedies before going to court.

It should be emphasized that this ability to adopt an appeal procedure is strictly optional at the boards discretion and that there are a variety of forms the appeal procedure could take.

Section 5

Section 5 amends AS 16.05 by adding a new section AS 16.05.261 which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct erroneous decisions by the boards, through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

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

#### Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where the

It is recommended that subsections (d),(e) and (f) be deleted. They provided detailed instructions on how to administer a permitting program. This information is already provided in the Administrative Procedures Act.

#### Section 7

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

## Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and traditional trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

## Section 9

Section 9 addresses several other definitions. Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

The bill adopts a definition of "rural area" similar to the House definition. It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or area. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the cash economy in the area, such as commercial fishing.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above. In the current statute the definition is located in AS 16.05.257, which is repealed. Also, in the current law, the definition is inappropriately located separate from the rest of the definitions. Therefore, it is necessary to readopt a definition.

It is recommended that definitions of "sustained yield" and "personal use fishing" be added to this section.

## Section 10

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

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

#### Section 11

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

SECTION BY SECTION ANALYSIS  
OF PROPOSED COMMITTEE  
SUBSISTENCE BILL -- DISCUSSION DRAFT

SENATE STATE AFFAIRS COMMITTEE

Senator Mitch Abood, Chairman

November 19, 1985

Introduction

The proposed draft subsistence bill attempts to strike a delicate balance on many different issues that are involved in the current subsistence debate. In striking that balance, the bill seeks to satisfy two goals that are equally important: (1) protecting subsistence use of fish and wildlife by those who are truly dependent on the resources, and (2) improving the opportunity for sport users of the resources. If those two goals can be accomplished, then hopefully the "subsistence issue" will subside.

The draft bill goes much further in addressing issues related to subsistence than has any bill that was previously submitted to the Legislature. Last session, the Senate declined to act hastily on legislation originally submitted by the Governor. In so doing, the Senate established an opportunity to examine many issues that deserve to be addressed. The draft bill addresses these issues in a manner that more fairly protects subsistence and non-subsistence uses than did either the previously submitted legislation or the existing state and federal law.

In order for the State to manage fish and wildlife on state, federal, and private lands, including Native lands, the State must be consistent with three aspects of the federal law. Those "consistency requirements" concern the definition of "subsistence uses", a preference for subsistence uses in certain circumstances, and a mechanism for public participation in regulating subsistence. Regarding the definition of "subsistence uses", the federal law says that it applies only to rural residents of Alaska. The present state statute does not use the word "rural". In February 1985, the Alaska Supreme Court issued a decision, the Madison decision, that said that subsistence privileges could not be limited to rural residents under the state subsistence law as it presently exists. Therefore, the Madison decision puts the State at odds with the federal law. Accordingly, the U.S. Department of the Interior has notified the State that it will be required to implement the federal statute on federal lands and waters unless the State amends the state law so as to again be consistent with the definition of subsistence uses.

The draft bill meets the consistency requirements. In doing so it retains for Alaska the authority to manage fish and wildlife on all lands and waters in Alaska, regardless of ownership. Furthermore, to the fullest extent legally possible, the draft bill even extends Alaskan authority beyond the borders of Alaska when fish and wildlife of Alaska origin migrate beyond Alaskan borders.

There are several reasons for being consistent with the three requirements of the federal subsistence law. First, fish and wildlife do not pay attention to legal boundaries. It makes biological sense to manage populations of fish and game as biological populations, rather than under inconsistent regulations depending upon whether the population at any given moment is on state, federal or Native land.

Second, people who hunt and fish often do not know whether they are hunting or fishing on state, federal or Native land. Boundaries are unmarked and unsurveyed, and land ownership is changing as the federal government conveys state and Native land selections.

Third, even when all state and Native selections have been conveyed, sixty percent of Alaska will remain federal. Many federal lands, such as wildlife refuges, national forests, national park preserves, and unclassified federal lands, are heavily utilized for sport, commercial and subsistence harvest of fish and game. Therefore, for the state to lose regulatory authority over those harvests could jeopardize or diminish the privileges of those Alaskans and non-Alaskans who utilize federal lands, whether for subsistence, sport or commercial purposes.

Fourth, the regulatory process of the Alaska Board of Fisheries and the Alaska Board of Game is an open public process involving many opportunities for the public to propose and comment upon proposed regulations. In contrast, the federal process is much more closed, in that it involves only the publication of proposed regulations in the Federal Register and a limited opportunity for comment. It is hard to expect many Alaskans to avail themselves to the Federal Register. Therefore, any assertion of federal authority over subsistence and non-subsistence uses on federal lands would result in a loss of those open state procedures with respect to federal lands.

A section by section analysis of the proposed draft subsistence bill follows.

Section 1: Findings and Intent

Section 1 states the findings and intent of the draft bill.

A primary concern in any debate over fish and wildlife ought to be the health of the resources. Therefore, the first finding in Section 1 recognizes that all management decisions, even allocation decisions, must rest upon good biological information. Management according to land ownership, particularly where fish and wildlife utilize different lands under different ownerships, would be contrary to sound biological management.

The second finding recognizes the importance of fish and wildlife to all Alaskans in that fish and wildlife provide opportunities and benefits that are rarely available or are less available in other states. The reason that the draft bill recognizes this obvious fact is that by recognizing it the bill sets the stage for the delicate balance that the bill seeks to achieve by establishing mechanisms and granting authority to deal fairly with subsistence, sport, commercial, and non-consumptive needs for fish and wildlife.

The third and last statement of findings and intent is important. It incorporates the several basic intentions of the bill as a whole. First, it almost goes without saying that the subsistence issue is a source of division and controversy among Alaskans. It must be resolved in a manner that is fair and generally perceived as fair. Therefore, the third statement of findings and intent recognizes that there needs to be an equitable balance between sport, commercial, subsistence and non-consumptive users of fish and game.

Second, it also recognizes that in times of resource shortage there needs to be a reasonable preference for subsistence use of fish stocks and game populations that are truly important subsistence stocks. The Alaska Constitution provides that fish and wildlife are reserved to the people for common use. The Constitution also provides that fish and wildlife may be subject to preferences among users. Therefore, the Legislature has authority to establish a preference for subsistence and define it, protect it and limit it as provided by the bill.

Third, this section also states the intention of the Legislature that the Board of Fisheries and the Board of Game have sufficient authority, flexibility and information necessary to manage the resources and deal sensibly and knowledgeably with the many issues that come to the boards. The purpose of this provision is to state that the authorities delegated by this bill to the boards and to the Department of Fish and Game are intended to be sufficiently broad and flexible so that the boards can deal with allocation issues, protect subsistence, sport, commercial and other uses and protect, maintain and manage the resources upon which they depend.

### Section 2: Responsibilities of the Subsistence Division

Section 2 amends existing law concerning the responsibilities of the Subsistence Division in the Department of Fish and Game. The Subsistence Division is a research and informational arm of the Department, rather than a management arm.

The draft bill expands and clarifies the informational duties of the Subsistence Division in that it requires the division to compile and analyze many different types of data that are useful to the boards in making knowledgeable decisions. The amendments require the division to assist the boards by identifying stocks of fish and populations of game that are used for subsistence, identifying the degree of importance that those stocks and populations have to customary and traditional subsistence use, the areas used by groups of subsistence users, the areas used by the wildlife upon which subsistence occurs, and the impacts of subsistence use and non-subsistence use. The bill also recognizes that in performing this informational role to assist the boards the division must interrelate many related needs for information. That is to say, for example, that identifying a population of game as an important subsistence resource is most useful if the division also identifies to the board other information about the resource in question, such as the uses to which the game is put, the importance of the use for subsistence purposes, the amount of those uses presently and traditionally occurring, the amount of the resource that is necessary to provide a reasonable opportunity for important uses to continue, the areas utilized for harvest, and the areas utilized by the game even when not under Alaska harvest since impacts of Alaskan activities may be felt outside of Alaska. Thus, these and other provisions in section 2 require the Subsistence Division to put subsistence use and subsistence issues in a broad factual context in order that the boards may make sound decisions.

### Sections 3, 4, 6 and 7: Authority of the Board of Fisheries and the Board of Game

Sections 3 and 4 amend the existing authorities of the Board of Fisheries, and sections 6 and 7 amend the existing authorities of the Board of Game. The provisions of sections 3

and 4 parallel those of sections 6 and 7. In most respects, only the boards are different. The amendments are in separate sections because the first of each pair of sections (i.e. sections 3 and 6) relates to the general authorities of the Board of Fisheries and the Board of Game respectively, and the second of each pair of sections (i.e. sections 4 and 7) deals specifically with the regulatory authority of the respective board over subsistence. In existing state law, the general regulatory authority of the Board of Fisheries is found in AS 16.05.251(a); the subsistence regulatory authority of the Board of Fisheries is found in AS 16.05.251(b); the general regulatory authority of the Board of Game is found in AS 16.05.255(a); and the subsistence regulatory authority is found in AS 16.05.255(b) and AS 16.05.257. Because the authorities of the boards are found in different sections and subsections of the present statutes, the draft bill deals with them separately, but similarly. However, for purposes of this section-by-section analysis, it is simpler to discuss them as a package of related and similar amendments.

