

ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672
4222.47 SRES SUBSISTENCE: MISCELLANEOUS (file 3)

1278

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

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

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

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

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

II. STANDARD OF REVIEW

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

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

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

In Kelly v. Zamarello, 486 P.2d 906, 917 (Alaska 1971), we stated that the "reasonable basis approach should be used for the most part in cases concerning administrative expertise as to either complex subject matter or fundamental policy formulations." However, the issues in this case concern statutory interpretation of the words "customary and traditional" and the question whether the board has acted within the scope of its statutory authority. Such issues "fall into the realm of special competency of the courts." Alaska Public Utility Commission v. Municipality of Anchorage, 555 P.2d 262, 266 (Alaska 1975). See also State, Commercial Fisheries Entry Commission v. Templeton, 598 P.2d 77, 80 (Alaska 1979).

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

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

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

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

III. LEGISLATIVE HISTORY OF THE 1978 SUBSISTENCE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

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

15. The board stipulated in 1982 that it violated

(Footnote Continued)

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

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

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

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

(Footnote Continued)

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

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

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

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

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

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

(Footnote Continued)

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

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

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

(Footnote Continued)

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

GREGORY FRANK COOK

ATTORNEY AT LAW

P.O. Box 618, Douglas, Alaska 99824

Residence (907) 586-9719

Admitted to Practice in Alaska and Oregon

Board of Directors
Territorial Sportsmen, Inc.
c/o Susan Arthur
9335 View Drive
Juneau, Alaska 99801

April 23, 1985

TO THE BOARD OF DIRECTORS;

You have asked this office for a legal opinion regarding HB 288, "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date." The analysis and opinion which follow responds to your request.

I must caution you that since the time for preparation of this material was quite short, further research could produce different, or contrary, conclusions. The political volatility of allocation of fishery and wildlife resources in Alaska should not serve as an excuse for facile reasoning, and the analysis presented herein has been limited by the time available for its preparation.

INTRODUCTION

HB 288 has been introduced at the request of Governor Sheffield for the primary purpose of inserting the qualifying adjective "rural" into the portion of the Alaska Fish and Game Code (AS 16) dealing with subsistence. (SEE Memorandum of March 6, 1985 from Attorney General Gorsuch to Governor Sheffield.) The purpose of this proposed change has been stated to be to legislatively override the relevant portion of the recent Alaska Supreme Court decision in Madison v ADF&G, Op. No. 2911 (Alaska, Supreme Court, February 22, 1985.)

Concerns have been expressed over the validity of the approach taken by HB 288 in light of the Alaska and United States Constitutions. Additional concerns have been raised over the alternative possibility of inaction on this topic by the Fourteenth Alaska Legislature, and the effect such inaction may have on non-subsistence uses.

It is the purpose of this letter to respond to these matters, albeit within the time constraints noted above.

SHORT ANSWER

HB 288 raises serious, unanswered questions regarding the constitutionality of discriminating between "rural" and "non-rural" Alaskans.

If passed, HB 288 will require definition of the term "rural," either by the Boards of Fisheries and Game adopting a regulatory definition, or through operational application, i.e., through a case-by-case application of the "rural" standard as the Boards adopt harvest regulations.

Because of the brief time available before the onset of the summer fisheries, combined with the time frames required by the Alaska Administrative Procedure Act's notice and comment provisions, the definition of "rural" for the 1985 summer fishing season will, in either event, be decided without thorough public review or opportunity for public comment.

The impact on non-subsistence uses of failure to pass HB 288, or similar legislation, is far too speculative to predict accurately at this time. A legal basis exists for closure of non-subsistence uses in order to protect subsistence uses under HB 288 as well as under the current legal regime.

GENERAL DISCUSSION

I. CONSTITUTIONALITY OF HB 288

A. EQUAL PROTECTION

1. Introduction

Equal protection under the laws is guaranteed by the U.S. Constitution and the Alaska Constitution. Under our federalist approach to government, the Alaska Constitution's test for equal protection has been interpreted somewhat differently from the federal test. Thus, these two standards must be discussed separately.

2. Equal Protection under the United States Constitution

The United States Supreme Court has applied two standards to equal protection challenges: the "strict scrutiny" standard and the "rational basis" standard. A "compelling state interest" must be shown to justify classifications that are "inherently suspect" or classifications that affect "fundamental rights." The strict scrutiny test is used in such cases, and applies where a statute operates to the peculiar disadvantage of a "suspect class," e.g., a racial group, a particular national origin, or

alienage, or impacts a "fundamental right," e.g., freedom of speech. SEE GENERALLY CFEC v Apokedak, 606 P. 2d 1255, 1266 (Alaska, 1980).

HB 288 is racially neutral, it does not involve a classification that is inherently suspect, and it does not involve fundamental rights. Thus, strict scrutiny will not apply.

HB 288 may implicate the constitutionally protected right to intrastate travel. Generally, this right is only implicated where the government creates distinctions between residents based upon the duration of their residency. Gilman v Martin, 662 P. 2d 120, 125 (Alaska, 1983). Since HB 288 does not contain a durational residency requirement, the right to intrastate travel will not be discussed here. A complete review of the validity of HB 288 should probably examine this issue.

Where non-fundamental interests are concerned, and the purpose of the statute is within the realm of legitimate state interests, the "rational basis" test is the proper standard. Baldwin v Fish and Game Commission of Montana, 436 US 371, 390 (1978). In other words, does the statute (in this case, HB 288) have a rational relation to a legitimate state interest, is the classification reasonable, and does the measure treat all within the class alike? CFEC v Apokedak, 606 P 2d 1255, 1266 (Alaska, 1980).

The "rational basis" test is the proper test to apply to HB 288 under federal equal protection analysis. Zobel v Williams, 457 U.S. 55, 59-61 (1982).

The purposes of HB 288 are conservation, allocation, and enforcement. These are legitimate state interests. (SEE GENERALLY, cases cited in Maeda v Amimaya, 594 P. 2d 136, 142 (Hawaii, 1979).) Thus, the proper inquiry under federal equal protection analysis becomes whether or not HB 288 bears a rational relation to achieving those purposes, whether or not the classification is reasonable, and whether or not it treats class members equally.

Whether or not HB 288 passes muster under this test will depend in large measure on what sort of legislative findings of fact accompany the bill. At the present time, those legislative findings of fact are absent. This author is unfamiliar with the nascent legislative history of HB 288. Thus, in many ways, it may be premature to attempt to assess HB 288 from an equal protection standpoint. Nonetheless, the record as it now exists permits some tentative conclusions to be drawn as to the arbitrariness or reasonableness of HB 288.

The classification of a particular group of individuals, such as HB 288's creation of a class of "rural" residents entitled to priority use of fish and game, must be reasonable in relation to the purpose of the legislation. If not, the classification is arbitrary, and cannot withstand equal protection review.

A reasonable classification has been described as one "which includes all (and only those) persons who are similarly situated with respect to the purpose of the law." Tussman and TenBroeck, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341, 346 (1949), cited in Leege v Martin, 379 P. 2d 447, 452, fn 18, (Alaska, 1963), and in Washington Kelpers' Association v State, 502 P. 2d 1170, 1176 (Washington, 1972) (en banc).

Does the "rural" classification of HB 288 include all persons, and only those persons, who are similarly situated with respect to the conservation, allocation, and enforcement purposes of HB 288?

There are a good many non-rural Alaskans for whom subsistence has great importance. The plaintiffs in Madison provide examples of such individuals. Other examples could include the members of the Kachemak Bay Subsistence Group, the members of the Copper River Subsistence Fishermen's Association, or Alaskans whose permanent residence may be in Anchorage, Fairbanks, or Juneau, but who annually spend time on a trapline, at a fish camp, or in other typical Alaskan activities wherein subsistence use of fish and game inheres.

It is my opinion that the "rural" classification of HB 288, by excluding such individuals from the benefits of the subsistence priority, fails to include all the people who are similarly situated with respect to the conservation, allocation, and enforcement purposes of HB 288. There does not appear to be a reasonable relation between categorizing the uses of rural residents as subsistence uses, yet categorizing the identical use by a non-rural resident as something else. Thus, the "rural" category appears to violate equal protection standards.

One of the critical defects discussed in Madison by the Alaska Supreme Court regarding the Board of Fisheries' Cook Inlet subsistence criteria was the fact that an individual would not qualify for a recognized subsistence use unless he were part of an identifiable community or group. (Madison v ADF&G, Opinion No. 2911, (Alaska, February 22, 1985).) Under the Board's Cook Inlet regulation, many individual users who have historically depended on subsistence fishing were eliminated from subsistence use at the outset by the Board of Fisheries' regulation.

Inserting the adjective "rural" to limit the new category of "personal use fishing" sought to be created by HB 288 would seem to have an effect similar to the regulation invalidated in Madison: eliminating, at the outset, many individual users who have historically depended on subsistence uses of fisheries and wildlife resources. The difference under HB 288 is that this elimination is performed by the Legislature rather than by either Board. Such a difference does not appear legally significant.

These defects in HB 288 may not be fatal.

"a statutory classification impinging upon no fundamental interest...need not be drawn so as to fit with precision the legitimate purposes animating it. That (Alaska) might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

Baldwin v Fish and Game Commission of Montana, 436 US 371, 390 (1978), citing Hughes v Alexandria Scrap Corp., 426 US 794, 813 (1976). See also: New Orleans v Dukes, 427 U.S. 297, 303 (1976). But c.f. Burger, concurring opinion in Baldwin, supra.

The measure of latitude which courts will allow underinclusive or overinclusive statutes is not easily described. Existing case law does not admit of predictability in this regard. (SEE L. Tribe, American Constitutional Law, Sec. 16-4, (1978).) In general, though, it is underinclusiveness, rather than overinclusiveness, that poses dangers to the constitutionality of legislation.

"nothing opens the door to arbitrary action so effectively as to allow...officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency, Inc. v New York, 336 U.S. 106, 112-113 (1949).

In conclusion, it can be said with certainty that the "rural" classification of HB 288 is open to substantial attack on equal protection grounds. Since the record is not yet fully developed, it is too early to speak with much assurance as to the validity of such a classification. At the present time, however, the "rural/non-rural" dichotomy does not appear to be a reasonable means for discriminating among Alaskan users of fish and wildlife.

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 COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,)	
)	
Appellant,)	File No. A-210
)	
v.)	<u>O P I N I O N</u>
)	
DAVID ELUSKA,)	
)	
Appellee.)	[No. 456 - April 12, 1985]

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

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

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

SINGLETON, Judge.

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

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

(Footnote Continued)

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

(Footnote 1 Continued)

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

2. 5 AAC 81.140(a) provides:

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

3. Alaska Statute 44.62.030 provides:

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

Alaska Statute 11.81.220 provides:

All offenses defined by statute. No conduct constitutes an offense unless it is made an offense

- (1) by this title;
- (2) by a statute outside this title; or
- (3) by a regulation authorized by and lawfully adopted under a statute.

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

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

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

DISCUSSION

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

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

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

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

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

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

. . . .

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

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

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

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

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

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

(2) local residency; and

(3) availability of alternative resources.⁴

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

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

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

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

5. The state finds support for its position in a series of attorney general opinions and in the legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) P.L. 96-'87, 94 Stat. 2371 (1980), particularly in section 804 (codified at 16 U.S.C. § 3114 (1982)). The state points out that the federal statute was intentionally patterned after Alaska's subsistence law and provides virtually identical language to that found at AS 16.05.255(b). H.R. Rep. No. 96-97, Part 2, 96th Cong., 1st Sess. 191 (1980). The legislative history of section 804 specifies that:

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

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

and 5 AAC 81.140(a) are on their face necessarily inconsistent statutory requirements of subsection (a), since, as the state pair is at least conceivable that sufficient deer existed on Kodiak Island to meet all subsistence needs despite the bag limits, seasons and other restrictions set by the regulations. But cf. Madison v. Alaska Department of Fish and Game, ___ P.2d ___, ___ n.9, Op. No. 2911 at 12 n.9 (Alaska, February 22, 1985) (holding Board of Fisheries regulations defining subsistence fisheries inconsistent with AS 16.05.940(22), (23), and 16.05.251(b), which define "subsistence fishing" and "subsistence uses," and require the Board to adopt regulations permitting subsistence fishing).

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

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

(Footnote Continued)

see page 16
"restriction" means "an
sufficient impairment
of subsistence uses
i 7f

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

(Footnote 6 Continued)

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

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

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

I. Legislative Mandate

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

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

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

(Footnote Continued)

This bill is intended to provide a coordinated plan for clarifying what subsistence use of fish and game is and for documenting subsistence uses so that they can be integrated into fish and game management planning. This bill also provides a legislative framework for the State's policy of recognizing subsistence as the priority use of fish and game.

. . . .

Sections six and seven: These two sections, [AS 16.05.251(b) and .255(b)] which are virtually identical for the Boards of Fisheries and the Board of Game, are intended to statutorily set out the priority given to subsistence use of fish and game resources. While there are presently regulations for subsistence fishing, there is no mechanism for the promulgation of subsistence hunting regulations except with the creation of subsistence hunting areas pursuant to A.S. 16.05.257. Section seven would allow for these regulations so that subsistence hunting could be distinguished by separate regulations from sports hunting. Further, these sections set forth a priority of users if restrictions are needed because of the unavailability of resources. The priority list is an attempt to insure that those with the most dependence upon the fish and game resources are the last to be restricted.

If there is a need to restrict the taking of fish or game in order to avoid damaging the fish stocks or game populations, or in order to assure that subsistence users may continue to take fish or game, it is the intent of the Committee that sports or commercial use be restricted before subsistence use. If these restrictions are inadequate, restriction of subsistence use as well is authorized based upon the dependence on the resource, the local residence of the subsistence users, and the availability of alternate resources. It is the intent of the Committee that decisions and determinations by the Board of Fisheries and the Board of Game will be subject to complete public scrutiny and that reasons will be given for any action or any failure to act.

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

(Footnote 7 Continued)

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

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

II. Board's Inaction

The Board of Game has not promulgated a specific regulation governing subsistence hunting in Game Unit 8, nor has it made specific provisions for a subsistence defense or exception to prosecutions under regulations adopted pursuant to AS 16.05.255(a). The time that has elapsed from 1973 to the present has provided more than adequate opportunity for the Board to carry out its statutory responsibility. Consequently, we conclude that the Board has failed to carry out its responsibilities and, under the authority of United States Smelting, 469 P.2d at 141-42, dismissal of Eluska's prosecution might have been justified. We believe the supreme court's comments regarding the Local Boundary Commission in United States Smelting are particularly appropriate to this situation:

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

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

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

III. "Subsistence" Defense

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

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

"defense", other than an affirmative defense, means that

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

8. The defense recognized in this opinion exists only to the extent that the state has not adopted detailed regulations providing for subsistence hunting within an area. Such regulations when and if adopted would have the additional effect of guarding against abuses and would aid in record keeping to determine the true impact of subsistence hunting upon game management. See Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979). Where the state has adopted valid regulations recognizing the subsistence priority they would be controlling and the defense recognized here would no longer apply. Whether given regulations are valid is of course a question of administrative law for the court not a question of adjudicative fact for the jury. Cf. Madison, _____ P.2d at _____, Op. No. 2911 at 13-15; Kelly v. Zamarello, 426 P.2d 906, 917 (Alaska 1971).

