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Potential for Dissemination of the Nonnative Salmonid Parasite *Myxobolus cerebralis* in Alaska

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Abstract.—*Myxobolus cerebralis*, the myxozoan parasite responsible for whirling disease in salmonids, was first introduced into the United States in 1958 and has since spread across the country, causing severe declines in wild trout populations in the intermountain western United States. The recent detection of the parasite in Alaska is further evidence of the species' capability to invade and colonize new habitat. This study qualitatively assesses the risk of further spread and establishment of *M. cerebralis* in Alaska. We examine four potential routes of dissemination: human movement of fish, natural dispersal by salmonid predators and straying salmon, recreational activities, and commercial seafood processing. Potential for establishment was evaluated by examining water temperatures, spatial and temporal overlap of hosts, and the distribution and genetic composition of the oligochaete host, *Tubifex tubifex*. The most likely pathway of *M. cerebralis* transport in Alaska is human movement of fish by stocking. The extent of *M. cerebralis* infection in Alaskan salmonid populations is unknown, but if the parasite becomes dispersed, conditions are appropriate for establishment and propagation of the parasite life cycle in areas of south-central Alaska. The probability of further establishment is greatest in Ship Creek, where the abundance of susceptible *T. tubifex*, the presence of susceptible rainbow trout *Oncorhynchus mykiss*, and the proximity of this system to the known area of infection make conditions particularly suitable for spread of the parasite.



Myxobolus cerebralis, the myxozoan parasite that causes salmonid whirling disease, is exotic to North America and was first detected in the USA in 1958 (Hoffman 1962). It is now reported in 25 states (Bartholomew and Reno 2002; Vermont Department of Fish and Wildlife 2002; Stromberg 2006; Arsan et al. 2007a). Although the pathogen appears to have little impact on fish populations in the eastern states and coastal western states (Modin 1998), it has caused dramatic, rapid population declines in wild rainbow trout *Oncorhynchus mykiss* of the intermountain western United States, particularly Colorado and Montana (Nehring and Walker 1996; Vincent 1996). As salmonids are inextricably linked to the culture and economy of Alaska (Kenai River salmon runs alone generate annual revenues of US\$70 million; Glass et al. 2004), the potential impacts of *M. cerebralis* in the state could be catastrophic, both ecologically and economically.

The first *Myxobolus cerebralis* detection in Alaska

occurred in 2006 (Arsan et al. 2007a) during a study of rainbow trout from an Anchorage hatchery. The prevalence of *M. cerebralis* infection in the hatchery population was low, and the parasite was detected only by molecular methods, as clinical whirling disease was not evident. However, cultured salmonids in Alaska are not routinely monitored for the parasite, and there is limited monitoring of wild salmonids (USFWS 2006). Prior to this detection, the closest *M. cerebralis* enzootic area was the upper Columbia River basin (CRB) in northeastern Oregon, southeastern Washington, and Idaho. The parasite has also been reported in wild and cultured salmonids from the Sakhalin Islands off the east coast of Russia (Bogdanova 1960).

The potential impacts of *M. cerebralis*, in addition to its rapid spread and establishment across the globe, indicate the need to identify pathways of parasite dissemination and to recommend specific measures for halting further spread of the pathogen. This paper uses risk analysis to qualitatively assess the likelihood of future spread of *M. cerebralis* within Alaska and the potential for new introductions. The framework for this type of risk assessment (Bartholomew et al. 2005) was created for use in whirling disease assessment. We use risk analysis as a map (MacDiarmid 2001) for navigating through possible pathways leading to

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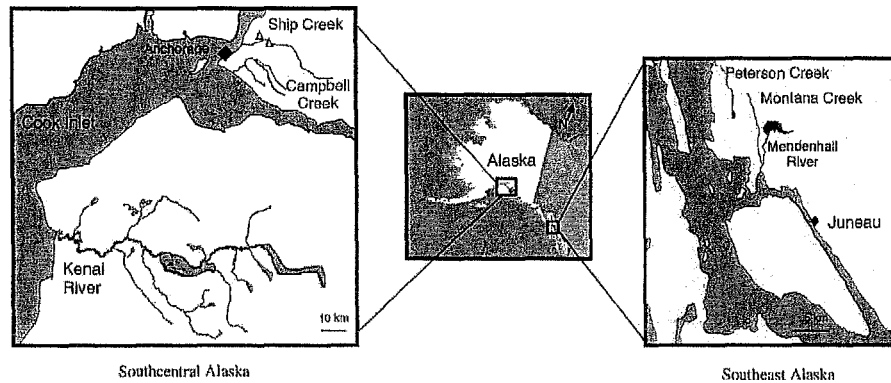


FIGURE 1.—Map of areas at highest risk for *Myxobolus cerebralis* dissemination in southeast and south-central Alaska, indicating sites of rainbow trout hatcheries (triangles).

parasite introduction and establishment and for assessing where to allocate resources to prevent such an occurrence. Our aim is to provide decision makers with tools to evaluate management implications and to eliminate low-probability pathways by using logical scientific arguments.

The Parasite Hazard

Tracking the epidemiology of parasites requires knowledge of an organism's life cycle, biophysical properties, and hosts. All of these topics have been reviewed (Bartholomew and Wilson 2002; Gilbert and Granath 2003); therefore, we will focus on those aspects as they pertain to the risk assessment. The life cycle of *M. cerebralis* requires two obligate hosts: a salmonid and the aquatic oligochaete, *Tubifex tubifex* (Wolf and Markiw 1984). In each host, the parasite maintains a unique spore stage. Myxospores develop in the fish host, are released upon the death of the fish, and are ingested by a *T. tubifex* as the worm burrows through sediment (Brinkhurst 1996). The parasite then undergoes reproduction and structural transformation and is released in its triactinomyxon (TAM) stage, which is infectious for the fish host.

The biophysical properties of *M. cerebralis* also affect its potential dissemination, and introduction most likely occurs via the myxospore stage. Myxospores are far more resilient than TAMs and are capable of withstanding environmental extremes (El-Matbouli and Hoffmann 1991) that might occur during transport and dissemination. Of the two obligate hosts of *M. cerebralis*, the fish host is more mobile; therefore, myxospores are more likely to be distributed over a broader area than are TAMs. Indeed, other researchers have speculated that myxozoan colonization on a landscape probably occurs via myxospores (Cone et al. 2006).

Host susceptibility affects both parasite dispersal and establishment. Most Alaskan salmonids except lake trout *Salvelinus namaycush* and arctic grayling *Thymallus arcticus* are susceptible to *M. cerebralis* (MacConnell and Vincent 2002). However, infections result in varying degrees of clinical disease, and rainbow trout generally exhibit the most severe signs of whirling disease (Hedrick et al. 1999a, 1999b; MacConnell and Vincent 2002).

Whereas many salmonid species are susceptible to *M. cerebralis*, only one species of oligochaete, *T. tubifex*, is capable of propagating the pathogen. Moreover, susceptibility of individual *T. tubifex* to *M. cerebralis* varies greatly and has been indirectly correlated with the *T. tubifex* 16S mitochondrial lineage (Beauchamp et al. 2001, 2005). There are at least six cryptic lineages of *T. tubifex*, five of which (I, III, IV, V, and VI) have been reported from North America (Beauchamp et al. 2001; Arsan et al. 2007b). Different *T. tubifex* lineages vary from highly susceptible to *M. cerebralis* (large numbers of TAMs are produced) to unsuitable for the pathogen (infection does not occur).

Risk Analysis

Because Alaska is approximately the same size as the continent of Europe (Pagano 2000), we narrowed the focus of this risk assessment to areas of the state where we considered the likelihood for introduction or further dissemination of *M. cerebralis* to be highest: southeast and south-central Alaska (Cook Inlet basin) (Figure 1). These areas have high concentrations of susceptible fish hosts, high angler traffic or a large commercial fishery, the highest concentration of human populations in the state, and high potential organic loading. The areas are also close to the road system and ports and are situated in the migration path of fish from enzootic areas. As a qualitative risk

TABLE 1.—Definitions of risk levels used in an analysis of the risk of further establishment of *Myxobolus cerebralis* in Alaska.

Risk level	Definition
High	The event would be expected to occur
Moderate	There is less than an even chance of the event occurring
Low	The event is unlikely to occur
Negligible	The chance of the event occurring is so small that in practical terms, it can be ignored

assessment, mathematical probabilities were not assigned to score risk. Thus, it is important that the terms are clearly defined; those used in this analysis (Table 1) are based on work by Moutou et al. (2001) and focus on the lower end of the scale to identify low-probability pathways or nonissues.

Study Sites

Southeast Alaska

Southeast Alaska has a maritime climate with cool winters and wet summers, and stream temperatures are generally warmer than those in the interior of the state. Typical hydrographs for southeast Alaska creeks are influenced by spring snowmelt and autumn rainfall (Milner et al. 1997). River basins of coastal southeast Alaska are generally small due to mountains and ice fields that rise sharply from sea level and create relatively short watersheds flowing into the Pacific Ocean. Two streams near Juneau, Peterson and Montana creeks, were selected for the risk analysis based on the criteria described above. The creeks support various salmonid populations, including steelhead (anadromous rainbow trout), pink salmon *O. gorbuscha*, chum salmon *O. keta*, coho salmon *O. kisutch*, Dolly Varden *Salvelinus malma*, and coastal cutthroat trout *O. clarkii* (Harding and Jones 1992; Chaloner et al. 2004). Detailed site information is provided by Arsan et al. (2007b).

South-Central Alaska

In south-central Alaska, the Cook Inlet is home to over half the state's human population. The area has a transitional climate (National Climate Center 1982) and is the ecotone between the Pacific Northwest rainforest and the northern boreal forest. Hydrographs in the basin are highly predictable and influenced by snowmelt and glacier melt in the summer; typical freshwater inflow into Cook Inlet is 15 times higher in July than in February (Dorava and Milner 2000). This study focuses on Ship and Campbell creeks in the Anchorage area and the Kenai River on the Kenai Peninsula. All three streams host popular sport fisheries because of their abundant fish runs, proximity to major

population centers, and accessibility by roads. The streams also have numerous sources of potential organic loading due to their urban proximity, commercial and industrial activity, streambank degradation by recreational traffic, and large pulses of organic material from spawning salmon runs.

The Kenai River supports populations of rainbow trout, Chinook salmon *O. tshawytscha*, coho salmon, pink salmon, sockeye salmon *O. nerka*, and Dolly Varden and has the largest freshwater sport fishery in Alaska (Hammarstrom 1988). Ship and Campbell creeks support populations of these species as well as chum salmon (Miller and Bosch 2004). Ship Creek is the site of the most popular sport fishery in the Anchorage area and sustains the state's only two rainbow trout hatcheries, Fort Richardson State Fish Hatchery (FTR) and Elmendorf State Fish Hatchery (ELM). Detections of *M. cerebralis* in Alaska were in rainbow trout from ELM (Arsan et al. 2007a). This hatchery uses untreated surface water from Ship Creek, and effluent from the hatchery flows back into the creek after passage through earthen settling ponds that contain populations of *T. tubifex* (Arsan et al. 2007b).

Release Assessment

The release assessment explores potential pathways of pathogen introduction and is focused on the parasite's myxospore stage. Because *M. cerebralis* has been detected in south-central Alaska, the release assessment provides insight into the possible mode of introduction and the mostly likely route of further dissemination. Four main pathways of *M. cerebralis* introduction were identified: movement of fish by humans, natural dispersal, recreational activities, and commercial seafood processing (Figure 2). Management recommendations are discussed in the conclusions of this paper.

Human Movement of Fish

Since the mid-1970s, the state of Alaska has adopted strict laws prohibiting the import of live, nonornamental fish (Alaska Administrative Code [AAC] 5:41.070), thus reducing the likelihood of inadvertent pathogen introduction as a result of aquaculture or resource management programs. Although there is little data regarding the number and distribution of private fish ponds, instances of illegal salmonid importation from outside the state for private use are also likely to be low considering the general lack of accessibility and proximity to ports, legal complications, and climatic limitations for private fish pond operations in Alaska.

State regulations (AAC 5:41.005) also prohibit within-state transport, possession, or release of any live fish or fish eggs without a permit. The frequency

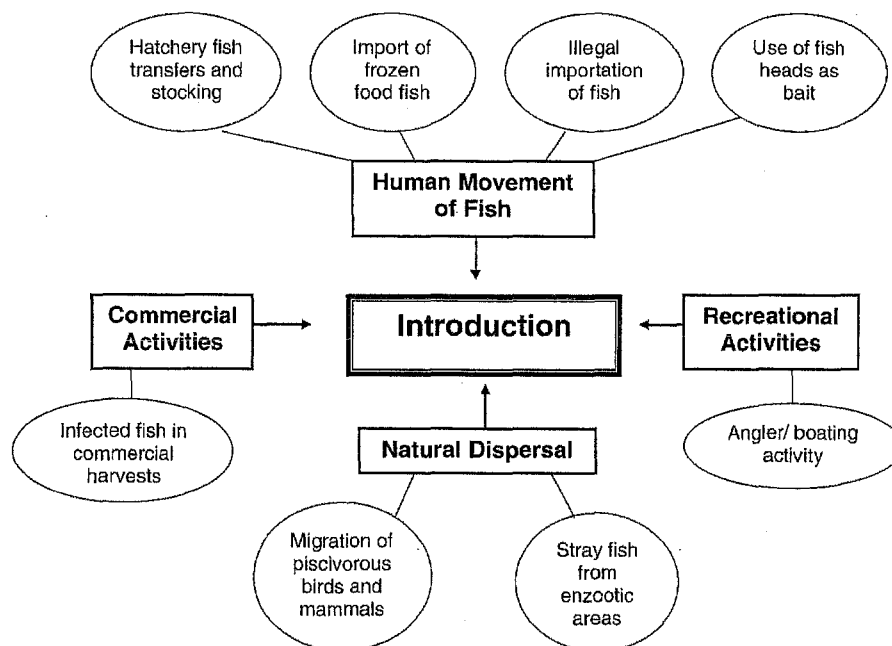


FIGURE 2.—Model of potential *Myxobolus cerebralis* introduction in Alaska. Four main pathways of dissemination (human movement of fish, commercial fishing activities, recreational activities, and natural dispersal) are shown, and specific activities are listed.

of unregulated movement of salmonids is difficult to estimate; however, illegal transfer (stocking) of fish within the state does occur, as evidenced by the presence of northern pike *Esox lucius* in the upper Cook Inlet basin and Kenai Peninsula (ADFG, no date).

Importation of frozen food fish is legal, and imported, frozen whole rainbow trout are common supermarket items in Alaska (T. Meyers, Alaska Department of Fish and Game [ADFG], personal communication). Importation of frozen fish is speculated to be the original pathway for introduction of *M. cerebralis* into the USA (Hoffman 1962), and at least one study demonstrated that *M. cerebralis* myxospores can survive freezing (El-Matbouli and Hoffmann 1991). However, a recent study on survival of myxospores in frozen fish heads found that the parasite is not viable after freezing for 1 week at -20°C or -80°C (R. Hedrick, University of California–Davis, personal communication). Although parasite viability between temperatures of 0°C to -20°C is unknown, processors typically freeze seafood by rapidly chilling fish to -40°C to prevent ice crystal damage in meat (Simply Seafood 2006). Frozen fish are then recommended to be stored at 18°C or below (U.S. Department of Commerce 2007).

Another potential pathway for within-state dissemination is the use of game fish (fresh or frozen) as bait. Heads, tails, fins, and viscera of legally caught game fish may be used as bait (AAC 5:75.026), but live fish may not. Fish heads, where parasite concentrations would be highest, could therefore be dispersed throughout the state. However, in Alaska, the use of fish heads as bait is more likely practiced in saltwater fisheries (sharks, Pacific halibut *Hippoglossus stenolepis*, etc.) than in freshwater fisheries.