The amendments of sections 3 and 6 to the general authorities are largely self-explanatory. They clarify and fill gaps in authority that have arisen in the context of many issues related to the management of fish and game. Most of these are technical amendments. All previous subsistence bills have addressed these general provisions in one form or another, and this bill more than others tries to deal with many technical and legal problems that have arisen before the Board of Fisheries and the Board of Game.

The amendments in sections 4 and 7 are to the main subsistence provisions of existing law. Several important concepts are stated. Section 4 and 7 establish a subsistence preference for subsistence use of fish and game. However, the preference does not apply to all fish stocks or game populations. One of the problems with the present subsistence law is that it arguably creates a subsistence priority on every stock of fish or population of game for which there is a harvestable surplus, even if the resource is not an important subsistence fish stock or game population. This made little sense to sport users and inhibited public acceptance of the subsistence laws.

In the draft bill, the language of the preference is more clearly consistent with federal law than is the present language adopted in 1978. In many respects it is modeled after the federal language creating the federal subsistence preference, so as to assure consistency. Nevertheless, the federal law on the preference is sufficiently general and flexible, such that it provides the state with an opportunity to be consistent yet also protect and manage sport, commercial, and subsistence uses, and the resources themselves, more specifically and more appropriately than either existing state law or federal law. The following changes are significant.

First, the subsistence preference is only for nonwasteful subsistence uses. The concept of protecting only nonwasteful subsistence is found in federal law, but not in present state law. Therefore, there will be no problem with consistency. "Nonwasteful" is defined in section 16 of the bill.

Second, subsistence preference, as defined by section 16 of the bill, is a flexible preference. It seeks to balance the degree of preference with the degree of dependence on the resource. The federal law does not require that in all cases of resource shortage there must be a total exclusion of other uses. The concept of a flexible preference recognizes that when dependence on the fish stock in question is very high and shortages are severe, then total exclusion may be necessary in order to provide a reasonable preference. However, when the fish stock is only marginally significant to subsistence, or when it is only incidentally harvested, or when it is consistently harvested by sport means regardless of the ultimate use and the character of the user, or when it is practically unimportant as a subsistence resource, then any preference for subsistence use clearly should not automatically exclude non-subsistence uses even when shortage occurs. Instead, a less than exclusive preference would be appropriate and may be provided in a manner in which there is still some degree of preference even though other uses continue and even though all user groups reduce their harvests. For example, although there are exceptions, generally dall sheep, sandhill cranes and steelhead and rainbow trout have not been important customary and traditional subsistence stocks in many parts of the state. Even where they have been subsistence stocks, they have often been only occasionally harvested in a historic sense, simply because other resources were more plentiful and easily accessible. They are generally not highly important subsistence stocks for purposes of assuring that a reasonable opportunity for subsistence uses will continue. Nevertheless, sheep, cranes and steelhead and rainbow trout are very highly prized recreational resources for sport and non-consumptive users. Accordingly, any preference at all should be less strict than would occur on stocks that are truly important for purposes of assuring that the opportunity for a subsistence lifestyle continues.

Third, the preference is only a preference over other consumptive uses. This is consistent with federal law. It means that the subsistence preference will not be a preference over certain practices that constitute taking of fish and game but which are non-consumptive in the usual sense of the term. For example, the Board of Fisheries has established some catch and release trout fisheries in which people take, but are not allowed to kill deliberately or consume, the resource. Similarly, the Department of Fish and Game often "takes" (as the term is defined legally) all the fish in a lake by poisoning them in order to clean out undesirable species prior to stocking. With respect to game, the department also "takes" game for purposes of transplanting game, controlling predators, and other reasons. In

national parks, opportunities for wildlife viewing and maintenance of substantially unharmed populations of game are non-consumptive dedications of the resources. Management tools like catch-and-release sport fisheries, "takings" for biological or management reasons, and parks should not be prohibited or made substantially more difficult because of a subsistence preference, particularly if there is no significant subsistence dependence on a resource in question.

Fourth, this section addresses what has become known as Tier I and Tier II subsistence. The most important point in any discussion about Tier II subsistence is whether or not any bill considered by the legislature will re-open hunts (and allow repeal of present Tier II hunts and fisheries) that were created by necessity of the Madison decision. This bill will re-open those hunts and it will allow repeal of the Tier II hunts and fisheries. The manner of accomplishing that is complex, however, due to the interplay of the two levels of the preference (Tiers I and II) with the absence of the word "rural" in the existing state law. Therefore, in order to understand how we get those hunts re-opened, it is necessary to understand what tiers I and II mean in state and federal law and also who gets the preference.

The existing state law more clearly states the two levels of the subsistence preference than does the federal law, and the Alaska Supreme Court found in the Madison case that these two levels exist in the present state law. The federal subsistence law is less precise with respect to whether or not it, like the state law, contains two levels for the preference. However, legislative history of the federal law indicates that even the federal law contains the two levels now known as Tier I and Tier II. In both the federal and the present state statutes, the first level (Tier I) is when non-subsistence users are restrained or eliminated, and the second level (Tier II) is when further restriction of harvest is necessary to protect the stock. In the latter instance, the preference goes to only those subsistence users who are customarily and directly dependent on the resource as a mainstay of livelihood, who are local residents, and who lack alternative resources.

A technical issue, with respect to solving the present Tier I and Tier II problems, arises because it is difficult (and quite an achievement) to be consistent with a less than precise federal statute. Therefore, by modeling sections 4 and 7 after the analogous provision in federal law, the draft bill is consistent, regardless of what the federal law says imprecisely about whether Tier I and Tier II implicitly exist in the federal statute.

Sections 5 and 8: "Targeting Issues" -- What are appropriate subsistence stocks; what are not appropriate subsistence stocks; when should the boards be allowed to shift or prohibited from shifting subsistence harvest to other stocks?

For lack of a better term, the issues addressed in sections 5 and 8 may be called "trageting issues". Sections 5 and 8 are parallel sections, with the former dealing with fish stocks and the latter dealing with game populations. In each section, subsections (e) and (f) of the amending language are the key provisions. Subsections (e) provide that if a fish (or game) stock or population is not a significant subsistence resource and if subsistence is not the best use of the resource, then subsistence may be prohibited even if the resource may be taken under other regulations. Subsections (e) also state the circumstances in which subsistence use of a resource may be shifted and may not be shifted to alternative fish stocks and game populations. With respect to fish stocks, the bill permits shifting only if there is a prior or contemporaneous stock that is suitable and available. With respect to game populations, shifting is only permitted if there is a suitable and available population. These legal standards for allowing or prohibiting shifting of a target stock are consistent with the federal law. They are consistent with several aspects of the federal law, including (1) the provisions of the federal law which make subsistence subject to sound management principles, (2) the federal constraint against wasteful subsistence use and (3) the guiding purpose of the federal statute, which is to provide the opportunity for rural Alaska residents engaged in a subsistence way of life to continue to do so.

In sections 5 and 8, subsection (f) of the amending language allows the respective boards to establish administrative appeal procedures and requires any potential plaintiff to exhaust administrative appeals before going into state court. This should keep many allocation issues out of the courts in that an administrative appeal process is a more economical and less time consuming method of settling many disputes than is judicial action.

Sections 5 and 8 also provide that subsistence fishing and hunting are subject to seasons, bag limits, methods and means restrictions and other regulations adopted by the boards. This is consistent with existing state law.

Section 9: Subsistence Hunting Defined

Section 9 amends the existing definition of subsistence hunting by clarifying that it is for "rural residents" of Alaska. This is necessary in order to accomplish repeal of the Tier II hunts, since they are the direct result of the absence of the word "rural" in the existing state statute. A very important question,

other than addressing Tier II problems, is how to define "rural", and the bill answers this in section 16 by defining "rural residents", rather than by defining "rural". The explanation is found under "Section 16" in this section-by-section analysis.

Section 10: Repeal of Automatically Exclusive Subsistence Hunting Areas

Under existing state law, AS 16.05.257(h)(2), any subsistence hunting area created by the Board of Game must be managed solely for subsistence hunting of the game population for which the area was created. Since the degree of the preference at Tier I subsistence may vary according to the importance of the stock and the degree of dependency, such subsistence hunting areas are in conflict with the preference as stated in the draft bill. Accordingly, they are repealed as defined in AS 16.05.257(h)(2). This is not to say however, that subsistence hunting areas may not be created or that they may not be exclusive. It is only to say that the present definition of them is at odds with the rest of the bill.

Section 11: Methods of Determining Customary and Traditional Subsistence Use and Allocations of Fish and Game

Section 11 establishes the rational procedure by which the boards shall determine customary and traditional subsistence uses and allocate resources. The provisions of section 11 are consistent with the informational tasks of the Subsistence Division, as stated in section 2 of the bill. Section 11, however, is new statutory language that says the boards shall first identify: (1) the amount of resources needed to reasonably provide a subsistence opportunity, (2) the customary and traditional subsistence use areas by species, stock or game population, and by groups of users, and (3) the important subsistence fish stocks and game populations. Second, each board then assess the biological status of the resources in question. Third, each board then determines the amount of harvestable surplus necessary to provide a reasonable subsistence opportunity with respect to the particular resource in question. Fourth, after that is determined, non-subsistence uses may be accommodated.

