

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672  
4222.46 RES SUBSISTENCE: MISCELLANEOUS (file 3) 27

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

## 2. Violations Occurring on All Other Lands

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

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

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

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

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

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

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

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

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

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

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

DWH/gb-10

cc: Larri Spengler  
Assistant Attorney General  
Juneau AGO

Liza McCracken  
Assistant Attorney General  
Anchorage AGO

# MEMORANDUM

# State of Alaska

COMMISSIONER'S OFFICE

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

DATE: May 23, 1985  
FILE NO: 322-375-85

RECEIVED  
MAY 30 1985

FROM: Norman C. Gorsuch  
Attorney General  
*LIS*  
By: Larri Irene Spengler  
Assistant Attorney General  
Department of Law

TELEPHONE NO: 465-3600  
SUBJECT: Requirements of  
Madison and Eluska

PUBLIC COMMUNICATIONS  
RECEIVED  
MAY 30 1985

DEPARTMENT OF FISH & GAME

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

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

### The Cases

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

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

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

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

### Fish

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

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

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

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

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

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

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

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

#### Game

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

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

yield of the resource is likely to be harmed.

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

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

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

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

#### Conclusion

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

If you have any questions, please contact me.

LIS:rn

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

May 23, 1985  
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cc: Steve Pennoyer  
Dennis Kelso  
Jim Ayers  
Lew Pamplin  
Steve Behnke  
Beth Stewart  
Dick Logan  
Ken Parker  
ADF&G

Norman Gorsuch  
Ron Lorensen  
Dan Hickey  
Liza McCracken  
Department of Law

HOUSE COMMITTEE ON SUBSISTENCE

July 2, 1985

The following people were present at the meeting in Juneau:

Denny Kelso	Department of Fish and Game
Larri Spengler	Department of Law
Beth Stewart	Department of Fish and Game
Jim Ayers	Department of Fish and Game
Norm House	Forest Service
Deborah Greenberg	Rep. Herrmann's office
Linda Wild	Rep. Fuller's office
Rodger Painter	Rep. Goll's office
Helen Fisher	Rep. Thompson's office
Paula Scavera	Sen. Ray's office
Mary Halloran	Speaker Grussendorf's office
McKie Campbell	Sen. Sturgulewski's office
Sandra Borbridge	Office of the Governor
Roland Shanks	Department of Fish and Game

The following were on line from other sites in the state:

Rep. Jack Fuller	Nome
Rep. John Sund	Wrangell
Howard Wayne	Wrangell, aide to Rep. Sund
LouAnn Cutler	Anchorage, for Rep. Adams
Lou Walker	Anchorage, National Park Service
Bartz Englishoe	Anchorage, AFN
June Baker	Anchorage, for Rep. Wallis
Henry Mitchell	Anchorage, Bering Sea Fish. Assoc.
Rep. Johne Binkley	Bethel
Bob Charles	Bethel, for Rep. Binkley
Rep. Katir Hurley	Wasilla
Rep. Peter Goll	Haines
Tom Panamaroff	Kodiak, aide to Sen. Zharoff
Dick Rohrer	Kodiak
Deborah Niedermeyer	Fairbanks, Aide to Rep. Koponen

Comments have been transcribed verbatim except where indicated by brackets [ ]. Material in brackets has been summarized.

Rep. Fuller - Good morning everyone. This teleconference is a meeting of the House Interim Committee on Subsistence. I've asked Denny Kelso and Beth Stewart from the Department of Fish & Game, Larri Spengler, Attorney General's Office, and Jim Ayer if they could give us a briefing on the recent meeting of the Game Board.

The Board needed to do two things--promulgate subsistence game regulations separate from general regulations to comply with the Eluska decision, and to make those regulations consistent with the Madison decision.

[Polls teleconference sites again to see who's on the line.]

Thank you Marty. I would like Denny and Beth and Larri and Jim to outline for us just what was the Board's task and what the process, (garbled) [was necessary] to accomplish that task. Some specific examples how hunts around the state were treated would be useful, particularly where the Board had to go to a Tier II situation. I would like to know, too, what the public's reaction has been so far on the new regulations. Finally, what is the next step for the Board? What is planned for the fall meeting? Once the presentations are finished I will open it up to legislators and staffers for questions.

[Stressed that this was not a public hearing. Public can testify during open subsistence hearings at a later date. Minutes of this meeting will be sent to members in a few days.]

Mr. Ayers - Thanks Jack. This is Jim Ayers. We really appreciate the opportunity to continue to work with you during the interim. The issue has not gone away and we don't see that it's going to go very quickly and that the issue seems to be getting more and more difficult as well as complex and, I might add, costly, as you will hear when we talk about the Game Board meeting.

Now what we had in mind for this morning was about 30 seconds of Madison and Eluska, since that seems to be the threshold of tolerability at this point for discussing those cases. Then Larri Spengler will talk a little bit about how we got to the Game Board meeting, what Eluska actually required and mention the 3 criteria again, then actually discuss--Beth and Larri will discuss--the Game Board meeting, and Denny will try and pull all that together in a summary about what we intend to do next and then the continued need for legislation.....

Ms. Spengler - In February the Supreme Court, the state Supreme Court, issued the Madison decision and in April the state Court of Appeals issued the Eluska decision. What the Madison decision did was determine that the Board had been implementing the state subsistence law incorrectly since it had been enacted in 1978, that the approach of the Board in identifying subsistence as rural, as rural uses based on (inaudible). . . criteria was not correct. This is the first time the state Supreme Court had had the opportunity to look at the subsistence law since it was passed.

The Madison decision held various things, and the nutshell of those is that all Alaskans who hunt . . . (inaudible). . . are subsistence hunting, and all Alaskans who hunt with subsistence gear--net, fishing [methods described in the subsistence statutes] as subsistence fishing, and that subsistence hunting and fishing cannot be restricted until other uses, non-subsistence uses, are eliminated.

In fishing that means you cannot restrict subsistence fishing until sport fishing and commercial fishing are eliminated. And in hunting it means that hunting by Alaskans for food cannot be restricted until uses by non state residents (which are virtually the only non-subsistence uses since there's no real commercial, nobody hunts to sell the product)

have been eliminated.

Now to say that the subsistence uses of fish and the subsistence uses of game cannot be restricted does not mean they cannot be regulated. The court in Madison and the court in Eluska made it quite clear that the Board can regulate as long as the regulations . . . . do not significantly impair subsistence uses. So that was one facet of Madison that was elaborated on in Eluska. Eluska confirmed that interpretation of the Madison decision. .... The Eluska decision did one other thing, which was determine that the approach the Board of Game had taken, which was not to have separate subsistence hunting regulations but rather just have one general set of regulations, was not correct, was not consistent with statute; that the statute required as the Fish Board now has one set of subsistence fishing regulations and one set of sport fishing regulations and one of commercial fishing regulations, that had been the case (inaudible) because it's basically been in the past gear type distinctions--sport fishing was rod and reel, subsistence fishing was net, commercial fishing was anything but you got money for it. In hunting there was no similar gear type distinction so all hunting was authorized just in the general regs. The court in Eluska said you cannot, people can go out and hunt out of season and assert what the court called the subsistence defense, unless the Board of Game had adopted separate subsistence hunting regulations that accomodated subsistence as defined by Madison, which means hunting by all Alaskans for food.

So, therefore, the Board of Game had a rather magnificent task set out for them. They had to look at the entire state and separate the regulations into subsistence regulations, which were regulations for hunting for Alaskan residents, and general regulations, which were for non state residents basically.

Because of the definition of subsistence in Madison that everybody qualifies, a facet of the state statute which had not ever really been triggered before became a very common thing that the Board of Game had to deal with. The way the state subsistence statute is set out, first it requires that if subsistence uses exist they have to be allowed, as long as it won't hurt the resource. This is different from non-subsistence uses which are up to the Board's discretion. The next step is that if there's a problem, if it's necessary to cut back, then subsistence uses cannot be restricted until other uses are eliminated. That's the subsistence priority kicking in.

But what if you've eliminated all subsistence uses, all non-subsistence uses? You've eliminated non state residents from hunting and you still don't have enough game compared to the amount of people who want to go hunting to allow people to hunt without there being significant impairment. Well in that case the statute sets out 3 criteria that explain how the Board is to decide who gets to go hunting among those eligible for subsistence hunting in those cases. If everybody can't go hunting, formerly what we had was random permit drawing. People put their names in the computer hat and were drawn out

at random. Say 2000 people applied, but only 50 can go hunting, they put the names in then draw out 50 and those people are the ones who go hunting. No longer is that acceptable, because now we're at what the court called Tier II, and the Board had to decide who of all the people who wanted to go hunting could go, based in situations where you couldn't let everyone go, based on local residency, availability of alternative resources and direct dependence on the resource as a mainstay of one's livelihood. These were the 3 criteria that were set out in the statute--direct dependence on the resource as a mainstay of one's livelihood, local residency, and availability of alternative resources.

The Board had not really used these 3 criteria ever before because the pool of people who were eligible for subsistence before was so much smaller--it was rural communities and areas. And now what Madison did was expand that to include all Alaskans. And so suddenly the Board was faced with a number of Tier II situations. The Board therefore had a meeting in June in order to do basically the job set out by Eluska--separate out the regulations so there were separate subsistence hunting regulations so that violations could be enforced and that poaching would not just sort of be allowed and be unenforceable--and to make those subsistence regulations consistent with Madison, which was a very different job than they would have had if Madison had not occurred, because they still would have had to separate out subsistence hunting regulations, but it would have been a much more limited task because there would be so much smaller amount of hunting that would qualify as subsistence hunting. So maybe Beth can describe how the meeting shaped up.