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

In order to permit a pretrial dismissal of charges where appropriate⁹ and avoid delay in presenting such a defense, we will require a

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

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

(Footnote Continued)

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

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

(Footnote 9 Continued)

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

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

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

"Customary" and "traditional" are not further defined in the statute and therefore must be given their common meanings. AS 01.10.040. "Customary" means according to custom, the usual way of doing something. See Oxford American Dictionary 156 (1930). "Traditional" means according to tradition, a custom handed down from generation to generation

(Footnote Continued)

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

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

(Footnote 10 Continued)

especially without writing, a long established custom or method of procedure. Id. at 728. But see Madison, ___ P.2d at ___, Op. No. 2911 at 20: "customary and traditional" should be defined in accordance with legislative history. The words "customary and traditional" serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans. In addition, subsistence use is not strictly limited to rural communities.

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

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

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

11. See note 10 supra.

12. "Reckless." See note 9 supra.

13. See note 9 supra.

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

3. Equal Protection under Alaska's Constitution

Under Alaskan equal protection analysis, the legal inquiry revolves around Article I, Sec. 1, and Article VIII, Sec. 17 of the Alaska Constitution. Each of these provisions guarantees Alaskans equal protection under the law.

As noted above, the threshold determination has already been made by this author that the classification of "rural" is not inherently suspect and that subsistence use of fish and wildlife does not involve a fundamental right. Thus, the strict scrutiny test will not be reviewed in this analysis. "Middle level" scrutiny, likewise, does not appear appropriate. (SEE Craig v Boren, 429 U.S. 190 (1976).) Instead, it is the "rational basis" test that appears to be germane to review of HB 288.

Equality under the law under Article I, Sec. 1, of the Alaska Constitution has been explained in the following fashion:

"The guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group, when considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same."

Leege v Martin, supra, at 452.

Another formulation of the test has focused on the nature of the scrutiny to be used by courts.

...in order for a classification to survive judicial scrutiny, the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Isakson v Rickey, 550 P. 2d 359, 362 (Alaska, 1976).

Under this test,

Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.

Id.

Discrimination against non-rural Alaskans can be justified only if there is some reasonable basis for placing them in a different class from those living in rural areas. The reasonableness of the classification depends, in part, upon whether the class includes all persons who are similarly situated with respect to the purpose of the law, and none who are not so situated.

Based on the nature of the right involved,

a greater or lesser burden is placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective.

Apokedak, supra, at 1264.

The analysis presented herein with respect to equal protection under the U. S. Constitution, is applicable to a large extent in assessing HB 288's reasonableness under the Alaska Constitution. If a statute fails to pass muster under the federal rational basis test, it will also tend to fail the more exacting standards of the Alaska Constitution.

It appears that the "rural" classification of HB 288 excludes a large number of Alaskans from the subsistence priority, despite the lack of a conservation or enforcement need to do so. Those excluded are the non-rural residents whose uses of fish and game do not differ substantially from the uses of rural Alaskans.

Although use of fish and game is often characterized as a mere economic interest deserving only minimal scrutiny, State v Ostrosky, 667 P. 2d 1184, 1193-1194 (Alaska, 1983), the magnitude of the importance of fish and wildlife to certain individuals may justify more intensive judicial review. That issue remains undecided at this time, however, so this analysis will proceed under the assumption that the "rational basis" test is applicable.

Viewed in allocative terms, discrimination on the basis of where individual Alaskans may be domiciled does not appear to have a rational basis. The customary and traditional uses of fish and game are often so similar as between rural and non-rural Alaskans, that there does not appear to be a reasonable basis for granting priority rights only to rural Alaskans. (As noted above, the Alaska Supreme Court has already given explicit recognition to the validity of urban subsistence uses in Madison.)

Thus, the "rural" classification scheme of HB 288 appears to be subject to substantial attack under Article I, Sec. 1, of the Alaska Constitution. Unless and until further reasons are adduced by the Legislature to support the "rural" classification, it appears to be arbitrary and a violation of the Alaska Constitutional guarantee of equal protection.

A separate equal protection provision appears in Alaska's Constitution in the Natural Resources Article, Article VIII, Sec. 17. This constitutional provision may require a more stringent review of actions that are challenged as violating equal protection. Gilman v Martin, 662 P. 2d 120, 126 (Alaska, 1983).

The Commentary by the Committee on Natural Resources, which drafted that part of Alaska's Constitution, wrote "This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state."

The intent of the delegates to Alaska's Constitutional Convention in drafting this provision was "simply based on the Fourteenth Amendment" to the U. S. Constitution. The precise wording of Section 17 was deliberately lifted wholesale from a 1936 State of Washington decision. (SEE Proceedings of the Constitutional Convention p. 2452.)

State v Huse, 59 P. 2d 1101 (Wash., 1936) is the case from which Section 17 derives. The regulation at issue therein sought to exclude from eligibility from fishing all individuals except those who had been licensed in 1932 or 1933. The regulation was overturned because it was founded on "mere fortuitous circumstances." Huse, at 1104.

The following passages from Huse are, perhaps, illustrative of how an Alaskan court would apply Section 17 to HB 288.

...such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state."

Huse, supra, at 1105.

The "rural" classification approach of HB 288 does not appear to run afoul of this rule. Any Alaskan could presumably become "rural" by changing his or her place of abode, thereby attaining eligibility for the subsistence priority.

Other language from Huse is also instructive.

A classification, to be legal and valid, must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act in respect to which the classification is made. The distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law and may not rest upon a mere fortuitous characteristic or quality of person, or upon personal designation. In short, the classification cannot be an arbitrary selection. Id.

This aspect of the equal protection rule of Article VIII, Sec. 17, appears to be violated by HB 288. In my opinion, the "rural" classification of HB 288 has not yet been adequately explained as bearing a rational relation to the purposes of the bill in order to allow HB 288 to pass muster under the equal protection analysis of Article VIII, Sec. 17.

It is possible that legislative history yet to be created may provide adequate justification to sustain the "rural" classification scheme of HB 288. The Alaska Legislature must address the factors noted in this analysis if it is to provide an adequate record for a court to uphold HB 288 as a valid exercise of legislative power.

For the reasons adduced above, it is doubtful if any amount of legislative history could immunize HB 288 from constitutional attack on equal protection grounds. The questionable nature of the "rural" classification, combined with the political volatility of fish and wildlife allocation, provide ample reason to anticipate a constitutional challenge if HB 288 is adopted in its present form.

B. Common Use

Article VIII, Sec. 3, of the Alaska Constitution reserves fish and wildlife to the people for common use. The history of Alaska's Constitution reveals that this section was primarily intended to recognize the role of the "public trust," or jus publicum, in Alaska. Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 914 (Alaska, 1961); Glenovich v Norenberg, 364 F. Supp. 1286, 1291 (D. Alaska, 1972).

The Commentary pertinent to the "common use" section of Article VIII and written by the drafters' Natural Resources Committee states simply:

These resources are subject to a private right only when they have been acquired or utilized as provided by law. For example, a private person has no right to buy and sell wild animals in their natural state, but once an animal is taken in compliance with law, it becomes the property of the taker, subject to use or disposition within the law."

The common use provision of the Alaska Constitution does not appear to preclude passage of HB 288. The bill in its current form does not convey any property rights in fish or wildlife that are ferae naturae. Thus, since HB 288 does not alienate any fish or wildlife, the common use provision of Alaska's Constitution does not appear to be violated.

C. No Exclusive Right of Fishery

Martin Friedman and Arthur "Chuck" Robinson, the prevailing attorneys in the Madison case, raised the issue of whether or not a "rural" classification system would run afoul of Article VIII, Sec. 15 of the Alaska Constitution. (p. 13, Memorandum of April 1, 1985 from Robinson and Friedman to the Alaska Legislature.) It is my opinion that their analysis of the law on this point is erroneous.

Article VIII, Sec. 15, of the Alaska Constitution forbids the creation of an exclusive right or privilege of fishery. This Alaska Constitutional provision derives from the (federal) White Act, 48 USC 222. (SEE Hynes v Grimes Packing Co., 165 F. 2d 323 (9th Cir. 1947).)

The meaning of the phrase "exclusive right of fishery" is that classes of use may not be created for which some individuals can never qualify. Id. Since, at least theoretically, any person could move from a non-rural area to a rural area in Alaska, this constitutional provision would not forbid use of the term "rural" as it is used in HB 288. An individual could qualify for the priority allocation of HB 288 simply by moving from an urban center to a rural area; nobody is permanently excluded from the class of persons to whom HB 288's priority would apply.

II. IMPACT ON NON-SUBSISTENCE USES

ADF&G Commissioner Collinsworth has raised the spectre of closing certain sport and commercial fisheries if the Madison decision is not superceded by legislative action. At the same time, Commissioner Collinsworth also recognizes that these fears may be entirely chimerical. (SEE pp. 1-2, Memorandum of March 15, 1985 from Commr. Collinsworth to Ron Jolin, Chrmn., Jt. Bds.)

Because ADF&G, Subsistence Division, has failed to adequately identify subsistence needs in Alaska (AS 16.05.094), and because of prior regulatory restraints and inadequate harvest report data, it is impossible to predict what level of subsistence demand for fishery and game resources exists in Alaska today. For identical reasons, it is impossible to predict the level of subsistence demand likely to emerge in 1985, whether the users are rural or non-rural.

Fears of commercial or sport closures required to comply with the subsistence priority are entirely speculative. It would appear irresponsible to give undue weight to such a scenario without more positive data on which to base a likelihood of its occurrence. The most responsible position appears to be that while such closures are a theoretical and legal possibility, there are no data at this time on which to base an estimate of the probability that such a "parade of horrors" will actually take place in 1985.

It appears true that the Madison decision has the potential to strongly impact non-subsistence uses. The Alaska Supreme Court has written in Madison that subsistence is not limited to "rural" Alaskans, and is not limited to Native Alaskans. Slip Op. at pp. 21, 23. Thus, apparently any Alaskan may qualify and come under the aegis of the subsistence priority. Slip Op. at p. 23-24, fn 13. Also, "customary and traditional" use was not intended to be restrictive, but rather was intended to be a recognition of the fact that individuals in Alaska have historically used wild resources for subsistence uses.

It is undeniable that the subsistence law accords a "priority" for subsistence uses. A priority is defined as "legal precedence over rights in the same subject matter." (Webster's Ninth New Collegiate Dictionary.) Alaska's Supreme Court has interpreted the subsistence priority so that the Board of Fisheries and the Board of Game may not restrict subsistence at all in an area in which sport or commercial uses are permitted. Madison, Slip Op. at 15-17. SEE ALSO State v Eluska, Alaska Court of Appeals Op. No. 456 (April 12, 1985), Slip Op. at pp. 7-8, fn. 6. This fact of the mechanics of priority allocation systems will not be altered by passage or defeat of HB 288.

The Board of Fisheries possesses regulatory authority to define the methods and means of harvest for subsistence fishing. There does not appear to be any obstacle to including within those methods and means the hook and line commonly used by many fishermen in Alaska to provide for "direct personal or family consumption" of fish. Indeed, it may be that most "sport" uses already qualify as "subsistence" uses. (SEE State v Eluska, supra.)

If "sport" fishermen are brought within the rubric of "subsistence" fishing by operation of existing law, or by a change in existing definitions, the Board of Fisheries will possess only limited discretion to allocate the resource among these subsistence users. If stocks are inadequate, the three, more specific, criteria of the "second tier" come into play, and the legal difficulties of the "rural" categorization are mitigated by the leavening presence of the "dependency" and "alternative resources" requirements of existing law. AS 16.05.251 (b). (Where hunting is concerned, the methods and means used by all hunters are already identical, so no change of this ilk would appear meaningful. AS 16.05.255 (b).)

Conflicts with the groups now denominated as "sport" users of wildlife and fish could be partially avoided if sport and subsistence uses were lumped under the same heading. It is foolish, however, to think that definitional legerdemain, either in statute or in regulation, will alter the fundamental fact that Alaska today has an insufficient supply of many wildlife and fishery resources to satisfy the constantly increasing number of people who seek to use those resources. This fundamental fact will not change, regardless of the passage or demise of HB 288.

Commercial uses of fish cannot be redefined to benefit from the subsistence priority in the same way as recreational fishing and hunting. HB 288 begs the issue on this fundamental policy question. Even if HB 288 passes, allocation conflicts between commercial and non-commercial interests will remain, and will intensify, in Cook Inlet, Prince William Sound, Bristol Bay, and other parts of Alaska. HB 288 is not a magic panacea, and its swift passage will neither resolve nor prevent continued allocative competition.

It is inescapable that as long as an absolute "priority" for any beneficial use of fish or game is present in Alaskan law, there will be some risk of diminution, or closure, of commercial uses in order to fully provide for the priority use. This risk will remain whether or not the priority use is qualified by the term "rural." SEE Madison, supra.

This basic policy decision, i.e., whether or not to accord any beneficial use of fish and game in Alaska a priority, rests with the Alaska Legislature and the U. S. Congress.

III. PROBLEMS RAISED BY INSERTING "RURAL"

A. The Problem of Defining "rural" in a Timely Fashion

HB 288 provides for the immediate effectiveness of that Act in accordance with AS 01.10.070 (c). Assuming, arguendo, that HB 288 is passed by the Legislature and signed by the Governor by May 1, 1985, the Board of Game and the Board of Fisheries will not have time to adopt regulations implementing or making specific how the change to a "rural" priority is to be implemented until several months have elapsed.

The Alaska Administrative Procedure Act (AS 44.62.180-.290), as well as regulations adopted by the Joint Boards of Fisheries and Game, (5 AAC 96) require time for public notice and comment, including local Fish and Game Advisory Committee and Regional Council participation, plus review by the Department of Law, before a regulation becomes effective.

Only by defining "rural" in emergency regulations can the delays necessitated by the APA's notice and comment provisions be circumvented.

It is highly questionable whether adoption of a regulatory definition of "rural" would be appropriate for emergency regulatory action by either Board. AS 44.62.250,.270.

Assuming, arguendo, that it would be proper to define "rural" by means of an emergency regulation, it should be noted that there are substantial drawbacks to such an approach from the standpoint of sound administrative practice and public policy.

The APA procedures of public notice and comment are designed to inform government agencies as well as provide the public with a "fair shake" in government decisions. (SEE NLRB v Wyman Gordon Co., 394 US 759, 764((1969).) Emergency regulations deprive the government of the chance to hear the full range of public opinion. At the same time, emergency regulations also deprive the public of an opportunity to comment on the laws by which they will be governed. It would seem to be sound public policy to allow for a full discussion, in public, of the benefits and detriments of the course charted by HB 288.