Assessment of Risk from Human Movement of Fish

Although human movement of fish presents a low risk for new introductions of *M. cerebralis* to Alaska, it is the most likely pathway for parasite dissemination within the state. Prior to parasite detection, potentially infected fish were transplanted throughout south-central and interior Alaska. Thus, some degree of parasite dissemination may have already occurred. Many of these stocked locations were no-outlet lakes, which would limit the spread of the parasite, but some fish were also stocked in open stream systems. The estimated prevalence of infection in production rainbow trout from ELM in 2006 was 25% (Arsan et al. 2007a); therefore, among a stocked group of 10,000 fish, 2,500 fish potentially have some degree of

TABLE 2.—Summary of the risk of *Myxobolus cerebralis* introduction and dissemination within Alaska.

Pathway of parasite dissemination	Risk of introduction from outside Alaska	Risk of dissemination within Alaska	Risk of dissemination with limited stocking ^a
Human movement of fish	Low	High	Low–moderate
Commercial seafood processing	Negligible–low	Negligible–low ^b	Negligible–low ^b
Recreation	Low–moderate	Low–moderate ^b	Low–moderate ^b
Natural dispersal by predators	Negligible	Low ^b	Low ^b
Natural dispersal by stray salmonids	Negligible	Low ^b	Negligible ^c
Overall risk level	Low	High	Low–moderate

^a Scenario in which (1) stocking is limited to no-outlet lakes where native susceptible resident salmonid species are absent or to seawater net-pens for terminal commercial and sport fisheries and (2) use of fish heads as bait is restricted to saltwater fisheries.

^b This risk level is conditional upon infection prevalence and severity remaining low.

^c This risk level is conditional upon the parasite's failure to establish outside of the Elmendorf State Fish Hatchery, where *M. cerebralis* was first detected in Alaska.

infection. Typically, 2,000–10,000 fish are transplanted per site in south-central Alaska (ADFG 2006b). Thus, without management action, the probability of *M. cerebralis* being spread by human movement of fish is high. In contrast, if (1) stocking of ELM fish is limited to no-outlet lakes where susceptible native resident fish are absent or to seawater net-pens for terminal commercial and sport fisheries and (2) anglers are prohibited from using fish heads as bait in freshwater, the probability of further parasite dissemination by human movement of fish decreases (Table 2).

Commercial Seafood Processing

Fish from *M. cerebralis* enzootic areas of the upper CRB are regularly caught in commercial fisheries in Alaska (ADFG 2006a; Pacific States Marine Fisheries Commission 2006). *Myxobolus cerebralis* could potentially be introduced if effluent from seafood processors is discharged into freshwater or if fish solids released into marine waters are ingested by scavengers and dispersed inland (see Natural Dispersal by Predators section below).

Authorized seafood processors in Alaska individually discharge from 13,608 kg to over 4.5 million kg of waste solids annually, and shore-based fish processors are required to grind solid waste to 1.27 cm or less prior to discharge (USEPA, no date[a]). These smaller pieces, including cartilage in which myxospores would be concentrated, would be less attractive to the scavengers that could distribute the parasite throughout freshwater ecosystems. Although processors with National Pollutant Discharge Elimination System waivers are allowed to discharge into freshwater rivers, very few of these waivers are granted and none are held by processors in the Cook Inlet basin or in southeast Alaska (USEPA 2006).

Alternatively, solid seafood processing wastes (including fish heads) are taken to by-product reduction facilities for reduction to fish meal or other secondary

products (USEPA, no date[b]). All fish meal is brought to 100–600°C during processing (USEPA 1995); these temperatures would destroy *M. cerebralis* myxospores.

Seafood processors discharging less than 454 kg of seafood waste per day and less than 13,608 kg per calendar year are not required to have a discharge permit. This limit was imposed to allow subsistence and direct market processors (processors receiving seafood that requires minimal further processing) to discharge without a permit. These processors are not included in this risk assessment, as information regarding their effluent discharges is unavailable.

Assessment of Risk from Commercial Seafood Processing

The likelihood of introducing *M. cerebralis* into Alaskan freshwaters via processing of infected CRB salmonids by means of permitted commercial seafood practices is negligible. None of the permitted processing plants in the study area discharge into freshwater, and discharges into marine waters are made less attractive to scavengers by grinding effluent to a small size. Scavengers are also more likely to be attracted to tissue than to cartilage, which has the greatest parasite loads. Because of the data gaps regarding effluents from unpermitted processors, the risk of new introductions of *M. cerebralis* by seafood processing was designated as negligible to low. If parasite establishment in Alaska occurs beyond ELM and if anadromous species become infected, the risk of dissemination by unpermitted fish processors will increase.

Dispersal via Recreation

Alaska has a world-class sport fishery that attracts anglers from across the country and the globe; many of these anglers use equipment in Alaska that has been used in other river systems. River systems that are most likely to experience introduction of *M. cerebralis* via recreational activity are those with popular sport

fisheries. The Kenai River has the state's largest freshwater sport fishery (Hammarstrom 1988). Ship Creek hosts the most popular sport fishery in the Anchorage area (Miller and Bosch 2004), and Peterson Creek has the only recreational steelhead fishery on the Juneau road system (Harding and Jones 1992).

A recent survey of anglers in Montana (Gates et al. 2006) reported that 40% of anglers do not clean their equipment between uses. Thus, anglers could introduce *M. cerebralis* by inadvertently transporting the parasite on the soles of their waders. Though anecdotal data collected prior to the determination of the *M. cerebralis* life cycle (Schäuperclaus 1931; Hoffman and O'Gradnick 1977) suggest that myxospores remain viable after drying, recent studies challenge this. One study demonstrated that myxospores on a nonpermeable surface do not remain viable after drying for 24 h (Hedrick 2008). Another study demonstrated that although waders with removable felt soles could transport myxospores and TAMs, spores were less viable after the soles were dried separately for 8–24 h and infectious parasites were no longer transmitted after 7 d of drying (P. Reno, Oregon State University, personal communication). Because of their fragility, individual TAMs are less likely to be transported by this route, although infected *T. tubifex* that are adhered to a felt sole (as documented in the latter study) could provide a suitable environment for TAMs to remain viable. Additionally, the duration of drying required to disinfect waders will vary by environmental conditions and wader material.

The likelihood of *M. cerebralis* transfer by a single angler or within a single angling day may be low, but when all angler-days in a year are considered, the likelihood increases. In 2001, there were 421,000 anglers fishing in state waters; 239,000 of these anglers were not residents of Alaska (USFWS and U.S. Census Bureau 2001) and may have used gear from outside the state. The number of anglers in Alaska and the potential for parasite transport continues to grow, increasing 36% from 1991 to 2001.

Recreational activities can also indirectly influence the risk of *M. cerebralis* introduction by enhancing *T. tubifex* habitat. Recreational foot traffic (such as angling from the bank) can damage vegetation and increase streambank erosion, causing more sediment to enter surrounding waters. Erosion is further compounded by boat wakes (Liepitz 1994).

Assessment of Risk from Recreation-Mediated Dispersal

The likelihood of new *M. cerebralis* introductions by recreational activity can be conservatively estimated as low to moderate. The likelihood of within-state transfer

of the parasite is also low if prevalence and severity of infection remain low (Table 2) and if management actions are taken to limit stocking of infected sport fish. However, the cumulative and long-term effects of angler and recreational activities in heavily used areas could be much greater than the likelihood of introduction (or further spread) in the short term or by a single event.

Natural Dispersal by Predators

The ability of piscivorous birds to pass viable *M. cerebralis* myxospores has been examined in several studies (Taylor and Lott 1978; El-Matbouli and Hoffmann 1991). Because *M. cerebralis* survives passage through the guts of birds, long food retention times would lengthen the distance over which the pathogen could be dispersed. However, numerous events must align in order for parasite introduction to occur.

Alaska is a migratory destination for thousands of birds worldwide. Although the likelihood of a bird releasing viable myxospores over a water body remains unknown, deposition near water may be sufficient for transport of the parasite if spores are rapidly washed into the river by high water or precipitation. The period of viability for myxospores deposited in bird feces is unknown but probably varies with environmental conditions.

Since *M. cerebralis* manifests in cartilage of fish, it is likely that birds would regurgitate the parasite in pellets. Small fish are more likely to be swallowed whole and thus present the highest risk of *M. cerebralis* dispersal. Double-crested cormorants *Phalacrocorax auritus* have a simple gut structure and were shown to egest bones, pieces of fish, and solid markers 1–2 d after ingestion (Brugger 1993). In contrast, the passage time of rainbow trout through bald eagles *Haliaeetus leucocephalus*, which have a more complex gut morphology, is approximately 62 h (F. Barrows, U.S. Fish and Wildlife Service, personal communication). Bald eagles may also store food in the crop (a pouch in the esophagus) and digest the contents over several days (Buehler 2000). Spores could therefore be excreted 2–3 d after a bald eagle eats an infected fish.

Raptors and large waterbirds have some of the fastest known migration speeds among birds; bald eagles travel 201 km/d in migration (Kerlinger 1995), and ospreys *Pandion haliaetus* travel 108–431 km/d (Hake et al. 2001; Alerstam 2003). The nearest *M. cerebralis* enzootic area outside Alaska (upper CRB) is approximately 1,800 km from southeast Alaska and 2,750 km from south-central Alaska. An osprey would have to retain food material for 4.2–16.7 d to transport

spores to Juneau and 6.4–25.5 d to transport spores to Anchorage.

The risk of *M. cerebralis* dispersal by other fish-eating species, such as American black bears *Ursus americanus*, brown bears *U. arctos*, and river otters *Lutra canadensis*, is unknown. Only one study has examined parasite survival after passage through the guts of mammals (El-Matbouli et al. 2005). The pathogen did not survive passage through the guts of mice *Mus musculus*; however, spore viability after gut passage may differ between mice and larger mammals with more complex gut morphologies.

Assessment of Risk from Dispersal by Predators

The likelihood of new parasite introduction via bird transport from the CRB is negligible. The likelihood of within-state transfer by bird or mammal transport is low because of the low infection prevalence, the apparently limited establishment in the state, and the fact that numerous events must align for dissemination to occur. This risk could change if the prevalence or severity of *M. cerebralis* infection increases.

Natural Dispersal by Stray Anadromous Salmon

Anadromous salmonids may stray into nonnatal streams during their return migration to spawning grounds, thereby potentially introducing new pathogens. For example, introduction of *M. cerebralis* as a result of straying salmonids has been documented in the Deschutes River, Oregon (mid-CRB; Engelking 2002).

Though CRB fish are commonly harvested in commercial marine fisheries off the coast of Alaska, little data are available on salmon straying into freshwater systems of Alaska. There is only one such record in state and regional databases: in 2001, a Chinook salmon from Marion Forks Hatchery on the North Santiam River, Oregon (lower CRB; non-zootic for *M. cerebralis*), was recovered in the Copper River of south-central Alaska (ADFG 2006a; RMIS 2006). Because wild fish do not receive marks or tags that could be used to identify strays, no data (current or historical) are available on the straying rates of wild CRB salmon into Alaska, yet these fish are potential carriers of *M. cerebralis*.

Assessment of Risk from Dispersal by Stray Salmon

Based on the available data, the likelihood of *M. cerebralis* dispersal by straying anadromous hatchery salmon from the CRB is negligible. However, the limited data represent a gap in this risk analysis, and the presence of the parasite at ELM on Ship Creek could provide a local source of dissemination. It is unknown whether *M. cerebralis* is established in Ship

Creek; however, if naturally reproducing fish become infected, the potential for further parasite dispersal will increase. Since rainbow trout are typically resident and do not make long migrations (Morrow 1980), the spread of the parasite is likely to be local. Other susceptible anadromous fish from Ship Creek could disperse the parasite, but *M. cerebralis* has not been documented in anadromous fish in Alaska.

Summary of the Release Assessment

The likelihood of re-introduction and within-state dissemination of *M. cerebralis* in Alaska is summarized in Table 2. The most likely pathway for new introductions into the state is recreation, which is conservatively assessed as having a low to moderate risk due to the number of anglers in the state and the potential cumulative and long-term effects of angler and recreational activities in areas of heavy usage.

While the overall likelihood of new introductions is low, the likelihood of further transport within the state is high if no management actions are taken. The pathway with the greatest likelihood for parasite transfer is stocking of infected rainbow trout, as this would repeatedly introduce large numbers of potentially infected fish. However, if stocking is limited to no-outlet lakes that lack native susceptible resident salmonids or to seawater net-pens (i.e., for terminal commercial and sport fisheries), the likelihood of further spread of *M. cerebralis* from these sites would be low to moderate. Significant data gaps exist for dissemination by illegal stocking, nonpermitted fish processing operations, and use of fish heads as bait; the likelihood of further movement by these routes will increase if the parasite establishes outside ELM. The risk posed by using fish heads as bait could be reduced by prohibiting the practice in freshwater or prohibiting the use of fish from ELM-stocked areas. Because of the low prevalence of infection in the state, the likelihood of parasite transport by pathways other than human movement of fish is likely to remain low unless prevalence or severity of infection increases.

Exposure Assessment

The exposure assessment explores the risk of parasite establishment and focuses on the TAM stage of *M. cerebralis* and its oligochaete host. Establishment of *M. cerebralis* has already occurred in south-central Alaska at ELM on Ship Creek. Whether establishment has also occurred outside the hatchery remains unknown.

Establishment of *M. cerebralis* is dependent upon environmental and biological factors, including distribution and genetic composition of *T. tubifex* populations, water temperatures, and spatial temporal overlap

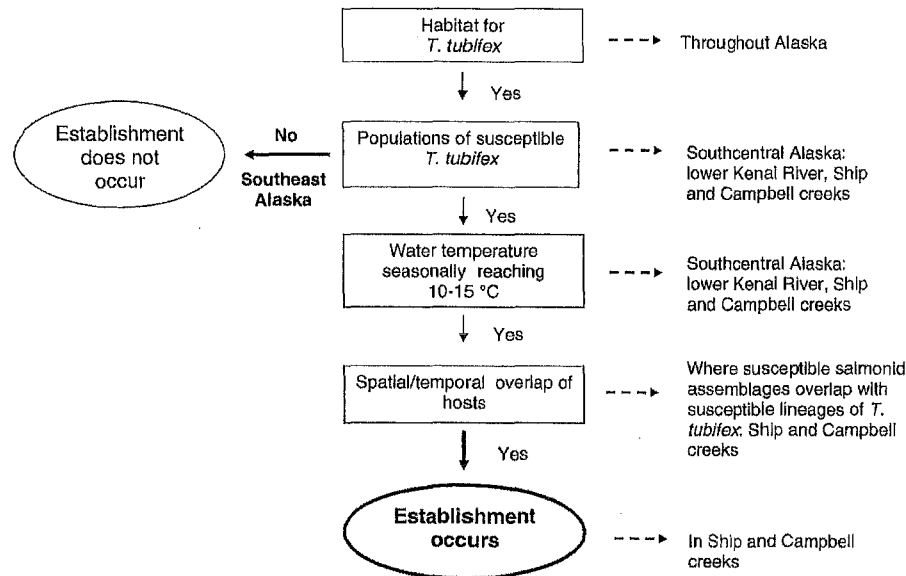


FIGURE 3.—Scenario tree depicting the risk of *Myxobolus cerebralis* establishment in southeast and south-central Alaska. Requirements for establishment (e.g., suitable habitat for the oligochaete host, *Tubifex tubifex*) and areas that meet each requirement are displayed.

of hosts. Each of these factors determines the outcome of the exposure assessment, as depicted by the scenario tree in Figure 3.

Tubifex tubifex Habitat and Populations

Habitat for *T. tubifex* is defined as areas with fine sediment, low flow, and organic matter (Brinkhurst 1996). Suitable habitat for *T. tubifex* was found throughout the study area.