Rep. Fuller - Larri, could you take half a second and review Tier II for everybody that's in the listening audience please?

Ms. Spengler - Tier I and Tier II are terms that were used by the Supreme Court in the Madison decision. Tier I is a situation where all Alaskans can go hunting--let's just use hunting since this is about the Game Board, but it would also apply to fishing. Tier I is a situation where all Alaskans can go subsistence hunting, and you may have non state residents or you may have eliminated them, but in any event all Alaskans can go hunting. Therefore the regulations for subsistence hunting would simply provide reasonable opportunity for all Alaskans.

However, sometimes there is not enough game available for harvest of a particular game population for all the people that want to go hunting on that game population. In that case you have a Tier II situation. Now people are not either Tier I or Tier II, it's the situation that is either Tier I or Tier II.

In a Tier II situation you cannot let everyone, all Alaskans, who want to go hunting on a particular population of game go hunting. You have to only let some people go hunting. Or it may be a situation where you can let all Alaskans go hunting but they can't have the same opportunity. Some of them may have a much more restricted opportunity.

For example you might have a fall season where everybody can go hunting and a winter season on the same population where you can't let everyone go hunting and that additional opportunity is basically the Tier II. You have people with different legal opportunities to go hunting and that's the Tier II situation.

In deciding which Alaskans get to go hunting in a Tier II situation the Board had to at this Board meeting use the 3 criteria that are set out in the statute. Those criteria are direct dependence, local residency, and available alternatives. What the Board had to do then was figure out factors that correlated to those 3 criteria so they could basically score everyone in a somewhat crude fashion at this first meeting, and then people would be ranked. And if you could only let, and Beth can go into this in more detail how it actually will be working, but if you could only let 150 people go hunting and you have 3000 people wanting to hunt, they would all be ranked as to how they fell with regard to the 3 criteria and the top 150 people in the scoring would get to go hunting.

Now if you had 100 people who had a score of 20, so they came out with the highest score and they got to go, and then you had let's say 75 people who are 19, but 50 more people could go hunting, at that point where you had people tied on a score and you had less permits available than people on that score, then you could have a drawing of those people because they had the same score with regard to the 3 criteria. But basically what the 3 criteria do is change the way hunting opportunity is distributed when everybody can't go, and instead of just letting everyone have the same chance by having their name put in a hat, you evaluate, the Board evaluates people based on the 3 criteria and decides who gets to go. This might become more clear as we get into the specifics of how the Board developed factors to correlate to the 3 criteria and how they followed them.

Jim Ayers - [Does anyone have any questions about Tier II?]

Rep. Sund - I don't have the statutes . . . are the 3 criteria in the statute books or are they something the court trumped up in the Madison case?

Mr. Kelso - I think it's important to point out that the 3 criteria appear in both state and federal law. The Supreme Court specifically talked about the 3 criteria in the Madison case, but they have their origin in both state and federal law.

Rep. Goll - I've got some specific questions that have come out of the complication of these criteria in Haines. Are you going to be elaborating on exactly how the criteria are going to be handled in terms of the point system in which case I'll defer those questions?

Mr. Kelso - Yes we are. In fact Beth is ready to go with that right now. I might just summarize that what we told the Board was that under the court cases and the statute and the advice we got from the

Department of Law, basically Tier I is the situation where any Alaska resident subsistence hunter could participate, and the status of non resident hunting was in a separate part of that Tier I question. But at Tier I any Alaskan who wanted to hunt for food or the other purposes listed in the statute could participate. At Tier II we had not enough animals available so that everybody could hunt and we were having to make decisions among the subsistence users on an individual basis. So maybe I can let Beth pick up exactly how the Board had to deal with that when they began looking hunt by hunt through all 450 regulations that they addressed.

Rep. Goll - [My question are specifically about the point system. Please let me know when the proper time is to ask them.]

Ms. Stewart - As Larri and Denny have pointed out, the Board members had to deal with approximately 450 different regulations with probably coming to that meeting with the same amount of information that you have now. It was a very difficult meeting. . . . They did very well given the situation.

The Board approached each regulation by deciding first whether subsistence uses were substantially impaired. If the Board could say that they were not, then they just duplicated what was in the regulations that you know as the general regulations in the subsistence regulations. An example of that would be western arctic caribou where the season is 10 months long and the bag limit is in the subsistence regulations now 5 caribou per day, so that's a fairly liberal season and the Board was able to say that subsistence uses were not impaired. Unfortunately, there were not very many of those situations and so the meeting took about 12 days, the Board members working about 11 to 12 hours a day.

If the Board could not say that subsistence uses were not substantially impaired, then the Board had to look at the impairments. The permit system and the first come, first served registration drawings were the most obvious cases there. But there were other cases where the seasons were either very short, a device the Board had used in the past to insure that overharvest did not occur, or when the seasons were placed in the time of year that make hunting very difficult, or whether the bag limits were very restrictive. And those cases were very difficult for the Board.

If the Board found that subsistence uses were substantially impaired, then automatically the Board had to eliminate non-resident uses. Sometimes this caused problems because the Board members had difficulty understanding why they had to eliminate non-resident uses even if non-resident uses had not been a factor in the impairment of subsistence uses. However, that is an automatic step and eventually they came to understand that and went ahead and eliminated non-resident uses.

If eliminating non-resident uses didn't alleviate the impairment,

then the Board had to look at other regulatory changes. And in those cases where other regulatory changes that would still allow all Alaska residents to hunt were not possible, then the Board did, as Larri described, go to Tier II.

Before the Board started examining each of the hunts, it did examine the Tier II criteria which are found in 16.05.255 and for the Board of Fish identically in 251. Those 3 criteria are customary and direct dependence on the resource for the mainstay of one's livelihood, local residency, and availability of alternative resources. This is a very difficult situation to deal with and the Board will be dealing with it again in joint session with the Board of Fisheries in November. However, for now the Board has adopted....(interrupted)

Mr. Kelso - Beth, maybe I should point out one thing. The reason the Board dealt with the impairment of subsistence uses is because that language "significant impairment" was used by the Court of Appeals in the Eluska case, so they were applying language specifically out of the case and the Department of Law helped them articulate just how to do that. The other thing which I know you're on the verge of pointing out here is that the Board took those 3 criteria that you've just read and established standards for the scoring system that Rep. Goll mentioned earlier. What I wanted to point out was that those 3 criteria now track directly into what we've been calling Tier II. When we get to Tier II it means we're automatically talking about those 3 criteria and the scoring system that was based on them.

Ms. Stewart - The Board had to find a way to measure each one of those criteria and they did it by developing a series of questions that are going to be used on the Tier II permit hunt applications. The Board had a great deal of difficulty with this and realizes that this approach will probably be modified somewhat in November. However, for now if someone finds himself interested in a Tier II hunt then he must fill out an application which will be available we hope fairly soon, probably by the first of August, and the questions on that application include basically the questions that deal with those Tier II criteria.

[She went on to describe questions which will appear on the applications and the number of points assigned to the possible responses. See attached material for this information.]

Those are basically the questions that people will be answering when they fill out these applications. Those questions will all be scored then and as Larri described, based on the number of permits that are available for the hunt, people with the highest scores will be allowed to go hunting.

Mr. Kelso - Perhaps we should turn to Rep. Goll's questions about the scoring system for a moment and then I think it might be useful for us to talk about which hunts are using this particular system.

Rep. Goll - Thank you very much. [Asked for clarification of some of the questions and the number of points which would be assigned for the various answers.]

Ms. Stewart - [Clarified the breakdown of the 30 points which are possible for each of the 3 criteria. See information packet.]

Mr. Kelso - [A packet of all the materials under discussion will be available within a day or so.]

Ms. Stewart - Perhaps then we can go through some of the Tier II hunts so you can get some idea of the kinds of hunting situations that resulted in assigning of Tier II. I'll preface that by saying that the Board took a fairly conservative approach this time around. They did not have of course public hearings, and so there were many cases where they had no way of documenting or verifying whether or not subsistence uses were substantially impaired. In cases where they felt they didn't know that, they did not make the finding that they were. After a public hearing, however, when people come in and talk about whether or not those regulations substantially impaired subsistence uses, we may see additional changes in the regulations that result in a few more Tier II situations.

[Here Ms. Stewart summarized which hunts were affected, where the Tier II situation existed and thus the hunting had to be restricted. This list can be found in the attached material.]

The regulations, before we get into more specific questions, are being prepared right now in my office to be sent to Lt. Governor and adopted as emergency regulations. As soon as that is completed we will circulate the regulations for written public comment. We have put an August 1 comment deadline on those regulations. After the Department has reviewed the comments that come in, the Commissioner has been delegated the authority to adopt those as permanent regulations. This was necessary because emergency regulations only last 120 days. The Board will not meet again until about mid November and we did not want to have a situation where we once again had no regulations that could be enforced.