This framework is similar to existing board policies found in 5 AAC 99.010, the validity of which was threatened by the Madison decision. By statutorily enacting the framework, the problem of potential invalidity is solved.

More importantly, the provisions establish a rational means of making allocation decisions which protect sport, subsistence, commercial, and non-consumptive users from unfair competition. The provisions do so by focusing on important subsistence stocks, by analyzing subsistence use in terms of areas used, and by protecting all uses accordingly.

Section 11 also allows the boards to adopt criteria for defining customary and traditional subsistence use, and until the boards do so, the draft bill re-adopts the eight point criteria for defining customary and traditional subsistence use that the boards have previously used.

#### Section 12: Subsistence Permits

Section 12 grants the boards authority to adopt programs for subsistence permits. No fee is suggested since the permits are technically not a license issued by the Department of Revenue. The draft language allows flexibility in designing a permit program. It recognizes that permits should be required when significant resource competition or other reasons make the gathering of data, through a permit system, a useful tool in management. Part of the flexible design of the permit authority contained in this section is the provision that permits need not always be handled on an individual basis, and that for purposes of efficiency it may be sufficient to design permits for areas, communities, discreet groups of individuals within communities, or simply individuals. The permit process will identify the fish stocks and the game populations that may be taken under the permit for subsistence.

#### Section 13: Technical amendment to existing law.

This corrects a misspelling in the existing statute and performs one other technical amendment.

#### Section 14: Definition of Subsistence Fishing

This is similar to the previously discussed definition for subsistence hunting.

#### Section 15: Definition of Subsistence Uses

This incorporates "rural residents" into the definition of subsistence uses. It is necessary for federal consistency.

#### Sections 16: New Definitions

Section 16 contains several new definitions. The most important ones concern the "maintenance of healthy and natural populations" as a clarification of sustained-yield principles, the definition of "rural Alaska resident" which is tied to the criteria for customary and traditional use rather than to the concept of some area of the state, and the definition of the variable and flexible "subsistence preference" which seeks to vary the degree of the preference with the degree of dependence on the resource in question.

DISCUSSION DRAFT 9/5/85 THIS IS A ROUGH DRAFT FOR DISCUSSION PURPOSES ONLY. TOGETHER WITH ANY CONCEPT CHANGES, SOME SECTIONS NEED TO BE FLESHED OUT, THE CRITERIA NEED TO BE REFINED, AND OTHER ADDITIONAL WORK NEEDS TO BE DONE BEFORE IT IS COMPLETE BILL FORM.

Section 1. FINDINGS The legislature finds that

(1) subsistence is important to residents of many small, remote communities in Alaska as a principal means of obtaining food;

(2) when the Congress of the United States referred, in Title VII of Public Law 96-487, ANILCA, to "(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska..." and found that "(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;" it was referring to rural residents in those areas where this is true;

(3) the opportunity to fish and hunt is vitally important to many Alaskans, throughout our state, for the experience as well as for food, and even in communities where there are practical alternatives means of obtaining food supplies, many residents place substantial reliance on fish and game as a part of their diet;

(4) it is the intent of the Legislature to establish a preference of subsistence uses as a principal of management of fish and wildlife by the Boards of Fish and Game in those areas, "where no practical alternative means are available to replace the the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on Subsistence uses";

(5) it is the intent of the Legislature that the Boards of Fish and Game have wide flexibility in managing Alaska's fish and wildlife and that the boards use this flexibility to ensure sustained yield and best use of all fish stocks and wildlife species.

AS 16.05.251 is amended to read:

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

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

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

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

- (4) establishing the means and methods employed in the pursuit, capture and transport of fish;
- (5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;
- (6) classifying as commercial fish, sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes;
- (7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;
- (8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;
- (9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;
- (10) establishing seasons, areas, quotas and methods of harvest for aquatic plants;
- (11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.
- (12) regulating selected stocks for catch and release sport fishing.
- (13) regulating commercial, sport, personal use, and subsistence fishing.

Section 3 AS 16.05.251(b) is amended to read:

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) regulating [PERMITTING] the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the preferred [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.

Subsistence fishing authorized under this section is subject to reasonable regulation of seasons, catch limits and methods and means.

If a particular fish stock is not a customary and traditional or significant source of subsistence for residents in a rural subsistence area, and, in the board's judgement, the best use of that stock is not as a subsistence stock, the board may determine that a particular stock shall not be taken under subsistence regulations.

Sec.6 AS 16.05.255(a) is amended to read:

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

- (1) setting apart game reserve areas, refuges and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;
- (2) establishing open and closed seasons and areas for the taking of game;
- (3) establishing the means and methods employed in the pursuit, capture and transport of game;
- (4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;
- (5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;
- (6) methods, means, and harvest levels necessary to control predation and competition among game in the state;
- (7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of game;
- (8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

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

(10) regulating sport and subsistence hunts.

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) regulating [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 preferred [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.

Subsistence hunting authorized under this section is subject to reasonable regulation of seasons, bag limits and methods and means.

If a particular species is not a customary and traditional or significant source of subsistence for residents in a rural subsistence area, and, in the board's judgement, the best use of that species is not as a subsistence species, the board may determine that a particular species in a particular area shall not be taken under subsistence regulations.

Sec 4 \*\*\*AMEND AS 16.05.251(c) TO REQUIRE EXHAUSTION OF ADMINISTRATIVE APPEALS BEFORE FILING COURT ACTION\*\*\*

Sec. 16.05.940. DEFINITIONS.

In AS 16.05 - AS 16.40

NEW SECTION ~~C-11-11~~

(28) "personal use fishing" means the taking or attempting to take by Alaska residents for personal or family consumption and not for sale or barter, finfish, shellfish, or other fishery resources with gill net, dip net, seine, pot fishwheel long line, or other similar

5

means defined by the Board of Fisheries, where the board decides, in its judgement, the abundance of the resource will support these more efficient means of taking in addition to sportfishing.

(29) "resident of a rural subsistence area" means a person who for 12 consecutive months has maintained a permanent place of abode in the same rural subsistence area and who has continually maintained a voting residence in the same rural subsistence area; however, a member of the military service who has been stationed in the same rural subsistence area for the preceding 12 consecutive months is a resident of that rural subsistence area for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the same rural subsistence area for the preceding year is a resident of that rural subsistence area for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the same rural subsistence area is a resident of that rural subsistence area for the purposes of this paragraph;

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

(23) "subsistence uses" means the customary and traditional noncommercial uses [IN ALASKA] of wild, renewable resources by a resident of a rural subsistence area of the state 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; in [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;

#### NEW SECTION

(B) "rural subsistence area" means a community or area of the state in which the Board of Fish or the Board of Game determines, "no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence resources". In making this determination the boards shall consider the following criteria:

(1) a lack of a cash economy, sources of employment, or stores within the community;

(2) a customary and traditional community dependence for sustenance on the consistent harvest and use, in a cost efficient manner, of fish or game which is near, or reasonably accessible from, the community;

(3) the remoteness of the community, its lack of access by road, regularly scheduled barge, railroad or airplane service;

(4) the population of the community, with communities in excess of 500 persons generally not being classified as part of rural subsistence areas;

ADDITIONAL SECTIONS TO CONSIDER:

SUBSTITUTION OF STOCK WHEN SUBSTITUTE RUN IS PRIOR OR CONCURRENT AND OF EQUAL OR BETTER QUALITY

CHANGE IN LICENSE SECTION TO REQUIRE PURCHASE OF LICENSE

SUBSISTENCE

MCDOWELL,

ETTAL

4-1-85

Hello Vic:

Per our conversation, please find enclosed (3) documents I believe every Legislature should receive marked up with yellow pencil to make sure they read, as I'm convinced they don't really understand the problems Governor Sheffield's proposed legislation will cause.

Note: Lyons case finding of facts, and page (4) King Salmon allocation (now 4200) whereby they need not count any other species, and Kings only represents 0.2%. !!! (What about the other salmon species 99.80%)

Note: Coob Inlet Management 1972 subsistence report, where it clearly spells out hook + line subsistence fishing, however special interest attys wrote us out in 10 point system. !!! See page #4 Madison case for suggestion. !!!

Honest people with cool heads can solve these problems, however Governor Sheffield's proposal will split this state like never before !!!

Vic, I do my best to furnish facts to assist our Legislators !!!

Your assistance will truly be appreciated

Have a good day  
Sam Maxwell  
Concerned  
Alaskan

Suggested  
Solution

Upper Cook Inlet

95% of all salmon harvested is between July 1st and August 15, however Sheffield's Board targeted subsistence harvest on the 5% before July 1st and after August 15th!!!

#(1) I suggest no commercial fishermen could receive subsistence permit, must take salmon from catch for personal consumptive use.

#(2) all net fishing will be restricted to the dates between July 1st and August 15th when 95% of salmon are available.

\* Commercial fishing Monday + Friday like present regulations!

\* Personal use nets on Saturday for all people who are not commercial or hook and line personal use fishermen.

\* No person who signs up for personal use fishery between July 1st and August 15th can hook + line personal use fish in upper Cook Inlet for salmon species.