A limited survey was conducted to ascertain relative abundance of *T. tubifex* in selected streams; details of the survey are described by Arsan et al. (2007b). Over 2,700 oligochaetes were collected from southeast Alaskan sample sites; however, morphological and genetic analysis demonstrated that none of the worms examined were *T. tubifex*. Inability to detect *T. tubifex* at these sites could have resulted from the limited sample size. Collections focused on areas of Alaska that we considered to have the highest likelihood for *M. cerebralis* introduction or further dissemination based on the risk assessment criteria. Areas that fit these criteria in southeast Alaska were few; thus, the number of sites sampled was low. In addition, the typical physical nature of streams in this region (short, low order, and steep) may limit availability of appropriate habitat. In contrast to southeast Alaska, *T. tubifex* were commonly found at south-central Alaska sites. Sites with the highest numbers (1,768 *T. tubifex* among 3,024 total worms) were in the lower Kenai River,

particularly Centennial and Eagle Rock boat landings; these areas have heavy recreational use and high sedimentation and organic loading (primarily from decaying salmon carcasses). *Tubifex tubifex* were also identified as occurring in Ship and Campbell creeks but were not found in the upper or middle Kenai River.

Oligochaetes gathered during the *T. tubifex* survey were held in water that was screened for *M. cerebralis* actinospores. No *M. cerebralis* TAMs were observed in samples from any of the surveyed sites. However, actinospores of several other myxozoans were detected (Arsan et al. 2007b), confirming that other myxozoan life cycles have established in both southeast and south-central Alaska.

Tubifex tubifex Susceptibility

Tubifex tubifex mitochondrial lineages I, III, IV, and VI were represented in the samples collected at our study sites. Parasite exposure experiments (described fully by Arsan et al. 2007b, and abbreviated here) demonstrated that three of these lineages (I, IV, and VI) did not support the *M. cerebralis* life cycle. Among the *T. tubifex* lineages detected in Alaska, lineage III was the only lineage that propagated the parasite. The presence of nonsusceptible lineages I, IV, and VI could translate to a reduced exposure risk for Alaskan salmonids in areas where these lineages dominate the *T. tubifex* populations. Lineage I predominated (71–86%) at sites on Ship and Campbell creeks, whereas

lineage VI predominated (69%) at sites on the lower Kenai River. Lineage III was present in low numbers (7–21%) throughout the Cook Inlet basin at seven of the nine sites where *T. tubifex* were collected; however, it was not detected at any of the hatchery sites.

Populations of lineage III from other geographic regions are highly susceptible to *M. cerebralis* (DuBey et al. 2005; Beauchamp et al. 2006; Arsan et al. 2007b), and detection of the lineage in Alaska is cause for concern. Though this lineage constituted approximately 14–21% of worms sampled in Ship and Campbell creeks and only 7% of those sampled in the lower Kenai River, lineage III can become infected with *M. cerebralis* and can release TAMs even when found in proportions as low as 3% of the total population (Arsan et al. 2007b).

Seasonal Water Temperature

Water temperatures below 10°C retard spore formation (El-Matbouli et al. 1999; Baldwin et al. 2000) and could delay TAM development and release at high latitudes. However, *M. cerebralis* has been found to persist and to cause reduced juvenile rainbow trout recruitment even in cold, oligotrophic, sediment-poor, high-gradient streams (Allen and Bergersen 2002) and at elevations as high as 3,300 m in Colorado (Nehring and Thompson 2002). Temperatures in such areas are similar to, and perhaps slightly warmer than, those at our study sites in Alaska.

Streams in south-central Alaska are generally cool and typically exhibit a total of 1,780 degree-days annually (Oswood 1997). In comparison, the Madison River in Montana (enzootic for *M. cerebralis*) has roughly 2,650 degree-days annually (USGS 2005). The mean summer (June–August) water temperature in the lower Kenai River during 1999–2001 was 11°C (USGS 2005); the average continuous period in which temperature exceeded 10°C was 79 d/year, and 1,801 degree-days were accumulated annually. Campbell Creek had a mean summer temperature of 10°C during 2000–2001, and temperature exceeded 10°C for a period of only 50 d/year (USGS 2002).

T. tubifex lineage III from Alaska required 1,382–1,536 degree-days for *M. cerebralis* to develop (Arsan et al. 2007b). Therefore, water temperatures in south-central Alaska are sufficient for parasite development and propagation, although complete life cycle duration may be longer than that seen in warmer climates.

Future climate trends could also influence parasite development; water temperatures in the Cook Inlet basin are likely to increase 3°C between 2001 and 2011 (Kyle and Brabets 2001). If such an increase occurs, water temperatures in south-central Alaska will be similar to that of the Madison River.

Spatial and Temporal Overlap of Hosts

For the parasite to establish after introduction of myxospores, spatial overlap of parasite and host must occur twice: once between myxospores and *T. tubifex* and subsequently between salmonids and TAMs.

Varied patterns of seasonality have been associated with TAM release; releases of this stage occurred during the spring warming and fall cooling periods in Montana (Gilbert and Granath 2003), during fall through winter in high-altitude areas of Colorado (Nehring and Thompson 2002), and from summer to early fall in other areas of Colorado (Thompson and Nehring 2000; Allen and Bergersen 2002). Seasonality of TAM releases is believed to be related to water temperature and the availability of myxospores as influenced by fish stocking schedules. We speculate that high-latitude Alaskan water temperatures would be similar to (if slightly cooler than) high-altitude water temperatures in Colorado and that seasonal TAM release in Alaska would be comparable to TAM releases in these areas.

Breakdown of cartilage tissue and release of myxospores is likely to occur gradually in slow-moving or cold waters (Hallett and Bartholomew 2008). Once infected, *T. tubifex* can remain persistently infected throughout their life span (Gilbert and Granath 2001), and TAM release occurs when water temperatures are appropriate. Hatchery and wild salmonids in south-central Alaska hatch primarily during December–August (ADFG 2003; Quinn 2005), and fish would be most susceptible to infection during the first few weeks posthatch. In rainbow trout (and to a lesser extent, steelhead), the period of greatest susceptibility is from 0 to 9 weeks posthatch (up to 756 degree-days at 12°C; Ryce et al. 2004). However, rainbow trout hatched in June would exhibit resistance to the parasite by September. On this schedule, young rainbow trout may avoid peak TAM release from oligochaetes if peak release begins in September. Thus, it may be possible for the parasite to proliferate at cold temperatures and yet have little impact on rainbow trout populations (Kerans et al. 2005).

Salmonid species composition will also affect the outcome of introduction. Generally, areas with the highest *T. tubifex* abundance, like the lower Kenai River, will have a higher likelihood of spatial-temporal overlap between hosts and parasite and thus a higher likelihood of *M. cerebralis* establishment. However, the contribution of rainbow trout to the juvenile salmonid assemblage in this area is 1% or less (Bendock and Bingham 1988; King and Breakfield 1998, 2002), whereas Chinook salmon and sockeye salmon contribute the greatest percentages. Chinook

salmon are susceptible to *M. cerebralis*, but they acquire resistance to the parasite more quickly and are less susceptible than rainbow trout (MacConnell and Vincent 2002; Sollid et al. 2003). Sockeye salmon susceptibility to *M. cerebralis* is lower than that of rainbow trout or steelhead but greater than that of Chinook salmon (O'Grodnick 1979; Sollid et al. 2002). Thus, the likelihood of spatial overlap of highly susceptible hosts in this area is low. Chinook salmon and coho salmon are believed to make up over 80% of the juvenile salmonid assemblage in Ship Creek (D. Bosch, ADFG Sport Fish Division, personal communication), but the percentage of rainbow trout is unknown.

Summary of the Exposure Assessment

The probability of further establishment of *M. cerebralis* in south-central Alaska is variable among locations (Figure 3). Susceptible *T. tubifex* distribution, water temperature, and juvenile salmonid species composition would be determining factors for establishment. Thus, the probability of establishment in the upper Kenai River is low due to a lack of oligochaete hosts. The lower Kenai River maintains a high abundance of *T. tubifex*, but the low abundance of juvenile rainbow trout decreases the risk of *M. cerebralis* establishment there. Ship and Campbell creeks have appropriate environmental and biological conditions and remain the most likely areas of parasite establishment (Figure 3). However, although these creeks support populations of *T. tubifex*, abundance and susceptibility of the worms appear to be low. Susceptibility is limited to lineage III, which was in low abundance (7–21%) in the Cook Inlet basin (Arsan et al. 2007b). Thus, although conditions are permissible for *M. cerebralis* establishment in south-central Alaska, their suboptimality may suppress infection rates and prevent disease from becoming apparent. Changes to physical or environmental conditions, such as climate change, may alter the probability of parasite establishment in the state.

The likelihood of establishment in the surveyed areas of southeast Alaska is considered negligible. Drainages in this region have frequent flushing action that may prevent the invertebrate host from becoming significantly abundant, as was suggested by Modin (1998). In addition, no *T. tubifex* were detected in southeast Alaska; however, oligochaete surveys were limited (Arsan et al. 2007b).

Conclusions and Risk Management

Risk of New Introductions

The probability of new introductions of *M. cerebralis* into Alaska is low, and the most likely pathway

is recreational and angler activity. Thus, areas that are most likely to first experience introduction are high-use sport fisheries, such as those of the Kenai River and Ship Creek. If a new introduction occurs, the probability of parasite establishment is moderate, particularly in systems like Ship Creek, which has permissive temperatures, a susceptible lineage of *T. tubifex*, and potential rainbow trout host populations.

Conditions in Ship Creek are permissive for *M. cerebralis* development but they are not optimal; thus, parasite development and establishment may be hindered. For example, water temperatures are acceptable for parasite development but are low enough to abate rapid proliferation. Susceptible *T. tubifex* are present in the creek, but the overall *T. tubifex* population consists primarily of nonsusceptible strains, again lowering the risk of rapid parasite proliferation. Lastly, fish species composition in south-central Alaskan creeks may also help to lower the risk of parasite establishment, as less-susceptible Chinook salmon tend to predominate in areas where susceptible *T. tubifex* were collected.

Policies that prevent importation of live salmonids into Alaska have been the most effective tool for limiting introduction. Existing regulations discourage establishment of private ponds, which are believed to contribute to spread of the parasite in areas of the contiguous USA (B. Nehring, Colorado Division of Wildlife, personal communication). We also recommend (1) maintenance of the state's policy requiring disposal of all seafood processor effluent into marine waters and (2) restriction of effluent waivers in areas considered to be high risk (Cook Inlet basin). Although the potential for introduction by anglers is moderate, the risks could be further reduced, especially in light of recent data on the vulnerability of myxospores to desiccation. To further reduce the angler-mediated introduction risk, we urge the state to allocate resources to angler education and further research on the effects of angler activity on dispersal of *M. cerebralis* (and other aquatic nuisance species). Education could be accomplished with signage at boat ramps, parking areas, or other access points; brochures distributed upon purchase of fishing licenses; and an informational web page recommending that anglers clean and thoroughly dry their gear before and after entering Alaskan waters.

Risk of Further Dissemination within Alaska

The probability of further transport of *M. cerebralis* within the state is high due to the presence of the parasite at ELM. The pathway presenting the greatest risk for within-state parasite transfer is human movement of fish. Because infection has only been

detected at a low prevalence in hatchery rainbow trout, the likelihood of parasite transport by other pathways is likely to remain low unless prevalence or severity of infection increases. Although the probability of *M. cerebralis* establishment in southeast Alaska is considered negligible due to the lack of suitable invertebrate hosts, only a few sites were surveyed. To gain more confidence in this assessment, additional sites should be surveyed for susceptible lineages of *T. tubifex*. In contrast, Ship and Campbell creeks in south-central Alaska have appropriate environmental and biological conditions and remain the most likely areas of parasite establishment.

It is unknown how long *M. cerebralis* has been present in Alaska, but previous monitoring using the pepsin–trypsin digest method as an initial screening test would probably have missed a low infection prevalence. Not only did all prior monitoring efforts in Alaska use pepsin–trypsin digest, but testing was nontargeted and did not focus on areas at risk for *M. cerebralis* introduction or on highly susceptible species. Molecular tests such as polymerase chain reaction are approximately 10-fold more sensitive than pepsin–trypsin digest (Andree et al. 2002) and could have detected the parasite. For management purposes, it may only be necessary to detect infections that cause negative impacts on fish populations or that are considered “significant” infections; both pepsin–trypsin digest and histology are adequate for such cases. However, if the criterion for a significant infection is presence of the parasite, then use of more sensitive assays is necessary.

Testing of sentinel rainbow trout fry in Ship Creek could determine whether the parasite has become established outside the hatchery; these methods have been used in similar situations after isolated parasite introduction (Bartholomew et al. 2007). Given the low prevalence and severity of infection in ELM fish, examination of other salmonid species or monitoring of Ship Creek water for TAMs would probably prove ineffective. Regular monitoring for *M. cerebralis* in cultured salmonids and regular testing of sentinel rainbow trout held in the hatchery inflow would provide baseline data for identifying changes in infection prevalence or severity. Similarly, monitoring of wild salmonids should focus on the most susceptible species and the areas of highest risk for parasite introduction and establishment.

Locations where potentially infected rainbow trout have been stocked should also be monitored by testing of sentinel or resident rainbow trout. To evaluate the likelihood of establishment in these areas, oligochaete populations should be surveyed for presence and lineage composition.

Furthermore, we recommend that the state prohibit the use of fish heads as bait in freshwater. Allotment of resources toward angler education would further benefit this action.

The risk of *M. cerebralis* dissemination in Alaska is not static and will vary with changes in environmental or physical conditions that affect parasite proliferation and development, such as climate change or land use modifications. The risk assessment should be as dynamic as the conditions it addresses, and this study provides a framework for re-evaluating the risk of *M. cerebralis* dispersal in Alaska.

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To: Board of Fish

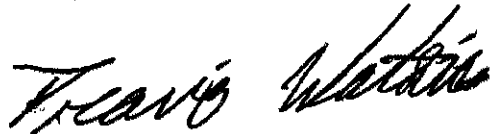
From: Travis Watkins

March 13, 2010

Regarding: Proposal 195, I am Opposed

I recently invested in a Commercial Dungeness permit. I live in Hollis, Alaska. This is my main source of income. Closing Area 2 would force me to leave my wife and newborn baby for long periods of time to fish elsewhere. I was counting on Area 2 being open for at least two more years, as decided at the last BOF meeting.

Thank you,
Travis Watkins

A handwritten signature in black ink that reads "Travis Watkins". The signature is written in a cursive, slightly slanted style.

RC 78

Sitka Fish & Game Advisory Committee

Tad Fujioka, Chairman
214 Shotgun Alley, Sitka, AK 99835

Record of Oral Testimony for March 2010 Statewide Finfish Meeting

- ❖ My name is Tad Fujioka, I am the trapping rep on Sitka Advisory Committee (SAC) & also the chairman.
 - Want to express thanks & appreciation for being able to be here representing SAC & Sitka
 - Fish & fishing are very important to Sitka
 - Many of you know that Sitka has largest harbor system in the state
 - Might not know that Sitka's harbor system is 10th in nation by # of stalls
- ❖ SAC consists of 13 designated seats+ 2 @ large & 2 alt
 - Each designated seat is assigned to a specific user group
 - No user group gets more than 1 designated seat
 - This is to maximize the diversity of opinions
 - Also helps to pre-empt user groups from arguing about reallocation
 - Makes a unanimous opinion difficult to attain,
 - Meaningful when it happens since indicates widespread support
- ❖ The SAC has a long history of fighting for conservation-oriented proposals.
 - We sponsored the steelhead size limit in the Sitkoh
 - This was the first stream to have a size limit
 - Now there is a size limit on steelhead throughout SE
 - SAC proposed the 1st marine sanctuary in the state @ Cape E pinns
 - This was approved by the BOF and today there is no groundfish harvest allowed by any user group there
 - We established the 1st LAMP to restrict halibut harvest by the commercial & charter fleets to insure fish for local subsistence harvesters
 - SAC developed the Redoubt Sockeye Mgmt Plan
 - This plan won national recognition from the USFS
- ❖ In the same spirit of conservation which has guided the SAC for many years, we have two proposals before the Board this meeting
 - Prop 175 Instituting sportfishing bag limits for blackcod (bcod)
 - Prop 182 Restricting use of electric sportfishing reels to only those anglers w/ disabilities
 - Committee members worked together on these proposals and both were unanimously supported for submission and again unanimously supported during the comment period.