B. The problem of properly defining "rural"

Courts generally give substantial deference to regulations that involve complex subject matters, fundamental policy formulations, or administrative expertise. Kelly v Zamarello, 486 P. 2d 906, 917 (Alaska, 1971). However, when the Board of Game and the Board of Fisheries seek to define "rural", they will be dealing in statutory interpretation, a matter in which courts, not the Boards, have special competency. Commercial Fisheries Entry Commission v Templeton, 598 P. 2d 77, 80 (Alaska, 1979).

Thus, assuming HB 288 is passed into law, courts will apply the "substitution of judgment" standard about the meaning of "rural" which the Boards employ, even if the Boards' interpretation has a reasonable basis in law. Earth Resources Co. v Department of Revenue, 665 P. 2d 960, 965 (Alaska, 1983).

The hurried tempo of legislative consideration for HB 288 is likely to provide a paucity of legislative history for reviewing courts that will pass on the adequacy of the Boards' definition of "rural." In the absence of adequate legislative history for HB 288, it becomes more likely that this critical facet of the fish and game management process will be handed over, by default, to the courts.

IV. CONCLUSION

A. Constitutionality

HB 288 invites attack on grounds of being violative of the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution, Article 1, Sec. 1 of the Alaska Constitution, and Article VIII, Sec. 17 of the Alaska Constitution. As legislative history of HB 288 becomes more fully developed, it may be possible to explain the defects in the bill discussed above, thereby "curing" its perceived legal deficiencies.

HB 288 does not appear to pose any problems of constitutional dimension under Article VIII, Sec. 3, or Article VIII, Sec. 15, of the Alaska Constitution.

B. Impacts on Non-Subsistence Uses

The impacts of HB 288 on non-subsistence users are remote and highly speculative. Passage of HB 288 will not eliminate the allocative priority which subsistence uses presently enjoy over other uses; it merely seeks to limit the class of persons for whom that priority operates. Regardless of the passage or defeat of HB 288, it will be necessary to reduce (or in extreme cases, to eliminate) non-subsistence uses before applying restrictions to subsistence take. AS 16.05.251 (b); AS 16.05.255 (b); Madison, supra, pp. 7, 16-17; Eluska, supra, pp. 7-8, fn. 6.

C. Caveat

Please let me reiterate the fact that the analysis and opinion presented herein should be regarded as introductory, and not as a final and definitive statement. The complexity of the legal issues raised by HB 288 could easily benefit from substantial additional study and analysis.

It is critically important that Alaska adopt an allocative system for fish and wildlife that is fair to all users, as well as being biologically sound. I hope that this analysis will be useful in moving towards that goal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory F. Cook', with a long horizontal flourish extending to the right.

Gregory F. Cook

Board of Game Meeting, 6/10/85

1A, 005 Mr. Collinworth - Good morning, and we welcome you all to Juneau on a lovely day. It's too bad we're not outside, rather than in here dealing with a series of difficult issues. I appreciate the fact that the Board members have been called to a special session to deal with the series of events that have led to a situation which required the coming together of the Board to take some remedial action to deal with the results of some recent court decisions. I think we're all aware and have no doubt read and contemplated the Madison and Eluska decisions, a Supreme Court and an Appellate Court decision, and the necessity to take some remedial, regulatory action by the Division or the Game Board. I have spend a considerable amount of time in the last few months discussing this issue with the Department of Law and the Department of Public Safety and folks in the Legislature before the session came to a close, trying to make some determinations of what kind of action would be required of the Board to provide us a legal regulatory framework, an enforceable framework, so that we can move through this summer and fall hunting seasons. I want to assure you that we retain and in discussion with the Department of Law we do retain and will use the Commissioner's authority, emergency order authority, to protect the resource. I am assured by the Department of Law that when it becomes, or if it does become necessary for us to issue an emergency closure closing all taking of animals, that the Department of Law will and the Department of Public Safety will vigorously enforce that action. There is, however, the need to undertake some regulatory action to provide a broader regulatory framework for this coming season. We have spent a great deal of time, the staff has spent a great deal of time trying to develop some alternatives that we might propose to you that will in fact develop a regulatory framework that is in reasonable compliance with the State laws as has been interpreted by the recent court decisions, and we'll be prepared to offer those to you and to work very closely with you over the course of the next several days to get that reasonable compliance so that we do have an enforceable framework.

It's an unfortunate situation that we're in, because what we're really talking about is a fairly short term solution to the subsistence issue. It seems likely that the regulations that we develop to come into reasonable compliance are going to be fairly short term because of two likely events, or one of two likely events. Either the Legislature when they come into session will take some action to change the statutory framework that we're dealing with, or if failing that, that the Federal Government will intervene and resume or assume management on Federal lands. So we have a difficult chore this week to see if we can bring our regulations into reasonable compliance so that we do have a regulatory framework that we can enforce against and manage against for this coming series of seasons. The Department of Law has spent a great deal of time both in their civil and criminal divisions looking at the court decisions, looking again at the state subsistence law, and then providing us some direction with regard to the actions that we need to take. We have needed to take some action both on the fisheries side and on the game side, and we have asked the Attorney General to join us this morning to provide you some additional comments on the issue, and of course Larri Spengler - we have been working closely with her over the last few months in trying to deal with the subsistence issue. So

their regulations and to maintain essentially the system as we had known it heretofore.

We are thus faced, whether we like it or not, we are thus faced with two court decisions which compel us to advise you that there are certain things, therefore, that can and cannot be done under the existing system; that is, under the existing statutes as they now are, as interpreted by our Supreme Court and our Court of Appeals. We must take actions as best we can until such time as the Legislature might choose to address what we would like to see in the nature of amendments to those statutes. And basically, as a result of both of these decisions, both the civil division and criminal division of my department engaged in an extensive internal analysis and tried to determine what we thought could still be done under the existing statutory scheme, as interpreted by our courts, to maximize our continued ability to manage our fish and game resources to the maximum extent that we can, and preserve as much of the system as existed heretofore, absent statutory changes.

So, basically, we then set up kind of an internal task force made up of the members of my civil division and members of my criminal division for purposes of determining what we now have in the way of guidelines for the Department of Fish and Game and the Department of Public Safety in terms of game management and enforcement.

In order to have enforceable regulations this Board, we believe, must address all hunts participated in by Alaskans for food, including permit drawing hunts. I know you have copies of some of the memorandums which have been issued as a result of that internal task force, and as a practical matter the combination of those two cases means that no poaching cases can be prosecuted except where a season is closed year round or by emergency order for conservation reasons. I think that that in essence summarizes kind of where we are. I can tell you as a result of our analysis of those two decisions, we believe that there are things that can be done. First of all, we believe that it is essential that this board promulgate some separate subsistence hunting regulations, and the purpose of this meeting is of course to consider the adoption of emergency regulations consistent with this court decision, and after the Board does this, in our legal judgment, then all hunting regulations will be enforceable. Meanwhile, however, until such time as this Board does adopt some emergency subsistence regulations, enforcement in our judgment can continue and we will continue as usual against first, non-resident hunting violations; second, hunting violations by commercial operators; third, non-possessory hunting violations such as wanton waste and same day airborne, and any hunting or fishing when the season is entirely closed because any additional harvest, including subsistence, could jeopardize the resource. That in our judgment is the existing list of hunting violations which we believe can continue to be enforced under the current situation.

CORRECTION

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

Board of Game Meeting, 6/10/85

1A, 005 Mr. Collinworth - Good morning, and we welcome you all to Juneau on a lovely day. It's too bad we're not outside, rather than in here dealing with a series of difficult issues. I appreciate the fact that the Board members have been called to a special session to deal with the series of events that have led to a situation which required the coming together of the Board to take some remedial action to deal with the results of some recent court decisions. I think we're all aware and have no doubt read and contemplated the Madison and Eluska decisions, a Supreme Court and an Appellate Court decision, and the necessity to take some remedial, regulatory action by the Division or the Game Board. I have spend a considerable amount of time in the last few months discussing this issue with the Department of Law and the Department of Public Safety and folks in the Legislature before the session came to a close, trying to make some determinations of what kind of action would be required of the Board to provide us a legal regulatory framework, an enforceable framework, so that we can move through this summer and fall hunting seasons. I want to assure you that we retain and in discussion with the Department of Law we do retain and will use the Commissioner's authority, emergency order authority, to protect the resource. I am assured by the Department of Law that when it becomes, or if it does become necessary for us to issue an emergency closure closing all taking of animals, that the Department of Law will and the Department of Public Safety will vigorously enforce that action. There is, however, the need to undertake some regulatory action to provide a broader regulatory framework for this coming season. We have spent a great deal of time, the staff has spent a great deal of time trying to develop some alternatives that we might propose to you that will in fact develop a regulatory framework that is in reasonable compliance with the State laws as has been interpreted by the recent court decisions, and we'll be prepared to offer those to you and to work very closely with you over the course of the next several days to get that reasonable compliance so that we do have an enforceable framework.

It's an unfortunate situation that we're in, because what we're really talking about is a fairly short term solution to the subsistence issue. It seems likely that the regulations that we develop to come into reasonable compliance are going to be fairly short term because of two likely events, or one of two likely events. Either the Legislature when they come into session will take some action to change the statutory framework that we're dealing with, or if failing that, that the Federal Government will intervene and resume or assume management on Federal lands. So we have a difficult chore this week to see if we can bring our regulations into reasonable compliance so that we do have a regulatory framework that we can enforce against and manage against for this coming series of seasons. The Department of Law has spent a great deal of time both in their civil and criminal divisions looking at the court decisions, looking again at the state subsistence law, and then providing us some direction with regard to the actions that we need to take. We have needed to take some action both on the fisheries side and on the game side, and we have asked the Attorney General to join us this morning to provide you some additional comments on the issue, and of course Larri Spengler - we have been working closely with her over the last few months in trying to deal with the subsistence issue. So

unless you have any questions, I'd ask Norman to make any comments that he might have.

1A, 061, Attorney General Norman Gorsuch - Thank you Don. It's a privilege to be here with you this morning to discuss an issue which I think is of great importance to many Alaskans, and your regulatory responsibilities in the area of game management are, of course, extremely important and your actions here are, in my judgment, essential and necessary with respect to the adoption of subsistence regulations if we are to have meaningful enforcement of our game laws and game management decisions. Just to give you a little background, the key, there are two cases with which I'm sure you are all familiar and have received much publicity and discussion in the last few months. The first one was the Supreme Court decision Madison vs. the Alaska Department of Fish and Game, and basically what Madison says is that it expanded subsistence eligibility to include in that case fishing, but since the language is virtually identical in the statutes with respect to game, to include hunting by all Alaska residents of game population, which have been hunted for food in the past. Earlier, if you recall, there was a rural bias to the subsistence user definition. Madison said all Alaskans are eligible for subsistence fishing and hunting. So we had first of all a dramatic broadening of the category of those eligible to participate in a subsistence hunt or fishery, and then this was followed shortly thereafter by a case by our Court of Appeals, which is the intermediate court in the State of Alaska, and that court which handles appeals from criminal cases handled by the lower court. And in that case, the Court of Appeals was discussing the case of a man who took deer out of season in Kodiak and he argued that he was subsistence hunting, and therefore could not be convicted because there were no regulations for Kodiak authorizing subsistence hunting separate from the general hunting regulations. The Court agreed with him and created what for us is an extremely serious problem. They created what's called a subsistence defense, that can be used in similar cases. And basically, because there were no subsistence regulations promulgated for that particular game unit, what happened was the Court said there was an obligation to promulgate those regulations. It was therefore noncompliance by the executive branch of state government with what they interpreted to be the clear legislative intent, and this person could not be held to be guilty of a violation if in fact the state did not carry out its function in promulgating subsistence regulations.

So what we have here, is that between the two cases, Madison and Eluska, this means that all Alaskans, all Alaskans, can use a subsistence defense. As a result of these two decisions, the administration as a result of the Madison decision clearly, and as a result of the problems created by the Eluska case, the administration introduced a bill which was designed to recreate the status quo by making some minor changes in the existing subsistence statutes to create a personal use fishery and to limit subsistence hunting and fishing to rural residents. The Legislature did not pass that bill. It passed the House, but did not pass the Senate. Now what that bill would have done would have considerably narrowed the universe of the problem that we have and would have allowed the fish and game boards both to adjust

their regulations and to maintain essentially the system as we had known it heretofore.

We are thus faced, whether we like it or not, we are thus faced with two court decisions which compel us to advise you that there are certain things, therefore, that can and cannot be done under the existing system; that is, under the existing statutes as they now are, as interpreted by our Supreme Court and our Court of Appeals, we must take actions as best we can until such time as the Legislature might choose to address what we would like to see in the nature of amendments to those statutes. And basically, as a result of both of these decisions, both the civil division and criminal division of my department engaged in an extensive internal analysis and tried to determine what we thought could still be done under the existing statutory scheme, as interpreted by our courts, to maximize our continued ability to manage our fish and game resources to the maximum extent that we can, and preserve as much of the system as existed heretofore, absent statutory changes.

So, basically, we then set up kind of an internal task force made up of the members of my civil division and members of my criminal division for purposes of determining what we now have in the way of guidelines for the Department of Fish and Game and the Department of Public Safety in terms of game management and enforcement.

In order to have enforceable regulations this Board, we believe, must address all hunts participated in by Alaskans for food, including permit drawing hunts. I know you have copies of some of the memorandums which have been issued as a result of that internal task force, and as a practical matter the combination of those two cases means that no poaching cases can be prosecuted except where a season is closed year round or by emergency order for conservation reasons. I think that that in essence summarizes kind of where we are. I can tell you as a result of our analysis of those two decisions, we believe that there are things that can be done. First of all, we believe that it is essential that this board promulgate some separate subsistence hunting regulations, and the purpose of this meeting is of course to consider the adoption of emergency regulations consistent with this court decision, and after the Board does this, in our legal judgment, then all hunting regulations will be enforceable. Meanwhile, however, until such time as this Board does adopt some emergency subsistence regulations, enforcement in our judgment can continue and we will continue as usual against first, non-resident hunting violations; second, hunting violations by commercial operators; third, non-possessory hunting violations such as wanton waste and same day airborne, and any hunting or fishing when the season is entirely closed because any additional harvest, including subsistence, could jeopardize the resource. That in our judgment is the existing list of hunting violations which we believe can continue to be enforced under the current situation.

So the purpose of my appearing here today is to emphasize to you very strongly that many, many hours of internal staff time between the Departments of Public Safety, Fish and Game, and Law have gone into a careful and detailed analysis of where we think we are and what we think we have now in the way of an enforcement scheme based upon the facts as

we now have them. And it is our conclusion that it is very essential that this board work very carefully with the Department of Fish and Game and Larri Spengler and others of my department to come to grips with this problem and take the necessary steps to promulgate some emergency regulations consistent with these court decisions. So that's basically all I have done, and thank you for giving me the opportunity to talk to everybody.