\* Hook and line personal use fishermen will support this proposal, provided the professional fisheries managers make sure enough fish is allowed to escape into river!!!! (I'll bet the commercial fishermen won't)



G. Cook

AS

RECEIVED

MAY 1980

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT

NATIVE VILLAGE OF TYONEK, et al., )  
Plaintiffs, )  
vs. )  
ALASKA BOARD OF FISHERIES, et al., )  
Defendants. )

Filed in the Trial Courts  
STATE OF ALASKA THIRD DISTRICT  
MAY 23 1980  
Clerk of the Trial Courts  
By [Signature] Deputy

CIVIL ACTION NO. 3AN-80-1073

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs' motion for a preliminary injunction in the above-entitled action having come on for hearing on the 22d day of May 1980, all parties having been heard and plaintiffs' motion having been granted, the Court hereby enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The village of Tyonek is an Athabascan Indian village of approximately 300 people and 80 households located on the west side of Cook Inlet. Tyonek has been inhabited for generations by the Tanaina group of Athabascans who succeeded the Eskimo population which originally settled in the area in prehistoric times. Today, the village still retains its ethnic identity and has the same characteristics of a rural Alaska Native community as those of Native villages in other areas of the state.
2. The Susitna River king salmon stock enters upper Cook Inlet and ~~is the~~ only stock of king salmon to pass by the village of Tyonek. The Susitna River stock enters Cook Inlet the beginning of May, and begins to pass by the village of Tyonek in mid-May.

\*\*  
not to be used

NORMAN A. COHEN  
ATTORNEY AT LAW

(1) See pages \* 1 + 4



7. In 1978, the Alaska State Legislature enacted ch 151 SLA 1978 (A.S. 16.05.251(b)) which requires that whenever it is necessary to restrict the taking of the Susitna River <sup>fish stocks</sup> king salmon stock to assure the maintenance of such stock on a sustained-yield basis or to assure the continuation of subsistence uses of such king salmon stock, subsistence use of such stock shall be the priority use over sport and commercial uses.

8. A.S. 16.05.251(b) <sup>also</sup> requires defendant ALASKA BOARD OF FISHERIES to adopt subsistence fishing regulations for Susitna River king salmon stocks, which implement the priority for subsistence uses referred to in paragraph 7, unless it determines that adoption of such regulations will jeopardize or interfere with the maintenance of Susitna River king salmon stocks on a sustained-yield basis.

9. Prior to the <sup>December 1979</sup> March 1980 meeting of defendant ALASKA BOARD OF FISHERIES, said defendant, on behalf of plaintiff NATIVE VILLAGE OF TYONEK, published <sup>summary of the proposed</sup> regulations pursuant to the Administrative Procedures Act to open a subsistence king salmon fishery for the residents of the village of Tyonek, between May 15 and June 15.

10. On March 26, 1980, defendant ALASKA BOARD OF FISHERIES held a public hearing and received testimony on the proposed regulations from the Alaska Department of Fish and Game, residents of the village of Tyonek and other members of the public.

11. Testimony presented at the public hearing indicated that the residents of the village of Tyonek <sup>have</sup> customarily and traditionally harvested king salmon for subsistence uses between May 15 and June 15 <sup>per the administrative</sup>.

12. Though evidence was presented that restrictions on taking by all user groups of the Susitna River king salmon stock were necessary, no evidence was presented at the hearing by the Alaska Department of Fish and Game <sup>that</sup> adoption of the proposed

cc  
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Alaska  
for  
people's  
conclusion

Norman A. Cohen  
Attorney at Law

regulations would jeopardize or interfere with the maintenance of the Susitna River king salmon stock on a sustained-yield basis and the defendant ALASKA BOARD OF FISHERIES made no finding to that effect. *11. Board continued to improve on the*

13. The defendant ALASKA BOARD OF FISHERIES rejected the plaintiffs' proposal<sup>*for subsistence fishing in Cook Inlet*</sup> but adopted proposals authorizing the harvest of 13,100 Susitna River king salmon, by sports fishermen. *in 1980.*

14. As a result of the failure of the defendant ALASKA BOARD OF FISHERIES to adopt proposed regulations opening a king salmon season for the residents of the village of Tyonek, the plaintiffs are threatened with irreparable harm in that plaintiffs' customary and traditional use of the Susitna River king salmon stock will be denied to them. Consequently, residents of the village of Tyonek will lose access to a valuable subsistence resource and the customary and traditional way of life of the village will be disrupted.

*list 10  
12*  
\* 15. No other species of salmon available to the residents of the village of Tyonek can replace the Susitna River king salmon stock <sup>*rejected by Alaska Board June 15, 1980*</sup> as a subsistence resource or substitute for the role of the Susitna River king salmon stock in the customary and traditional way of life of the village.

16. Defendants will be adequately protected if the residents of the village of Tyonek are permitted to harvest 3,000 king salmon from the Susitna River king salmon stock between May 23 and June 15, 1980.

17. Plaintiffs have raised serious and substantial questions. The failure of defendant ALASKA BOARD OF FISHERIES to adopt the proposals submitted on behalf of plaintiff NATIVE VILLAGE OF TYONEK and the adoption of proposals authorizing the harvest of 13,100 Susitna River king salmon by sports fishermen is a violation of A.S. 16.05.291(b) in that whenever it is necessary to restrict

ROTHMAN A. COHEN  
ATTORNEY AT LAW

the taking of Susitna River king salmon to assure the maintenance of that fish stock on a sustained-yield basis, or to assure the continuation of subsistence uses of such resource, subsistence use shall be the priority use.

CONCLUSIONS OF LAW

1. Unless the preliminary relief requested by plaintiffs is granted plaintiffs will suffer irreparable harm in that plaintiffs customary and traditional use of the Susitna River king salmon stock will be denied to them. Consequently, residents of the village of Tyonek will lose access to a valuable subsistence resource and the customary and traditional way of life of the village will be disrupted.

2. Defendants and the resource will be adequately protected if the residents of the village are permitted to harvest 3,000 king salmon from the Susitna River king salmon stock between May 23 and June 15, 1980.

3. Plaintiffs have raised serious and substantial questions in that:

a. Whenever it is necessary to restrict the taking of a fish stock to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use of such stock.

b. The residents of the village of Tyonek have a customary and traditional use of the Susitna River king salmon stock between May 15 and June 15.

c. Adoption by defendant ALASKA BOARD OF FISHERIES of regulations which allow for the sport fishing of Susitna River king salmon without first adopting regulations which provide for the customary and traditional use of such stock by the residents of the village of Tyonek is a violation of the subsistence priority set forth in A.S. 16.05.251(b).

HENRY A. COHEN  
ATTORNEY AT LAW

4. No bond is required of the plaintiffs prior to the issuance of the preliminary injunction.

DATED this 23<sup>rd</sup> day of May, 1950.

John D. Carlson  
JUDGE OF THE SUPERIOR COURT

I certify that on 5-30-50  
a copy of this document was sent to:

Attorney(s) of Record, or

Other: \_\_\_\_\_

at address of record.

D. O. E. \_\_\_\_\_

cf  
Clerk of Court

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT

NATIVE VILLAGE OF TYONEK, <sup>et al.</sup> )  
Plaintiffs, )  
vs. )  
ALASKA BOARD OF FISHERIES, <sup>et al.</sup> )  
Defendants. )

CIVIL ACTION NO. JAN-30-3073

AGREEMENT OF SETTLEMENT

WHEREAS, a civil action has been brought by the Native village of Tyonek and several residents of the village of Tyonek, in which plaintiffs allege inter alia that the decision of the Alaska Board of Fisheries rejecting proposed regulations for king salmon fishing for subsistence uses in the upper Cook Inlet between May 15 and June 15 by residents of the village of Tyonek was a violation of A.S. 16.05.251(b) and request declaratory and injunctive relief; and

WHEREAS, on May 22, 1980, this Court granted plaintiffs' motion for a preliminary injunction and on May 23, 1980, entered findings of fact and conclusions of law restraining defendants from enforcing regulations which prohibit residents of the village of Tyonek from subsistence fishing for king salmon in the <sup>vicinity of</sup> ~~Cook Inlet~~ <sup>Tyonek</sup> between May 23, and June 15, 1980, and requiring defendants to adopt emergency order regulations to authorize the residents of the village of Tyonek to harvest king salmon ~~in the~~ <sup>in the vicinity of</sup> Tyonek for subsistence uses between May 23, 1980 and June 15, 1980, with a limit of 50 king salmon per household not to exceed a total of 3,000 king salmon

and regulated to minimize the impact on any one stream.

WHEREAS, the parties in order to avoid the uncertainty of further litigation, wish to resolve this matter by means of settlement;

NOW, THEREFORE, the parties, through their attorneys and subject to the approval and order of this Court, hereby agree as follows:

STATEMENT OF FACTS

1. Plaintiff NATIVE VILLAGE OF TYONEK is a nonprofit corporation organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., to provide for the general health, safety, and well-being of the Athabascan Indian residents of the village of Tyonek, a substantial number of whom customarily and traditionally harvested king salmon in the vicinity of Tyonek during May and June for subsistence uses prior to the closure of the Tyonek king salmon subsistence fishery by Alaska Board of Fish and Game in 1964, and would harvest king salmon in the vicinity of Tyonek for subsistence uses in 1980 but for the fact that defendant ALASKA BOARD OF FISHERIES did not adopt proposed regulations for subsistence king salmon fishing in the vicinity of Tyonek by residents of the village of Tyonek between May 15 and June 15.