- ❖ First some background on Bcod. Bcod stocks are cyclic
 - Recruitment is dependent on the highly variable survival rate of the larval and juvenile stages.
 - Occasionally, juvenile survival is good and the resulting strong year class can boost the fishable biomass by up to 50% in the best cases
 - But, most years only very few survive. With so few young fish maturing, adult biomass declines. This continues until the next strong year class
 - Unfortunately, there has not been a year of even moderately good juvenile survival since the 2000 yr class
 - As a result, bcod stocks are currently at or near all-time lows
 - Observations show that pre-recruit juvenile bcod have not been abundant recently either. Thus, the NMFS forecast is for a continuation of the downward trend for at least 2 more years and possibly even longer until the birth & maturation of the next strong year class whenever that might be.
 - As a result of this decline, the commercial bcod quota in Chatham Strait where most of the 2009 sport catch was taken has been dropping as well- down 48% in the last 3 yrs; Down 78% since 1989- compounded average of 7.8%/yr for 20 yrs. 78
 - Thus, this is a particularly bad time to allow a new bcod fishery to develop on a full-utilized stock already at its all-time low and still headed down.

- ❖ The dept sportfish catch data shows that currently only a handful of charter operations targeted bcod in 2009
 - But compared to estimated catches reported to the BOF 13 months ago, the catch while still relatively low in absolute terms, has increased several orders of magnitude in this time.
 - The BOF has a unique opportunity to stop this exponential growth in bcod harvest by the guided sport fishery now.

- ❖ We've seen the consequences of rapid growth in this sector before
 - King salmon, halibut, lingcod, yelloweye have all suffered from this
 - Bcod is next
 - SAC asks that you take preemptive action to prevent the social tensions, the painful financial sacrifices and general community-wide animosity that we have seen will plague fishermen from all sectors in the future if action is not taken now

- ❖ Electric reels are a related but distinct subject. It is an issue that encompasses many species
 - The sport fish regulations on this topic were written long before electric reels were available to sportfishermen.
 - While a recent court ruling has indicated that powered reels have been legal under those regulations, this board should not be misled into thinking that this was by design
 - Here the BOF has an opportunity to restore the regulation's original intent and to keep the image of sportfishing in Alaska from becoming dominated by mechanized harvest
 - Additionally, the increased effectiveness & efficiency associated with electric reels as well as the additional anglers they will encourage all directly increase harvest.
 - Catching more fish faster is not in the best interest of the fish resources. We've seen this play out time and again with salmon, lingcod, yelloweye, halibut...
 - Whatever species is the target, when CPUE goes up, the level of effort must go down or the fish stocks will suffer.
 - Looking ahead, if electric reels become commonplace, how will this BOF restrict fishing effort in order to limit pressure on the stocks? What is going to be more difficult for sport fishermen to accept-keeping electric reels off the water or reduced bag limits and season and area closures?
- ❖ The loss of what you are already accustomed too always hurts more than abstaining from a potential benefit of the same magnitude.
 - The board can avoid the more painful future loss by acting today to stop the widespread use of electric reels instead of waiting until tomorrow to institute reduced limits or complete closures

- ❖ You've probably heard that some fishermen think that they need electric reels in order to catch a blackcod.
 - I would like to close by recalling a testimony given to the SAC by our Subsistence representative Jack Lorrigan. It concerns his Grandmother, Blanche Isaacs Ohneck a Haida elder.
 - She liked to eat blackcod. The best means to catch them that she had available to her was a small Boston Whaler and a sport rod with a manual Penn reel.
 - Mrs. Ohneck had been caught in a fire as a girl. Her hands were badly burned and nearly had to be amputated. The doctors were ultimately able to save her hands, but her four fingers on each hand were fused together. She went the rest of her life as if wearing mittens.
 - To get her blackcod Mrs. Ohneck would locate her fishing hole the old fashioned way- by lining up islands- GPS didn't exist back then.
 - Despite her crippled hands, Mrs. Ohneck would jig and handcrank her reel to catch her blackcod. All that she and her family wanted to eat.
 - Mrs. Ohneck was in her late 70's at this time- a Haida Indian fishing to feed herself and her family.
 - If Blanche Ohneck could catch subsistence quantities of blackcod with a manual reel, the SAC is convinced that able-bodied anglers do not need electric power to catch these same fish for sport.

RC 79

March 16, 2010

To Vince Webster

Chairman

Alaska Board of Fish

I oppose the use of electric reels in the recreational fishery (except handicapped). I feel recreational fishing for sablefish should be a very low limit- like 1 per year at most as it is not a traditional fishery, is a fully utilized fishery and is a declining biomass as well. To allow a new fishery to start up in sablefish will be detrimental to the existing fishery and stocks.

To allow electric reels will allow access into depths not traditionally fished, which will put pressure on already fully utilized and carefully regulated stocks.

The accounting methods for recreational fisheries are completely inadequate for keeping track of what is caught and will definitely result in harming the various fish stocks accessed by electric reels as well as the people in the existing fisheries. Any fish taken from any fish stocks need to be 100% accounted for. Sablefish, halibut and rockfish are all either fully utilized or declining stocks. I do not feel self reporting will accomplish this accountability as it hasn't in the past for any recreational fishery.

Do not allow the mess associated with the halibut fishery to happen again by any decision by the Board of Fish.

Do not allow electric reels in the recreational fishery.

Make a 1 fish limit for sablefish annually at the most.

Thank You

Randy Nichols

Sitka Alaska

RC 80

**Southcentral Alaska Subsistence Regional Advisory Council
c/o U.S. Fish & Wildlife Service
1011 East Tudor Road MS 121
Anchorage, Alaska 99503
Phone: (907) 786-3888, Fax: (907) 786-3898
Toll Free: 1-800-478-1456**

March 16, 2010

Vince Webster, Chair
Alaska Board of Fisheries
Boards Support Section
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK 99811-5526

Dear Chairman Webster:

The Southcentral Alaska Subsistence Regional Advisory Council met in a public meeting on March 10-11, 2010 in Anchorage, Alaska.

In regard to the Alaska Board of Fisheries proposals 200 and 201, the Council submits the following comment. At its meeting, the Council discussed Alaska Board of Fisheries proposals 200 and 201. Proposal 200 addresses adoption of subsistence finding standards and proposal 201 is to find a customary and traditional use of salmon stocks in the Chitina subdistrict and to establish amounts necessary for subsistence. When deliberating on these proposals, the Council respectfully requests that the Alaska Board of Fisheries consider the effects of any action on the upriver Federally qualified subsistence users, and ensure that the effects on these users is minimal.

Thank you for the opportunity for this Council to review and provide comments on State proposals 200 and 201. If you have questions about this letter, please contact me via Donald Mike, Regional Council Coordinator, with the Office of Subsistence Management at 1-800-478-1456 or (907) 786-3629.

Sincerely,



Ralph Lohse, Chair
Southcentral Subsistence Regional Advisory Council

cc: Peter J. Probasco, ARD
Southcentral Subsistence Regional Advisory Council Members
Federal Subsistence Board Members
Alaska Department of Fish and Game

Tony O'Connell

RC 81

ALFA -

In reference to Mr Brown's questions on allocation I would refer the Board to their allocation criteria:

Thank you.

BOF Allocation Criteria

Although not strictly allocation, a bag and annual limit do in effect allocate resources to the sport and charter sectors. In Southeast recent allocations have been based on the previous 5 years of history. Lingcod sport allocations range from 44% to 2% based on their recent history of use. An allocation of sablefish to the charter sector reasonably would be 1% or less using this established precedent. Under your own allocation criteria the current 2 daily 8 annual limit is extremely generous particularly in light of the fact that the charter fishery lobbying for expanded use of this resource has predominately nonresident clientele.

The Board of Fisheries may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries. The board shall adopt criteria for the allocation of fishery resources and shall use the criteria as appropriate to particular allocation decisions. The criteria may include factors such as

(1) the history of each personal use, sport, guided sport, and commercial fishery;

ADF&G reports from February, 2009 clearly show that this is a commercial fishery and historically has been used primarily by commercial fishermen with some subsistence take. The ADF&G wrote in their comments that 11 fish (or 7 if you read their February comments) have been observed by creel samplers. Sablefish were first reported commercially in 1906 (Bergmann 1975). 2009 charter = 3877

(2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future; The CFEC reports that for the NSEI sablefish fishery 75% of the permit holders are resident Alaskans and that 77% of the SSEI sablefish permit holder are

residents. By definition all subsistence fishermen are residents. By contrast the Southeast charter fishery is almost entirely nonresident anglers.

(3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption; There is a long history of subsistence take of sablefish using longline gear which provides Alaskans the opportunity to obtain fish for personal and family consumption. The sport and charter fishery should not be a vehicle to meat hunt, it is a recreational opportunity.

(4) the availability of alternative fisheries resources; There is already enormous charter fishing opportunity in Southeast. Combined daily bag limits exceed 30 fish per day for saltwater anglers. There are no open access commercial sablefish fisheries in Southeast. Any new charter harvest will automatically reduce the harvest available for commercial permit holders.

(5) the importance of each fishery to the economy of the state; The sablefish fishery is the most valuable groundfish fishery managed by the State of Alaska (Richardson and O'Connell 2004). NSEI sablefish permits are valued by CFEC at \$310,000 each, the most valuable state limited entry permit. Based on charter testimony at the February BOF meeting there is no "directed" sport fishery for sablefish and the catch is minimal, the economic importance of a sablefish charter fishery is trivial at this point in time. Any erosion of the commercial fishery by development of a new fishery will hurt the economy of the State because charter anglers will come even if sablefish were not allowed because charter anglers come for a mixed species opportunity focusing on king salmon and halibut.

(6) the importance of each fishery to the economy of the region and local area in which the fishery is located;

Sablefish is the second most valuable commercial fishery resource in Southeast, topped only by halibut.

The annual permit fees for sablefish fisheries are the highest in the region as well.

2007 CFEC Data: Estimated Gross Earnings, Commercial Fisheries Southeast

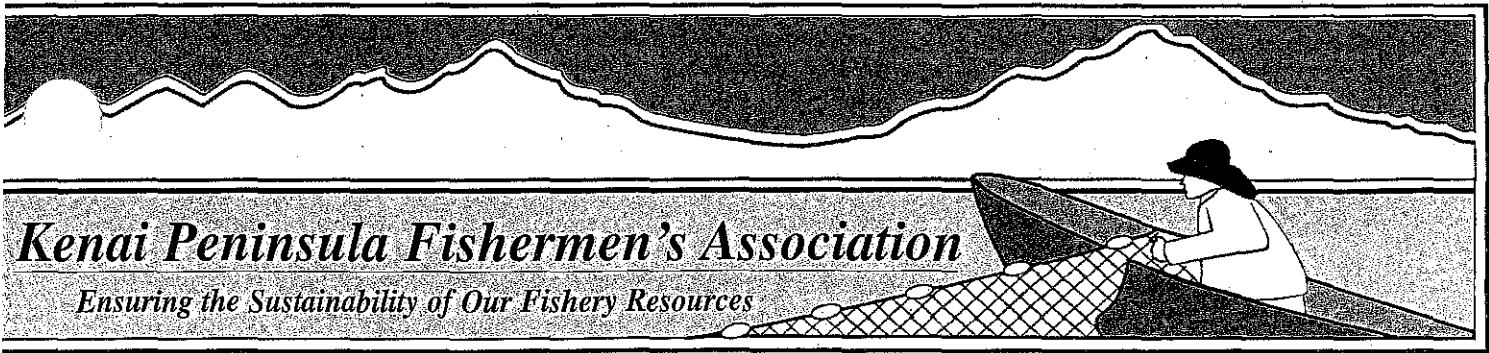
Region	Column1
Fishery	Gross Earnings
Halibut	\$150,267,584
Sablefish	\$73,688,793
SALMON, PURSE SEINE, SOUTHEAST	\$46,481,473
SALMON, POWER TROLL, STATEWIDE	\$45,083,312
Crab	\$43,359,434
SALMON, DRIFT GILLNET, SOUTHEAST	\$22,360,480
Herring	\$18,697,523
Other Shellfish	\$18,383,176
SALMON, HAND TROLL, STATEWIDE	\$2,776,136
Other Groundfish	\$1,850,271
SALMON, SET GILLNET, YAKUTAT	\$261,962

Sablefish is not at all important economically to

~~OS Comment~~

Charter testimony in 2/11/07 indicated charter sablefish catch is not large, less than 1%

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents. As evidenced by bag limits for other high value and/or vulnerable species a bag limit of ~~2~~ 2 fish with an annual limit of ~~4~~ 4 fish provides ample recreational opportunity for nonresidents, a 2 fish daily limit for residents also provides ample opportunity. Charter operator testimony in Sitka overwhelming spoke to the lack of importance of this species in their business plan. After rightly denying the petition to reconsider, it would appear that the Board has crafted a proposal to address the needs of a specific charter operation that would like to take a large quantity of fish (8 annual) and have dedicated sablefish fishing days. In trying to accommodate the needs of one user the Board will allow for rapid growth of a new industry that may severely impact existing users.



43961 Kalifornsky Beach Road • Suite F • Soldotna, Alaska 99669-8276
 (907) 262-2492 • Fax: (907) 262-2898 • E Mail: kpfa@alaska.net

March 16, 2010

Boards Support Section
 Alaska Department of Fish and Game
 P.O. Box 115526
 Juneau, AK. 99811-5526

ATTN: Alaska Board of Fisheries

Chairman: Webster

The Kenai Peninsula Fishermen's Association (KPFA) is a fifty year plus non-profit 501 (c) (6) organization that works for '*ensuring the sustainability of our fishery resources*'. We believe that managing for the best productivity is the first mandate to deliver our state's constitutions promise of resources *maintained and developed for maximum beneficial uses*. What better way for the State of Alaska to provide a reasonable opportunity to the residents.

We have submitted a separate RC that details our comments on Statewide proposals.

KPFA has also submitted two proposals for this meeting.

Proposal 169 is a request to further define the use of the phrase "fair and reasonable opportunity" AS 16.05.251 (d) as it relates to (e) and 5 AAC 39.205 *Criteria for the allocation of fishery resources among personal use, sport and commercial fisheries*.

We appreciate the DOL's memorandum that outlines "updated advice on general legal requirements". It advises the Board on the application of "*fair and reasonable opportunity*" as it is in part (d):

Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

We look for definition or guidance in how the public or the members of the board will incorporate this into their deliberative process. How do we utilize this phrase in a consistent application as it relates to the allocation criteria or for that matter any duties of the board?

The legislature defines the phrase in AS 16.05.258 *Subsistence use and allocation of fish and game* (f) *For the purpose of this section, "reasonable opportunity" would seem important enough to require an explanation and direction to the Board on how it is applied in subsistence applications.*

DOL makes a clarification as it references a court decision that involved KPFA.

The opinion of how article VIII section 15 applies to "reasonable opportunity" "*...that section was not meant to prohibit differential treatment for such diverse user groups as commercial, sports, subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must be allowed, would be to go far beyond the purpose of this section.*"

The court made their justification on rulings decided in 1962 and 1949. Both dealing with Native sovereignty issues, fish traps and Federal rights vs States rights.