For the mid November meeting we will, instead of calling for proposals, format the new regulations in the proposal format and circulate those to get public comment for advisory committee meetings, for regional council meetings, we will draft a fairly explicit "dear reviewer" letter so that people have some idea of what's going on with these regulations. Tier I and Tier II are fairly alien ideas to people. There's a lot of confusion about. . . We're getting probably throughout the department 100 phone calls a day about what's going on with these hunts. Some of the phone calls are from down south, from Field and Stream magazine and other magazines like that, some of them are from people who want to know if they can still go hunting as they had planned to this year. We're putting together a public information packet that will go out I hope by the end of this week or the first part of next

week. All in all, I think it's a fairly difficult thing for people to understand and it's going to take quite a bit of time for people to even begin to know how to analyze those regulations. The Board's going to have to meet for about 2 weeks in November and about 2 weeks in January, which is very unusual for the Game Board, to get public comment on the regulations they have developed.

Mr. Kelso - One of the things we are trying to do now is to get the regulations in final form as quickly as possible and then publish a new handbook of hunting regulations for Alaskans to use during this coming season. We've shortened the turn around time as much as we possibly can on that and we anticipate handing them out in time to have them usable in the field, assuming that there are no printing delays. But it's still going to be a very tight fit.

There are some other administrative details that have actual effects on people that are probably worth bearing in mind. One of them is that in order to use the questionnaire and to score it in the way that the Board directed we're going to need a certain amount of time. First of all that time is used up in getting information out, and having the regulations finalized is the first step in that.

The next part of it, though, is getting the applications filled out and returned. We'll be distributing applications to all the normal vendor outlets as well as all the department offices. They'll be available to people there and of course by mail if any of those outlets are not convenient. And then our staff will be available to help people fill them out. We're of course preparing a set of instructions to help with that, but I think it's going to be very important for people to have access to department staff to have assistance in making sure they're filled out, because unless they're filled out correctly and completely they automatically fall out of the pool of possible hunters.

Initially we are, there are very few permit drawing hunts that have remained untouched. Most of them have either gone to registration hunts, which we've been calling Tier I hunts, or have gone to the Tier II hunts as Beth just described. Now the registration hunts outnumber the Tier II hunts. It's simply that the Tier II hunts probably have a greater impact on Alaskans. However, in the short run what that means is we are returning virtually all the applications for permit drawing hunts that had been accepted so far and we have received over 40,000 of those. So we're basically returning all applications and application fees for any hunt that no longer is to be conducted the way it had been planned in March. That means we're returning about \$275,000 to Alaskans and in excess of 40,000 pieces of application.

The next step then would be for us to get the information out so people can determine whether there are registration hunts, or what we've been calling general hunts open to any participant, and if there are then of course people are free to participate in those. If there are not, then Tier II hunts will require a separate application for each hunt the individual wishes to participate in. And there will be a five

dollar application fee for all the hunts that are Tier II except bison and musk oxen and there the fee is ten dollars and those fees are set by statute.

Once we receive the completed application we'll have staff working overtime to get them scored as quickly as possible. The scoring will probably be done manually by a template because that is likely to be faster than data entry and running on computer. Now if we're doing this next year we'll have it all computerized. But the time required to get it set up, key punched and run is actually greater than what we take to do them as they come in using the manual template.

Then we need to give people a reasonable amount of time to pick up the application materials, fill out the form and get it back to us. And then once that happens we will score them and mail out the permit information as quickly as we can. The problem of course is that we have to get all the permits [applications] back in order to score any of them. We can score the ones we get first, but in order to compare them to other applications and the scoring for those other applications, we have to have them all in hand. So we are somewhat limited in how quickly we can get the scoring done and send out permits. What we're trying to do, though, is expedite the earliest hunts so that there are minimum delays. There are August hunts that will require attention first, but again we can't do that until we actually receive the entire set of applications back.

Now the danger in that, in our view, is that it is possible that some hunts may be delayed, and the Board recognized that by providing a specific delegation authority to the Commissioner in case that becomes necessary. We will not open hunts for which we have not processed the applications and if we have not gotten the regulation materials out to the public so that they know what the rules are. But we will do everything we can to expedite that.

What that means in terms of impact in addition to the administrative disruption to the department is that it will cost between a hundred and fifty and two hundred thousand dollars to implement this system and there are some potentials for additional costs, depending on if there are problems that actually develop. This is as we have scheduled it now. In addition, there may be fiscal impacts to the Fish and Game fund depending on the percent of impact on non-resident hunters and on resident hunters who would otherwise pay fees for taking trophy animals. In this instance we are calculating what we estimate that to be and there has been requests for us to provide information on just what that fiscal impact is. We've been working on it. It's somewhat difficult because we have not only the Tier II hunt impacts but also the registration hunt impacts, and it's difficult to estimate. We will have that information as quickly as we can put it together.

Beth, are there any other administrative details that affect people that you think we ought to mention?

We see the potential for disruption because of delays as significant, but the directive we've given the staff is we want to find any way we can to shorten the time so that Alaskans have the opportunities to hunt that the Board envisioned. So far, we discovered a couple of ways to change our planned procedure so that we could cut a few days off of the scoring for sheep hunts which are some of the earliest hunts beginning in August. So we'll continue to try to do that, although the primary limitation is the time required for people to have the permit applications in their hands and to get them back to us. They just need some time to figure out how to do that.

Maybe, I have a few things to summarize, but before I do maybe I could ask is there are any questions on this scoring system, or the administration of it, or what the Board intended us to do in handling this material.

Ms. Greenberg - I have a couple of questions. It seems to me that for the Tier II hunts in particular that the people that are most likely to qualify for that may also be people that are the least acquainted with the system in terms of filling out forms. They may never have done that before for any kind of hunt that they've participated in. Is there any kind of administrative way of, I don't know, hooking up with other agencies or the number of available state people that may be bilingual in areas to help out with that? What kind of effort is going on?

Mr. Kelso - We're trying to get the word out to the public in a couple of ways. First, we've put together, we're in the process of putting together, a public information program--not simply press releases, but public service announcements, newspaper advertisements, the hunt supplement, the newspaper insert that we publish listing what the hunts are, and we'll have to of course do one specific to these hunts now that the Board has taken action. We'll be attempting to get information on statewide media networks including Learn Alaska Network, so we are going to try to do an integrated approach to really get the word out. We'll also have codaphones for people to call in and get a brief run down on what hunts are affected in particular areas and we have them now in Juneau but there'll be one in Anchorage as well. And we haven't discussed yet the details of which offices need to have that kind of capacity. Maybe Beth would want to comment more on how we're trying to get the word out.

But the second part of that is in areas where there may be bilingual requirements we may have some difficulty getting correctly filled out applications because people aren't familiar with the materials or don't have access to assistance in quite the same way that you would if you were in Anchorage or Juneau or Fairbanks. What we're going to try to do is either work with non profit organizations or to have our own staff help people in communities where we know Tier II hunts are going to be needed, and in particular I've asked the subsistence division to put together a plan for how they can target some effort on those communities that we think are going to be filling out Tier II application forms, and just how that thing fits with our

advisory committees which is not simple at this time of year. Many people are extremely busy with commercial fishing right now and so we're not positive that that's going to really work, but it's one other way we have of trying to do it. We're also fairly well assured that rural radio stations and media will help us quite a bit in trying to get that message across. So I think basically the answer is no, there isn't going to be any late application period, there isn't going to be any appeal process, there just really isn't any way to do that. Unlike the Commercial Fisheries Entry Commission where a person was given an opportunity, a use privilege that lasted for that person's lifetime, this hunt opportunity thing is something you have to go through every year. It isn't like the entry permit in that way. It can't be sold, it can't be transferred. It's for that hunt, for that season and then it must be all done again.

Ms. Fisher - . . . This application for a Tier II hunt, does this entitle me to just the actual hunting, or may I hunt until I have the animal? What decides that?

Ms. Stewart - It means that you can participate in the hunt during the time that that hunt is legally authorized. It does not mean that you are guaranteed a moose. If you get a Tier II moose permit for the Anchorage area, you have the same opportunity as other people who have those permits to go out and hunt, but you cannot hunt until you are successful. You can only hunt until the period is closed.

Ms. Halloran - Jack, this is Mary. Maybe one of the things the committee members might want to consider is making available the help of the legislative information offices in getting some of this information out in the villages. We do have a good network there. See what you think about that.

Rep. Fuller - I think that's a good idea, and also I have notes here for Linda . . . for maybe cutting some tapes that we run on the rural broadcasting throughout all the different villages.

Rep. Sund - . . . . I didn't even know the Board of Game had been meeting, so you've got a big chore ahead of you there. But I have two questions. One is that if somehow by late application this year you were unable to participate in a hunt and you have to reapply next year, I assume next year's permit is going to give points for having prior participation. Is that person somehow going to be able to just slowly fall out of the system because he was late to get his first application in and therefore has less points for the next year and then following years? What's the prognosis on that issue? And then I have one more question.

Ms. Stewart - There's a possible ten points, ten points that a person can accumulate for having actually harvested the animal in the past. And you're correct in that those people who are able to successfully hunt every year will continue accumulating those points. I don't know that any of us can predict how far apart the point spread is

going to be on getting a permit or not getting a permit. I don't know that it's going to come down to you know, somebody having 60 points and somebody have 59 and the separation being right there. Also, I'm not sure that that exact point system will be what's in place permanently. I think it's important to understand that the Board adopted a point system they thought could be used this year without doing a lot of research or having a lot of information available to them at the time. So I'm not positive that that's you know, that's something that's going to have a long term effect. But yes, if something like that 10 point total is available on the applications in the future, not only your not going hunting but your being unsuccessful in your hunting would cause you to not be able to accumulate those points.