. . . .

Dennis Kelso - Thank you Madam Chair. Perhaps I can give a general description of how we have proceeded and then I will, as soon as Larri gets here, I will turn it over to her.

During the past few weeks as both Commissioner Collinsworth and Attorney General Gorsuch mentioned, we've been working very closely with both divisions of the Department of Law to try to come up with a formulation that will provide enforceability throughout the season and will be consistent with the requirements of the Madison and the Eluska cases. What we have done is to start at the field level with both Game Division and Subsistence Division staffs. They put together a form, one for subsistence, one for game, which we basically exchanged between divisions so we knew that they would be addressing the same problems. And then the field level began filling out those forms with available information and submitted them to their regional supervisors and then eventually down here to headquarters. What you will have in front of you by the time you begin your deliberations will be not only your general board book, but also a three ring notebook containing summaries of data from Game Division and summaries of data from Subsistence Division. Now the Subsistence Division data has basically been reworked by Steve Behnke so that it is as specifically targeted as possible to the same questions you'll be facing and the Game Division data is broken out on a species basis. We can go into that in much more detail when we actually get to proposals.

What we have tried to do is find a framework that you can use to accomplish two things. First is adopting a set of regulations separate for subsistence. That is primarily directed to solving the Eluska problem. But the Eluska case recognizes that subsistence uses now must meet the standards set in the Madison decision, so in doing that we are having to come to grips with the underlying problem that we began to talk about in April. Of course we didn't expect that we would have to shorten the time frame. You had originally indicated that we would convene again in September to do the work that Madison required, but now it's necessary to do both.

So what we basically have is field data that came in from the Game Division, field data that came in from Subsistence Division. We won't go into great detail on that yet. The framework we have to work with is the one that is required by the courts, and that the Department of Law has actually developed, so I don't want to belabor this at this point. If either Steve Behnke or Bob Hinman has anything to add right now, please feel free to do so. Lou Pamplin will be joining us in about two hours and will be here for the balance of the meeting. Steve or Bob? Then, Madam Chair, with your permission I'll turn it over to Larri.

Brenda Johnson - Larri Spengler.

Larri Spengler - I have an attempt at condensing all this onto one page which I thought might be helpful maybe. It is of course incredibly overly simplified in order to make it fit on one page, but I thought as we go through the meeting and get disoriented as to why we're going through all this it would be helpful to have something to look at just to remember why we got here and where we're trying to get.

There are as has been mentioned already, two cases that bring us here. It's a combination of Madison and Eluska, and although chronologically Madison was decided first in February and Eluska was decided in April, I think it's more helpful to talk about Eluska first and then go back to Madison and see really what the extent of the problem is.

Now Eluska was not decided, had not been decided when you were meeting in April. It was issued very shortly after the Game Board adjourned. In this state we have a court system basically with three levels. There's the Trial Court level, and that's the District and Superior Courts where people who file suit against one another go in for trials, or people that get charged with criminal activity, Fish and Game violations, get tried. There's a jury there and a judge, and they present evidence and so forth. The second level court is the Court of Appeals, and this is a court that was created not very long ago in the state's history, a couple of years ago, because the Supreme Court which is the highest court in the state was getting totally overloaded with work, and so they created this midlevel court which is the court that handles all criminal appeals. If there's a crime charged in a trial court and either the state (which is very rare, only in certain circumstances) appeals, or the defendant appeals, then this Court of Appeals handles it first. And that's the last appeal they get of right. They can ask the Supreme Court to look at it, whoever after the Court of Appeals has finished with it, any one of the parties can ask that the Supreme Court review it. But they don't have a right to an appeal. You have a right to appeal to the Court of Appeals, but not to the Supreme Court.

If you have a civil case on the other hand, where crime isn't involved, like the Madison decision was, or any typical you know contract dispute, any kind of civil case that doesn't involve crime, the person has a right to appeal to the Supreme Court. So you always get

one right of appeal. It's just that the criminal cases go to the Court of Appeals and the civil cases go to the Supreme Court. The criminal cases can get to the Supreme Court if the Supreme Court agrees to hear them, and they only do that if there are extraordinary circumstances involved.

So the Eluska case is a Court of Appeals case. It's officially called State vs. Eluska, and it came as Norm mentioned out of Kodiak. A man, Mr. Eluska in fact, was convicted, or was charged rather, with taking deer out of season. And he argued that there were no subsistence hunting regulations adopted for Kodiak. And since there were no subsistence hunting regulations adopted for Kodiak, he, being a subsistence hunter as he asserted, had a right to go hunting and that he couldn't be charged with a crime. And the Trial Court bought his argument. So, all right, the state said you know, this is untenable. The Board of Game has always accommodated subsistence hunting in the general hunting regulations except in some specific cases. So we appealed it to the Court of Appeals. And this was handled out of the Anchorage office. The Court of Appeals was ready to issue this decision apparently just when the Supreme Court issued the Madison decision in February. And then the Court of Appeals jerked the decision back, didn't issue it and reassessed it and analyzed Madison, and rewrote their decision so it references Madison throughout. It is replete with footnotes to Madison, and in fact it's a footnote at the end that explains that it was ready to issue it. That's not some big secret. They pulled it back and then they issued it finally in April, and the Court of Appeals held that the Trial Court was right, that under the state subsistence law, the Board has an obligation to adopt separate subsistence hunting regulations, and that unless there are separate subsistence hunting regulations on a game, for a game population, if there are subsistence uses of that game population, then people can subsistence, can hunt out of season and can argue that they were subsistence hunting, there were no subsistence regs and therefore they should get off until the Board adopts subsistence regs.

Now this is called, the Eluska court called it the subsistence defense, and it's a specific defense just created now by the court. It's only available in cases where there are not subsistence hunting regulations called that, separated out from general hunting regulations, so there are a few cases where right now, putting aside the Madison problems, there are a couple of places where the Game Board does have separate subsistence hunting regulations on particular game populations. In those situations, putting the problem of Madison aside again, the subsistence defense cannot be raised. So, for example, in the Unit 13 moose, I think there's a separate subsistence moose hunt on the books, separate from the general moose hunt. Under the Court of Appeals decision, in that situation, putting again aside the Madison problem, the subsistence defense couldn't be raised, cause there's two sets of regulations. One is subsistence hunting and one is general hunting, or sport hunting, whatever we choose to call it.

So the Court of Appeals basically said people are supposed to follow the regulations, but the state is supposed to follow the law too, and the law requires separate subsistence hunting regulations. Now this hasn't been a problem particularly on the fish side, because fishing, since statehood there has been a statutory definition based on gear type of subsistence fishing and of sport fishing. So subsistence fishing has always been until the subsistence law passed, fishing by nets for personal use, and sport fishing is fishing by rod and reel for personal use. So always the Fish Board has had two sets of regulations, sport fishing regulations and subsistence regulations. So the Fish Board is not going to be faced with as much of a sweeping problem as the Game Board is on this.

The Game Board, on the other hand, has not historically done that because virtually everyone hunts with the same method, and there's no gear type distinction like that. So that's sort of the history of why there's more of a problem for the Game Board than the Fish Board.

Now the Eluska decision means, then, that if you don't--not you, but well it is you in fact--if one doesn't, if the Game Board doesn't have separate subsistence hunting regulations, there can be no enforcement on poaching unless there's a biological problem, and for that reason the resource is closed.

I'll come back after I talk about Madison to the Chief Prosecutor's memo and his assessment of the chances of prosecution and his decision that no prosecution will occur. So I'll get back to that in a moment. After I talk about Madison, then maybe we'll stop for some questions about the cases and then go on to his assessment and where we need to go from here.

Now, as I said I'm going out of chronological order. Eluska came out in April. Now if you think about where we stood before Madison came out, let's think back to pre-Madison, and subsistence uses were identified by the Board as customary, traditional uses by rural Alaska residents that were identified by the eight criteria set out in the regulations, what you would have had to do if Eluska, under Eluska, in a pre-Madison situation, was to go through the regulations and adopt subsistence hunting regulations for communities or areas where there were customary and traditional uses under those criteria. It would not have been a statewide requirement. So a number of hunts might not have even had to have two sets of regulations. The division of subsistence hunting regulations and general hunting regulations would have been much different. Now, as we're going to see, subsistence hunting is practically all the hunting in the state. Before Madison, subsistence hunting was this very narrow band.

What Madison held was that the Board could not identify subsistence hunting in terms of the uses of an area or community, could not require, could not use the rural definition, could not use residency as a

qualification for subsistence hunting in initially identifying subsistence hunting. Therefore, any Alaskan basically, under the court's direction, could qualify for subsistence hunting. Subsistence hunting is defined as hunting for subsistence uses, and subsistence uses is defined under IIa here, there are some of the catch words from the definition, subsistence uses of game for food, shelter, fuel, clothing, tools, transportation, customary trade, barter or sharing. Now, after Madison, subsistence hunting means hunting of a game population by any Alaskan, no matter where the Alaskan lives, for any of those purposes set out there. And the first step of the subsistence statute requires that unless sustained yield will be jeopardized, unless the resource will be harmed, subsistence hunting has to be authorized if the game population has been hunted in the past for food, shelter, fuel, clothing, tools, transportation, customary trade, barter or sharing.

OK, so if that has occurred in the past, then it has to be authorized again unless the resource will be hurt.

Now the second step of the subsistence law, of the statute, is that if subsistence uses must be restricted, I'm sorry, if hunting must be restricted, then subsistence gets the priority. And Eluska has said that restricted means significantly impaired. So if, the second step under Madison is that if subsistence hunting must be restricted, significantly impaired, to protect the resource, then non-subsistence uses have to be eliminated before subsistence uses can be restricted.

Now non-subsistence uses in hunting is a much different band again than it is in fishing. In fishing we have commercial fishing and sport fishing, both of which are categories widely participated in by Alaskans as well as non-Alaskans. In hunting, there's not a similar distinction. There is really no commercial hunting as such. Guiding is a commercial activity, but the meat is not harvested for sale, and you don't have control over guides anyway, you just have control over hunting. The only non-subsistence hunting that's easily identifiable or that you can point at is hunting by non state residents, because the definition of subsistence uses, subsistence hunting, specifically talks about hunting by Alaska residents.

So, if we're in a situation where subsistence hunting has to be restricted, significantly impaired, the first thing you have to do is cut out non state resident hunting. That's the second step of the law. That's the priority kicking in. If there's a problem, non-subsistence uses are the first to go. And now that subsistence uses after Madison mean all Alaskans, the only thing left to go is non Alaskans, so they go first.

Then if it's still necessary, if we're still in a situation where subsistence uses have to be significantly restricted, the statute sets out and Madison repeated three criteria that you are to use to decide who gets to go hunting, who gets which hunting opportunities among the

pool of subsistence users which is now all Alaskans. And those three criteria which I suspect we are all going to get very sick of before this meeting is over, are customary and direct dependence upon the resource as a mainstay of one's livelihood, local residency, and availability of alternative resources.

Now just to go back a step again and think about Eluska, the Court of Appeals decision, held that you have to have separate subsistence hunting regulations separate from the general hunting regulations or else poaching will not be able to be prosecuted. Now that's just off here by itself. Madison is what defines what is subsistence hunting now, and subsistence hunting, which must be authorized by regulation or else there can be no prosecution, is all hunting by Alaskans of game populations which have been hunted for food, shelter, fuel, clothing, tools, transportation, customary trade, barter or sharing. I will probably throughout this meeting just shorthand that to hunting for food, but we should all be aware that the definition is somewhat broader than that.

The Chief Prosecutor, well the Department of Law is divided into two divisions, and I think before we stop for questions I think I'll summarize what Dan Hickey's assessment was of the situation and then we can pause for questions. We have the Attorney General Norm Gorsuch who just left, who's on top of the Department of Law. Then we have two divisions--we have the criminal division and the civil division. I'm in the civil division. The civil division is generally called the Attorney General's Office, and it handles everything except criminal activity. The criminal division is headed by the Chief Prosecutor. His name is Dan Hickey, and he works for Norm Gorsuch. Norm is on top of the, of both divisions, but Dan is on top of the criminal division. Under him are all the district attorneys in the state, and the offices of special prosecutions which handles complicated white collar crime and sometimes Fish and Game crime, criminal cases.

Dan Hickey issued a memorandum which I believe you all have copies of in the Board book. Based on his assessment of the combination of Madison and Eluska, and Norm basically summarized that, that under his analysis which Norm concurs with, and which I'm afraid I think is probably right as well, until we adopt separate subsistence hunting regulations it will be virtually impossible to get a conviction on a poaching case unless the season is closed by emergency order because specifically because of sustained yield, or unless the season is closed year round to either that sex or that species. It would be virtually impossible to get a conviction. The burden of proof imposed by the Court of Appeals is very confusing and very heavy on the state. Consequently, Dan has determined that it's not possible to spend the time prosecuting it. It's not worthwhile. We're not going to get any convictions until we have separate regulations. And that, in a nutshell, is what his memorandum says. It also lists out all the things that will be prosecuted in the meantime--things that have nothing to do

with that such as non-resident hunting, guiding violations, wanton waste, the things that Norm mentioned.

As a consequence of that, if we want enforceable regulations and if we want the prosecutor's, the district attorneys' offices to start prosecuting fish and game cases again for all game regulations, we need to adopt subsistence hunting regulations that are consistent with Madison. And there is under III on this page a very, very capsulized synopsis of what we need to do. We'll be going over this in a lot more detail I suspect.

The first thing we have to do is to separate out subsistence regulations from general hunting regulations or sport hunting regulations, whatever we wind up calling what's left when we separate out subsistence. We have to look at the regulations that we've got to see if they either prohibit any Alaskan from subsistence hunting or if they fail to provide the same legal opportunity. Now that's an important distinction, the same legal opportunity for all Alaskans to hunt. For example, in some cases right now we have situations where people who live in certain game management units have a better chance, because of the structure of the hunt, at getting a permit. There's a special drawing for residents in that unit, or a special registration hunt for residents in that unit in some cases, in limited cases. So if that's the case, or if the current regulations simply otherwise in some fashion significantly impair subsistence uses (and that's going to be a judgment call for you to make and probably a hard one) it'll have to be based on examining a number of factors, and we'll get into that later.

If the current regulations do any of those things, if they don't allow all Alaskans to hunt, or if they allow some Alaskans a better legal chance to go hunting than others, or if they significantly impair subsistence uses in some other way, then the first thing you have to do is trigger the subsistence priority and eliminate non-subsistence uses, which are non state residents, from hunting. After you do that you then look over the remaining regulations to see if that takes enough pressure off that there's no longer a need for the significant restriction. If there is no longer a need for the significant restriction, that's fine. However, if that doesn't take enough pressure off the hunting and that leaves still significant restrictions on subsistence uses, then we need to apply the Tier II standards in some crude fashion because, simply because we probably don't have time at this meeting nor the ability to apply them in a sophisticated fashion.