This decision would seem to be contrary to a the courts decision in McDowell v State in which the natural resource article sections 3,15, and17 also known as the "equal access clauses" apply. *... exclusive or special privileges to take fish and wildlife are prohibited.*

Proposal 172 asks the Department and the BOF: What is a SET as it relates to a SEG. What is the practical science that would establish an SET? How does an SEGT differ from a SEG or SET? What are the effects of over escapement and of lost harvest opportunities as a result of now defined top and of an escapement goal?

Thank You,

Paul A. Shadura II
Executive Director

Inactivate spores adhering to utensils.

PL83

Detection of Early Infection

Under experimental conditions, the initial infection of whirling disease can be detected microscopically in wet mounts of the skin or fins or in histological sections (Fig. 6) in the form of aggregates of small (1.52 μm) intracellular sporozoites (sporoplasms). These can be detected only during a few hours after penetration of the infective *Triactinomyxon* spore stage because the sporozoites move or are transported rapidly from the external epithelial layers into deeper strata (Markiw 1989b). After initial infection of the fish, mature spores of *M. cerebralis* can be found in 2.6 months at a water temperature of 12.5° C.



Fig. 6. Initial form of whirling disease infection in histological section of dorsal epithelium of rainbow trout fry 30 min after exposure to the *Triactinomyxon* spores. Intracellular inclusions of numerous small (1.5-2 μm in diameter) sporozoites (sporoplasms) are intensely stained with May-Grünwald Giemsa.

Life Cycle

The whirling disease protozoan has a twohost life cycle (Fig. 7) involving a fish and the aquatic oligochaete *Tubifex* (Markiw and Wolf 1983; Wolf and Markiw 1984; Wolf et al. 1986); two separate stages of sporogony occur, one in each host. Antigenic homology of the two morphologically distinct spore forms was demonstrated serologically (Markiw 1989a).

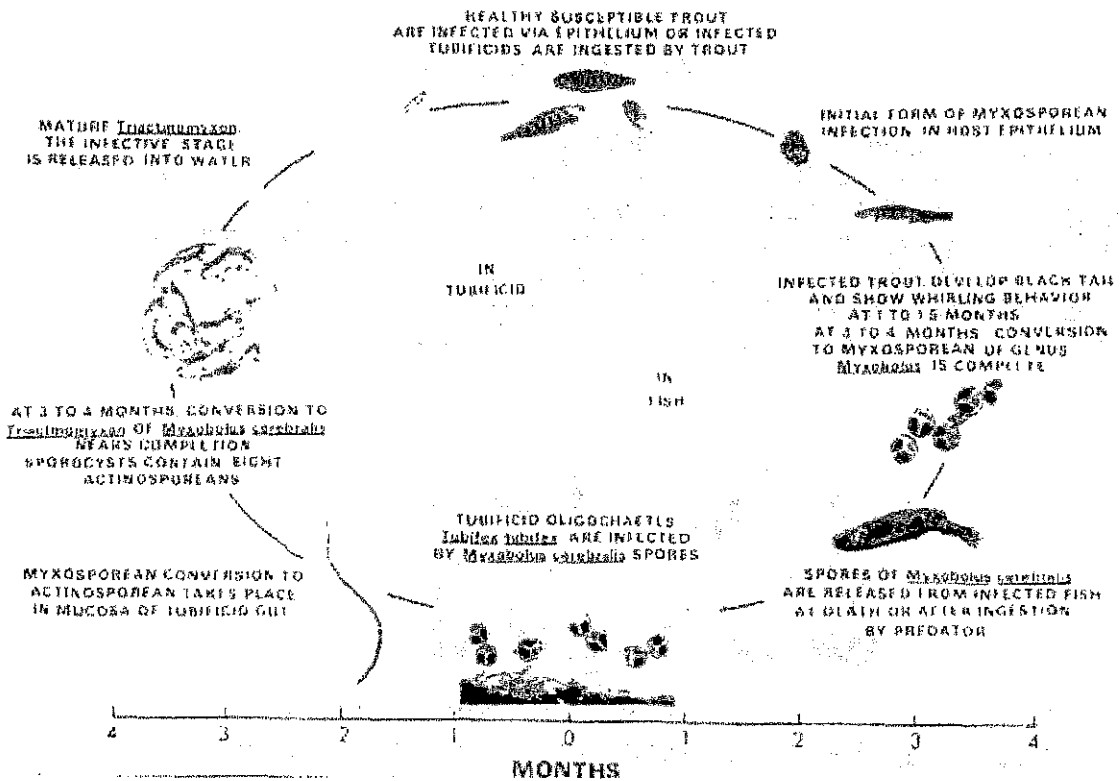


Fig. 7. Diagram of a two-host life cycle of the whirling disease parasite.

In brief, spores of *M. cerebralis* are released into the aquatic environment when infected fish die and decompose or are consumed by predators or scavengers. The myxosporean-type spores are ingested by worms in whose gut epithelium the next phase develops (Fig. 8). Transformation into the actinosporean *Triactinomyxon*, the infective stage to fish, takes about 3.5 months at 12.5° C, after which infected worms release numerous mature forms into the water for several weeks. The *Triactinomyxon* spores are much larger and have three polar capsules and three grapplelike appendages, 170180 μm long (Fig. 9). The *Triactinomyxon* stage enters susceptible fish through the epithelial cells of the skin, fins, buccal cavity (particularly at the base of the gills), upper esophagus, and lining of the digestive tract. Transformation into *M. cerebralis* spores then takes about 2.6 months at a water temperature of 12.5° C. This life cycle was confirmed by ElMatbouli and Hoffmann (1989) for *M. cerebralis*; a similar life cycle was shown for *Myxobolus cotti*.

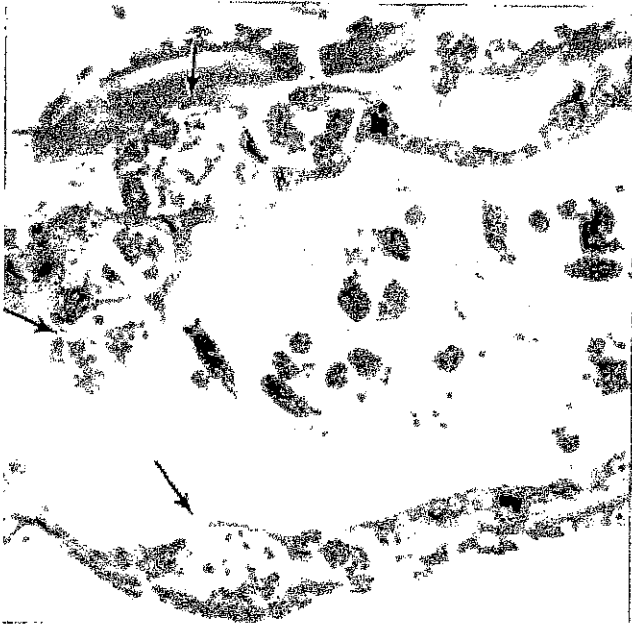


Fig. 8. Histological section of a tubificid worm infected with actinosporean 130 days after exposure to *Myxobolus cerebralis* spores. Note (arrows) several undeveloped cysts in a gut wall and mature *Triactinomyxon* in the lumen. May-Grünwald Giemsa stain. x 450 magnification.



Fig. 9. Living unstained mature waterborne *Triactinomyxon* spore stage. The episore contains three polar capsules, about 30-60 sporozoites, and three grapple-like appendages, 170-180 μm long. x 450 magnification.

Although a two-host life cycle of the whirling disease organism is now widely accepted and the parasite has been recycled at this laboratory in fish or tubificids for nearly a decade without losing its infective potency, Hamilton and Canning (1987), Prihoda (1983), and Uspenskaya (1978) claimed direct transmission of the parasite from fish to fish by way of aged spores.

Transmission

Salmonids contract whirling disease in two ways: by ingesting tubificids that harbor the specific actinosporean *Triactinomyxon* and by brief contact with waterborne *Triactinomyxons* released from infected tubificids. The experimentally produced actinosporean stage of *M. cerebralis* is shortlived, persisting 34 days at 12.5° C and fewer days at warmer temperatures (Markiw 1992b). Studies of the dynamics of the infective stage for fish (Markiw 1986) demonstrated that, after a single exposure to *M. cerebralis* spores, a population of infected tubificids can release viable *Triactinomyxon* spores for as long as a year at a level detectable by only sentinel fish.

O'Grodnick (1975b) demonstrated that whirling disease cannot be transmitted vertically from infected brood stock to the egg. Shipments of salmonid eggs from waters

contaminated with whirling disease are also unlikely to disseminate the parasite because rainbow trout are refractory to the infection during hatching and for a day afterward (Markiw 1991). Contrary to reports from eastern Europe and Russia (Prihoda 1983; Uspenskaya 1978), attempts to effect fish-to-fish transmission of whirling disease or through aged spores of *M. cerebralis* in absence of tubificids in our laboratory have been unsuccessful.

Development

Development time for both stages of the whirling disease organism, myxosporean in fish and actinosporean in tubificids, is directly related to temperature. Trout fry that are fed infected worms or exposed to waterborne *Triactinomyxon* show blacktail after 3545 days at a water temperature of 12.5° C. Whirling behavior first appears at about the same time or slightly later. Fully mature spores were first detected after 2.635 months at 12.5° C. Under *M. cerebralis* experimental conditions, after a short single exposure (3 h) of 2-month-old rainbow trout to quantified numbers of *Triactinomyxon*-infected trout head cartilage ranged from less than 100 to , production of spores by *M. cerebralis* in nearly 2 million at 5 or 6 months and showed limitation of parasitism at the highest levels of infection (Markiw 1992a, 1992b). Development time is shortened or lengthened at temperatures above or below 12.5° C; about 50 days at 17° C and 120 days at 7° C (Halliday 1973).

Development time in the worm is defined as the interval between first contact with *M. cerebralis* spores and the release of the first *Triactinomyxon*. Under experimental conditions at 12.5° C, after single exposure of one population of tubificid worms to *M. cerebralis* spores, the *Triactinomyxons* were released in a consistent pattern that began at 104113 days, peaked during the next 1560 days, and continued at trace levels for about 6 months. During the next 3 months the infectivity was detectable by only sentinel fish (Markiw 1986). Whether the same infected worms are releasing *Triactinomyxons* for 11 months or a new generation of worms must become infected with *M. cerebralis* spores to produce infectivity is not known. One tubificid worm, at peak of productivity (about 130 days after exposure) can harbor 9001,000 mature *Triactinomyxons*.

Reservoir of Infectivity

Trout and salmon can be infected with whirling disease and may harbor *M. cerebralis* spores. Predators and scavengers, such as birds (Taylor and Lott 1978) that consume infected fish, can release viable *M. cerebralis* spores into the environment and may disseminate the parasite.

The source of the infective agent for fish is usually the water supply or earthen ponds inhabited by aquatic tubificid worms.

An outbreak of the disease can occur after stocking with infected fish or transferring fish from facilities where the infection had not yet been detected.

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF FISH AND GAME

DIVISION OF COMMERCIAL FISHERIES

802 3rd St.
Douglas, AK 99824-0020
PHONE: (907) 465-4250
FAX: (907) 465-4944

MEMORANDUM

To: Deborah Hart, Joe Stratman, Commercial Fisheries Division

From: Gretchen Bishop, Commercial Fisheries Division

Date: March 17, 2010

Subject: Dungeness soft shell information for Southeast Alaska

The purpose of this memorandum is to provide information on Dungeness crab soft shell in preparation for the upcoming Board of Fisheries (BOF).

Summary of Region I data on Dungeness soft shell for 2010 BOF

Survey findings

Results of a Dungeness crab pot survey of 8 areas conducted from 2000/01 through 2004/05 seasons shows that depending upon the year and location, 3–61% of the catch of legal male Dungeness crabs captured during the June (preseason) survey was shell condition soft or light (one or two)—had molted within the previous two months. The preseason survey was conducted during the first two weeks of June, immediately prior to the June 15 start of the commercial season (Table 1).

Dockside findings

During the 2009/10 season, 947 of 8,738 crab sampled were measured for shell hardness using a durometer **for the first time during the 2009/10 season**. This is an average of 73 crab per district. A linear regression of the % shell soft or light (one or two) versus the weighted mean of durometer readings showed only a very small amount ($r^2=.168$) of the proportion of soft shell was explained by the mean durometer reading. Possible explanations include 1) the small sample size or 2) the small resolution in the data (range of 0.0% to 6.5% soft or light shelled), 3) errors in using the durometer, and 4.) soft and light crab were removed prior to sampling (Table 3).

A quick summary of 2009/10 season sampling data indicates that mean durometer readings by shell condition and district differ predictably, with light shell crabs having a lower durometer reading than new shell which are lower than old shell. This suggests that durometer readings are a useful method of quantitatively discriminating between shell conditions; however, statistical tests should be run for conclusive results (Table 4).

Looking at the proportion of soft or light crabs sampled dockside from 2000/01 through 2009/10 seasons by district it is apparent that for the high years of 2001/02 and 2002/03 when the survey showed 54% and 61% soft or light in Duncan Canal, District 6 dockside proportions of soft shell were 9.2% and 6.6% soft or light respectively. Likewise for the same two years for Tenakee Inlet, the survey found 25% or 17% and dockside 4.1% or 1.5%. What this means is that a relatively modest proportion of soft shell delivered to the dock can actually indicate a very substantial amount of handling and resulting leg loss, reduced growth, or direct mortality on the grounds (Table 5).

The shell hardness of Dungeness crabs rejected by the processor for purchase was measured **for the first time during the 2009/10 season** and averaged 52.2%, which is not soft or light shelled by our definition. We define soft shell (Shell condition 1) as durometer less than 40%, light shell (Shell condition 2) as 40–50%, and new, old or very old as >50. This is because our definition of soft or light shelled was deliberately established very conservatively to consist almost entirely of crabs that would be refused by the processor (Table 6).

Fish ticket findings

The proportion of fish ticket landings, in pounds, that were coded as dead, soft shell, or landed discard was examined for the 2000/01 through 2009/10 seasons. For the 2001/02 and 2002/03 seasons in Districts 106, 108, and 112 respectively, it is apparent that there is a fairly consistent 3-5% of the “on the grounds” (survey) soft or light shell that make it onto the fish ticket as dead loss, soft shell, or landed discards (Table 7).

Tables and Figures

Table 1. Proportion of legal male Dungeness crab that were shell condition 1 or 2 sampled during preseason June surveys of 8 areas, 2000/01 through 2004/05.

Survey period	District	Location	Season				
			2000/01	2001/02	2002/03	2003/04	2004/05
June	106	Duncan Canal	13%	54%	61%	18%	25%
June	108	Stikine River Flats	6%	18%	13%	17%	3%
June	109	Port Camden		40%		16%	
June	111	Seymour Canal				25%	
June	112	Tenakee Inlet		25%	17%	10%	13%
June	113	Peril Strait		8%	19%	12%	
June	115	Berners Bay		10%	3%		
June	115	St. James Bay			11%		

Table 2. Shell condition, mean, and 95% confidence intervals of durometer readings from male and female Dungeness crabs captured in 9 survey areas grouped in Southeast Alaska from September 2000 to June 2004.

Shell condition	Mean durometer and 95 % confidence interval	
	Male	Female
1	39.2 +/- 0.79	35.0 +/- 1.73
2	50.7 +/- 0.45	47.6 +/- 1.42
3	72.7 +/- 0.35	73.7 +/- 0.37
4	83.0 +/- 0.48	74.6 +/- 0.46
5	79.4 +/- 2.36	75.9 +/- 0.85

Table 3. Shell condition of Dungeness crab from dockside sampling during the 2009/10 season.