2. Plaintiffs NELLIE CHICKALUSION, FEDOPA CONSTANTINE, PETER CONSTANTINE, and SAVA STEPHAN are Athabascan Indian residents of the village of Tyonek who customarily and traditionally fished at Tyonek for king salmon for subsistence uses in May and June prior to the closure of the Tyonek king salmon subsistence fishery by the Alaska Board of Fish and Game in 1964, and who (with the exception of plaintiff PETER CONSTANTINE) would harvest king salmon in the vicinity of Tyonek in May and June for

subsistence uses in 1930 if defendant ALASKA BOARD OF FISHERIES had adopted proposed regulations for subsistence king salmon fishing in the vicinity of Tyonek by residents of the village of Tyonek. Health problems would prevent plaintiff PETER CONSTANTINE from harvesting king salmon in the vicinity of Tyonek for subsistence uses in 1930, but residents of the village of Tyonek would share their king salmon subsistence harvest with plaintiff PETER CONSTANTINE as is the customary and traditional practice of the residents of the village of Tyonek with respect to the distribution of subsistence resources to the elders of the village.

3. Defendant ALASKA BOARD OF FISHERIES is established by A.S. 16.05.221 for the purposes of the conservation and development of the fishery resources of the state. The board is required by A.S. 16.05.251(b) to adopt regulations permitting the taking of king salmon in the vicinity of Tyonek for subsistence uses.

4. Defendant RONALD O. SKOOG is the Commissioner of the Alaska Department of Fish and Game and is required by A.S. 16.05.020 to manage the fish resources of the state in the interest of the economy and general well-being of the state. These fish resources include king salmon in the vicinity of Tyonek. Defendant RONALD O. SKOOG is the ex officio secretary of defendant ALASKA BOARD OF FISHERIES and has authority pursuant to A.S. 16.05.060 to open and close seasons and periods on fish.

5. Defendant WILLIAM R. NIX is the Commissioner and principal executive officer of the Alaska Department of Public Safety. Pursuant to A.S. 44.41.020 the Alaska Department of Public Safety is charged with responsibility for the administrative functions relative to the protection of life and property including enforcement of fishing regulations adopted by defendant ALASKA BOARD OF FISHERIES.

6. Tyonek, a community on the west side of Cook Inlet, is an Athabascan Indian village of approximately 350 people, over 95% of whom are Athabascan Indians. Tyonek has been inhabited for generations by the Tanaina group of Athabascans who succeeded the Eskimo population which originally settled the area in pre-historic times. The present residents of the village are the descendants of the Tanaina group. Today, the village still retains its ethnic Athabascan identity, is a rural Alaska Native village and has not abandoned its customary and traditional use of king salmon.

7. For the purposes of this Agreement of Settlement, "fish" means the Susitna River king salmon which enter Cook Inlet waters the beginning of May and begin to pass by the village of Tyonek in mid-May and spawn primarily in streams located in the Susitna River drainage.

8. Susitna River king salmon peak at the village at the end of May or in early June and are usually completely past the village by the end of June.

9. The mid-May to mid-June king salmon fishery is a customary and traditional subsistence use by residents domiciled in the village of Tyonek of the Susitna River king salmon in that this fishery has been in existence for generations, that the harvest of the king salmon at this time is a customary and traditional component of the cultural life of the village, that the art of cutting large king salmon has been handed down through generations, that the early king salmon are the first significant subsistence fresh salmon of the spring, that Susitna River king salmon are oilier than other species of salmon found in Cook Inlet in the vicinity of Tyonek and therefore better suited for drying and preserving for winter use and less susceptible to damage while

drying from insects and seabirds, and that drying takes approximately three weeks and is usually completed by the end of June.

10. The residents of the village of Tyonek harvest king salmon with set nets from the beach in front of their fish camps immediately south of the village.

11. Since 1964, the residents of the village of Tyonek have been prevented from participating in their customary and traditional mid-May to mid-June king salmon subsistence fishery by regulations adopted by defendants and their predecessors. These regulations were initially adopted due to poor escapement of the Susitna River king salmon.

12. Prior to the December 1979 and March 1980 meetings of defendant ALASKA BOARD OF FISHERIES, said defendant, on request of plaintiff NATIVE VILLAGE OF TYONEK, published summaries of regulations proposed by said plaintiffs pursuant to the Administrative Procedure Act to open a subsistence king salmon fishery for the residents of the village of Tyonek, between May 15 and June 15.

13. On March 26, 1980, defendant ALASKA BOARD OF FISHERIES held a public hearing and received testimony on the proposed regulations from the Alaska Department of Fish and Game, residents of the village of Tyonek and other members of the public. Public testimony was also received at the December 19, 1979 meeting of defendant ALASKA BOARD OF FISHERIES.

14. Testimony presented at the public hearings indicated that the residents of the village of Tyonek customarily and traditionally harvested king salmon for subsistence uses between May 15 and June 15 prior to the closure in 1964.

15. Though evidence was presented to defendant ALASKA BOARD OF FISHERIES that restrictions on taking by all user groups of Susitna River king salmon in Cook Inlet were necessary, no

evidence was presented stating that adoption of the proposed subsistence regulations would jeopardize or interfere with the maintenance of Susitna River king salmon on a sustained-yield basis and the defendant ALASKA BOARD OF FISHERIES made no finding at the March meeting to that effect.

16. The defendant ALASKA BOARD OF FISHERIES rejected the plaintiffs' proposals for subsistence fishing in Cook Inlet but adopted proposals which resulted in authorizing the sport harvest of up to 13,100 Susitna River king salmon pursuant to 5 AAC 60 .030(a).

17. A failure of the defendant ALASKA BOARD OF FISHERIES to adopt regulations opening a king salmon season for the residents of the village of Tyonek, between May 15 and June 15 of each year, threaten plaintiffs with irreparable harm in that plaintiffs' customary and traditional use of Susitna River king salmon from May 15 to June 15 will be unnecessarily denied to them. Access to a significant customary and traditional subsistence resource in accordance with A.S. 16.05.251(b) will be lost and the customary and traditional cultural life of the village will be disrupted.

18. No other species of salmon available to the residents of the village of Tyonek can fully replace Susitna River king salmon harvested between May 15 and June 15 as a subsistence resource or substitute for the role of Susitna River king salmon in the customary and traditional cultural life of the village.

CONSENT DECREE

1. Under A.S. 16.05.940(6) and (26), subsistence uses of fish are the customary and traditional uses in Alaska of such fish for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of such fish

evidence was presented stating that adoption of the proposed subsistence regulations would jeopardize or interfere with the maintenance of Susitna River king salmon on a sustained-yield basis and the defendant ALASKA BOARD OF FISHERIES made no finding at the March meeting to that effect.

16. The defendant ALASKA BOARD OF FISHERIES rejected the plaintiffs' proposals for subsistence fishing in Cook Inlet but adopted proposals which resulted in authorizing the sport harvest of up to 13,100 Susitna River king salmon pursuant to 5 AAC 60.030(a).

17. A failure of the defendant ALASKA BOARD OF FISHERIES to adopt regulations opening a king salmon season for the residents of the village of Tyonek, between May 15 and June 15 of each year, threaten plaintiffs with irreparable harm in that plaintiffs' customary and traditional use of Susitna River king salmon from May 15 to June 15 will be unnecessarily denied to them. Access to a significant customary and traditional subsistence resource in accordance with A.S. 16.05.251(b) will be lost and the customary and traditional cultural life of the village will be disrupted.

18. No other species of salmon available to the residents of the village of Tyonek can fully replace Susitna River king salmon harvested between May 15 and June 15 as a subsistence resource or substitute for the role of Susitna River king salmon in the customary and traditional cultural life of the village.

CONSENT DECREE

1. Under A.S. 16.05.240(a) and (b), subsistence uses include: (1) uses are the customary and traditional uses in Alaska or even fish for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of such fish

taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption.

2. The residents of the village of Tyonek have a customary and traditional subsistence use of Susitna River king salmon between May 15 and June 15 for all of the reasons set forth in paragraph 9 of the Statement of Agreed Facts. The role of the harvest of Susitna River king salmon in the cultural life of Tyonek and the handing down of information about the harvest, preparation, and use of such fish from generation to generation are significant factors in determining whether use of such fish for personal or family consumption is a "customary and traditional" subsistence use of such fish.

3. Defendant ALASKA BOARD OF FISHERIES is required to adopt regulations which authorize the subsistence fishing of Susitna River king salmon by residents of the village of Tyonek in the upper Cook Inlet in the vicinity of the village of Tyonek between May 15 and June 15 each year, unless such defendant determines, in accordance with the Administrative Procedure Act, that any subsistence fishing for Susitna River king salmon by the residents of the village of Tyonek will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis.

4. The parties agree and the Court approves, for the purposes of achieving an agreement to this litigation, that whenever defendant ALASKA BOARD OF FISHERIES makes a finding that any subsistence fishing for Susitna River king salmon by residents of the village of Tyonek will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis, such finding shall be made on the record and shall detail the biological information which forms the basis of such finding. The finding (including the biological information) shall be reduced to writing.