Rep. Sund - Thanks a lot. I have one more question, probably to Larri. Did somebody trace the legal ramifications of prohibiting out of state hunters from hunting game on federal land? I'm sure the issue's going to come up from some out of state people saying that's federal land, they're federal animals, and why is one state prohibiting us from traveling across state lines to hunt in another state. What are the state statutes and then the federal statutes that allow us to do that?

Ms. Spengler - Are you referring to a situation where we have a Tier II situation on federal lands? Is that what your question's directed at?

Rep. Sund - The question goes to the first step you do in looking at an area that's substantially impaired, if the subsistence hunting is substantially impaired, the first thing you do is eliminate non resident uses regardless of whether they're a cause of the impairment or not, if I understood the prior testimony. My question is what is the legal basis for doing that, either in federal statute and then where does it show up in the state statute that gives us the right to first toss non residents out regardless of whether they're a cause of the impairment or not?

Ms. Spengler - That's not in the statute itself. Even before this all happened, and even separate entirely from the subsistence law, in at least one hunt in the state the Board had decided that non state residents were a different kind of beneficial use than state residents when they were hunting, because the Board determined that Alaskans were generally hunting the Nelchina caribou for food, while out of state residents were more generally hunting it for trophies and/or recreation rather than food. Therefore, even before any of this happened the Board had quite a while ago eliminated non state residents from the Nelchina caribou hunt even when the Board did not consider the Nelchina caribou hunt to be a subsistence hunt. The basis I suppose would be in the state constitution that allows the Legislature and boards of the delegation to treat beneficial uses differently, and the Board determined that in that case, for example, the beneficial use that was participated in by Alaskans was paramount and that the other use could fall to the side. I think that those same principles would apply for the rest of it, whether we're at Tier II or Tier I with the non state

# **CORRECTION**

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residents being eliminated. Case law allows states to treat non state residents differently than Fish and Game, particularly in non commercial kinds of situations which the game would be, with some justification. And the justification here is would be uses by different kinds of groups.

Rep. Sund - . . . [instead of] just throwing them out, why don't we just put them within the same point system as everybody else is, therefore they're being treated the same. Just because they can't accumulate the same amount of points or an adequate amount of points isn't our problem. But it seems to me that the arbitrariness of just eliminating, of making the determination that . . . (inaudible) . . . the subsistence use of that hunter will be substantially impaired because there's too many hunters, and our first arbitrary action is to eliminate non resident users, I don't understand the logic in that. Why don't we just toss them into the point system and let them make application like everybody else?

Ms. Spengler - I see your point, and there is some basis in statute for this part of it. The definition of subsistence hunting in the state statute is hunting for subsistence uses by Alaska residents, so that's the first piece . . . (inaudible) . . . and the way Madison and Eluska interpreted the framework of the subsistence statute does provide for what seems . [an] irrational and unnecessary step. If the Board looks at subsistence uses and determines that they are significantly impaired, the first step, no matter whether the non state residents are the cause or not, is to eliminate non state resident hunting. And then to go along and divide up, if there's still significant impairment, to apply Tier II if that's the appropriate step. The language in Madison and Eluska don't really leave any options on that, and because of the definition of subsistence hunting in the statute to be restricted, to be limited to state residents, the Board didn't have any way to allow, either to allow non state residents to keep hunting or to put them into the Tier II pot. That was just part of guidelines that were surrounding how they had to behave.

Mr. Kelso - Representative Sund had a question which triggered another question in my mind for which we do not yet have an answer, and that is whether there may be effects on federal funding, Pittman Robertson funding if non-residents are significantly restricted from participating in hunts in Alaska. We've actually posed that question to the federal aide coordinator with U.S. Fish and Wildlife Service, and we actually don't have an answer yet. But we are quite concerned about that possibility, and the funding from Pittman Robertson is a substantial amount. It's been less in recent years but it's still very significant. It's figured on a formula basis and we certainly would still meet the formula. The question is whether we would in some way have failed to qualify because of some guideline and we don't know the answer to that. Of course we would argue that we should still receive the funding and we intend to do that if the question arises.

Rep. Sund - I'd like to follow that up, because it seems to me that the real driving force behind the subsistence issue we're in is the

the federal law itself, and I can't see the rationality of us having to do this to comply with the federal law, and by complying with the federal law get kicked out of another federal program. It seems to me our posture should be one of trying to find the grass roots in the federal statutes for the rational of what we're doing now.

Ms. Spengler - John, this last board meeting had nothing to do with federal law. In fact, it probably took us farther away from complying with federal law. What it had to do with was complying with what Madison and Eluska said state law required. In federal law, if you're at a Tier II situation, if we were in a Tier II situation, the 3 criteria and the way that we've been interpreting the state law before Madison, the 3 criteria would have been used to decide which rural residents got to go hunting. And the federal law would never, to have a system where people from anywhere in the state can put their names into the Tier II calculation from anywhere in the state, and possibly depending on how they scored on the different criteria, override or rank higher than someone from a rural area, it's just I mean that certainly is a theoretical possibility that someone from Anchorage could have very little alternative resources, be poor, have hunted in the past, those other criteria--they might score low on local residency but high on everything else--and beat out someone from the local area. So this system has nothing to do whatsoever with complying with federal law.

Rep. Sund - I guess, Larri, the same issue I was looking at there was that we wouldn't probably have a subsistence law on the books at all if it wasn't for the federal law to start with.

Ms. Cutler - There was an article in the paper up in Anchorage a few days ago that seemed to indicate that the Feds were still threatening to take over. . . (inaudible).

Mr. Kelso - The information we have is that the Department of the Interior is prepared to indicate what their position is, but that they are awaiting response to an earlier letter which we will be responding to as rapidly as we can. We wanted to wait until after the Game Board had completed it's work so that we could advise the Interior on what they had done. We had, as a matter of record we're not prepared to concede that the state is out of compliance, although that isn't ours to determine. So we want to communicate in writing with them carefully. But we thought that now that the Game Board has concluded it's work we can correspond with them, and we expect that they will then respond to us by telling us what their intentions are over the next few months.

Ms. Cutler - Okay, okay. I guess what you're really saying is that it's basically the same.

Mr. Kelso - We have reason to believe that they actually have formulated a position so that it isn't the same as Bill Horn's original letter to the state. We expect, we don't know exactly what the content of that position is, but we are aware that the federal agencies have been asked to prepare contingency plans.

Mr. Painter - I'd like to follow that up with another question. I believe that the federal government is looking at this from two separate angles--from enforceability of state Fish and Game laws and from compliance with ANILCA. Is that correct?

Mr. Kelso - That's correct. There was some initial concern that the Eluska case might make enforcement difficult on federal lands and especially the interest there was in parks and refuges. I think we, through our communications directly with those game managers, we indicated that actions were being taken and that the state regulations were going to be enforceable. I think that is understood now, and of course we're, since we're putting out these emergency regulations we expect that they will be enforced and that prosecution can be brought if necessary. But that was one point of their concern. And the second point of their concern was whether under the Madison case we are now in compliance with Section 805 and 804 of ANILCA. So I guess that's the point that we'd like to know exactly what they intend.

Ms. Cutler - I've got one more question. If I could change the subject just for a minute, can you guys talk a little bit about what's going on with fish, I guess both in terms of are there any areas that are being . . . people are being adversely affected. Also, what plans does the Fish Board have, does the same process have to be gone through for fish? . . .

Ms. Stewart - The Board of Fisheries does not have to go through quite the same process in that they already have subsistence regulations. Many of those regulations are probably fine just the way they are. Those that are not, the Board took some initial steps in March to correct. After Eluska came out, though, the Board did have to delegate authority to the Commissioner to do something that they hadn't planned on and that was to issue permits for subsistence fisheries that had existed at some time since statehood. Statehood is not the automatic answer to the question of how far back you have to go, but it was one that was agreed upon so that the D.A.'s office . . . protection, would prosecute violations for this summer. I don't know that anything bad is happening right now. It's a little early in most fisheries for the species that people are interested in to even be fished right now.

We do have some new things happening right now. We have the Taku River gillnet fishery, which is new. We have some new fisheries in Cook Inlet that will be taking place basically on cohoes and then later in the year, so as far as fishing goes right now, we don't know of any instances where subsistence fishing has dramatically changed the way we prosecute either sport fisheries or commercial fisheries. There is a case near Klawock on the Klawock River with the sockeye salmon that has caused us to issue an emergency order closing the sport fishery on sockeye. And that's being done this week. And that's as far as I know. We did receive a request to open the Chitina dip net fishery. Actually, it was a letter to the Governor that came to our office just last week from the Chitina Dip Netters Association asking that the fishery be conducted according to the 1978 regulation in the belief, apparently,

that those regulations allowed seven day a week fishing. That's not the case. Those regulations did not allow seven day a week fishing. Apparently the other belief was that the fishery had no limits at that time. That's also incorrect. In fact, the regulation that was in effect in 1978 allowed the Commissioner to "set limits from time to time", and that's a quote. That kind of regulation wouldn't be tolerated any longer, but at the time the Board frequently did things like that. So as it turns out, no situation has arisen because that fishery is actually going on seven day a week fishing anyway. The dip netters have not taken their weekly quotas since the fishery opened, and so the Department opened the fishery to seven day a week fishing. I guess the Department that since they're so far behind in their weekly catch quotas, it's unlikely that they will catch up. It's probably also unlikely that they'll take the 60,000 fish that have been identified for the dip net fishery for this season. It seems pretty clear that the Board's going to have a tough time deciding how to deal with those tasks on the subsistence fisheries. The Board will have to insure that they've provided reasonable opportunities for subsistence fishermen. We believe they can still use guideline harvest levels as long as those guideline harvest levels realistically reflect the kind of participation the Board believes will occur in that fishery. In the case of fishing we need some kind of harvest level to shoot for so that you can prosecute other fisheries that occur ahead of subsistence fishing. But that's kind of a long and involved argument.