District	Number CW measured	% shell soft or light	Number durometer readings	Weighted average durometer reading
101	75	0.0%	50	58.8
102	325	1.5%	65	46.3
105	50	0.0%	20	52.5
106	1,496	4.8%	175	52.5
107	225	3.1%	25	46.2
108	3,335	6.4%	292	49.5
109	553	5.1%	60	52.9
110	504	3.6%	70	53.5
111	700	4.3%	105	51.6
112	125	0.8%	15	55.2
113	900	0.0%	10	52.4
114	300	0.7%	45	54.5
115	150	0.0%	15	55.2
Total/Average	8,738	2.3%	947	52.4

Table 4. Durometer readings by shell condition of Dungeness crab accepted by the processor from dockside sampling during the 2009/10 season.

District	Mean durometer reading				
	Soft shell	Light shell	New shell	Old shell	Very old shell
101			58.2	62.4	
102		32.2	46.8		
105			52.5		
106		31.3	52.2	59.3	
107		28.3	46.9		
108		29.4	49.1	59.9	
109		33.3	52.1	60.0	
110		36.8	53.5	59.2	
111		33.5	51.8	58.2	
112		34.3	56.3	58.5	
113			52.4		
114			53.9	60.7	
115			53.6	61.9	
Mean		32.4	52.2	60.0	

Table 5. Shell hardness by season from dockside sampling for Dungeness crab from 2000/01 through 2009/10 seasons, Districts 1–16.

Season	Mean % soft or light by district													
	101	102	103	105	106	107	108	109	110	111	112	113	114	115
2000/01	1.72%	6.77%	4.95%	0.33%	1.22%	0.00%	0.10%	1.34%	0.54%	0.00%	7.60%	1.45%	0.67%	0.00%
2001/02	0.87%	1.20%	4.00%	4.31%	9.23%	2.00%	7.75%	5.47%	5.73%	4.50%	4.12%	2.22%	0.00%	1.03%
2002/03	1.47%	1.33%	2.69%	0.25%	6.56%	4.00%	4.12%	2.52%	0.50%	1.34%	1.54%	0.00%	1.75%	0.00%
2003/04	1.89%	2.95%	0.00%	0.00%	2.73%	1.43%	2.95%	3.42%	1.62%	1.88%	1.57%	0.00%	0.00%	0.00%
2004/05	3.80%	2.67%	4.85%	0.86%	2.07%	2.00%	1.90%	0.81%	0.99%	3.31%	0.34%	0.67%	0.46%	0.00%
2005/06	0.29%	0.00%		4.00%	1.10%	0.00%	0.67%	0.00%	0.91%	0.38%	1.11%	1.17%	0.00%	0.00%
2006/07	0.00%	0.00%	0.00%	0.00%	0.90%	0.00%	0.67%	0.21%	1.00%	0.68%	0.40%	0.00%	0.25%	
2007/08	0.00%	0.18%			3.42%	0.00%	4.76%	0.78%	2.27%	1.75%	6.75%	0.12%	2.32%	1.09%
2008/09	0.00%	2.46%	0.00%	4.73%	7.94%	0.36%	7.56%	7.97%	5.54%	8.26%	4.89%	0.42%	3.46%	0.55%
2009/10	0.00%	1.54%		0.00%	4.81%	3.11%	6.39%	5.06%	3.57%	4.29%	0.80%	0.00%	0.67%	0.00%
Mean	1.00%	1.91%	2.36%	1.61%	4.00%	1.29%	3.69%	2.76%	2.27%	2.64%	2.91%	0.60%	0.96%	0.30%

Table 6. Shell hardness of Dungeness crabs rejected by the processor by district for the 2009/10 season.

District	Number crab sampled	Mean durometer reading
106	14	48.3
108	34	48.0
109	50	54.1
111	75	51.6
114	50	58.8

Table 7. Mean proportion of landed Dungeness crab coded as dead loss, soft shell, or landed discard, on fish tickets for 2000/01 through 2009/10 seasons, Districts 1-15.

Season	Mean proportion dead loss, soft shell, or landed discard by district														
	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115
2000/01	0.58%	0.54%	0.64%	0.00%	0.17%	0.88%	0.00%	0.69%	1.61%	1.22%	0.28%	0.91%	0.68%	0.12%	0.00%
2001/02	0.69%	0.60%	0.28%	0.00%	0.91%	2.44%	0.01%	0.56%	1.27%	1.49%	1.52%	1.11%	1.00%	0.29%	0.97%
2002/03	0.73%	0.18%	0.89%		1.10%	1.94%	2.26%	0.50%	0.89%	1.23%	1.51%	0.51%	0.22%	0.58%	0.31%
2003/04	0.37%	1.25%	0.11%		0.17%	0.66%	0.00%	0.37%	0.30%	1.41%	1.33%	0.41%	0.78%	0.92%	0.56%
2004/05	0.21%	0.28%	0.08%		0.39%	0.79%	0.00%	0.50%	0.37%	0.73%	3.53%	0.69%	2.10%	1.78%	0.60%
2005/06	0.18%	0.06%	0.25%		0.33%	0.73%	0.01%	0.39%	0.44%	0.92%	0.70%	1.13%	1.64%	0.54%	0.49%
2006/07	2.48%	0.99%	0.25%		0.29%	0.76%	0.01%	0.57%	0.32%	0.92%	0.96%	1.50%	0.11%	0.11%	1.64%
2007/08	0.29%	0.45%	0.00%		0.58%	1.30%	0.00%	0.58%	0.52%	1.47%	1.64%	1.51%	1.08%	1.49%	2.08%
2008/09	0.12%	0.96%	0.00%		0.28%	0.80%	0.11%	0.36%	0.31%	0.95%	0.78%	1.13%	0.37%	0.33%	5.46%
2009/10	3.21%	1.43%	0.00%	0.00%	1.01%	1.96%	1.00%	0.92%	1.59%	2.55%	1.61%	0.79%	0.39%	1.48%	0.77%
Mean	0.89%	0.67%	0.25%	0.00%	0.52%	1.23%	0.34%	0.54%	0.76%	1.29%	1.39%	0.97%	0.84%	0.76%	1.29%

RC85

Submitted by: John Blair, SEAG
Date: 3/17/10

Recorded Comment
Proposal #180

Amend item 1(b) to read

B) the power assisted fishing reel assembly, motor, gearbox, fishing line [~~attached power cord, and any other attachments~~] weigh no more than 15 pounds total when detached from the fishing rod.

This is to accommodate operations where the boat is used to power the reel.



Substitute language for proposal 172
Alaska Department of Fish and Game
March 17, 2010

5 AAC 39.222. Policy for the management of sustainable salmon fisheries. (f) (36) "sustainable escapement goal" or "(SEG)" means a level of escapement, indicated by an index or an escapement estimate, that is known to provide for sustained yield over a 5 to 10 year period used in situations where a BEG cannot be estimated **or managed for** [DUE TO THE ABSENCE OF A STOCK SPECIFIC CATCH ESTIMATE]; the SEG is the primary management objective for the escapement, unless an optimal escapement or inriver run goal has been adopted by the board, [AND] **the SEG** will be developed from the best available biological information, **and should be scientifically defensible on the basis of that information**; the SEG will be determined by the department and will be stated as a range "**(SEG Range)**" or a lower bound "**(Lower Bound SEG)**" that takes into account data uncertainty; the department will seek to maintain escapements within the bounds of the SEG **Range or above the level of a Lower Bound SEG.**

RC 87

Alaska Board of Fisheries Committee Report

COMMITTEE A

Commercial Fisheries, General Provisions, and Sustainable Salmon/Escapement Goal Policies March 17, 2010

Board Committee Members:

1. Mel Morris, *Chair
2. Bill Brown
3. Howard Delo

Alaska Department of Fish and Game Staff Members:

1. Steve Honnold – Regional Supervisor, Westward Region, CF
2. Wayne Donaldson – Westward Region Groundfish/Shellfish Management Biologist, CF
3. Doug Pengilly – Westward Region Shellfish Research Biologist, CF
4. Karla Bush – Extended Jurisdiction FMP Coordinator, CF
5. Stefanie Moreland – Extended Jurisdiction Program Manager, CF
6. Forrest Bowers – BSAI Area Management Biologist, CF
7. Nick Sagalkin – Westward Region Area Management Biologist, CF
8. Lance Nelson – Department of Law
9. Joe Stratman – Shellfish Management Project Leader- Region 1, CF
10. Deborah Hart – Marine Fisheries Program Supervisor – Region 1, CF
11. Jim Hasbrouck – Regional Supervisor, Region 2, SF
12. Jeff Wadle – Westward Regional Management Biologist, CF
13. Eric Volk – Chief Fisheries Scientist, CF
14. Charlie Trowbridge – Groundfish Area Biologist, Homer, CF
15. Rob Bentz – Deputy Director, SF
16. Scott Kelley – Regional Supervisor, Southeast, CF
17. Bob Clark – Fisheries Scientist, SF
18. Peter Froehlich – CFEC Commissioner
19. Davin Holen – Subsistence Resource Specialist, Subs
20. Steve Fleischman – Fisheries Scientist, SF
21. Jeanette Alas – BSAI Assistant Area Shellfish Management Biologist, CF
22. John Hilsinger – Director, CF
23. Sue Aspelund – Deputy Director, CF

Advisory Committee Members:

1. Mike Petersen – Juneau/Douglas AC

2. Jim Stubbs – Anchorage AC
3. John Scoblic – Ketchikan AC
4. Lloyd Gossman – Saxman AC
5. Don Fox – Kodiak AC
6. Steve Vanek – Central Peninsula AC
7. Andy Couch – Mat Valley AC
8. Stu Merchant – Craig AC
9. Keith Van den Broek – Copper River/PWS AC
10. Bruce Knowles – Susitna Valley AC
11. Dianne Dubuc – Seward AC

Public Panel Members:

1. Art Nelson - BSFA
2. Dwight Kramer - KAFC
3. Steve Tvenstrup - UCIDA
4. Ronald Leighton – Kasaan Village
5. Larry Painter – Retired Fisherman
6. Gene Sandone - YRFDA
7. Chuck McCallum – Chignik Lake & Peninsula Burough
8. Tony Gregorio – Chignik Seiners
9. Ryan Kapp – Seiner
10. Kevin Delaney – KRSA
11. Paul Shadura – KPFA

Federal Subsistence Representative:

1. Rod Campbell – U.S. Fish and Wildlife Service

The Committee met March 17, 2010 at 10:05 a.m. until 11:48 a.m. and from 1:20 p.m. until adjourned at 2:20 p.m.

PROPOSALS BEFORE THE COMMITTEE WERE: (12 total) (167-174 and 195-198).

PROPOSAL 167 – 5 AAC 39.105. Types of legal gear. Modify definition of mechanical jigging machine.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 8, AC 9, AC 10, AC 11, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 6.

Record Comments: RC 25, RC 28, RC 35, RC 59.

Narrative of Support and Opposition:

Department:

- Department submitted RC 59 with substitute language that clarified operation of jigging machine on vessel and that vessel could be anchored.

Department of Law: None.

Federal Subsistence Representative: None.

Support: None.

Opposition: None.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Support.

AC Positions: Support: Ketchikan.
Oppose: None.

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language: RC 59 as follows:

5 AAC 39.105 Types of Legal Gear.

(d)(25) a mechanical jigging machine is a device that deploys a line with **lures or baited** hooks, and retrieves that line and **lures or** hooks with electrical, hydraulic, or mechanically powered assistance; a mechanical jigging machine allows the line with **lures or** hooks to be fished only in the water column; a

mechanical jigging machine must be attached to a vessel registered to fish with a mechanical jigging machine [AND]. The mechanical jigging machine may not be anchored or operated [OFF] unattached to the vessel.

PROPOSAL 168 – 5 AAC 39.117. Vessel Length; bulbous bow. Repeal the length limit on salmon seine vessels in Alaska.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 8, AC 9, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 1, PC 6, PC 30, PC 33, PC 34.

Record Comments: RC 14, RC 23, RC 25, RC 28, RC 35, RC 68, RC 69.

Narrative of Support and Opposition:

Department:

- CFEC would be able to comply with new permitting regulations.
- Could require more capitalization for same economic return.

Department of Law: None.

Federal Subsistence Representative: None.

Support:

- Improved efficiency and safety for larger vessels.
- Potential for increased product quality and value due to processing at sea.
- Smaller vessels could increase vessel size without additional permitting costs.
- Proposal does not attempt to change unit of gear.

Opposition:

- Decrease the value of existing vessels.
- Larger vessels could fish in inclement weather disadvantaging smaller vessels.
- Larger vessels have more holding capacity which would interfere with inseason data reporting.
- Larger vessels could increase the prevalence of intercept fisheries on capes.
- Safety concerns due to larger vessels being less maneuverable.
- Coastal communities need longer period of time to review this complex issue.
- Could affect permit buyback plan for Lower Cook Inlet.
- May need operator's license for increased vessel size.
- Historical fishery was designed around 58 ft vessel length.

General:

- Proposer offered compromise on vessel length to be maximized at 79 ft, which is consistent with federal load line and crew regulations.
- Proposer suggested the vessel length change apply to a smaller geographic area (Southeast).

- Proposer suggested two permits required for new vessel entries over 58 ft; vessels currently in fishery could increase length under same permit.
- Proposer was asked by board committee member to submit compromises as an RC.

SSFP: Not discussed.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: None.

Oppose: Ketchikan.

Craig.

Seward.

Saxman.

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 173 – 5 AAC 28.086. Management Plan for Parallel Groundfish Fisheries. Amend regulation.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 9, AC 10, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: None.

Record Comments: RC 25, RC 35, RC 60.

Narrative of Support and Opposition:

Department:

- Substitute language in RC 60 intended to codify current practices.

Department of Law: None.

Federal Subsistence Representative: None.

Support:

- If substitute language passes there will be no change in the way the fishery is currently managed.

Opposition: None.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: None.

Oppose: None.

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language: RC 60 as follows:

5 AAC 28.086 Parallel Groundfish Fisheries Emergency Order Authority. (a) In addition to the provisions of this chapter and the reporting requirements specified in 5 AAC 39.130, and notwithstanding any contrary provisions of this chapter, the commissioner may open and close, by emergency order, parallel groundfish fisheries during which area closures, gear and vessel size restrictions, and bycatch control measures may be imposed as the commissioner determines reasonably

necessary to coordinate state-waters fishery seasons and parallel fishery seasons to correspond with federal groundfish fishery management measures in adjacent federal waters.

(b) For the purposes of this chapter, unless otherwise specified, a 'parallel groundfish fishery' means a fishery in state waters opened by the commissioner, by emergency order, to correspond with a federal groundfish fishery in adjacent federal waters.

PROPOSAL 174 – 5 AAC 28.050. Lawful gear for groundfish. Amend lawful gear for groundfish to include sunken gillnet.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 8, AC 9, AC 10, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 6, PC 27.

Record Comments: RC 25, RC 54.

Narrative of Support and Opposition:

Department:

- Studied bycatch in relation to sunken gillnets as a result of board direction in 1991 and 1992; results from these studies resulted in board prohibiting use of sunken gillnets in 1992.
- Opposed due to concerns for high bycatch potential for that gear type.

Department of Law: None.

Federal Subsistence Representative: None.

Support: None.

Opposition:

- May lead to habitat destruction.
- May lead to high levels of bycatch; more studies needed to determine bycatch levels.
- New gear type would affect existing state-waters Pacific cod allocation.
- Possible gear conflict with existing gear types.
- Habitat differences around the state make statewide implementation difficult.

General:

- Member of public recommended letter to the proposer from the board to apply for Commissioner’s Permit for exploratory fishing.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral on allocative aspects; opposes development of sunken gillnet fishery for groundfish due to bycatch concerns.

AC Positions: Support: None.
Oppose: Ketchikan.
Kodiak.

Public Panel Recommendation: Consensus to oppose.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 195 – 5 AAC 32.110(1). Fishing seasons for Registration Area A. Close summer commercial Dungeness crab fishery in Southeast Alaska District 2.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 8, AC 9, AC 14, AC 16.