5. Regulations setting bag limits, gear types, and open

fishing periods for the subsistence fishing of Susitna River king salmon by residents of the village of Tyonek shall cause the least adverse impact upon such residents, and shall be consistent, insofar as practicable, with sound fishery conservation practices, such as minimizing the impact on the return of such fish to any one stream.

6. Whenever it is necessary to restrict the taking of Susitna River king salmon to assure the maintenance of such fish on a sustained-yield basis, or to assure the continuation of subsistence uses of such fish, customary and traditional subsistence use by the residents of the village of Tyonek shall be the priority use under A.S. 16.05.251(b). The defendant ALASKA BOARD OF FISHERIES shall not adopt regulations which allow for the commercial (between May 15 and June 15) and sport fishing of Susitna River king salmon, without first adopting regulations which provide for this subsistence priority over such commercial and sport use unless the Board has made a finding, as required by A.S. 16.05.251(b), that any subsistence fishing for Susitna River king salmon by the residents of the village of Tyonek will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis.

7. Defendants ALASKA BOARD OF FISHERIES, RONALD O. SKOG, and WILLIAM R. NIX and their successors in office are hereby permanently restrained from enforcing regulations which prohibit residents of the village of Tyonek from subsistence fishing for Susitna River king salmon in the upper Cook Inlet in the vicinity of the village of Tyonek between May 15 and June 15 of each year without defendant ALASKA BOARD OF FISHERIES first finding, in accordance with the Administrative Procedure Act, that such subsistence fishing will jeopardize or interfere with the maintenance of such fish on a sustained-yield basis.

8. Counts I, II and IV of plaintiffs' complaint are dismissed with prejudice.

9. This Court shall retain jurisdiction over this civil action until July 1, 1931.

DATED: \_\_\_\_\_

DATED: \_\_\_\_\_

\_\_\_\_\_  
Larri Spengler

\_\_\_\_\_  
Norman A. Conen

DATED: \_\_\_\_\_

DATED: \_\_\_\_\_

\_\_\_\_\_  
John Gissberg

\_\_\_\_\_  
Donald C. Mitchell

Attorneys for Defendants

Attorneys for Plaintiffs

ORDER

The above Agreement of Settlement and Consent Decree are approved.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Victor Carlson  
Superior Court Judge

COOK INLET MANAGEMENT AREA SUBSISTENCE  
FISHERY REPORT 1972

A. General Information

1. Description of Area: The Cook Inlet area includes all waters of Alaska in Cook Inlet and Resurrection Bay north of Cape Douglas and west of Cape Fairfield, including the Barren Islands. (Figure 1)
2. Species Utilized: All five species of pacific salmon are utilized in the Cook Inlet area. Since 1952 cohos have made up 65 percent of the subsistence catch, reds 20 percent, pinks 8%, chums 5%, and kins 0.2 percent. (Table 1) King crab, tanner crab, dungeness crab, shrimp, smelt, herring, bottom fish, and clams are also utilized for subsistence purposes. However, few records are available on degree of utilization. In actuality it is hard to define what constitutes "sport fishing" and what constitutes "subsistence fishing" for the above listed species.
3. Economic Conditions: No figures are available on the average income of those applying for subsistence permits in the Cook Inlet area. It is the personal opinion of the area management biologist that less than five

\* See pages # 3, 6, 7, 9, 10, 17.

FIGURE I

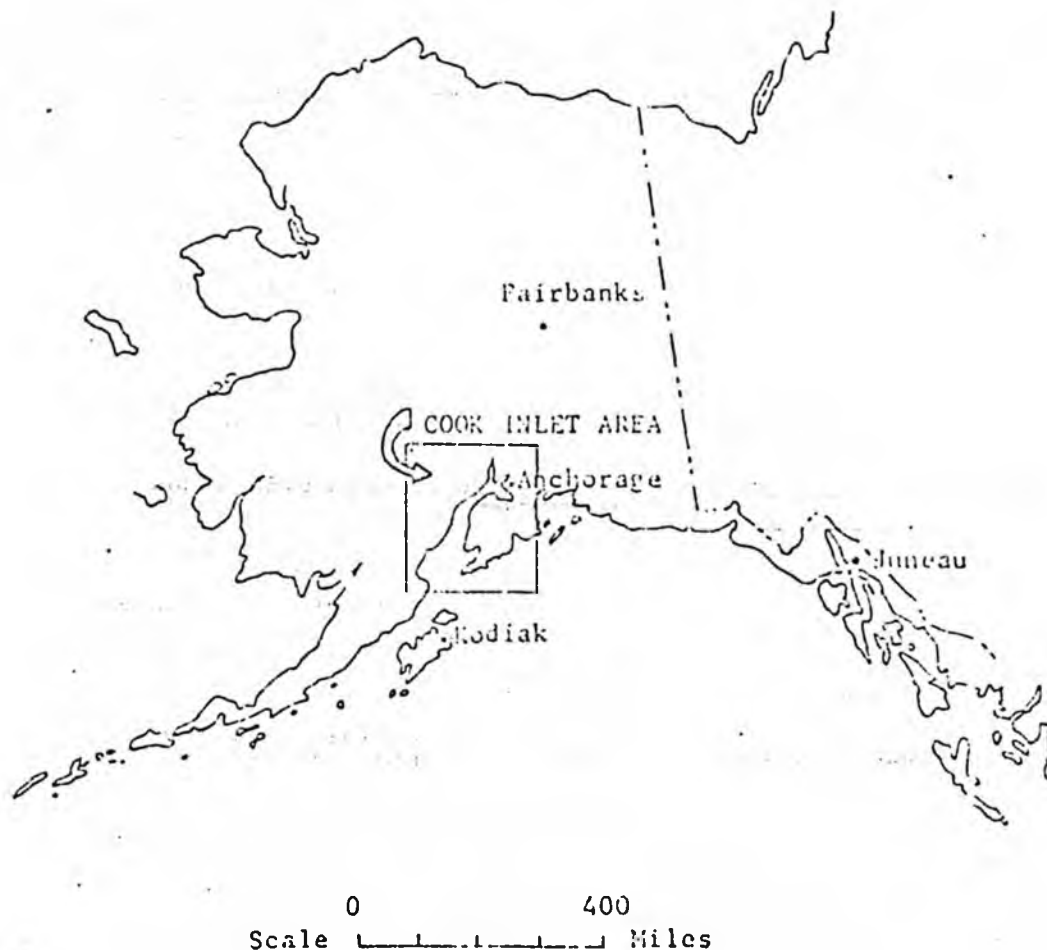
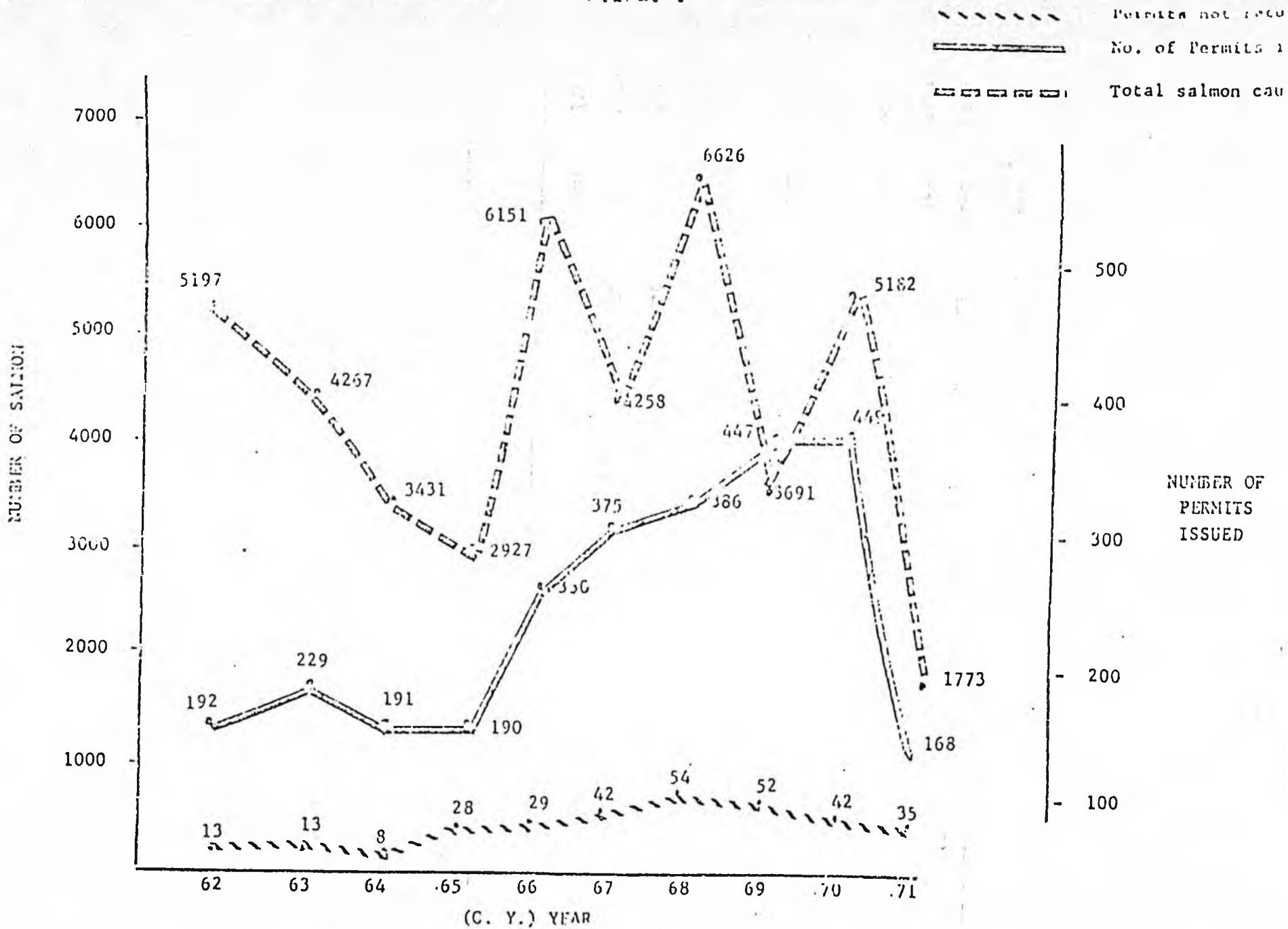


Figure 1. Cook Inlet area location map.