This III is incredibly abbreviated for a very complicated analysis that we're going to have to be doing and that will be discussed further by either Beth or Steve Behnke, I'm not sure which of them will be talking about it.

I will be here probably for the whole meeting instead of bopping in and out, so I'm afraid I'll have to live through this with you, and if there are any questions I'll be happy to answer them.

Joel Bennett - This is not to be taken to be a statement that we don't need to develop things as you indicate, but I'm curious about your feeling on the poaching defense, whether are you saying that if a season is closed to one sex of an animal that essentially that person, an Alaskan, can assert that defense? Or are you saying that the season has to be closed to the taking of the species?

Larri Spengler - If the season is closed year round to one sex, then the Chief Prosecutor believes that we can enforce the taking of that sex. Like if the cow moose season is closed all year, then he sees no problem in enforcing. Or if it's been open and then suddenly has to be closed by emergency order because there's, we're clearly in a problem this year--it's not just something we forecast maybe there would be one--then that would probably be enforceable.

Joel Bennett - I guess I just don't concur with that. It seems to me that if we have a closed portion on a sex it has to do with the biological aspects of it and that in fact would then fall under, I mean we don't know really with such an open ended system it seems to me you could make a very good case that something could be put in jeopardy, and therefore it would fall under that.

Larri Spengler - Do you mean if the season were open for a few months for cow moose and then closed the rest of the time?

Joel Bennett - Yes.

Larri Spenger - I, it would seem you would be able to make a case, but normally those kind of things are in regulation, and there's no instant proof of it. And he's requiring a fairly, because under Eluska it's going to be so hard to convict anybody, that he's making this as narrow and as precise as possible.

I would like to clarify one point. When I was talking about significantly restricting subsistence uses as being the key that first triggers the priority, that means that non-subsistence uses have to be eliminated and then if it's still a significant restriction is necessary, I mean a restriction that significantly impairs subsistence uses triggering Tier II, that doesn't mean you can't regulate subsistence. Subsistence hunting can always be regulated. That's very clear in the footnote, I mean in the body of the opinion in Eluska, but those regulations have to be reasonable and have to adequately accomodate those subsistence uses. They can't contain provisions that cause a significant impairment until we follow these procedures. So we can always have bag limits and seasons and so forth, as long as they reasonably reflect what's necessary for the subsistence uses to be satisfied.

. . .Mr. Fleek, Dept. of Public Safety - volume too soft to hear his question. He basically asked can the Board prohibit non-residents from hunting on federal lands.

Larri Spengler - Yes, there is a U.S. Supreme Court decision that basically gives, in the noncommercial area, gives states a fair amount of leeway in treating non state residents differently, depending on the circumstances and the need of state residents, so probably there would not be a problem with doing that. Of course on federal land there is a sort of backwards situation to that, in parks and monuments and so forth ANILCA sets up certain guidelines by which those federal land managers decide who gets to come into their land to hunt, and those aren't changed. So even though Madison says all Alaskans are subsistence hunters, under the federal guidelines, the federal land managers can still decide under ANILCA standards who comes into their land to hunt. They hunt under the state regs, but who comes in is up to the federal land managers.

Mr. Hinman - Thank you Madam Chair. Larri, one thing that bothers me perhaps more than (garbled) you mentioned, as a biologist, is the continual reference in Madison and elsewhere too, unless sustained yield will be jeopardized or unless the population is jeopardized and so on, and it seems that that sort of puts us in the boat of having to prove we're innocent rather than somebody else guilty. That is, we have to prove that the biological situation is such that uses should be restricted before they can be restricted, and that is very difficult at times to have that kind of biological information. In addition, I guess the question is whether this gives the Board the latitude to follow a management plan that envisions increasing populations. For example, we all know that game populations are very rarely at their maximum or their ideal or at least not for very long, and the Board may well have a management plan in mind to increase that population considerably over the years. Does this restriction to not restricting unless sustained yield would be jeopardized, does that prohibit the Board from following a management plan that would envision taking less right now than could be taken in order to build the population up?

Larri Spengler - Probably not, because even before Eluska and even before the state subsistence law, the Board operated under sort of a tension in the constitutional provisions of providing to Alaskans, making game available to the maximum extent possible consistent with the public interest, managing on sustained yield principle and other similar provisions in the constitution. Under those provisions, the Board probably would be beyond its bounds in completely closing hunting if there was a need, if there was interest in hunting, and there was enough population to sustain a hunt and accommodated increase. If you completely, if you cut back hunting as far as possible to have the maximum increase would be one extreme, or the other extreme would be to have as much hunting as you could to just sort of barely maintain as much as you've got. A middle ground is probably where you'd usually be going anyway to allow some hunting, but not as much as could possibly be handled by the population so that there could be some increase. The

increase might not be as sharp as it would be if you cut back hunting as much as would be desirable if the goal, if the only goal were maximum increase in population. And I don't believe the subsistence law would change those requirements, because setting, determining whether an increase in the population would be in the public interest would still be within the Board's prerogative. Completely closing hunting to achieve that would probably not be, so some midground.

Sarah Scanlan - Bob, are you talking about doing something different than what we've been doing all along? Are you talking about closing hunting when we've allowed it all along?

Bob Hinman - Madam Chair, no I was not referring to that at all. I was thinking in terms of a situation like the Western Arctic like we had a few years ago where we, or still do, our policy is to allow that herd of caribou to grow, and we are until just recently, or the last few years, we restricted the take in order to allow it to grow. Now that meant that we were taking less than what could be taken annually from that herd at that level. My question really had to do with whether the Madison case forced us to look at populations as they existed at any one time, and say that is what we manage to. But if as Larri says we can modify the consideration of the allowable sustained yield by whatever our management plan for that particular herd is, that removes much of my concern.

.....

Beth Stewart - Madam Chairman, maybe, I think it's probably hard to come up with questions based on a kind of large amount of information you've gotten this morning. Maybe to make things a little easier to understand, one of the questions we've been asked since we announced that the Board would be meeting in an emergency session, is why isn't the Fish Board also meeting in emergency session, and maybe that will help clarify for you at least some of the different problems that you face.

First of all, the Board of Fisheries has had subsistence regulations even before the 1978 subsistence law was passed. Most of those regulations did not become adopted through the 8 point criteria that Madison voided. There were actually very few fisheries that did, so the Board of Fisheries does not have the Eluska problem that you have, and that they do have regulations, and for the most part their regulations already comply with Madison because they did not use those 8 criteria on very many of the fisheries. And at their March meeting they were able to make fairly adequate changes to most of those that did use the 8 criteria, and adjust them. Since the Eluska case came out, Board of Fisheries regulations came under scrutiny as did Game Board regulations in the Chief Prosecutor's office, and the Board was teleconferenced and told that we would have to start issuing subsistence fishing permits in areas where subsistence fishing has occurred since statehood, and where we had it authorized in the regulations. So they were able to take the emergency action they needed without meeting,

because they don't have the same kinds of problems that you do.

The other difference is that the Board of Fisheries is not looking at Tier II situations, and maybe to help you understand that a little better, because commercial fishing takes so many fish and there's also active sport fishing, the Board can allocate away from other uses to meet subsistence needs and subsistence uses where they occur in most cases. There are probably some cases where they will also be at Tier II, but those are pretty rare.

The Game Board, however, because you don't have the same kind of body of activity that allows you to allocate away from one group of users to another, except for the non-resident, is faced probably with Tier II situations in many, many instances. And so not only do you have to have subsistence regulations, but they have to comply with Madison and to some extent your compliance is more difficult because you're already at the situation where the Game Board would be, had they already eliminated commercial and subsistence uses. You don't have this pool of spare animals out there that you can take away from other users to put into the subsistence pool to allow for harvest. This expanded definition of what subsistence uses is creates a great deal more difficulty in the instant case for the Game Board than for the Fisheries Board.

So that's why you are meeting and they're not, at this point, and that's why your problems are significantly different. Both Boards would have to go through the same procedures for Tier II, just as both Boards adopted the 8 criteria initially when they thought they were dealing with the subsistence statute the way it should have been dealt with. Now that that's incorrect, I would assume that both Boards would continue to deal with those three standards and that statute in a similar manner, since the statute is as Larri pointed out identical for both Boards. But the similarity stops there. As unpleasant as it might be for commercial fishermen and sport fishermen, the Board can allocate necessary numbers of fish away from their use and keep providing for subsistence uses for a much longer period of time than the Board of Game can, just because there's so many more fish than there are moose or caribou or other kinds of animals.

If that picture is clear, if the Board understands why Tier II is a focal point for the Game Board and not at this time a focal point for the Board of Fisheries, maybe you can start looking at examples of how these things occur in your regulations. It's an entirely different way of looking at hunting regulations than you're used to, and it's probably going to be difficult to grasp hold of it all at once. We've spent in the office the last several weeks meeting fairly regularly to get the materials ready for this meeting, and it's still not clear to us exactly what all has to be done. And we've come up with numbers of examples that we think we've got a handle on and then we don't, and so this is a fairly complex set of problems that you're facing now. I think you really need to be sure you understand what approaches you're going to take. I think we'll have Larri explain how your proposal book is laid

out. We went ahead and called them proposals, even though they aren't, just for ease of handling, and then maybe you can start to see how you would begin to approach this. We recommend that you actually begin by dealing with Tier II, and thoroughly understanding what Tier II is before you go ahead and start moving through the regulations.

.

Mr. Collinsworth - Yes, Madam Chair, before you get into more detail that'll be provided by Mr. Edfelt, I think the, I have I think great familiarity with the issue having participated very closely in this whole discussion with the Department of Law and Public Safety and internally with the staff and with the folks in the administration and the legislature over the last several weeks. And I think that listening again to the overview provided you this morning, while it was summary in nature, I think it did provide a good kind of a framing of the situation that you have to deal with.

I would like to suggest, however, that in trying to cope with the situation that has been laid on the table in front of you, that you keep in mind that what I mentioned earlier, that we are working against a certain statutory and legal framework during this meeting where we're trying to take the actions that are reasonable and necessary to bring us into compliance with the state subsistence law as it has been interpreted by these court decisions. But, while we need to do that so we can have a regulatory framework that we can enforce against and manage against for this season, also keep in mind that what we're probably doing is engage in a series of short term actions. It's my belief that the legal framework that we're working against during this session is going to change, as I said earlier, that either the state legislature will take some action which will change the regulatory or the statutory framework that you're working against, or there is going to be federal action that is going to change the environment that you're working against.

And because of that, I'm going to encourage you not to spend much time in developing your regulatory actions extending these things into the future. In other words, I know we have done it internally in trying to figure out what kind of remedial action would be taken, we got ourselves into a trap of thinking over a much longer period of time and fine-tuning the system that would be in place over a series of years. It's my opinion that what we're really doing is looking at a near term solution for this season. And so we wasted time thinking about how you would implement some kind of a management program to deal with the permit hunts and we were kind of carrying that on through the building of a system that would allow this thing to continue over time. And if you get involved in too much of that you can waste time as we wasted time, and your agenda is very tight, and you've set a very vigorous schedule for yourself in the evening meeting, so I think the issue is near term. You need to do those things that are suggested by the Department of Law as being reasonable to bring you in compliance with the state law so that we do have that enforceable framework, but

always keep the dimensions of the issue in front of yourself so that you don't start thinking on down the line. I mean, if we felt that what the statutory framework that we're going to be dealing with, both the state and the federal, were going to persist for a long time, we would start to build a program that we would fine tune over a series of years. I don't see that as a real situation that we're in, because there are going to be actions external to what we control either in the department or you control that will alter the framework and we're going to be coming back in some time in the fairly near future to be making adjustments.

So I guess the only purpose of taking this time was to hopefully save some time as we move along in the next several days.

Mr. Bennett - Well I don't mean to object to anything that you're saying Don, really, except that there's something about what you're saying that doesn't feel right to me. It seems to me we're in this situation now and having these extra meetings and extraordinary sessions for the very reason that we've not really dealt with this issue fully enough, and soon enough, in the past. And I'm not sure we can operate totally on the theory that the legislature is going to change something. Lots of things could change. The election's going to change a lot of things, for instance. We have to operate under the law as it is now. Frankly, I think we've just -----? this thing all along as it is, and I don't want to see us do more than we need to do, but at the same time it seems to me that the Board members have to come to grips with the idea that we need to address this full on, and not just provide a short term, you know, limited hoped for temporary solution. I mean I want to come to grips with this in the best way I can, and I'm sure the other Board members do too, and I'm tired of waiting for the legislature to do something.

Mr. Collinsworth - Yes, Mr. Bennett, I tried to choose my words very carefully, and I said compliance with the law, and I'm agreeing with you. We do need to take some very specific action. And maybe the point I was trying to make was that we have sat in our various forms internally discussing these issues, and if you start extending these concepts out for a long period of time, how you would deal with these issues in a very finite way, you're going to spend more time than I think you have in the short term. I think Larri said that we're going to have to take some fairly gross actions in terms of trying to implement the law and do it in a reasonable way and do it in a way that we will be in compliance. I'm in full agreement of that. I'm not suggesting at all that we do not take the steps necessary, nor that we undershoot our target. But I think, it's fairly clear to me, that there is going to be a change in the legal structure that we're going to be working against. We're either going to have federal intervention, or we're going to have some change in the state subsistence law. And under either case, those things are external to this body, and it's going to change how we do business.

I do agree that we do need to implement the law, and do it very, in a very constructive way. And in fact we would not be here if we had taken a different set of actions in the past. That's hind sight, that's not to criticize the actions that were taken in the past. We were working against a different understanding. We need to take the understanding that we have now and make sure that we take the right set of actions.

Larri Spengler - Don's comments brought to mind something I basically omitted from my earlier introductory remarks, and that has to do with federal intervention. It has nothing to do with specifically what you have to do now, but as Don pointed out it is a very real possibility given the interpretation of Madison, by Madison, of our state law. I thought a brief review of why that is the case might be helpful, just so we have a complete picture as we go forward.

The federal subsistence law, ANILCA, allows the state to continue managing fish and game on all lands in the state, including federal lands. And federal lands make up about 60% of the land in the state, if the state provides three things in law. One of those things is the regional council system, an advisory committee system, which we already have. One is a priority for subsistence use, which is the same as the priority basis that we have in our statute. The third is the same definition of subsistence uses that's found in ANILCA. ANILCA defines subsistence uses in statute virtually identically to the words used in the state law, except that ANILCA has one small but very important difference. It says rural, it's customary and traditional uses by rural Alaska residents of fish and game for various purposes, by rural Alaska residents. Before Madison, the Boards in their joint regulation, had interpreted the state law to cover that same definition, so that before Madison the regulation, the joint Board procedural regulation, had interpreted the state law to be the same as ANILCA so we were certified to be in compliance.

Since Madison has come out, that may well not be the case any more, cause the Supreme Court said that we can no longer use rural as a way of identifying subsistence uses. The federal government may not be eager to come in and take over management, but there is a provision in ANILCA under which people can seek judicial assistance, can go to the federal court, can get an expedited hearing on the matter, and can basically ask for the federal government to do something. And then if the court ordered, the federal government would have no choice, even if they didn't want to.