Timely Public Comment: RC 1, Public Comment Tab, PC 12, PC 13, PC 23, PC 24, PC 28, PC 41, PC 43, PC 44, PC 45, PC 46, PC 47, PC 50.

Record Comments: RC 17, RC 18, RC 19, RC 21, RC 22, RC 24, RC 28, RC 29, RC 30, RC 53, RC 64, RC 70, RC 77, RC 84, RC 89, RC 90, RC 100.

Narrative of Support and Opposition:

Department:

- Would close portions of District 2 to commercial fishing in summer; it is unknown whether adoption of this proposal would result in a fall-only fishery or if there would also be a winter fishery.
- Limited data on shell conditions due to dockside sampling conducted after sorting; some limited stock assessment results, but not from Districts 1 and 2.
- Surveys from 2000 – 2004 show soft shell crab are found regionwide during some seasons; no unique situation with Districts 1 and 2.
- Fall/winter season for Districts 1 and 2 were instituted in 1985, while summer seasons remained for the rest of the region.
- Staff comments included in RC 2 resubmitted as RC 70 due to a table error and harvest updates.

Department of Law: None.

Federal Subsistence Representative: None.

Support:

- High amounts of discarded crab.
- High rate of soft shell crab.
- Negatively impacted subsistence fishery.
- Effort to distribute commercial fleet was unsuccessful.
- No new on-the-grounds data collection occurred since fishery reopened in summer 2009.
- Could lead to gear conflicts and allocative issues, and also conflicts in Misty Fjords National Monument.
- Lower average weight for crab during summer fishery.
- Summer closure in 1985 led to improved subsistence fishing by 1989.
- Prevalence of soft-shelled crab led one permit holder to switch to fishing salmon in the summer.
- Greater handling mortality in commercial fishery than in subsistence/personal use fisheries.

- Issues of soft shell crab during summer months also exist in northern districts.
- Fishing grounds are scattered and small due to habitat.
- Fall harvest in District 2 is trending down.

Opposition:

- If soft-shell crab is a problem in the district then subsistence and personal use fishing should be restricted as well as commercial fishing.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: Ketchikan.
Oppose: None.

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 196 – 5 AAC 35.517(a)(2). Bering Sea *C. opilio* Tanner crab harvest strategy. Remove minimum total allowable catch threshold for the Bering Sea *C. opilio* Tanner crab commercial fishery by repealing section (a)(2).

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: None.

Timely Public Comment: None.

Record Comments: None.

Narrative of Support and Opposition:

Department:

- Would not impact federal annual catch limit (ACL) or rebuilding plan amendments; these amendments provide an upper bound to total allowable catch (TAC) setting, but would not impose a lower constraint.

Department of Law: None.

Federal Subsistence Representative: None.

Support: None.

Opposition: None.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Supports.

AC Positions: Support: None.
Oppose: None.

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 197 – 5 AAC 35.520. Size limits for Registration Area J and 5 AAC 35.508. Bering Sea District C. bairdi Tanner crab harvest strategy. Reduce the minimum size limit for Tanner crab in the Bering Sea commercial fishery.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: None.

Timely Public Comment: None.

Record Comments: None.

Narrative of Support and Opposition:

Department:

- Potential interaction with federal ACL and rebuilding plan amendments; a size limit change could require modification to harvest strategy which could impact rebuilding trajectory.
- Size of maturity has decreased and crabs are reaching terminal molt without reaching legal size which contributes to high bycatch.
- Tanner crab that reach terminal molt below legal size limit contribute to TAC calculation, but are not part of fishable stock leading to poor fishery performance and high bycatch; this problem is more pronounced in the Pribilof area than in Bristol Bay.

Department of Law: None.

Federal Subsistence Representative: None.

Support: None.

Opposition: None.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: No position.

AC Positions: Support: None.
Oppose: None.

Public Panel Recommendation: No action because size limit analysis was not completed in time to allow for adequate public review prior to this meeting. Proposer agreed with department comments to table proposal to March 2011 BOF meeting.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 198 – 5 AAC 34.917. Saint Matthew Island Section Blue King Crab Harvest Strategy.
Remove minimum total allowable catch threshold for the Saint Matthew Island Section blue king crab commercial fishery.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: None.

Timely Public Comment: None.

Record Comments: None.

Narrative of Support and Opposition:

Department:

- Reviewed staff comments to remove minimum TAC for Saint Matthew Island Section blue king crab fishery.
- The minimum TAC for Saint Matthew blue king crab was included in the rebuilding plan analysis and was found to be an important factor contributing to stock rebuilding; it served as a de facto higher fishery threshold.
- The stock is currently rebuilt and no longer being managed under the rebuilding plan.
- The minimum TAC could cause foregone harvest at biomass levels above the fishery threshold, but too low to meet the minimum TAC.

Department of Law: None.

Federal Subsistence Representative: None.

Support:

- Would make permanent an emergency regulation adopted by the board in September 2009 that expired February 1, 2010.

Opposition: None.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Supports.

AC Positions: Support: None.
Oppose: None.

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: None.

Substitute Language: None.

PROPOSAL 169 – 5 AAC 39.205. Criteria for the allocation of fishery resources among personal use, sport, and commercial fisheries. Amend criteria for the allocation of fishery resources.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 6, AC 8, AC 9, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 22, PC 29.

Record Comments: RC 25, RC 35, RC 50, RC 63, RC 68, RC 82.

Narrative of Support and Opposition:

Department:

- In 1987 the board adopted 5 AAC 39.205 which referenced allocation criteria in statute.
- Department questioned need for this proposal as criteria are already addressed in statute.

Department of Law:

- Unsure what proposal was asking.
- Not necessary for board to define “opportunity” in regulation.
- The board has wide discretion to define “opportunity” based upon facts before the board.
- The board has authority to open or close user groups.
- Duty of board is to create policy.
- No real language provided to discuss what is being proposed.
- Term “fair and reasonable opportunity” could be broadly defined by user groups.
- Not advising that board can’t define “fair and reasonable opportunity,” but the board would not be required to do so.

Federal Subsistence Representative: None.

Support:

- Public wants less ambiguity for definition of “fair and reasonable opportunity” to aid all users in coming to board with proposals.
- Board does not review allocative criteria in detail.
- Previous case law describes what is not considered “fair and reasonable opportunity.”

Opposition:

- Broad definition allows board to determine reasonable opportunity for different situations.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: Central Peninsula.
Oppose: None.

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 172 – 5 AAC 39.222. Policy for the management of sustainable salmon fisheries and 5 AAC 39.223. Policy for statewide salmon escapement goals. Provide definition for escapement goal threshold.

Staff Reports: None, Oral Tab RC 6, Written Tab: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 9, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 22, PC 29.

Record Comments: RC 25, RC 35, RC 58, RC 63, RC 68, RC 69, RC 86.

Narrative of Support and Opposition:

Department:

- Substitute language proposed in RC 86 is a change in definition for the policy of sustainable salmon fisheries and the escapement goal policy.
- Lower bound sustainable escapement goals (SEGs) would not be set on fisheries with excess fishing power on targeted species.

Department of Law:

- Board does not have administrative authority to establish biological or sustainable escapement goals as written (see AS 16.05.241 as referenced in RC 1).

Federal Subsistence Representative: None.

Support:

- Need clarification of ambiguous terms.
- Suggested language for lower bound SEGs put forth in RC 58.

Opposition: None.

General:

- When stock is yield or management concern department should define sustainable escapement threshold (SET).

SSFP: Relates directly to SSFP.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Supports.

AC Positions: Support: None.
Oppose: None.

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language: RC 86 as follows:

5 AAC 39.222. Policy for the management of sustainable salmon fisheries. (f) (36) "sustainable escapement goal" or "(SEG)" means a level of escapement, indicated by an index or an escapement estimate, that is known to provide for sustained yield over a 5 to 10 year period used in situations where a BEG cannot be estimated **or managed for** [DUE TO THE ABSENCE OF A STOCK SPECIFIC CATCH ESTIMATE]; the SEG is the primary management objective for the escapement, unless an optimal escapement or inriver run goal has been adopted by the board, [AND] **the SEG** will be developed from the best available biological information, **and should be scientifically defensible on the basis of that information**; the SEG will be determined by the department and will be stated as a range "**(SEG Range)**" or a lower bound "**(Lower Bound SEG)**" that takes into account data uncertainty; the department will seek to maintain escapements within the bounds of the SEG **Range or above the level of a Lower Bound SEG.**

PROPOSAL 170 – 5 AAC 39.222. Policy for the management of sustainable salmon fisheries.
Clarify regulations establishing escapement goals.

Staff Reports: None, Oral Tab RC 6, Written Tab: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 8, AC 9, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 22, PC 29.

Record Comments: RC 16, RC 25, RC 35, RC 58, RC 63, RC 66, RC 68, RC 69.

Narrative of Support and Opposition:

Department: None.

Department of Law:

- Board does not have administrative authority to establish biological or sustainable escapement goals as written (see AS 16.05.241 as referenced in RC 1).

Federal Subsistence Representative: None.

Support:

- Escapement goals without established range can result in overescapement.
- More public process with development of escapement goals.
- Opposition to lower bound SEG on Anchor River.
- Intent of lower bound SEG was for use on stocks in small streams with no significant fishery.
- Of the 43 lower bound SEGs, half are based on aerial survey data and surveys may occur infrequently.
- Escapement goal changes have been based on questionable data without public process.
- Important to have ranges to get a high sustainable yield (avoid overescapement).

Opposition:

- Uncertainty will always be a factor, but comfortable with department position on SEGs.

SSFP: Relates directly to SSFP.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Opposes.

AC Positions: Support: None.
Oppose: None.

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 171 – 5 AAC 39.223. Policy for statewide salmon escapement goals. Clarify escapement goals and establish ranges.

Staff Reports: None, Oral Tab RC 6, Written Tab: None.

Staff Comments: RC 2.

Deliberation Materials: None.

AC Reports: RC 1, Advisory Committee Comment Tab, AC 9, AC 12, AC 13, AC 16, AC 18.

Timely Public Comment: RC 1, Public Comment Tab, PC 22, PC 29.

Record Comments: RC 16, RC 25, RC 35, RC 58, RC 63, RC 66, RC 68, RC 69.

Narrative of Support and Opposition:

Department:

- Reference Proposal 170 and RC 1.

Department of Law:

- Reference Proposal 170.

Federal Subsistence Representative: None.

Support:

- Reference comments for proposal 170.

Opposition:

- Reference comments for proposal 170.

SSFP: Reference Proposal 170.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Opposes.

AC Positions: Support: None.
Oppose: None.

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

RC 88

Alaska Board of Fisheries
Committee Report
COMMITTEE B
Statewide Finfish and Supplement Issues
Subsistence, Personal Use and Sport
March 17, 2010

Board Committee Members:

1. Karl Johnstone, *Chair
2. Vince Webster
3. John Jensen

Alaska Department of Fish and Game Staff Members:

1. Tom Vania, Cook Inlet Regional Management Coordinator, SF
2. Matt Miller, Region 2 Regional Management Coordinator, SF
3. Bob Chadwick, SE Regional Management Coordinator, SF
4. Tom Taube, Region 3, AYK Regional Management Coordinator, SF
5. Rob Bentz, Deputy Director, SF
6. Charlie Swanton, Director, SF
7. Brian Marston, Area Biologist, SF
8. Suzanne Schmidt, Assistant Area Biologist, SF
9. Al Cain, Board Enforcement Specialist
10. Scott Kelley, Regional Supervisor, CF
11. Debbie Hart, Marine Fisheries Program Supervisor, CF
12. Sue Aspelund, Deputy Director, CF

Advisory Committee Members: (only those representing committees in committee)

1. Dianne Dubuc, Seward AC
2. Keith Van den Broek, Copper River/Prince William Sound AC
3. Steve Vanek, Central Peninsula AC
4. Andy Couch, Mat-Su Valley AC
5. Tad Fujioka, Sitka AC
6. Don Fox, Kodiak AC
7. Jim Stubbs, Anchorage AC
8. Mike Peterson, Juneau/Douglas AC
9. Paul Shadura, Kenai/Soldotna AC
10. John Scoblic, Ketchikan AC
11. Stu Merchant, Craig AC
12. Virgil Umphenour, Fairbanks AC

Public Panel Members:

1. Richard Yamada, Alaska Charter Association
2. Dave Kumliem, Trout Unlimited
3. Tom Seward, self
4. Tory O'Connell, Alaska Longline Fishermen's Association
5. Ricky Gease, Kenai River Sportsman Association
6. Mark Kaelke, Trout Unlimited
7. Andy Szczesny, self
8. Larry Edfelt, Territorial Sportsmen
9. John Blair, Southeast Alaska Guide Organization
10. Dave Goggia, self – Kenai River Guide Association
11. Roland Maw, United Cook Inlet Drift
12. Reuben Hanke, Kenai River Sportsman Association
13. Ken Rogers, self, Cook Inlet commercial fisherman
14. Brian Kraft, self, Sport fishing lodge operator

Department of Law:

1. Michael Mitchell

Federal Subsistence Representative:

1. Rod Campbell

The Committee met March 17, 2010 at 10:15 a.m. and adjourned at 4:00 p.m.

PROPOSALS BEFORE THE COMMITTEE WERE: (21 total) Subsistence 164, Personal Use 165-166 and Sport Fish 175, 176, 177, 178, 179, 182, 183, 180, 181, 184, 185, 186, 187, 188, 190, 191, 192.

PROPOSAL 164 – 5 AAC 01.030. Unlawful Possession of Subsistence Finfish. Revise unlawful possession of subsistence finfish as follows:

Amend 5 AAC 01.030 by adding paragraph (d): Subsistence Sockeye and Chinook Salmon (commonly referred to as home packs)

- (1) Home packs shall have no monetary value and can not be sold to any business or individual.
- (2) Home packs may be bartered for other subsistence foods.
- (3) Only one home pack shall be authorized per family of two or more.
- (4) ADF&G issued permits for home packs shall be required at no cost to the receiving family.
- (5) Only three proxy permits shall be authorized per commercial fishing vessel
- (6) Home packs shall be limited to a total of 40 salmon of which only two can be Chinook salmon.
- (7) Commercially caught salmon and salmon caught for subsistence shall not occupy the same storage or processing areas.

Staff Reports: None.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 2, 8, 9, 10, 12, 13, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 22, 29, 32, 47.

Record Comments: RC 25, 35, 50, 63, 68, 69.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- Proposal erroneously classifies 'home pack' fish as 'subsistence'.
- It is unnecessary to reclassify finfish retained for a person's own use as subsistence fish.
- If the board wants to address restrictions on the use of commercial 'home packs,' it can do so in the context of 5 AAC 39.010. as that is the regulation governing the use of commercially-caught fish retained for a person's own use.

Department of Law:

- According to the Department of Law, reclassifying commercially-caught fish as subsistence fish is outside the board's authority because it would be inconsistent with current statutory standards.

Federal Subsistence Representative: None

Support: None

Opposition:

- Fairbanks AC supported with amended language (AC 17).
- Fish not sold, taken for own use, are taking money out of pocket of boat and crew. In some boats, crew must pay for the fish.

- Home pack is a long standing practice in most every commercial fishery in the state.
- In commercial fisheries, home pack is recorded on fish tickets.
- In some instances, the cost of the fish removed from the commercial harvest and retained as home pack is recorded on the crewmember's 1099 for tax purposes.

General:

- Home pack is recorded on commercial fish tickets as PU and definition of PU on a fish ticket is not the same definition as used in the Personal Use fishery.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: Fairbanks AC
Oppose: Central Peninsula AC
Mat-Su Valley AC

Public Panel Recommendation: Consensus to oppose.

Board Committee Recommendation: No Recommendation.

Substitute Language: None.

PROPOSAL 165 – 5 AAC 77.xxx. New Section. Delay opening personal use fishery until escapement goal is met as follows:

Personal use dipnetting will only begin after the biological escapement goal for a stream is met.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 6, 8, 9, 12, 13, 15, 17, 18, 34.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 20, 22, 29.