TABLE 1

## COOK INLET SUBSISTENCE CATCH OF SALMON, 1962-1971

YEAR	NO. PERMITS	DID NOT REPLY	KINGS	REDS	COHO	CHUM	PINK	TOTAL
1962	192	13	45	770	3574	391	417	5197
1963	229	13	29	859	2510	424	447	4269
1964	191	8	--	393	2463	207	368	3431
1965	190	28	--	484	2109	285	49	2927
1966	330	29	8	1656	3523	356	598	6151
1967	375	42	4	863	3105	213	73	4258
1968	386	54	10	1009	4201	236	1170	6626
1969	447	52	--	1518	2011	94	68	3691
1970	449	42	3	1218	3371	152	438	5182
1971	168	35	2	23	1697	7	44	1773
TOTALS	2,957	316	101	8,793	28,574	2,365	3,672	43,505
PERCENT	100.0	10.7	0.2	20.2	65.7	5.4	8.4	100.0



or ten percent of the subsistence fishing in the area is carried out by persons in such financial positions that they actually have a legitimate need of the resource harvested in order to subsist. The type of subsistence fishing found in the Cook Inlet area could more appropriately be classified as recreational or supplemental fishing. Many people regard it as a form of sport fishing in which they not only derive recreational benefits but at the same time supplement their food stocks. Some people in the Cook Inlet area, natives and whites alike, because of either need or personal preference, are trying to maintain a "live-off-the-land" life style. To these few, "subsistence" fishing may fall into a need category and may play an important part in their means of existing.

## B. History of Fishery

1. Methods of Fishing: A variety of subsistence fishing methods are used in the Cook Inlet area, as it is a multi-species utilization area.
  - a. Salmon: Set nets, seines and drift nets are currently used with set nets accounting for about 95 percent of the effort. Since statehood, all subsistence salmon fishing has been in conformance

with commercial regulations and, therefore, areas open and methods used have been identical to those in commercial fishing. Prior to statehood, much of the subsistence fishing took place in salmon spawning streams with gear ranging from hook and line to gill nets. Snagging was one of the more popular methods.

- b. Shellfish: King crab, tanner crab, dungeness crab and shrimp are taken with various forms of pots. Most fishing takes place at or near the small boat harbors of Homer and Seward. Clams for subsistence are taken by use of a clam shovel. The methods currently used for taking shellfish species for subsistence purposes do not differ appreciably from those used prior to statehood.
- c. Smelt: Both bill nets and dip nets have been used in the Cook Inlet area for taking smelt, however, in 1972 dip nets became illegal gear for taking smelt in the waters of the Kenai Peninsula. A limited amount of hook and line snagging for smelt also exists.

d. Freshwater species: The gear most commonly utilized for freshwater species is small mesh gill nets and seines. In the past, fish-wheels and dip nets have also been used in freshwater.

2. Catches and Fishing Effort

a. Salmon: Salmon fishing is the only subsistence fishing for which reliable catch and effort data exists and this data covers from 1962 to 1971 only. During these years, a total of 2,957 subsistence permits were issued and all but 316 were returned.

The total reported salmon catch from 1962 to 1971

\* is as follows: 101 kings, 8,793 reds, 28,574 cohos, 2,365 chums, 3,672 pinks, for a total of 43,505 salmon.

The number of permits issued and the total catch by species appears in Table 1 and is depicted in graphic form in Figure 2.

b. Smelt: Catch data on smelt is only available for the past two seasons. In 1971, there were 1,387 smelt reported taken and in 1972, the reported catch was 8,542. Most effort has taken place along the western shoreline of the Kenai Peninsula and around Turnagin Arm.

The number of permits issued by year since 1969 appear below:

<u>Year</u>	<u>Salt Water</u>	<u>Kenai River</u>	<u>Total</u>
1969	150	194	344
1970	157	393	550
1971	92	*	92
1972	160	*	160

\*Smelt permits not required for Kenai River.

- c. Shellfish: No permits are required for taking shellfish and, therefore, no records are available on effort or catch. Most effort occurs in Kachemak and Resurrection Bays.
- d. Freshwater species: Relatively few permits have been requested for taking freshwater species and most of these have been for Lake Louise and Tyone Lakes. Whitefish comprise about 90 percent of the catch.

3. Management Regulations: The following is a history of subsistence regulations in Cook Inlet from 1943 to 1972.

1942 through 1950

No mention made in Cook Inlet section of commercial fisheries regulations.

1951

First mention in commercial regulations. Required notification of intention to take salmon for personal use, with statement of type of gear to be used, area, time, number of fish to be taken and intended disposition of fish take.

Fish, Ship, and Campbell and Cottonwood Creeks closed to subsistence fishing.

1952

No intent to take notification required. More streams closed, including all tributaries to Knik Arm, Willow Creek (tributary to Susitna), Campbell Creek, and all streams and lakes of Kenai Peninsula that are tributary to Cook Inlet: Provided this  
\* shall not apply to fishing with rod, hook and line  
for personal use.

(Apparently this was the first time many Cook Inlet streams were closed to use of nets for personal use of fish.)

1953

Above regulations same, plus added stipulation that no personal use fishing allowed within 300 feet of weirs and ladders. Snagging was prohibited for the first time.

Also, personal use fishing prohibited within 500 yards of all other streams or lakes except with hand rod, hook and line. Bay limit two (2) per day per person.

And subject to laws regulating commercial fishing 48 hours before and continuing 48 hours after each fishing period. Except for fall season and/or place greater than 25 miles from waters open to commercial fishing. . .

\* And in Knik Arm where 15 fathom set nets, 100 yards apart, shall be operated prior to August 6, only during hours open to commercial fishing in the Northern district.

1954

Same as 1953 with additional sections that. . . Commercial gear may be used for personal fishing during any fall season. . .

Fishing allowed in Turnagain Arm east of a line between Hope and Indian, and. . .

Fishing allowed more than 5 miles upstream from tidewater on all streams and lakes of Cook Inlet drainage South and West of the Susitna river or South of town of Homer.

1955

General regulations and .

Cook Inlet regulations same as 1954.

1956

Same as 1955 with added restrictions. . .

Closed Kenai & Russian Rivers within 300 yards of their confluence (this to 'Sportsmen').

Rod and line. . . limited take to two (2) salmon over 16 inches, per person per day.

1957

General regulations same as 1956.

Cook Inlet about same except for limit on take by rod and line fishermen ('. . . not to exceed 10 inches'. . . per person per day by hook and line, and not more than two (2) may exceed 16 inches').

1958

General same as 1957 plus. .

A series of regulations devised to try to curb snagging. . including limiting size hooks and making it illegal to use weights with multiple hooks.

Cook Inlet same as 1957.

1959

General same as 1958.

Cook Inlet--added restrictions that . . . personal use fishing be allowed in the main stem of the Susitna River above the town of Alexander. . . with nets less than 30 feet and more than 100 yards from any other set net and from tributary streams-- and identified with name and address of owner.

And personal use fishing must be done in conformance with commercial regulations (This closed Knik Arm and Turnagain Arm).

Many Kenai Peninsula streams closed above ~~markers~~ placed from 3 to 5 miles up from mouth (Anchor, Deep Creek, Stariski and many others).

Added closure of Cooper Creek, Little Willow Creek and Montana Creek. . . And . . . allowed 30 yards of set nets for use in Knik Arm after August 9, also Fish Creek closed July 21 (snaggers harrassing red run).

1960

General same as 1959.

Cook Inlet--personal use fishing to be allowed on Northwest shore Knik Arm. . . with nets 90 feet or less and more than 500 yards from terminus of any salmon stream. . . and conform to commercial open periods in Northern district. . . and identified with name and address of owner.

1961

General same as 1960.

Cook Inlet added open fishing season on clams, crabs, and bottomfish. . all in conformance with commercial regulations.