So when Don talks about the legal framework that we're working in at this particular point in time, not extending into the future, I think he's not only referring to the fact that the legislature may change the law, but he's also referring to the fact that the federal government may be required by a court or of their own initiative under ANILCA to come in and take over management on a significant portion of our land. So I think that may be a missing link in what I left out in the earlier discussion that fits in with what Don was saying.

. . . .

Larri Spengler - Under the subsistence statute we have two different situations which the Supreme Court in Madison called Tier I and Tier II. And the first thing that we have to be absolutely clear about is that people are not either Tier I people or Tier II people. Tier I and Tier II are situations.

Tier I is a situation where you can let all Alaskans go hunt and let them have the same legal opportunity to hunt without significantly impairing subsistence uses. You can have cut out non-subsistence uses, but you can still have all subsistence uses present.

Tier II is a situation where you cannot let all Alaskans go hunt, or you cannot let them all have the same legal opportunity to hunt, or in some other way you are significantly impairing their subsistence uses. So when we talk about Tier II, we're not talking about a defined subset of Alaskans that would be, you know, 549 would be Tier II Alaskans for a particular hunt. If a particular hunt is in a Tier II situation, it means the Board has to decide how many people are going to go, but it wouldn't always be a static number if the number of animals in that population increased, the number of people that could go would also increase, or could also increase, up until the time when you finally got back to a Tier I situation, and everyone could go hunting.

The Tier I, sorry, the Tier II factors are listed on this overview sheet that I handed out, under Roman Numeral IIc, and what those are, are criteria that are set out in the statute that say once you've eliminated non-subsistence uses, and you still need to restrict, you still need to significantly impair subsistence uses, then you decide how to distribute the opportunity for subsistence hunting based on these three criteria--customary and direct dependence on the resource as the mainstay of one's livelihood, local residency, and availability of alternative resources. Now these criteria are directed at individual situations, and theoretically, under a very sophisticated system of analysis and scoring, you would have a set of factors correlating with each of the three criteria and you could score every single Alaskan in some numerical way, the Board could assign points and weights to the different factors, you could score everybody out and then you would have this line of everybody with their own score. And then you could let forty people go hunting in the Tier II situation, you would let the first forty on the list with the highest scores go hunting. If you could let forty-seven go hunting, the next seven would go on. It would be a continuum, it's not one set and then for all time those are Tier II people.

The point of the subsistence law according to Madison is to protect these uses of Alaska's fish and game resources by Alaskans for food, etc., and (garbled) those were to be protected at the expense of non-subsistence uses, non state resident hunting for game, and then if it was necessary to distinguish among Alaskans to protect those people who had the most customary and direct dependence, the most local

residency and the least availability of alternative resources. So those are all things that have to be weighed and arranged out. These must be applied when you have a permit drawing situation. Currently we've been using random drawings. People put their name in a hat and we distribute who gets to go hunting based on whose name gets pulled out of the hat.

If the game population is being hunted for the specified purposes-- food, fuel, etc.--then we can't distribute that opportunity anymore based on random drawing. We have to make some kind of crude cut at something that matches these criteria or according to the Chief Prosecutor's memo, those hunts, there won't be able to be enforcements in those hunts.

Now, nobody expects a sophisticated, elaborate scoring system at this point, but we do need to have some rough approximation of factors that correlate with the three criteria so that we can roughly distribute hunting opportunities among people, and we've spent days here trying to think of different factors, to come up with different ways that might work that will be discussed in a bit more detail in a bit.

You do have to use all three factors at once. You can't say OK, first we'll let in everybody local, whatever you decide under this theory "local" would mean, and then once we still can't let everybody go, then use the other criteria. All three criteria are relative to one extent or another, and all three criteria have to be used at the same time. It doesn't mean that everybody would qualify on all three criteria. If somebody had never hunted a resource before, it would be very hard for them to show that they had a customary, direct dependence on that resource. But you have to use it in evaluating their chances on going hunting.

I suppose what might be most useful next is for someone else, either Beth or Steve, to discuss various ways we might approach this. I'm not sure if we want to do this now or after lunch when we have the paper to hand out. I don't know what's best.

Mr. Kelso - Madam Chair, the Department has prepared a summary of the approaches that may be useful to you, and we'll have that for you right after lunch. It's in final draft right now. It may be most useful if you wish to break early for lunch and reconvene early, we can have that for you and perhaps instead of having more summary by Larri at this point, Beth and Steve Behnke could walk through that paper with you very quickly and then you'll have it for future reference, and then perhaps we could talk some specific applications so we can really have particular fact situations to work with in looking at how Tier II would really work, would really require some changes. That would be my suggestion. If you would prefer to continue now, we'll still have that paper for you right after lunch. Either way, whichever you prefer.

Joel Bennett - Is the paper to be sort of a checklist then, for evaluating how a person might fall into those three, or measure up against those three standards?

Mr. Kelso - The paper is designed to explain some of the background, some of which you already received, but also to identify some of the possible standards that you may want to consider for using the three criteria. There will be a separate checklist or decision tree that Steve Behnke and Lou Pamplin and the Department of Law have worked up, but initially what we were trying to do is to come to grips with what standards might be useful and what we might actually be able to employ this year in order to make the three criteria actually have some effect.

Sarah Scanlan - Denny, what's the definition of a general hunt? We've been talking about general hunts and subsistence hunts, and I was just trying to think of cases where we would have both and maybe it would give me a better understanding of what we're trying to talk about when we're defining subsistence hunts to define what a general hunt is.

Denny Kelso - I think this is one of those areas that the Chairman and Joel were both mentioning earlier where we have the difficulty of letting go of the way we used to think about all of this and starting in a new direction. In the past, we had a number of formats for hunts, some of which were simply open for a particular season using whatever methods and means the Board had adopted and with whatever bag limit. Anyone, at least any Alaskan, could participate in those hunts and they tended to be those that had the, either were not in the most heavily populated parts of the state where the demand was heaviest, or for some other reason--maybe because the population of animals was sufficient--there wasn't the need to have the same kind of restrictions that there had been in other areas.

Then we had sort of a continuum of hunt formats. There would be, for example, registration hunts where participation was not limited, but we had registration for information reasons to make sure we knew exactly what the participation was to avoid over-harvesting in a particular area. We had registration hunts that were limited, where for administrative reasons or because of the conditions in that particular place we used the registration hunt format, where people came in and registered, but we either limited the number or required the registration to happen in a particular area that required a commitment from individuals to get there and get registered in order to participate. Then further down the continuum, and I guess really at the end of the continuum, we used permit drawing hunts which the Board is very familiar with.

When we've used the term "general", what we've tended to mean is hunts that were not limited by one of these other methods, in which any Alaskan could participate and they were not restricted by registration requirements or by permit drawing hunt requirements. Now there might be other restrictions such as length of season, type of access, or other regulatory measures that the Board had taken, but in terms of participation, that's what we have meant when we say "general". Now I should ask Bob Hinman whether there's anything that he'd like to add to that or correct.

Mr. Hinman - Madam Chair, I think that what we used to call in the slang "general hunts", just indicated as you say, Denny, that it was those for which there was no particular restriction. What we're calling general hunts now, however, are those opposed to subsistence. In other words, a general hunt would be any hunt that non-resident as well as residents could participate in. And I guess it's a matter of choice of using that phrase or calling it sport hunt, which I personally do not particularly care for, and so I'd prefer staying with the term general hunt. But I think it's just any hunt that is not restricted just to state residents.

Ms. Scanlan - Madam Chair, Denny or Bob, are those then now restricted because of the definition by Eluska and Madison to a few isolated areas around the state where we have an abundance of resource? Are we going to totally eliminate those now with the new criteria that we have to deal with?

Mr. Hinman - Madam Chair, I guess that's going to be up to the Board, after listening to the summary of information and so on. But it seems to me that there are a number of situations in which we would recommend having general hunts, that is it's unnecessary to restrict it only to state residents, deer in Southeastern being a good example, where there's no, we don't see the need for restricting only to residents of the state in order to provide a reasonable opportunity, and so I think there'll be, there should be, opportunity for quite a number of general hunts in the state. Does that answer the question you were asking?

Ms. Scanlan - Yes, I disagree with you maybe, until we get into a more detailed discussion about which hunts those are.

Ms. Johnson - I think one of the things we need to reiterate here again, Sarah, is that when we talk about the subsistence hunt, we're talking about the hunt that Madison has given us that all Alaskans that hunt for food are subsistence users. Larry?

Larry Edfelt - Madam Chair, my interpretation of how to define this general hunt would be if the subsistence use is at Tier I under Madison, and there's still enough animals to allow non-resident hunting, then you have a general hunting season. And as soon as you get into Tier II and the subsistence use, then the general hunt would have to disappear.

.

Larri Spengler - I just put a very illegible chart on the board just for conceptual purposes. We have to have subsistence regs, which is what that says over to the left on top--subsistence regs--and those would be for Alaska residents only for food and the other purposes listed. If we're in a Tier I situation, the subsistence regs would let everyone hunt. All Alaskans would go hunting with the same legal opportunity and wouldn't be significantly impaired. If we're in a Tier II situation we have different opportunities among Alaskans. So those

are off on one side. The general regs are not the subsistence regs. Thus the general regs would not provide food for Alaskans. They would either be a hunt that would allow food for non state residents, like in the caribou herd where there are so many caribou you can let everyone hunt, then the hunt would be for food for non state residents--that would fall in the general category. Or, it could be for trophies for anyone. So if you decide that a brown bear population has never, I don't know if this is the case by the way, but if it has never been hunted for food by anyone and nobody wants to hunt it for food, then you set up a hunt that's open to anyone, either Alaskans or non-Alaskans, but the focus of the hunt is trophies and they don't have to salvage the meat. So those would fall into the general regs.

You could have either, you could have general regs on a, let's say you have a population of animals, you could have either general regs and subsistence regs letting, at the Tier I situation, letting everyone, all Alaskans, hunt, or you could have no general regs, if you had to wipe out non-residents, and if that were enough to make it possible for all Alaskans to hunt, then you could have Tier I again, or you could have Tier II, but you couldn't have Tier II and general regs at the same time.

FOCUS 6/17/85

Subsistence quotient may decide who hunts

By DAN JOLING
News-Miner Bureau

JUNEAU—Planning a big game at this year? For certain species, Fish and Game Department officials may measure your "subsistence quotient" to determine if you're more qualified than other state residents to kill a moose, caribou, or sheep.

Fish and Game Department officials say a likely solution to turmoil over big game allocation may be a sort of point system based on criteria in the 1978 subsistence law. Residents would be ranked based on their proximity to the animal, the availability of food and their customary dependence on the game.

Accorded with a pair of court decisions that define virtually all Alaskans as subsistence hunters, the Board of Game will meet here today to draw up emergency regulations for the 1985 hunting season.

In the Madison decision four months ago, the state Supreme Court ruled that the Board of Fisheries had incorrectly limited definition of a subsistence user before limiting other users of the state's fish resources. The court said sport and commercial fishing had to be curtailed because the pool of "users" could be restricted.

On the game side, that's been interpreted to mean all resident Alas-

kan hunters are subsistence hunters since they're required to salvage and consume the meat they shoot.

The board must now narrow the pool of hunters based on three criteria included in the 1978 subsistence law for distinguishing between them when all other uses have been excluded and there's still too much pressure on the resource.

- The three criteria in law are:
- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
 - Local residency;
 - Availability of alternative resources.

Department officials say the board will probably have to come up with a system that determines how each Alaskan measures up under the criteria.

"Our guess is that it's probably going to have to be a point system of some kind," said Paddy McGuire, a Fish and Game Department special assistant for public communications.

In the past, the department has determined subsistence users in part by having them sign affidavits in which they swear that more than 50 percent of their fish and meat diet comes from wild fish and game they harvest themselves.

McGuire said such surveys could be expanded to find out more about people so that they could be ranked. Once the boards set a limit on

caribou or moose or bear in a certain area, the Alaskans who most closely fit the definition of subsistence user would get the hunting permits.

The alternative to emergency regulations would have been a change in the law, a solution Gov. Bill Sheffield pursued by introducing language to define a subsistence user as a "rural" resident. That matches the regulations the Board of Fisheries had promulgated from the '78 subsistence law.

The Senate refused to pass Sheffield's quick fix, but pledged to pass a comprehensive bill in the 1986 session. That means the system the board comes up with for 1985 may not be the final solution.

"The board is going to be covering a lot of new ground," McGuire said. "It's safe to say that what they do next week, probably five years from now, it won't be recognizable to what they're doing now. It's an evolving process."

"Right now we're looking to getting through this hunting season and giving people access to their hunting seasons," McGuire said.

Game employees are expecting a board meeting of 10 days to two weeks. That may be conservative.

"Every hunt in the state is going to have to be looked at as a subsistence hunt and new regulations will have to be adopted," McGuire said.

(See GAME, page 5)

(Continued from page 1)

"They have to come up with an entirely new book. Presumably, the new book will bear a fair amount of resemblance to what people are used to," McGuire said.

"It's going to be a real burden on the board members to go through this," he said.

By law, emergency regulations will last only 120 days, which will carry the state through October unless the board makes them permanent at its fall meeting.

A point system is by no means assured.

"We are often surprised by what the board does. It's up to the board, not the department, to make these determinations," he said.

"They may dream up some other system that we haven't even imagined. It might be a lot better than anything we've thought of. That would be great," McGuire said.

If the board does not pass subsistence regulations for each game

unit, the state is vulnerable to poaching in each unit where a sport hunt is allowed some time during the year.

That's a result of the Eluska decision, in which the state Court of Appeals ruled that state regulations had not made adequate provision for subsistence hunting in Game Unit 8.

The court said David Eluska, a Kodiak resident who killed a female Sitka black tail deer out of season in May 1983 and used it to satisfy the subsistence needs of his family, could use subsistence as a defense against prosecution.

6-25/8

Subsistence hunting
may be...

Daily News-Miner, Fairbanks, Alaska, Monday, June 10, 1985-7

Governor doesn't expect much from Game session

By ANDY RYAN
Alaska News Service

JUNEAU—Proposed hunting regulations under consideration is week by the state Board of Game will probably have little effect on Alaska hunters, Gov. Bill Sheffield says.

And the governor said that unless major problems flare up with regard to regulation of hunting and fishing under a pair of recent court rulings, it probably will not be necessary to call the Legislature to special session this year.

"I don't think they're really going to change much of anything," Sheffield said of the proposed hunting regulations drafted for consideration by the Game Board.

The board meets here in emergency session, beginning today.

The suggested regulations, prepared by the staff of the Department of Fish and Game, are in response to two recent court rulings which, in effect, interpreted the state's current law as extending subsistence hunting and fishing rights to most Alaskans.

"I think the same people who hunted before are going to be able to hunt (after new regulations are

adopted)," Sheffield said.