Mr. Kelso - I might note that we've always believed that the changes in the fisheries would be over a longer period. It takes people time to get geared up, to figure out where they might want to set a net if they want to participate in the expanded subsistence fishery after Madison, and we've never expected that that would happen all at once. Certainly a potentially difficult problem in the future will be that allocation between the Chitina dip net fishery and (inaudible) the Copper River Flats. But in terms of the conflict related to the Kenai Peninsula, we would expect developments in those subsistence fisheries to take some time. There is an August fishery which has some potential for being a difficult situation. 13,000 coho have been allocated for the subsistence fishery there for this year, and assuming that that's sufficient, that people don't demand more than that, it probably will be relatively straight forward. If the 13,000 are taken, however, it's our understanding from the Department of Law that we have no alternative but to close the other fisheries, which would include the sport fishery, in order to allow for the subsistence fishery to progress. So there's a potential danger spot. And there are other potential hot spots scattered throughout the Kenai Peninsula, but we don't expect that there'll be a major, instant conflict. It's a much slower process, with fish, just because there are so many more fish and so many more kinds of uses of those fish than there are in the hunting context.

Ms. Cutler - (inaudible)... asking about the Kenai fishery, and of course since it's not really something that's of concern to a rural legislator. I did just pass the inquiry on to one of the legislators that represents that area. But this person was under the impression that,

when he heard you talking earlier about another Board meeting in November, that in November there would be discussion of whether or not there would need to be changes made to regulations for subsistence fishing. And that's what prompted the question and I guess what you're really saying is that you just sort of have to take . . . (inaudible) . . . and see what develops, and make changes as they're needed.

Ms. Stewart - Good advice, LouAnn, we could probably put you on duty.

Mr. Kelso - I think our first responsibility, of course, is to the resource. And so as we try to implement the rules announced by the two courts we're trying to take it as specifically step by step as we can, and although there are some problem areas, in the longer run, some potential for real conflict in those fisheries, right now we don't have anything right now on the east side beaches, for example, that is a major conflict. We have had a request, we had a request earlier to open the east side beaches to king salmon fishing north of a certain point, and we did not open them at that point in time because we had not permitted that kind of (inaudible) during prior regulation since statehood. But we have opened the requested areas as of June 22, so yes there is some potential, but I don't want to overstate what the conflicts are at this point. I think the longer range conflict is very much greater than the short term conflict.

Mr. Painter - I'd just like to add that the Special Committee on Fisheries will be sending out an update on the subsistence situation on the fisheries side in the near future. I might also ask Denny or Beth or Larri or whoever's the appropriate person to update people on the lawsuit that was brought to make hook and line subsistence fishing, and the implications of that lawsuit in terms of disruption to the (inaudible).

Ms. Spengler - The lawsuit was filed in Homer by an individual representing himself. The pleadings are not drawn in the traditional style of pleadings, but it appears that he is requesting that all rod and reel fisheries be declared subsistence fisheries. The status of the suit is we have not yet filed our response. The (inaudible) . . . so we have not yet answered. He has not requested any sort of preliminary relief, so at the moment it's on hold. The pleadings were drawn in such a way that it's not entirely clear what his arguments are going to be so it's a little harder for me to predict what the implications will be at this time.

Rep. Goll - [Wants to review the point system.] As Roger pointed out, the Special Committee on Fisheries will be doing continuing updates on the situation. We're getting an awful lot of questions from people here in Haines now that the moose are in season. As they said, it's a Tier II subsistence hunt. I'm a little bit concerned and I think my reasons will be clear. We are questioned here locally as I'm sure you would if by doing it this way the local folks will get a sense of . . . (inaudible). We're getting a kind of a backlash. For example, working

people are worried that someone who is collecting public assistance will essentially be getting a double advantage, with the working person feeling that he is subsidizing the income of the non working person plus deferring his ability to hunt. The second concern has to do with the fact that a lot of the people in the area do not (inaudible) [believe] that the moose is in fact a critical means of support for anybody. This is being alleged based on the number of moose that have been taken and basically what a moose can do for a family and this of course will be subject to challenge by the people who would disagree, but this is what I'm hearing. Another issue is whether limited entry like situation which was developed that one person qualifies one year and (. . . inaudible. . . ). And these are the kinds of concerns. Another is how much the dependence factor is going to weigh. Here in Haines, for example, dependence on the moose is not a major issue or (inaudible) maybe, but in some place--let's say up in the arctic--we might find that residents, that is being right in the unit or the hunting area, . . . (inaudible). Because of issues like this I'm trying to get a clear handle on exactly what the point system is.

[Rep. Goll and Ms. Stewart review the points and scoring on the permit application. See attached material.]

[If there's a lot a fish available in the area, would that be counted as available alternative resources, or would it only be game to game comparison?]

Ms. Stewart - The Board decided to include big game and/or fish, and so in those cases where there are a lot of fish available then people should view that as a reasonable substitute. Some of the problems with these things, of course, is that we don't have quantifiable information for what's available in each community at this point. So we're relying somewhat on people's subjective views of that question.

Rep. Goll - Okay. Do you feel that the point system as it will be applied around the state will be.... How will you deal, now getting back to the issue that brought me to ask you this, how will you deal with the circumstance where dependence in one area maybe more important than residents' dependence in another area, less important, are you basically going to try to use the same point system with the same kind of guidelines statewide, or do you expect to do any local tailoring? And if so, what will be the procedure in that regard?

Ms. Stewart - In the short term, the only local tailoring that has gone on the Board has already determined, and that is in defining those residency zones. Certainly over time I would expect that the standards used to weigh those three criteria will be modified and I believe probably met for each hunt. You may see some special modifications after the Board has been able to get public testimony and additional information from the department. As you know, the division of subsistence is always engaging in subsistence research and is coming up with new information for both boards on a fairly regular basis. So

while for now we have this single application with very few exceptions, I would expect that in the future those things will be modified.

Rep. Goll - Okay, thank you. Just a final question, what will you do about the income issues? When you say income sufficient to purchase alternatives, if someone's on public assistance, do they have income sufficient to purchase alternatives or do they not?

Ms. Stewart - That certainly was a difficult one for the Board. The way the question is worded now, the answer is just subjective. We are not asking for any kind of proof of income at this time, so it's a subjective question. Someone is going to decide for themselves whether or not they have adequate income to purchase other items as alternatives.

Rep. Goll - Don't you see that's kind of a problem? Obviously one person may think he does and another person might think he doesn't, and they might have the same income. A person could even say it's going to be difficult to purchase any equivalent to a moose. Therefore, even though I make a hundred thousand dollars a year I could never do it. How are you going to deal with people who come back to you later and say well, I could have answered it one way but I didn't? And this person lied or in my opinion misrepresented the facts and he qualified. These kinds of issues are being raised to me roughly five and six times a day over the past week, and I want to bring them to the attention of the group. And I'm really concerned about getting some consistency here.

Ms. Spengler - The Board, when they determined what language to use to correlate to the 3 criteria, realized that they in some regard would have to rely at this stage, because of having this other crude set of factors that can't be a very sophisticated system, on people's assessment and honesty. Some of the factors that they used are verifiable, and those can be verified and cross-checked and will be on a spot check basis. Some are not verifiable, but the Board felt that people would to the best of their ability sort themselves out and assess themselves. At this stage, having to do this on fairly short notice and without a lot of knowledge about how this is going to work and with such a short time frame before the hunt, that was the best that they felt could be done at this time. If this system has to be in place for next year, I'm fairly certain that the Board will refine the regs which set out the factors and try to work in more verifiable, more objective rather than subjective questions. At this time, the best they could do, though, was a mix of those.

Rep. Goll - Okay, well then just to get off the air but to put on the record that I'm already getting some concerns about the income issue. A lot of people allege that income is not a valid factor and alternatives are not available whatever your income. And on the issue of years of participation I've got several people concerned as Rep. Sund was about creating something of a limited entry subsistence proof based upon participation which you know, since there's a ten year limit, may or may not be [an all-important thing].

Ms. Stewart - The joint boards will be adopting, we believe, the standards for measuring those 3 criteria together come November. That meeting will be in Anchorage. This, the set that the Game Board adopted, is what will go out for public comment and we certainly plan to work very closely with the advisory committee so that their comments then can help the boards build a better system than the one that the Game Board was able to come up with at this time. The Game Board certainly has no pride of authorship in the set of regulations that they have right now in terms of defining those criteria. They did the best they could with the kind of information and time they had, but they certainly realize that there are problems with these questions. They spent about four of the twelve days they were in session working on ways to measure those 3 statutory criteria, and as you say there are certainly problems with a great many of those. Local residency is probably the least problematical, but availability of alternative resources and customary and direct dependence on the resource are two very difficult criteria to measure. So encourage people to get their comments in to us as soon as we get the regulations out.