Salmon for subsistence was broken into districts. . . apparently this did away with fishing in main stem of Susitna River above Alexander (see subsistence regulations for Northern district 1961).

1962

General regulations added restrictions--personal use fishing must be done by permit only, issued by commissioner. . . limited subsistence catch to individual regional regulations.

Cook Inlet---same as 1961.

1963

General regulations--new regulation--fish other than salmon may be taken at any time in any area of state by any method except by use of explosives or chemicals, except as hereinafter provided or as provided in the Sport Fishing Regulations of the Department.

Cook Inlet--same as 1962.

1964

General same as 1963.

Cook Inlet--new regulation--must have permit for salmon and all catches by species, location and date of catch must be reported. Freshwater species except for trout, grayling, and char may be taken for subsistence purposes via permit and these permits be issued by commissioner or his representative when deemed warranted.

Also not more than 50 salmon be taken per permit and subsistence fishing is prohibited in any area closed to commercial fishing except for parts of Knik Arm.

And all districts with exception of Outer district, must have name and address of owner on fishing gear. The Outer district regulations were amended to conform with commercial regulations.

Another Cook Inlet regulation was amended-- sports fishing licenses required for clams and/or bottom fish and crab pot floats will contain the name of owner. No sex or size limitations on crab.

1965 through 1969

Outside of minor amendments and a few changes in regulations in the different fishing districts, personal use fishing regulations are about the same for that period from 1965 to 1969.

1969

Cook Inlet--new regulations--

Restrictions:

(a) Subsistence fishermen taking herring and smelt in the Kenai River must be physically present at all times said net is being fished.

(b) A sports fishing license is required when bottom fish are taken with fishing rod and line.

(c) A sports fishing license is required for the digging of razor clams.

Size Limits: There are no size or sex limitations on crab.

1970

Cook Inlet--new regulations--

Salmon - The subsistence fishery on the Northwest of Knik Arm was deleted.

Smelt - In the Kenai River the length of gill nets may not exceed 20 feet in length.

Smelt may be taken in that portion of the Kenai River from its mouth upstream to the Soldotna bridge from April 1 through May 31.

1972

Cook Inlet--new regulations--Smelt - Dip nets may not be used for taking smelt in the waters of the Kenai Peninsula.

6. Problem Areas

1. Northwest Shore Knik Arm: This area is no longer a problem as it was closed to subsistence fishing in 1971. The number of permits issued for this area had increased during the mid-60's to a level of 290 during the last two years of the fishery. (1969 and 1970) The reported catch during this period averaged 3,300 salmon (Table 2). The main justification for closing this area was the declining red salmon escapements into Fish Creek which reached a low of 6,233 in 1969.
2. Mud Bay: The problem here appears to be over-utilization of available fishing space rather than over-utilization of the resource. Commercial fishing, sports fishing, and subsistence fishing all take place in this rather confined area of Kachemak Bay along the Northeast side of the Homer Spit. Peak utilization occurs in mid to late August when approximately 10 seine fishermen, 50 subsistence fishermen and several hundred sports fishermen fish

TABLE 2

COOK INLET SUBSISTENCE SALMON FISHERY  
Permits Issued and Total Salmon Catch By District, 1967 - 1972

YEAR	NORTHERN <sup>1/</sup>		NORTH and SOUTH CENTRAL		SOUTHERN		EASTERN	
	Permits	Total Catch	Permits	Total Catch	Permits	Total Catch	Permits	Total Catch
1967	218	2,947	13	119	51	942	91	262
1968	276	5,395	30	303	79	953	--	--
1969	290	1,563	40	400	85	1,067	32	929
1970	290	3,448	45	206	78	1,386	36	181
1971	9	10	28	138	112	1,618	19	7
1972	9	<u>2/</u>	5	<u>2/</u>	151	<u>2/</u>	5	<u>2/</u>

<sup>1/</sup> Northern district represents Northwest shore at Knik Arm

<sup>2/</sup> Catch data not available for 1972.

this area. The main species being sought are silver salmon and the subsistence catch has averaged about 1,000 since 1967. The commercial catch in the Southern district has averaged 2,800 silvers since 1967 and an estimated 50 percent of these have been taken from Mud Bay proper. Sports harvest figures are not available, however, the average catch since 1967 would probably not exceed 500 fish. Commercial and subsistence harvest figures indicate no decline in abundance of silver stocks in Mud Bay. A tagging study in 1970 indicated the silver stocks of Mud Bay were mostly local stocks bound for upper Kachemak Bay and escapement indices in this area have been consistent in recent years.

Although there is no biological justification for closing Mud Bay, the time has perhaps come for closing a portion of Mud Bay to commercial and subsistence fishing because of user-group conflicts.

For the last several years proposals have been submitted to the Board of Fish and Game asking for either complete or partial closures of Mud Bay. The commercial fish staff has always opposed these closures on the basis that no biological justification exists.

Because of the increasing sports fish utilization there will be a public proposal submitted to the Board of Fish and Game at the November meeting by a Homer commercial fisherman which will ask for a partial closure of the Mud Bay area. The commercial staff intends to support this proposal.

3. Shellfish: Another potential problem is the crab and shrimp pot fisheries which have developed tremendously in the last few years. A considerable volume of gear is being fished in the immediate vicinity of the Homer small boat harbor and again, rather than over-utilization of the resource, the main problem is over-utilization of area. Gear is so concentrated in this one area that navigation has been hindered. A regulation may be necessary in the near future to close a section of the bay in the immediate vicinity of the small boat harbor entrance.

D. Recommendations:

It is the personal opinion of the area biologist that a need exists for subsistence fishing in Cook Inlet and that it should be continued perhaps with some modifications.

The 5 or 10 percent of the people who actually have a legitimate need to subsistence fish should not be denied this right just because the fishery has become recreationally oriented.

Perhaps a fee could be placed on a subsistence permit or license. This might tend to eliminate some of those who are participating more for recreation than need and yet keep the regulation constitutional. For those who could show need, through an application for a waiver on the license fee, a special free permit would be granted. A maximum income level would be established similar to that used in the Food Stamp Program and those falling below the established level would be eligible for the free permit. These measures would probably reduce subsistence fishing by 75 percent in the Cook Inlet area and subsistence fishing would again conform with the true meaning of subsistence.

APPENDIX

1. A copy of the Cook Inlet Subsistence Fishery Instructions of 1972.

COOK INLET SUBSISTENCE SALMON FISHERY, 1972

Salmon may be taken for subsistence purposes under authority of a permit which may be obtained from the local representative of the department.

Each subsistence fisherman taking salmon shall keep accurate records of the catch involved, by species, location caught, date of catch, and other such information as the department may require

Salmon may be taken for subsistence purposes only by residents.

Identification of fishing gear shall consist of the name and address of the owner and the number of his subsistence permit.

Not more than 50 salmon may be taken under the authority of a subsistence permit.

Only one salmon subsistence permit will be issued to each person during a year.

A set gill net shall not be longer than 35 fathoms in length and 45 meshes in depth.

The operation of each set gill net shall be performed or assisted by the fisherman in whose name it is registered.

No part of a set gill net may be placed or operated within 600 feet of any part of another set gill net.

FISHING SEASONS:

NORTHERN DISTRICT: from 6:00 a.m. July 21 until 6:00 a.m. September 20 during open commercial fishing periods in conformance with all commercial regulations.

NORTH & SOUTH CENTRAL DISTRICTS: from 6:00 a.m. August 18 during open commercial fishing periods in conformance with all commercial regulations.

SOUTHERN DISTRICT: from 6:00 a.m. August 18 during open commercial fishing periods in conformance with all commercial regulations EXCEPT that set gill nets may be used in any beach area open to commercial salmon fishing.

OUTER DISTRICT: in conformance with commercial regulations.

EASTERN DISTRICT: from June 1 through June 30 during open commercial fishing periods in conformance with all commercial regulations EXCEPT that set gill nets may be used in any beach area open to commercial salmon fishing.



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

THE SUPREME COURT OF THE STATE OF ALASKA

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

File Nos. 6824/  
7181

Appellants,

v.

O P I N I O N

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

Appellees,

and

THE ALASKA FEDERATION OF NATIVES,

Intervenor.

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

File No. 7410

Appellants,

v.

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

[No. 2911 - February 22, 19

Cross-Appellees.

Re: Pages 4, 8, 12, 16, 19, 20, 22, 23, 24, 25, 27

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

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

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

MOORE, Justice.

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

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

Ass'n v. State, 628 P.2d 397 (Alaska 1981). Although the policy did not specifically refer to subsistence uses of salmon in Cook Inlet, it had a substantial impact on subsistence fishing. Commercial fishermen, accustomed to taking subsistence salmon from their commercial catch, instead obtained subsistence salmon fishing permits in order to fish for their personal and family use after the commercial season was over.

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

2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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

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

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(Footnote Continued.)

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

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

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

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

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

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

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

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

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

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

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

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

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

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

The House Special Committee on Subsistence drafted a letter of intent for House Bill 960<sup>11</sup> that supports our interpretation. With respect to AS 16.05.251(b) (which was § 6 of House Bill 960),<sup>12</sup> the letter of intent made clear the priority to be given subsistence uses in general over sport and commercial uses and explained the two-tier system among subsistence users.

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

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

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

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