"It just won't be as free for all as far as the permits are concerned. They'll be tightened up. There'll be the same number of moose and caribou killed as there was the year before."

In an interview last week, Deputy Commissioner of Fish and Game Dennis Kelso said the court rulings require that in situations where there are more Alaskans who want to hunt than there are animals that can be harvested without harming the resource, the state must weigh three factors.

In such cases, he said, prospective hunters must demonstrate a customary and direct dependence on the resource as a mainstay of their livelihood. Local residency and availability of alternative resources will also be factors in determining who gets to hunt, he said.

"We're going to protect the resource, no matter how the allocations are made. That's our fundamental responsibility, and we stand by that," Kelso said.

"We're going to continue to protect the resource, but it's going to change the way Alaskans have an opportunity to hunt."

Kelso said the net effect of the

new regulations may be to end the use of lottery-type permit drawings and limited registrations in picking who gets to hunt.

"We're no longer free simply to use those, and the board will have to decide how it's going to apply the criteria. How it's going to figure out a new balance. But whatever it is, it's not going to be business as usual," Kelso said.

Sheffield said that although the use of drawing permits may be curtailed under the proposed regulations, he hopes it will be done in a manner that will not work hardships on any Alaskans.

"They won't be as free and easy on the number of permits, or how you get that permit, or how you get your name in the hat. Hopefully, there won't be any hardships put on anyone," Sheffield said.

The governor also said that, although he will call a special leg-

islative session if necessary to deal with subsistence hunting problems, no problems have yet arisen that cannot be handled through regulation, and through emergency powers of the administration.

Problems have not yet occurred to the extent that I would call a special session over. We'll just have to wait and see what happens

throughout the summer," Sheffield said.

"If necessary I will. Hopefully, we won't have to, and we can resolve it with various Fish and Game Board regulations and by the strength that the commissioner of Fish and Game has, and the things that he's empowered to do," the governor said."

Game board meets to consider subsistence laws

by Larry Persly
Times-Juneau Bureau

6/10/85

Juneau — The Alaska Board of Game is meeting in emergency session today to consider regulatory changes in response to the demise in court of the state's subsistence hunting and fishing laws.

The meeting will determine who gets to hunt what, when and how much in Alaska this year.

Because of the recent court decisions, "the board must take emergency action to provide enforceable hunting regulations for this year," according to Department of Fish and Game officials.

The meeting started this morning at Fish and Game headquarters in Juneau.

No public testimony will be taken at the emergency meeting, which is expected to last 10 days

to two weeks. Emergency regulations become effective immediately upon notice by the game board, and expire 120 days after adoption.

Before the Feb. 22 Alaska Supreme Court decision that struck down existing laws, the game board "under the subsistence law had been providing reasonable opportunities for subsistence hunting by Alaskans living in

rural areas or communities," while also providing hunting opportunities for other Alaskans and non-residents through permit drawings, registration hunts and general open hunts, according to an April memo from the game board.

After the court decision, the memo states, "If a game population has been hunted by Alaskans for food, subsistence hunting

must be allowed, unless the resource would be jeopardized. All Alaskans are eligible for subsistence hunting...."

The game board will attempt to fashion regulations that protect the subsistence rights of all Alaskans, while also establishing rules to limit the number of subsistence hunters in those areas where game stocks cannot sup-

See Subsistence, page A-8

Continued from page A-1

port unlimited hunting.

Elimination of permit drawings poses a big problem to the board, which must come up with a new system for limiting the number of hunters in areas where game stocks are not strong enough to support large numbers of hunters.

"The legal principles set out by the court will require substantial reallocation of game among Alaskans, because in most cases

the board cannot use permit drawings to decide who may participate in a particular hunt," said Brenda Johnson, chairman of the game board, in an April letter to Don Collinsworth, Fish and Game commissioner.

She added, "Rather, the opportunities to hunt must be distributed based on three criteria:

- "Direct dependence upon the resource as the mainstay of one's livelihood.
- "Local residency.
- "Availability of alternative resources."

Johnson also noted, "The court's reasoning requires that non-state residents be excluded from many hunts."

The game board has in place 164 permit drawing hunts, which operate on chance, and 11 registration permit hunts, which distribute permits based on the order of application. These 175 hunts "must be restructured," according to the board's April memo, because they do not follow the criteria of need, residency and alternative sources of food.

"While the current random drawing or first-come, first-served system must be replaced by systems based on one three criteria," the memo adds, "the board must not act arbitrarily," and must work within the guidelines of the court decision.

Any decision to eliminate non-resident hunters from certain areas likely would meet with protests from big game guides, who would lose much of their business if their clients were denied access to the hunts.

Board tackles hunting

'Perfect' statutes are not expected

by Larry Persily
Times Bureau Bureau

6/11/85

Juneau — The Alaska Board of Game opened its emergency meeting on subsistence hunting regulations Monday to address some "obvious" problems in allocating game animals to hunters. "Obviously we can't allow all Alaskans to hunt all the time because the resources just aren't there," said Sarah Scanlan, game board member from Anchorage.

"Obviously the board will not be able to create a perfect set of regulations," said Beth Stewart, director of the state Department of Fish and Game's Division of Boards.

Many of the hunts in Alaska will be relatively easy to regulate, Stewart said, because there is sufficient game to support the hunting effort, with reasonable bag limits and seasonal closures.

"But probably what will take up the majority of this meeting will be the very popular hunts," she said, where there are far too many people who want to hunt too few animals, forcing the game board to choose who hunts and who doesn't.

"You now have to think of subsistence in a different way," Stewart told the board at Monday's opening session of a scheduled nine-day meeting in Juneau to adopt emergency hunting regulations.

Defining subsistence hunting as rural "is simply not the case any more," she said.

Prior to this spring's court ruling, which tossed out the state's regulations on subsistence hunting and fishing, rural residents were given priority for fish and game resources.

Stewart said although priority had been given to rural residents in the past based on their historical use of fish and game resources, the court decision means, "This multi-generational

Attorney General Norm Gorsuch told game board members that February's supreme court decision "expands subsistence eligibility to include hunting by all Alaskans," forcing the game board to establish a new system for choosing which Alaskans will be allowed to participate in hunts that must be restricted.

In a related case, a state appeals court decision in April created "the subsistence defense," Gorsuch explained, all-
See Subsistence, page A-14

Continued from page A-1

lowing defendants in cases of fish and game violations to claim subsistence as a defense. To allow for the prosecution of fish and game violators, he said, the game board needs to take away the defense by adopting subsistence regulations for every hunt in the state.

Board members will review both court cases as they work to adopt emergency regulations at their meeting in Juneau. The meetings are open to the public, though no public comments are allowed under emergency regulation procedures.

Following adoption of the emergency regulations, the board will move to adopt permanent regulations, allowing for public comment this summer and fall during that process.

Larri Spengler, the assistant attorney general who has handled the state's subsistence case in court, explained that since the state can no longer limit subsistence hunts to rural Alaskans and can no longer utilize permit

drawings to select who is allowed to participate in a particular hunt, the board must establish a new system for "determining how hunting opportunities are to be distributed among Alaskans."

Spengler said the Game Board needs to consider three criteria listed in state regulations in determining who is allowed to participate in hunts that need to be limited:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood.
- Local residency.
- Availability of alternative resources.

In drafting regulations this week and next, the game board needs to set up a point system for the scoring of eligible hunters. All three factors must be considered in each case, Spengler said.

One option would be for the board to set up a scoring system utilizing the three criteria, with the Department of Fish and Game then sending out questionnaires and scoring the responses to select eligible hunters, according to department staff.

Survey may decide subsistence hunts

By DAN JOLING
News-Miner Bureau

JUNEAU—In big game hunts this fall, answers to a questionnaire now being written by the Board of Game may be as critical to success as a rifle.

In special meetings here, the game board Monday began to formulate its response to recent court decisions that recognize virtually every Alaskan as a subsistence hunter and subsistence hunting as a defense in poaching cases.

The board plans to adopt emergency regulations that will narrow the pool of hunters when too many apply for a particular species.

That's expected to be accomplished through some form of a point system, measured by a questionnaire, grading hunters on their subsistence needs compared with other applicants.

Adopting specific subsistence regulations for every hunt will also

611185
allow state law enforcement officials to resume poaching prosecutions.

Where there are too many subsistence hunters, the field can be narrowed based on three criteria in the 1978 subsistence law:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
- Local residency;
- Availability of alternative resources.

Any one of the three can be weighted more heavily, according to Assistant Attorney General Larry Spengler, but they all must be considered.

Translating them to a questionnaire is expected to take the first days of meetings planned to last 10 hours daily, seven days per week. The meetings may last for two weeks or longer.

"Any system you come up with has to be administratively 'do-'
(See GAME page 3)

(Continued from page 1)

able," said Steve Behnke, director of the fish and game department's subsistence division.

He also urged board members to keep it simple.

"A complex scoring system probably isn't workable if you're going to do it this summer," Behnke said.

In discussions Monday, the board wrestled with questions on how to measure customary and direct dependence or local residency.

They discussed whether a person should earn points for every year he has hunted in a particular area,

how close he has to live to be credited with local residency, and whether there should be degrees of local residency.

In considering availability of alternative resources, the board discussed whether "resources" meant other wild game, access to grocery stores, jobs, or transportation that would allow hunting elsewhere.

The emergency regulations must end after 100 days unless adopted after a public hearing process. Whatever system is adopted, it may be scrapped next year if the Legislature modifies the subsistence law.

Sen. Mitch Abood, R-Anchorage, introduced legislation late this session to base subsistence eligibility in part on a person's income. Gov. Bill Sheffield advocated basing subsistence preference on "rural" residency in conformity to federal law.

Whatever is adopted, there will be some expense to the state.

License fees and tag fees account for more than \$2 million in state coffers, 67 percent of which is paid by non-residents.

Dipnetters strike it rich on Copper: 1,300 fish

6/12/95 FBK

By KATHI BERRY
Staff Writer

Dipnetters on the Copper River surprised Fish and Game officials by defying low-catch predictions and capturing 1,300 salmon during the second open period at Chitina last weekend.

Fish and Game expects more than 1,600 fish will be harvested during the third open period, sche-

duled for noon Friday to midnight Monday.

After three salmon were netted during the first open period, Fish and Game officials warned that they did not expect the fish to be plentiful in the Copper River near Chitina until the third weekend in June.

The meager take was attributed
(See CHITINA, page 3)

CHITINA . . .

(Continued from page 1)

to the late breakup of ice at the mouth of the Copper River, which had delayed the arrival of the majority of the salmon. Fish and Game officials reported that they expected the second open-period take to be as poor as the first.

But a large number of fish defied the officials' predictions by arriving in Chitina toward the end of the second 48-hour open period, which ran from midnight Friday to midnight Sunday.

"The salmon have definitely arrived," Alaska Department of Fish and Game Management Coordinator Dennis Haanpaa said. "Many more fish could have been taken during the second open period if there had been greater effort. There were not a lot of people fishing."

Fish and Game officials issued 136 permits, compared with the 479 permits issued the first weekend.

"It's too bad more people didn't show up," said Lenore King, owner of the Chitina Cash Store. "The weather was good and many of the dipnetters got so many fish that they limited-out for the season."

The limits this year are 15 fish per individual or 30 fish per household.

The 84-hour period next weekend is the longest yet this season.

"We are running a lengthy session because there are lots of fish available out there," Haanpaa said. "We expect the reds and kings to be traveling through Chitina all the way up until August."

Nineteen kings and 1,281 reds were netted last weekend.

"There is no problem with the kings," Haanpaa said. "They are never as plentiful as the reds."

The Chitina Native Corp. reported that they had no difficulties last weekend collecting a \$15 fee imposed on dipnetters who want to cross Native land to get to the Copper River. Six dipnetters initially refused to pay a guard set up in a booth at the beginning of the popular O'Brien Creek Trail during the first open period. The offenders were apprehended and dismissed without incident when they later agreed to pay the fee.

The Native corporation would not say how many permits they issued last weekend.

Most of the dipnetters avoided paying the fee by camping on state-owned land, netting by the Chitina-McCarthy bridge or riding in boats over to the Copper River banks within the highwater marks, which are not under the Native corporation's jurisdiction, King said.

Information about open periods can be obtained at least 24 hours in advance by dialing 456-8482 in Fairbanks, 822-5224 in Glennallen or 344-2622 in Anchorage.

ing of subsistence tangled Game Board struggles with '78 big game law

DAN JOLING
S-Miner Bureau

The state Board of Game is attempting to write new big game regulations, but is guessing what the legislature meant when it passed the subsistence law. The Alaska Supreme Court ruled that the subsistence law had been improperly interpreted when the Board limited the pool of subsistence users to rural residents. The legislature said the law was intended to limit users until the subsistence had been eliminated. That means that virtually any hunter qualifies as a subsistence hunter.

The court said the pool of subsistence users can be narrowed by three criteria in the law. It's those meanings, applied when there are too many subsistence hunters bringing pressure on a certain species, that the Game Board has been struggling to interpret.

"It would make our job easier if we had explicit definitions, but we don't," said Game Board member Victor VanBallenberghe of Fairbanks.

- The three criteria are:
- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
 - Local residency;
 - Availability of alternative resources.

Where only a limited number of animals may be killed to prevent biological damage to the resource, the board can use the three criteria to limit hunters identified as "tier two" subsistence users in the court decision.

As of this morning, the board had begun drafting a questionnaire to gauge who is most eligible to hunt when the pool of hunters must be narrowed.

The next task will be assigning values to each question and fitting it into a point system that can be tabulated by computer.

But members have yet to agree on the Legislature's terms. For example, they disagree on a

definition of "alternative resources."

Board Chairwoman Brenda Johnson said that should mean the availability of non-wild meat, like food in a grocery store.

"If you're in an area where you have access to grocery stores, it's going to be easier to obtain that meat," Johnson said after the meeting. "Most of those places have better employment."

She said the game board has used the criteria before when requested to extend certain hunts for particular groups.

In the absence of clear definitions, she said, it's left to the board's discretion to interpret the Legislature's meaning.

"That's where we have that responsibility of making that regulation since we have no information about what they meant," she said.

But VanBallenberghe said he's bothered by assuming factors that were not specifically ordered.

"The courts have told us that all subsistence users are subsistence users. When we're into tier two and we have to start dropping people out, I think we have to look at the rules by which we drop them out very carefully," he said.

He does not believe non-wild resources should be considered.

"I don't feel comfortable instituting those as criteria," he said. "As far as I can tell, neither the courts nor the Legislature in defining

alternative resources have spoken to wild resources," he said.

VanBallenberghe instead believes that alternative resource refers to wild resources like other game animals or fish.

For the first criterion, customary and direct dependence on the resource, the game board may ask hunters how directly dependent they are on the harvest, with one of four declining categories to check off.

To judge local residency, a questionnaire could ask only where a person lives and give varying points depending on how close it is to the species in question.

Johnson said she believes the first two criteria are most important.