Rep. Goll - Thank you very much. That's exactly what I'm going to do. I would make one comment and pose the question to Rep. Fuller if I could. Specifically, what has brought me to be concerned about this, and I'm pretty new to the game issues--it's mostly fisheries that I have some familiarity with--when I found out that this was coming down people started coming up to me and making comments like "we would rather see the season closed for a couple of years and let the stocks rebuild than to cut 90% of the participants out of the hunt." Our areas here in this particular moose hunt is fairly different from the areas up north. The circumstance is that there is a great mixture of (inaudible) participation and an awful lot of local people reading the criteria believe they're going to be excluded and they say "well, I'd rather go spend a day in the woods and get a crack at it" in this particular community where we allege or they allege that there is no real dependence upon the moose here for subsistence, irregardless of how it may be defined legally. A lot of people are saying, they take a look at this, they say before I go through the bother of filling this out I'm going to poach, or they say before you make everyone do this you ought to just close the season for a year, and I was rather surprised by that response as you can imagine. I'll pose my question to you, Jack, a bit later, but it has to do with the issue of residence and how far the people in your region have to go in order to get the subsistence gathering done. Again, thank you for your time.

Mr. Kelso - I might summarize very quickly and then turn it back to Rep. Fuller, but I'd like to emphasize again that under no circumstances will the Boards actions or the Department's actions abrogate the responsibility to maintain the resources on a sustained yield level. We're going to continue doing that, we're going to protect the resources. And the reason for the Board's action was to enable us to do that by having enforceable regulations. The Board . . . are implementing what are mandatory directives of the courts and neither the Board nor the Department had the authority to do otherwise than what the

Board has done at this point. The effects on Alaskans will be impacts on hunting opportunity, the permit drawing hunts in which every Alaskan had an equal chance of being drawn have been greatly reduced, and of course the registration hunts have been changed as well. This means there will be impacts not only on Alaska residents but on Alaskans who are involved in the guiding industry. And even if Alaskans are able to hunt in hunts that are of interest to them, there may be potential delays associated with getting this new system on the line.

I mentioned the fiscal impacts, and out of pocket costs are between 150 and 200 thousand dollars, as well as potential revenue effects to the Fish and Game fund as a result of, a possible result of fewer tag fees being paid in.

What I thought might be most useful is for us to go ahead and put together the information packet that we've been talking about, we'll get that out to you as rapidly as we can, and then this is going to obviously be a continuing concern because people, as people get more familiar with it they're going to have more questions. So we'd like to be on call to all the legislators. If you need to talk with us about it please feel free to call us directly. If you'd like to get together for a meeting we're happy to be available to you and please just treat us as available for the balance of this year. If you have suggestions on how we can be more effective with this and we can work with you to get word out to your constituents we'd very much like to do that. I'll turn this back to Rep. Fuller.

Rep. Fuller - Thank you very much. I really appreciate this update and I'm sure that everyone that's listening in does. [Thank you all for your information. Linda will be sending out minutes of the meeting.]

[Rep. Sund asked if there would be upcoming meetings of the House Interim Committee on Subsistence. Rep. Fuller answered that he didn't anticipate any, but if it was necessary they would give everyone as much advance notice as possible. Rep. Goll asked a question about clarifying what is meant by principal means of support. Ms. Stewart had left the room and would answer him by phone later.]

Rep. Binkley - Just a quick question. . . . Was he referring strictly to Tier I hunts when he says registration hunts and that's just something that you have to register for in those Tier I hunts?

Mr. Kelso - You are correct that when we talk about Tier II hunts we're talking about those hunts where those 3 criteria have to be applied and that's what that questionnaire was all about, that application form. Registration hunts are what we've been calling Tier I hunts, although some registration hunts may be occurring in situations where no other hunting is allowed, for example, non resident hunting may already have been eliminated. But the registration hunts are those hunts where, because they're, the resource is not so numerous that we can simply allow an open ended season and bag limit, let me rephrase that, an open ended participation with set seasons and bag limits, we

have to register people so we can sort of keep track of the level of participation. But that is less restrictive than in the Tier II situation.

So the most general hunting opportunity would be what we've been calling general hunts, which do not require registration. An example might be the western arctic caribou herd. The next most restrictive kind of participation would be a registration hunt, and that's what we've been calling Tier I, in which people have to sign up. They don't have to be drawn out of a hat, they don't have to be pre-selected, but they have to register when they arrive in the area where they want to go hunting. Then the most restrictive, which is what we've been calling Tier II, is where we use the application form and the 3 criteria--customary and direct dependence, local residency, and availability of alternatives. Does that respond to your question John?

Rep. Binkley - So there's actually 3 different levels and that registration hunt is the middle level.

Mr. Kelso - Yes. We really are, in dealing with subsistence hunting, we have sort of 3 levels at which people can participate and the most general one is the one in which non subsistence hunters can also participate. That's what we've been calling the general hunt. Then when we get down to Tier I, we may be in a situation where the non subsistence hunting has been eliminated and it is within Tier I that registration hunts could occur. Now a registration hunt is not the only kind of hunt you might have in Tier I, but it's a good example.

. . . . [Jim Ayers asks legislators to call their offices]. . . .

JUL 09 1985

NOTICE OF ADOPTION  
OF EMERGENCY REGULATIONS

As required by AS 44.62.250, notice is given that, under authority vested by AS 16.05.255, AS 16.05.340, AS 16.05.346, AS 16.05.780, AS 16.05.920, and AS 16.05.930, the Alaska Board of Game adopted on this date, as emergency regulations, 5 AAC 78,001 - 5 AAC 78.600, 5 AAC 80.001 - 5 AAC 80.600, 5 AAC 82.001 - 5 AAC 82.600, 5 AAC 86.001 - 5 AAC 86.910, 5 AAC 88.001 - 5 AAC 88.910, 5 AAC 92.001 - 5 AAC 92.990, relating to the use or taking of game.

Regulations adopted as emergency regulations and emergency orders of repeal are as follows:

CHAPTER 78. SOUTHEAST ALASKA

- 5 AAC 78.001. DESCRIPTION OF SOUTHEAST ALASKA
- 5 AAC 78.002. APPLICATION OF REGULATIONS
- 5 AAC 78.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 78.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 78.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 78.030. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 78.040. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 78.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 78.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 78.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 78.070. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 78.115. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 78.120. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 78.130. GENERAL HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 78.140. GENERAL HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 78.145. GENERAL HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 78.160. GENERAL HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 78.165. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 78.170. GENERAL HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME

- 5 AAC 78.210. PERMITS, PERMIT PROCEDURES, AND PERMIT CONDITIONS
- 5 AAC 78.300. AREAS CLOSED TO HUNTING
- 5 AAC 78.600. CLOSURES AND RESTRICTIONS ON STATE GAME REFUGES

CHAPTER 80. SOUTHCENTRAL ALASKA

- 5 AAC 80.001. DESCRIPTION OF SOUTHCENTRAL ALASKA
- 5 AAC 80.002. APPLICATION OF REGULATIONS
- 5 AAC 80.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 80.010. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BISON
- 5 AAC 80.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 80.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 80.025. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 80.030. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 80.040. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 80.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 80.055. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 80.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 80.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 80.070. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 80.115. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 80.120. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 80.125. GENERAL HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 80.130. GENERAL HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 80.140. GENERAL HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 80.145. GENERAL HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 80.155. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 80.160. GENERAL HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 80.165. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 80.170. GENERAL HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME

- 5 AAC 80.210. PERMITS, PERMIT PROCEDURES, AND PERMIT CONDITIONS
- 5 AAC 80.300. AREAS CLOSED TO HUNTING
- 5 AAC 80.400. CONTROLLED USE AREAS
- 5 AAC 80.500. MANAGEMENT AREAS
- 5 AAC 80.600. CLOSURES AND RESTRICTIONS ON STATE GAME REFUGES

CHAPTER 81. HUNTING

- 5 AAC 81.010 is repealed
- 5 AAC 81.013 is repealed
- 5 AAC 81.020 is repealed
- 5 AAC 81.021 is repealed
- 5 AAC 81.022 is repealed
- 5 AAC 81.030 is repealed
- 5 AAC 81.040 is repealed
- 5 AAC 81.055 is repealed
- 5 AAC 81.056 is repealed
- 5 AAC 81.057 is repealed
- 5 AAC 81.060 is repealed
- 5 AAC 81.072 is repealed
- 5 AAC 81.075 is repealed
- 5 AAC 81.080 is repealed
- 5 AAC 81.090 is repealed
- 5 AAC 81.110 is repealed
- 5 AAC 81.115 is repealed
- 5 AAC 81.125 is repealed
- 5 AAC 81.126 is repealed
- 5 AAC 81.130 is repealed
- 5 AAC 81.140 is repealed
- 5 AAC 81.145 is repealed
- 5 AAC 81.160 is repealed
- 5 AAC 81.170 is repealed
- 5 AAC 81.175 is repealed
- 5 AAC 81.180 is repealed
- 5 AAC 81.185 is repealed
- 5 AAC 81.200 is repealed
- 5 AAC 81.210 is repealed
- 5 AAC 81.215 is repealed
- 5 AAC 81.216 is repealed
- 5 AAC 81.218 is repealed
- 5 AAC 81.237 is repealed
- 5 AAC 81.238 is repealed
- 5 AAC 81.239 is repealed
- 5 AAC 81.240 is repealed
- 5 AAC 81.250 is repealed
- 5 AAC 81.260 is repealed
- 5 AAC 81.270 is repealed
- 5 AAC 81.280 is repealed
- 5 AAC 81.290 is repealed
- 5 AAC 81.300 is repealed
- 5 AAC 81.310 is repealed
- 5 AAC 81.320 is repealed
- 5 AAC 81.330 is repealed