Special session hinges on Game Board decisions

KEAN FOSDICK
Associated Press

JUNEAU (AP)—The odds of Gov. Bill Sheffield calling a special session appear reduced since lawmakers left town a month ago. But it's still possible they could be brought back this year to deal with subsistence-related hunting and fishing problems, a Sheffield spokeswoman says.

Molly McCammon, Sheffield's assistant press secretary, said that depends upon what the state Game Board decides after its emergency meeting in Juneau. The eight-member panel is trying to sort out who will be

allowed to hunt what in Alaska this fall.

"It's expected that the board, which began its meeting Monday, will need at least another week to 10 days to resolve a number of subsistence questions raised recently by the courts. That's in addition to making some technical changes in Alaska's 60-year-old patchwork of game laws.

"There's always the possibility of a special session," McCammon said. "He'll be looking at what comes out of the Game Board in the next couple of weeks. The state will use all the tools it has available."

While the state Department of Fish and Game manages the state's wildlife resources, the fish and game boards separately make the allocations.

The current system of doling out fish and wildlife to a variety of users has been turned upside down by two recent court cases pertaining to subsistence. The rulings mean that virtually all Alaskans now qualify for subsistence rights.

Sheffield introduced a bill about mid-session that would have allocated the same subsistence rules by statute that had been mandated by the fish and game boards. His

measure would return first subsistence rights to rural users.

But legislative leaders — particularly Senate President Don Bennett — delayed final action on the issue until next year. They argued it was too complicated and too politically charged to be solved in just a couple of months.

Sheffield had warned shortly before lawmakers adjourned May 12 that he might call a special session if he wasn't satisfied with their output on a combination of things — the capital budget, the state's troubled longevity bonus program, and subsist-

ence.

Although vetoing \$35.8 million from next year's \$433 million public construction budget last week, he commended legislators for fashioning a capital spending plan that "makes the most of the limited dollars available unlike some capital spending bills in the past."

The governor also signed into law a measure calling for an advisory vote in next year's general election on the future of old-age benefits.

That delays a final legislative solution for the state's \$250-a-month longevity bonus program at least until 1987.

"Even though he had some reservations, he obviously signed the longevity bonus bill so there's no reason for a special (session) on that," McCammon said.

"On the budgets, he could have vetoed almost the whole thing and called them back to deal with the fact they'd gone about \$50 million over (budget)," she said. "Or he could have vetoed out \$50 million. And that's what he decided to do."

Public pressure about dealing with subsistence-related problems is expected to build through the summer, McCammon said.

Game Board nears subsistence ruling

6/13/85

By DAN JOLING
News-Miner Bureau

JUNEAU—Alaska Board of Game members were a step closer to determining who will qualify as "Tier 2" subsistence hunters today after deciding to weigh equally three criteria set forth by the 1978 Legislature.

In past years, subsistence users were limited to rural residents. However, court decision this year ruled that the pool of subsistence users cannot be reduced until all other uses have been eliminated. Virtually all Alaskans fall into the category of "Tier 1" subsistence hunters.

When there is too much subsistence hunting pressure on a big game species, the Game Board can limit the hunt to "Tier 2" subsistence users.

There were approximately 150 hunts in the state planned before the court decisions in which hunting was limited by randomly drawn permits or first come, first served permits.

The court said Tier 2 users must be determined based on three criteria in the 1978 subsistence law:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
- Local residency;
- Availability of alternative resources.

The board so far has decided to weight the criteria equally. They have yet to figure out a scoring system, but the three criteria may be

measured with the following standards.

For customary and direct dependence, the board picked standards of the number of years an applicant has harvested an animal and his dependence on it as his primary food source. The latter would be gauged by answering, "great, moderate, slight or no dependence."

Applicants would score the most points for local residency if they lived in the affected hunting area. They would receive a declining number of points for living outside the hunting area but within the game management unit, then adjacent game management units.

The board could make exceptions depending on the range and distribution of the animal, such as caribou.

For determining alternative resources, the department would ask how available other fish and game resources are in the applicants hunting area or another reasonably accessible area: greatly, moderately, slightly or not available.

The board also included a standard to award points if the applicant's financial resources were not adequate to purchase non-wild resources as a reasonable alternative to purchasing game.

This morning, board members were figuring out a scoring system to measure the standards.

Board approves hunter point system

By DAN JOLING
News-Miner Bureau

FAIRBANKS—A point system designed to distinguish "Tier 2" subsistence hunters from the general hunting population was unanimously adopted Thursday by the Alaska Board of Game.

The system follows guidelines in the 1978 subsistence law and will determine who is most qualified to

hunt for subsistence purposes.

Applicants will be questioned on the location of their home, financial status, past dependence on an animal for food, and other factors.

The system to refine the pool of users will be applied only when pressure from hunting by all subsistence hunters could cause biological damage to a species. Court decisions this year determined that

the subsistence law had been incorrectly applied to restrict subsistence taking of wild fish and game to rural residents.

The court rulings meant virtually every Alaska resident could be considered a subsistence hunter.

The point system applies only to Alaska's big game, including moose, caribou, brown bear, black

bear, sheep, goats, elk, musk ox and bison.

A maximum of 90 points can be earned, 30 for each of the three criteria included in the 1978 law:

- Customary and direct dependence upon the resource as the mainstay of one's livelihood;
- Local residency;
- Availability of alternative resources.

The three criteria will be scored as follows:

- Customary and direct dependence: One point can be earned for each year an applicant has harvested an animal from the population, to a maximum of 10 points.

Also, 20 points can be earned for "great" dependence on killing the big game animal for the primary food source of the applicant. The

applicant can earn 15 points for "moderate" dependence, 10 points for "slight" dependence and 5 points if he does not depend on harvest as a principal meat support.

- Local residency: 30 points will be awarded if the applicant lives in the hunting area where the species lives. The applicant will receive 15 points if he lives in the area.
- (See GAME, page 3)

(Continued from page 1)

points if he lives outside the hunting area but within the same game management unit. The applicant will receive 10 points if he lives in a game management unit adjacent to the unit in which the species lives, and no points if he lives in any other game management unit.

The board included an exception clause under local residency: When the board determines that the zones set out would treat a specific concentration of similarly located individuals differently, or would be inappropriate due to the range and distribution of the resource, the board will, by regulation, modify the boundaries of the zones.

- Alternative resources: Applicants will receive 15 points if other fish and game resources are not available in their hunting area, or another "reasonably accessible"

area: Applicants will receive 10 points if other wild resources are "slightly" available, 5 points if they're "moderately" available and no points if they're "greatly" available.

An additional 15 points will be given to applicants if their financial circumstance "is not adequate to purchase non-wild resources as a reasonable alternative to taking the game."

Board of Game Chairwoman Brenda Johnson said Thursday applicants will score themselves as to great, moderate or slight dependence on a wild game animal or availability of another, and that filling out sworn questionnaires will be somewhat of an honor system.

However, the department will be able to cross check some factors such as past success at hunting and what other fish and game is avail-

able near an applicant's home, she said.

There are about 150 hunts in Alaska which were restricted last year by randomly selecting a limited number of permits or issuing a limited number on a first-come, first-serve basis.

"I'm satisfied with the point system we came up with," Johnson said. "There's going to be a lot of holes in it, but I think it's a lot more fair than the other ones we looked at."

Rather than judge hunters strictly on where they live, Johnson said, the point system gauges dependence, past hunting and the ability to buy or hunt other meat.

After agreeing on the point system Thursday, the board began deciding how it should apply to specific hunts, taking into consideration past permits issued, past number of animals killed, success rate and other factors.

Subsistence statutes set a clear mandate

FBKS 6/14/85

By MARC GROBER

No doubt someone, someday, will write at least one book about the politics of subsistence. Certainly a few inches of this paper can't scratch the surface of this topic. We do have just enough space, however, to mull over a few items.

The boards of Game and Fisheries are meeting in Juneau this week to adopt emergency regulations due to the Madison and Eluska decisions (and because the Legislature failed to adopt the governor's proposed bill). No testimony will be taken at this meeting nor has any input been requested from advisory committees. A number of attorneys who have been involved in litigating Madison and Eluska issues have offered to assist in drafting regulations without charge to the state, and to my knowledge the state has not sought this help. What is really happening in Juneau this week?

To even begin to address this question you must first understand what the holding in Eluska (requiring implementation of a subsistence priority as provided by statute) was first enunciated several years ago by District Court Judge Stephen Cline in Nenana (State vs. Ketzler). The state appealed the

matter and the case was eventually affirmed and dismissed on other grounds. The point here is that the argument adopted by the Court of Appeals is not new to the state, but has for years been forcefully opposed by the state despite the clarity of the underlying statute mandating the opinion finally issued as Eluska.

After Madison was handed down the joint boards in March called for testimony on the impact of that decision. The boards heard public testimony from the attorneys in Madison requesting that the boards take steps to adopt regulations proffered from the inception of that litigation. The board took no action. The boards also heard testimony that Madison was equally applicable in game matters, that the boards' current regulations were void for failing to meet subsistence requirements, and that it was just a matter of time before opinions such as that of the District Court in Ketzler were adopted by the Court of Appeals or the Supreme Court. The testimony fell on deaf ears.

Further, proposals regarding subsistence priorities were placed squarely before the board in March. The proposal specifically relating to compliance with the subsistence statute was unilateral-

Guest Opinion

ly rejected by the office of Elizabeth Stewart, director of the Division of Boards, acting on behalf of the boards, and the Board of Game refused to adopt any regulation in response to the balance of the proposals (requesting protection for subsistence hunters in portions of unit 20).

Finally, Eluska was handed down by the Court of Appeals. The opinion can only be viewed as a severe reprimand of agencies knowingly violating the clear intent of the law. The court's language is unequivocal.

The boards have had years to comply with the statutes and have, with the advice of counsel, simply refused to comply. Yet now there is an alleged emergency of such urgency that the boards will not accept testimony on the issue, even from the population segment they have been abusing for all these years. And the director of the Division of Boards is heard to be making remarks that the emergency regulations are necessary because the Legislature failed to do its job.

Let's get a few things straight: The Legislature has already adopted a law and directed the boards to adopt regulations to implement the law. The bottom line is that the boards have simply refused to implement a law that they find distasteful. The debate over the governor's stop-gap measure only detracts (as one supposes it was meant to do) from the issue (perhaps more clearly set out in Eluska than in Madison); the boards have knowingly and willfully violated state statute in refusing to implement the subsistence priorities required by law. There is just no other way to say it.

Now the boards, having waited until the midnight hour, intend to adopt hunting and fishing regulations under emergency authority without any public input. Even advisory committees, the quasi-agencies responsible for grassroots input, have been excluded. Can the boards be expected to turn 180 degrees and act in good faith with respect to subsistence users while cloistered in Juneau, free of public comment, with the very advisors who have brought them to this precipice?

Marc Grober, a lawyer practicing in Nenana, is a member of the Tanana Fish and Game Advisory Committee.

FBIS

Villages could enforce hunting, Williams says

By KATHI BERRY
Staff Writer

Village governments—not the federal or state government—should be allowed to enforce subsistence regulations within rural communities, according to Spud Williams, president of the Tanana Chiefs Conference.

"The village government is the only one that can deal with local problems," Williams told the Farthest North Press Club Friday.

To illustrate his contention, Williams cited an incident in which a U.S. Fish and Wildlife Service officer arrested a Barrow Native for shooting a restricted duck in the 1960s. Nearly 200 community residents reacted by shooting the same species of duck and bringing them in bags to the arresting officer.

The officer's case against the arrested man was eventually dropped and state officers have been hesitant to enforce subsistence regulations against Natives ever since, Williams said.

By contrast, management plans involving federal, state and village Native corporations work well to curb the hunting of restricted fish and game, according to Williams.

As proof, he cited a recent incident in which a Barrow Eskimo was fined \$5,000 for spearing a bowhead whale in defiance of the Alaska Eskimo Whaling Commission. The whaling commission is responsible for enforcing whale quotas set in conjunction with the National Marine Fisheries Service.

Williams was reacting to a recent controversy created when two court decisions made it almost impossible for Alaska Fish and Game to enforce subsistence hunting regulations.

The court rulings, which nullified the "rural preference" qualification outlined in state subsistence law, meant that virtually all Alaskans qualify as "subsistence hunters."

The Alaska Board of Game, meeting in Juneau, Thursday

adopted a point system that separates subsistence users into two categories.

The system, which gives Fish and Game the authority to enforce hunting regulations again, applies only when the population of a hunted game animal drops below specified limits.

State and federal subsistence regulations would definitely be enforced by village governments because hunting is the only means of survival for many Natives living in rural communities, Williams said.

"The villages would be turned into welfare states or the villagers would have to leave if their resources were depleted," Williams said. "The economy of those communities is not based on cash flow."

Construction projects and seasonal fire fighting jobs give villagers cash to buy three wheelers, snow machines, boats "and other things that are a necessary part of their subsistence lifestyle," Williams said.

6.15.85

'Tier 2' hunts assigned

By DAN JOLING
News-Miner Bureau

JUNEAU—Moose hunts in three Southeast game management sub-units are the first declared "Tier 2" hunts under emergency regulations adopted by the Board of Game Friday.

That means they will be open only to applicants determined to be most qualified as subsistence users under a point system adopted by the board Thursday.

All non-residents are automatically excluded from Tier 2 hunts.

In addition, the Game Board declared musk oxen hunting on Nunivak Island off-limits to non-residents to protect subsistence hunting, but did not place it in a Tier 2 category because of a 1980 law.

The Game Board has met this week in emergency meetings to write subsistence regulations, sessions prompted by a pair of court decisions earlier this year.

In the Madison decision, the Alaska Supreme Court declared that the pool of subsistence users of Alaska's fish and game could not be limited until all other uses had been curtailed. That means virtually all Alaskans have been designated as "Tier 1" subsistence users.

If a species could suffer damage because there are too many Tier 1 hunters, the board can narrow the pool to Tier 2 hunters based on three criteria listed in the 1978 subsistence law: customary and direct dependence on the resource as the mainstay of one's livelihood, local

(See GAME BOARD, page 3)

GAME BOARD ...

(Continued from page 1)
residency and availability of alternative resources.

In the Eluska decision, the Alaska Court of Appeals ruled that a Kodiak deer hunter charged with poaching could use a subsistence defense in the absence of the adoption of specific subsistence regulations for a hunting area.

It's those subsistence regulations that the Board of Game have been developing this week.

Thursday they adopted a scoring system to rate subsistence hunters to be determine Tier 2 hunters.

In Tier 2 hunts, applicants will "earn" up to 90 points depending on how they answer questions on the location of their home, financial status, past dependence on eating an animal and other factors that measure the three criteria.

The three moose hunts designated as Tier 2 hunts include a Game Management Unit 1C moose season at Berners Bay, north of Juneau; a sub-unit 1D moose season near Haines; and a sub-unit 5A moose season on the "forelands" near Yakutat.

The board determined that no other subsistence hunts in Southeast would be impaired by allowing other types of hunting, and all other