- 5 AAC 81.340 is repealed
- 5 AAC 81.350 is repealed
- 5 AAC 81.360 is repealed
- 5 AAC 81.400 is repealed
- 5 AAC 81.900 is repealed
- 5 AAC 81.910 is repealed
- 5 AAC 81.920 is repealed
- 5 AAC 81.930 is repealed

CHAPTER 82. SOUTHWEST ALASKA

- 5 AAC 82.001. DESCRIPTION OF SOUTHWEST ALASKA
- 5 AAC 82.002. APPLICATION OF REGULATIONS
- 5 AAC 82.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 82.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 82.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 82.025. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 82.030. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 82.035. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR ELK
- 5 AAC 82.040. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 82.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 82.055. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 82.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 82.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 82.070. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 82.115. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 82.120. GENERAL HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 82.125. GENERAL HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 82.130. GENERAL HUNTING SEASONS AND BAG LIMITS FOR DEER
- 5 AAC 82.135. GENERAL HUNTING SEASONS AND BAG LIMITS FOR ELK
- 5 AAC 82.140. GENERAL HUNTING SEASONS AND BAG LIMITS FOR GOAT
- 5 AAC 82.145. GENERAL HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 82.155. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 82.160. GENERAL HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS

- 5 AAC 82.165. GENERAL HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME
- 5 AAC 82.170. GENERAL HUNTING SEASONS AND BAG LIMITS FOR UNCLASSIFIED GAME
- 5 AAC 82.210. PERMITS, PERMIT PROCEDURES, AND PERMIT CONDITIONS
- 5 AAC 82.230. SPECIAL PROVISIONS FOR GENERAL PERMIT HUNTS
- 5 AAC 82.240. PERMIT FOR ACCESS TO MCNEIL RIVER STATE GAME SANCTUARY
- 5 AAC 82.250. PERMIT FOR ACCESS TO WALRUS ISLANDS STATE GAME SANCTUARY
- 5 AAC 82.300. AREAS CLOSED TO HUNTING
- 5 AAC 82.400. CONTROLLED USE AREAS
- 5 AAC 82.600. CLOSURES AND RESTRICTIONS ON STATE GAME REFUGES

CHAPTER 84. TRAPPING

- 5 AAC 84.010 is repealed
- 5 AAC 84.020 is repealed
- 5 AAC 84.030 is repealed
- 5 AAC 84.040 is repealed
- 5 AAC 84.050 is repealed
- 5 AAC 84.060 is repealed
- 5 AAC 84.080 is repealed
- 5 AAC 84.110 is repealed
- 5 AAC 84.115 is repealed
- 5 AAC 84.120 is repealed
- 5 AAC 84.160 is repealed
- 5 AAC 84.170 is repealed
- 5 AAC 84.175 is repealed
- 5 AAC 84.280 is repealed
- 5 AAC 84.285 is repealed
- 5 AAC 84.300 is repealed

CHAPTER 86. WESTERN AND ARCTIC ALASKA

- 5 AAC 86.001. DESCRIPTION OF WESTERN AND ARCTIC ALASKA
- 5 AAC 86.002. APPLICATION OF REGULATIONS
- 5 AAC 86.005. DESCRIPTION OF GAME MANAGEMENT UNITS
- 5 AAC 86.015. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BLACK BEAR
- 5 AAC 86.020. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR BROWN AND GRIZZLY BEAR
- 5 AAC 86.025. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR CARIBOU
- 5 AAC 86.045. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MOOSE
- 5 AAC 86.050. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR MUSK OXEN
- 5 AAC 86.055. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SHEEP
- 5 AAC 86.060. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR FUR ANIMALS
- 5 AAC 86.065. SUBSISTENCE HUNTING SEASONS AND BAG LIMITS FOR SMALL GAME

# MEMORANDUM

State of Alaska

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

DATE: March 15, 1985

FILE NO:

TELEPHONE NO: 465-4100

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

SUBJECT: Management Issues  
Arising From the  
Madison Decision

## INITIAL ASSESSMENT

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

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

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

## COOK INLET/KENAI RIVER/SUSITNA RIVER SALMON

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

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

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

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

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

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

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

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

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

NAKNEK RIVER SALMON

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

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

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

COPPER RIVER/PRINCE WILLIAM SOUND SALMON

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

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

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

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

# MEMORANDUM


State of Alaska

TO: Honorable Bill Sheffield  
Governor

DATE: March 6, 1985

Thru: John Shively  
Chief of Staff

FILE NO: 366-375-85

FROM:   
Norman C. Gorsuch  
Attorney General

TELEPHONE NO: 465-3600

SUBJECT: Briefing memorandum:  
subsistence

## I. Suggested Attendees

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

## II. Issue Summary

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

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

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

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### III. Necessity for Governor's Briefing

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

### IV. Background

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

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

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

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

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V. Relevant Laws

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

B. Federal law:

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

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

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

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

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VI. Alternatives

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

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

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

# MEMORANDUM

State of Alaska

TO: Don Collinsworth, Commissioner  
Department of Fish and Game

DATE: March 8, 1983

FILE NO: 166-423-83

TELEPHONE NO:

FROM: Norman C. Gorsuch  
Attorney General

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

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

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

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

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

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

LIS/jmo

DEPARTMENT OF LAW

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

OFFICE OF THE ATTORNEY GENERAL

March 3, 1985

M E M O R A N D U M

TO: Honorable Bill Sheffield  
Governor

FROM: Norman C. Gorsuch  
Attorney General

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

Attached is a bill regarding the taking of fish and game for subsistence and personal use. It was requested in order to return to the Boards of Fisheries and Game the regulatory authority they had exercised before Madison v. Alaska Department of Fish and Game, Supreme Court Opin. No. 2911 (Alaska, February 22, 1985).

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

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

NCG:LIS:dln

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

D R A F T

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

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

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

Alaska Department of Fish and Game, Division of Subsistence, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, technical paper No. 61, 274 (1983).

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

conserve fish stocks for the maximum benefit of all Alaskans.

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

Sincerely,

Bill Sheffield  
Governor

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

377-176-85

referred in house = resources and judiciary

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2

SENATE BILL NO. 231 (House bill 233)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

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

9

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

10

\* Section 1. FINDINGS. The legislature finds that

11

(1) the taking of fish stocks and game populations for

12

personal and family consumption and related uses is essential to the

13

health, safety, and general welfare of Alaskans domiciled in rural

14

communities or rural areas in which the taking of fish and game for

15

such uses is a significant part of the economy of the community or

16

area; and

17

(2) the taking of fish stocks and game populations for

18

personal, sport, and commercial uses is also of economic and recre-

19

ational importance to Alaskans who reside anywhere in the state.

20

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

21

(a) The Board of Fisheries may adopt regulations it considers

22

advisable in accordance with the Administrative Procedure Act (AS 44.-

23

62) for

24

(1) setting apart fish reserve areas, refuges and sanctu-

25

aries in the waters of the state over which it has jurisdiction,

26

subject to the approval of the legislature;

27

(2) establishing open and closed seasons and areas for the

28

taking of fish;

29

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

1 size limitations on the taking of fish;

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

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

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

9 (7) watershed and habitat improvement, and management,  
10 conservation, protection, use, disposal, propagation and stocking of  
11 fish;

12 (8) investigating and determining the extent and effect of  
13 disease, predation, and competition among fish in the state, exercis-  
14 ing control measures considered necessary to the resources of the  
15 state;

16 (9) prohibiting and regulating the live capture, posses-  
17 sion, transport, or release of native or exotic fish or their eggs;

18 (10) establishing seasons, areas, quotas and methods of  
19 harvest for aquatic plants;

20 (11) establishing the times and dates during which the  
21 issuance of fishing licenses, permits and registrations and the trans-  
22 fer of permits and registrations between registration areas is al-  
23 lowed; however, this paragraph does not apply to permits issued or  
24 transferred under AS 16.43;

25 (12) personal use fishing.

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

27 (23) "subsistence uses" means the customary and traditional  
28 uses by rural [IN] Alaska residents of wild, renewable resources for  
29 direct personal or family consumption as food, shelter, fuel,

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

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

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

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

16

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### NOTES TO DECISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- (2) local residency; and
- (3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

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

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

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

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

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

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

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

#### NOTES TO DECISIONS

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

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

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

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

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

(b) The regulations may include but are not limited to the following:

(1) the establishment of subsistence hunting areas;

(2) the regulation of transportation methods and means to protect subsistence hunting within subsistence hunting areas, including the prohibition or limitation of pack animals, mechanized vehicles and aircraft, other than watercraft or wheeled vehicles operating on a road maintained by public funds;

(3) the establishment of open and closed seasons and areas to protect subsistence hunting;

(4) the limitation of hunting to only one sex of the animal.

(c) Regulations may not be adopted by the Board of Game under (a), (b) or (f) of this section unless, in addition to the requirements of AS 44.62.180 — 44.62.290, the department

(1) holds public hearings, after reasonable notice, at least 30 days before the meeting at which the regulation is to be adopted, with at least one of the hearings being held in close proximity to the area potentially affected;

(2) presents at the hearings the information provided for in (e) of this section;

(3) makes the information provided for in (e) of this section available to the appropriate advisory committees and to petitioners if consideration of adoption of regulations was prompted by petitions under (a)(3) or (4) of this section; comments shall be received by the board until 10 days before any adoption of regulations.

(d) A petition submitted under (a)(3) — (4) of this section shall contain a complete description of the area requested as a subsistence area and a specification of the species within the area considered necessary for subsistence use. A petition or recommendation made under (a)(2), (3) or (4) of this section must be filed with the department at least 75 days before the meeting of the board at which the petition or recommendation is to be considered.

(e) The department shall investigate, by collecting existing data, and, when necessary, conducting new studies, every petition or recommendation made under (a)(2), (3) or (4) of this section to the extent practicable within the time available and provide the following information:

(1) the concentration of the species to be affected and carrying capacity of the area to be affected;

(2) the current hunting practices in the area, including numbers of animals taken and by what methods and means and whether the take is subsistence or recreational;

(3) the dependence of persons in the area for subsistence use of a species;

(4) the population trends of the affected fish and game in the area;

(5) whether the affected fish and game population is able to support a nonsubsistence harvest; and

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

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

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

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

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

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

(h) In this section

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

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

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

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

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

cial Acts and Resolves.

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

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

#### NOTES TO DECISIONS

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

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

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

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

(b) A person may not knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this title except AS 16.51 and AS 16.52, or a poster or notice to the public concerning the provisions of this title except AS 16.51 and AS 16.52, or a regulation adopted under this title except AS 16.51 and AS 16.52, or a marker indicating the boundary of an area closed to hunting, trapping, fishing or other special use under this title except AS 16.51 and AS 16.52. A person may not knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this title except AS 16.51 and AS 16.52 or a regulation adopted under this title except AS 16.51 and AS 16.52.

(c) A person may not import, possess, transport or release in the state live venomous reptiles, live venomous reptile eggs, live venomous insects, or live venomous insect eggs, except in accordance with the terms of a permit issued under (d) of this section. This prohibition does not apply to bees as defined in AS 03.47.040. A person who violates this subsection is guilty of a misdemeanor and may be cited as set out in AS 16.05.165.

(d) A permit required under (c) of this section may be granted only if, in the determination of the commissioner, the applicant demonstrates a valid educational purpose for seeking the permit. A valid educational purpose includes display in educational institutions and in zoos. (§ 28 art I ch 94 SLA 1959; am § 3 ch 110 SLA 1970; am §§ 20, 21 ch 132 SLA 1984)

**Effect of amendments.** — The 1984 amendment, effective July 3, 1984, substituted "AS 16.05 — AS 16.40" for "this chapter" in two places in subsection (a) and "this title except AS 16.51 and AS 16.52" for "this chapter" throughout sub-

section (b) and added subsections (c) and (d). The amendment also made a minor punctuation insertion in subsection (a) and a minor word insertion in the first sentence of subsection (b).

#### NOTES TO DECISIONS

Cited in *Guidry v. State*, Sup. Ct. Op. No. 2741 (File No. 6362), P.2d (1983).

**Sec. 16.05.925. Penalty for violations.** A person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor. However, a person who violates a regulation adopted under this chapter for the regulation of commercial fisheries is subject to the penalties set out in AS 16.05.720. (§ 22 ch 132 SLA 1984)

**Effective dates.** — Section 30, ch. 132, July 3, 1984, in accordance with AS SLA 1984, makes this section effective 01.10.010(c).

**Sec. 16.05.930. Exempted activities.** (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the Department of Fish and Game examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes. (§ 28 art I ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984)

**Effect of amendments.** — The 1984 amendment, effective July 3, 1984, in subsection (c), made a word correction in the first sentence and added the second sentence.

**Sec. 16.05.940. Definitions.** In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

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

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

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

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(10) "fish derby" means a contest in which prizes are awarded for catching fish;

(11) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(12) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means

having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

(13) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(14) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40;

(15) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(16) "nonresident" means a person who is not a resident of the state;

(17) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(18) "operator" means the individual by law made responsible for the operation of the vessel;

(19) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident 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 state is a resident for the purposes of this paragraph;

(20) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(21) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

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

(24) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(25) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(26) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(27) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft. (§ 2 art I ch 95 SLA 1959; am §§ 1 — 4 ch 131 SLA 1960; am § 1 ch 21 SLA 1961; am §§ 1, 2 ch 102 SLA 1961; § 9 art III ch 94 SLA 1959; am § 23 ch 131 SLA 1960; am § 1 ch 160 SLA 1962; am §§ 13, 14 ch 31 SLA 1963; am § 2 ch 32 SLA 1968; am § 3 ch 73 SLA 1970; am § 1 ch 91 SLA 1970; am § 4 ch 110 SLA 1970; am § 1 ch 90 SLA 1972; am § 5 ch 82 SLA 1974; am §§ 26, 82 ch 127 SLA 1974; am §§ 18 — 20 ch 206 SLA 1975; am § 12 ch 105 SLA 1977; am §§ 14, 15 ch 151 SLA 1978; am § 1 ch 78 SLA 1979; am § 1 ch 24 SLA 1980; § 4 ch 74 SLA 1982; am § 24 ch 132 SLA 1984)

**Effect of amendments.** — The 1984 amendment, effective July 3, 1984, substituted "AS 16.05 — AS 16.40" for "this chapter" in the introductory language and paragraphs (14), (15) and (20); in paragraph (9), substituted "invertebrate, or amphibian" for "invertebrates and amphibians" and "its" for "their" preceding "life cycle" and added the language beginning "and includes any part of such aquatic finfish"; reworded the con-

tents of paragraph (13); inserted "reptile" near the beginning of paragraph (14); substituted "those chapters" for "it" in paragraph (15); substituted "this paragraph" for "this chapter" in three places in paragraph (19); inserted "of" following "taking" in paragraph (22); deleted "for the purposes of this chapter" preceding "does not include aircraft" in paragraph (27); and repealed paragraph (28), defining "visitor."

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

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

## TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

### FINDINGS

6 USC 3111.

Sec. 801. The Congress finds and declares that—

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

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

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

16 USC 1601  
et.

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

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

### POLICY

USC 3112.

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

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

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

Ante, p. 2377.

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

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

### DEFINITIONS

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

16 USC 3113.

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

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

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

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

### PREFERENCE FOR SUBSISTENCE USES

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

16 USC 3114.

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

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

- (1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;
- (2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(X)(iv) of this subsection; and
- (3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

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

- (A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;
- (B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;
- (C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;
- (D) the preparation of an annual report to the Secretary which shall contain—

Annual report to Secretary.

- (i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;
- (ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;
- (iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and
- (iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

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

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

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

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

Implementation.

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

Reimbursement to States.

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

Report to Congress.

FEDERAL MONITORING

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

Report to congressional committees. 16 USC 3116.

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

#### JUDICIAL ENFORCEMENT

Civil actions.  
16 USC 3117.

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

Hearing.

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

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

#### PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

6 USC 3118.

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

Subsistence  
hunting pro-  
gram.

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

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

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

Program and  
recommendation  
implementation.

#### COOPERATIVE AGREEMENTS

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

16 USC 3119.

#### SUBSISTENCE AND LAND USE DECISIONS

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

16 USC 3120.

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

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

Hearing.

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

Notice and hearing.

2 USC 4332.

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

8 USC note rec. 21.

1 USC 1601

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

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

ACCESS

1 USC 3121.

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

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

RESEARCH

USC 3122.

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

PERIODIC REPORTS

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

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

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

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

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

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

(7) such other recommendations the Secretary deems appropriate.

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

Publication in Federal Register.

REGULATIONS

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

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

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

16 USC 3125.

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

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

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

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 663dd-ji), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (86 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 317; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal

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

CLOSURE TO SUBSISTENCE USES

3126.

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

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

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

SUBMERGED LANDS STATUTE OF LIMITATION

1601

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

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

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

43 USC 1601  
note.

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

Costs and  
attorney fees.

43 USC 1601  
note.

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

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

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

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

Agreements or  
reconveyances  
with State.

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

48 USC note  
prec. 21.

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

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

THE SUPREME COURT OF THE STATE OF ALASKA

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

File Nos. 6824/  
7181

Appellants,

v.

O P I N I O N

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

Appellees,

and

THE ALASKA FEDERATION OF NATIVES,

Intervenor.

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

File No. 7410

Appellants,

v.

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

Cross-Appellees.

[No. 2911 - February 22, 1985

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

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

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

MOORE, Justice.

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

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

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

#### I. SUMMARY OF FACTS

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

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

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

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

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

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2. Section 4, ch. 131 SLA 1960:

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

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

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

(Footnote Continued)

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

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(Footnote Continued)

the Board of Fisheries.

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

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

5. AS 16.05.251(b) states:

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

(2) local residency; and

(3) availability of alternative resources.

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

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6. AS 16.05.251(a) states:

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

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

(Footnote Continued)

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.

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

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

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

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

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

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

CHARACTERISTICS OF SUBSISTENCE FISHERIES.

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

(Footnote Continued)

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

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(Footnote Continued)

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

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

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

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

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

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

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

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

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

(Footnote Continued)

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

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

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(Footnote Continued)

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

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

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

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