Record Comments: RC 25, 34, 35, 58, 63, 69.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- The department uses its emergency order authority to modify personal use dip net fisheries to meet established escapement goals and harvest objectives.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Needed tool to reach minimum escapements on low returns.
- A member of the public offered three areas where personal use (PU) fisheries are not allowed until certain escapement point has been reached (based on numbers, not a date): Naknek, Copper River and SE.
- Personal use fishery responsible for overescapement, because commercial fishery is closed to allow fish into system for PU fishery and PU fishing power not strong enough to harvest the number of fish that entered during the commercial fishery closure.
- Currently there are no statewide guidelines for PU fisheries.
- Questioned how the department can defend a PU fishery if there are no rules or guidelines defining a PU.

Opposition:

- Against principles of sustainable salmon policy because it condenses effort only in the later portion of the run.
- PU fisheries can either harvest a large percentage of fish, which can be an issue, or not harvest many which is not an issue.
- This proposal is allocative in nature.
- This proposal is referencing the Kenai and is a regional issue. This should be resolved in regional area BOF meeting during normal board cycle.

- More likely to exceed the escapement goal.

General:

- Is it possible to have statewide PU fisheries designed as tiers? When escapement is strong, more PU fishing time and during times of lower escapement result in less PU fishing.
- PU fisheries need to be managed and enforced better.
- A work group was suggested to develop statewide guidelines for PU management.

SSFP: 5 AAC 39.222.(2)(D)

SSFP recommends harvests should occur throughout run.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: Central Peninsula AC
Oppose: Mat-Su Valley AC
Anchorage AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 166 – 5 AAC 77.010. Methods, means and general restrictions. Eliminate requirement of having a sport fishing license to fish in personal use fisheries as follows:

(a) Finfish, shellfish, and aquatic plants may be taken for personal use only by [A HOLDER OF A VALID RESIDENT ALASKA SPORT FISHING LICENSE OR BY] an Alaskan resident. [EXEMPT FROM LICENSING UNDER AS.16.05.400.]

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 34.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 22, 29, 36, 46, 47, 49.

Record Comments: RC 16, 25, 34, 35, 58, 63, 66, 68, 69.

Narrative of Support and Opposition:

Department:

- Both the Department of Fish and Game and Department of Public Safety oppose this proposal.
- The sport fish license requirement provides the state with a means of prosecuting offenders and funding for management of personal use fisheries.
- The department works closely with vendors and Department of Public Safety to ensure personal use permits are distributed only to qualified applicants.

Department of Law:

- Board does not have authority to set fees.

Federal Subsistence Representative: None

Support:

- A member of the public suggested an amendment: a fee could be charged to anglers in order to obtain a PU license and funds generated could be used to fund department staff to obtain harvest information and increase enforcement.
- Users should pay for management of resource they use.
- A member of public questioned why in other fisheries, anglers are charged fees to participate, but not to participate in a PU fishery.

Opposition:

- PU licenses would be a burden to the vendors and users.
- PU fishermen who are also sport fishermen would need to purchase two licenses.
- Sport license is used as a tool for enforcement to determine an angler's residency.
- Current system is stream lined and works.

General:

- A member of the public was concerned with lack of harvest numbers, due to 15% of non-returned permits.
- PU fisheries are expensive to the local area to support and should be funded by the users. (i.e., Kasilof).

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: Central Peninsula AC
Oppose: None

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 175 – 5 AAC 75.xxx. New section. Establish bag limit for sablefish as follows:

For resident anglers: sablefish may be taken from January 1 through December 31: daily bag limit of 2, 4 in possession, and no annual limit; for nonresident anglers: sablefish may be taken from January 1 through December 31: daily bag limit of 2, 4 in possession and an annual limit of 4 fish.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 8, 9, 10, 11, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 8, 22, 27, 29, 38, 39, 46, 47, 48, 49.

Record Comments: RC 20, 25, 28, 35, 54, 55, 73, 78, 81.

Narrative of Support and Opposition:

Department:

- The department is neutral on the allocative aspects.
- Takes no position on this proposal.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Federal commercial fishery is an IFQ fishery.
- Need to limit such a valuable fishery, need an annual limit on valuable species.
- The fishery is already fully allocated; sport shouldn't take any.
- Two published reports state there is a biological concern.
- Need to reduce bag limits before there is a problem –be proactive.
- Offered the option of bag limits that are line with commercial quotas.
- Sharks have a statewide management plan and annual limit.
- Commercial quota has been reduced 80%.
- Chatham Straits commercial fishery is an equal share fishery.
- Sablefish migrate and are considered one stock, so there should be a statewide bag limit.
- Fishery should be managed conservatively, similar to rockfish.
- Concern that under-reporting by sport fishery might result in entire commercial fish quota being harvested before the commercial fishery even opens.
- Restrictions to the guided halibut fishery may cause more anglers to target sablefish in sport fishery.
- Captains may begin to target sablefish in order to get history of harvest in case of future restrictions.

Opposition:

- This is Southeast allocative issue, a management plan is needed; should be taken up in regional BOF in cycle.
- When comparing sport fish harvest to total commercial fish, total sport harvest is less than .25%.
- NOAA report stated that sablefish stocks are not in decline.
- Currently there is low sport effort in Kodiak area; AC wondered why it is necessary to regulate such a small fishery.
- There is no need for annual limit.
- This is an allocation issue.
- Commercial fishing has existed for 100 yrs and harvests up to 99% of the stock; if stock is in decline, it is commercial fisheries' fault not sport fishing.
- Regional issue; no other species has statewide bag limit.
- Bag limits should be set by area.

General:

- In 2009, letters were sent to business operators asking sablefish and only sablefish, to be recorded in the 'other' column.
- Department stated the number of fish listed in the 'other' in logbook remained stable, even though in 2009 sablefish were the only fish to be listed.
- Department aware that other fish, some which were identified by species, were also listed in the 'other' column, but department wanted to provide total number of fish as reported, even though it is not a true estimate of sablefish.
- In 2010, sablefish have their own column in the logbook for harvested and released.
- There was a three year comparison study on logbook, which found SWHS and logbook data to be comparable. Council uses logbook data.
- 2010 logbooks will be scanable so that data will available within 1 month for inseason management.
- Department already has EO authority.
- Regional bag and possession limits can exist along with statewide limits and be more or less restrictive than the statewide.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral/No Position.

AC Positions: Support: Sitka AC
Central Peninsula AC
Oppose: Kodiak AC
Juneau/Douglas AC
Seward AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 176 -- 5 AAC 75.xxx. New Section. Increase bag limit for spiny dogfish as follows:

Make a more reasonable possession/daily limit of the spiny dogfish, such as 5 fish per day, with a combined limit of 10 per year

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 8, 9, 10, 12, 13, 16, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC6, 22, 29.

Record Comments: RC 25, 28, 35, 63, 68.

Narrative of Support and Opposition:

Department:

- The department is neutral on this proposal.
- Unless demand increases, a liberalization of the bag limit is unlikely to harm the stock.
- The department is bound to manage for sustained yield, but could support a bag and possession limit in line with the life history limitations of this species (long lifespan, high age at maturity, and long gestation period).
- Given low angler demand, department does not see a need for an annual limit at this time.
- Department is comfortable with a bag limit of 1-5, but would need to consult with groundfish staff about bag limits above 5.

Department of Law: None

Federal Subsistence Representative: None

Support:

- In support of daily limits with no annual limit.
- Dogfish are highly migratory and need to be managed closely.
- Support for higher limits as long as no electric reels could be used.

Opposition: None

General:

- Dogfish have high handling mortality.
- Harvest info is needed and harvest numbers may be low due to low 1 shark daily limit.
- All sharks should still be recorded on license.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: Seward AC
Kodiak AC
Sitka AC
Oppose: None

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language:

5 AAC 75.012(X). Sport Shark Fishery Management Plan.

(X) The bag and possession limit for spiny dogfish is 5 fish, no annual limit.

PROPOSAL 177 – 5 AAC 47.020. General provisions for seasons and bag, possession, annual, and size limits for the salt waters of the Southeast Alaska Area. Establish bag limit for thornyhead rockfish as follows:

Shortspined and longspined thornyhead rockfish may be taken from January 1 - December 31; bag and possession limit of one fish.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 11, 12, 13, 16, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 27, 38, 39, 47, 48.

Record Comments: RC 25, 28, 54, 74.

Narrative of Support and Opposition:

Department:

- The department is neutral on this proposal.
- Implementing a thornyhead bag and possession limit of one thornyhead rockfish would have little effect on sport harvest since they are rarely taken in the sport fishery.
- Many, if not all, anglers would have trouble distinguishing a thornyhead from some other non-pelagic rockfish.
- One potential approach might be to redefine the non-pelagic rockfish category to include the genus *Sebastolobus* (including thornyheads), for which conservative regulations are already in place.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Sport fishery harvest numbers are likely higher because lodges are remote and not captured in creel survey.
- General support of small bag limit.
- Since fishery is not targeted on thornyheads conservative limits should be set.
- Very long lived species slow to mature that needs conservative management.

Opposition:

- Commercial fishery allows 15% bycatch. If you restrict sport bag limit, you should address commercial bycatch.
- Need for catch data before setting limit.
- No commercial fishery concerns regarding conservation.

General:

- Thornyheads do not have a closed swim bladder can successfully re-submerge and do not suffer barotraumas.
- Possession limits are generally 2 times the bag limit.
- No current stock assessment in SE Alaska
- Panel member asked what was commercial harvest. Closed directed fishery in 2003. 2000-2002 average total harvest 460,900 lbs; 2003-2009 average total harvest 361,750 lbs (93,000 lbs of which is in NSEI ("Chatham")).

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: Sitka AC
Oppose: Fairbanks AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language:

5 AAC 75.995 (46) "non-pelagic rockfish" includes all rockfish species in the genus *Sebastes* and *Sebastolobus* that are not defined as pelagic rockfish.

PROPOSAL 178 – 5AAC 75.003. Emergency order authority. Clarify emergency order authority as follows:

The commissioner may, by emergency order, change bag and possession limits and annual limits and alter methods and means in sport fisheries. These changes may not reduce the allocation of harvest among other user groups. An emergency order may not supersede **provisions for increasing or decreasing** bag and possession limits or **changing** methods and means established in regulatory management plans established by the Board of Fisheries. The commissioner will use emergency order authority to manage sport fishing opportunity in the following circumstances:

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 8, 9, 10, 11, 12, 13, 16, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 29.

Record Comments: RC 25, 28, 35, 63, 69.

Narrative of Support and Opposition:

Department:

- The department submitted this proposal.
- The department supports this proposal; it is intended to resolve internal inconsistencies in emergency order authority and prevent future uncertainty in department actions.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Proposal clarifies language of EO authority as it is used by ADF&G.
- Proposal gives ADF&G the correct tools to manage fisheries for escapement goals.
- Similar to language found in Cook Inlet commercial fishery management plan.

Opposition:

- Preference to clarify individual management plans in area by area in regular BOF cycle.

General: None

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Support.

AC Positions: Support: None
Oppose: Seward AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 179 – 5 AAC 75.003. Emergency order authority. Clarify the emergency order authority as follows:

The commissioner may, by emergency order, change bag and possession limits and annual limits and alter methods and means in sport fisheries. These changes may not reduce the allocation of harvest among other user groups. An emergency order may not supersede bag and possession limits or methods and means established in regulatory management plans established by the Board of Fisheries. The commissioner will use emergency order authority to manage sport fishing opportunity in the following circumstances:

(1) The commissioner or his authorized designee [MAY] **will close if necessary** or decrease sport fish bag and possession limits and restrict methods and means of harvest by emergency order **in order to achieve established escapement goals** [WHEN] **in the following way:**

(A) **If** the total escapement of a species of anadromous fish is projected to be less than the escapement goal [FOR THAT SPECIES LISTED IN A MANAGEMENT PLAN THAT HAVE BEEN ADOPTED BY THE BOARD OF FISHERIES OR] established by the department **and board, the department will close the sport fishery or reduce the bag and possession limits by emergency order to ensure the escapement goal will be achieved. When it is necessary to close the sport fishery it will be closed to fishing for that species.**

(B) if the recreational harvest must be [CURTAILED] **eliminated or reduced** in any fishery for conservation reasons, the department may issue a “catch and release” only emergency order **only if the escapement goal will be achieved and then only** when the estimated hooking mortality is not projected to reduce the population of fish below the number required for spawning escapement or, in the case of resident species, below the level required for maintenance of the desired age and size distribution of the population; “catch and release” as a tool to address conservation under this section shall be labeled “conservation catch and release” to differentiate from catch and release regulations adopted by the Board of Fisheries for special management to create diversity in sport fisheries.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 8, 9, 12, 13, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 29.

Record Comments: RC 16, 25, 28, 63, 66, 68, 69.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- The department believes in adapting management through emergency order authority to addresses conservation issues unique to each fishery.
- In many circumstances, issuing emergency orders that prohibit the retention of certain species rather than complete closures appropriately addresses a conservation issue.

- Unlike Proposal 178, this proposal only clarifies the department's authority to reduce bag and possession limits by emergency order and does not address liberalizing fisheries in which some, but not all, provisions for increasing bag and possession limits or changing methods and means are established in management plans.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Hooking mortality from catch and release should be stopped if escapement goal will not be met.
- Abandons escapement goal management.

Opposition:

- The proposal will limit flexibility for management.
- Department has acted appropriately in the past when issuing emergency orders.
- Department has closed SE fisheries to all fishing if they have a major concern.

General:

- Rivers are often closed to all fishing.
- Questions were asked to determine if ADF&G would allow catch and release if they were sure the escapement would not be met. ADF&G responded no; catch and release is used when escapement is low early in the run when total escapement is not known.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: None
Oppose: None

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 182 –5 AAC 75.xxx. New Section. Prohibit the use of electric reels as follows:

5 AAC xx.xxx. Statewide methods, means, and general provisions – Finfish. Power assisted retrieval of sport fish (including the use of an electric reel) is prohibited in Alaska except, the following anglers may use an electric reel attached to a fishing rod to fish: i. anglers that have in their possession a copy of an approved official certification of disability form a government agency (i.e. declared disabled by the Federal Social Security Administration, the State Department of Worker's Claims, the United States Railroad Retirement Board, The Teacher Retirement system, any state or country Department of Motor Vehicles of the United States office of Personnel Management);

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9,10, 11, 12,13, 15, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 26, 27, 29, 35, 38, 39, 46, 47, 48, 49.

Record Comments: RC 25, 28, 34, 35, 42, 51, 52 54, 55, 69, 73, 78, 79.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- The aspects of this proposal that address power retrieval of sport fish and the use of electric reels are addressed under proposal 180 which was submitted by the department at the request of the board.
- The department is neutral towards the social aspects of this proposal that address the prohibition of power retrieval of sport fish and determining who should be allowed to use electric reels.
- If the board chooses to limit the use of electric reels to people with disabilities, the department suggests that this be administered under existing regulations in 5 AAC 75.038.

Department of Law:

- Found that current statutes and regulations are sufficiently broad to allow the use of powered reels in a sport fishery.

Federal Subsistence Representative: None

Support:

- This proposal is middle ground for those anglers in need of assistance.
- Allows disabled anglers to go fishing without stopping by an area office to obtain a department permit.
- Electric reels would allow anglers and effort to spread over a larger area.
- Issue is not only sablefish, but other species; halibut and rockfish.

Opposition:

- Issue is driven by sablefish allocation.

General:

- Clarification if methods and means allow for the use of electric reel for disabled that is not available to others. Department responded, yes, there is a special permit already available.
- Asked for definition of disabled – department responded, minimum of 70% disability with a physician's note.
- State does not have a definition of handicap.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Opposes. Neutral on social aspect.

AC Positions: Support: Sitka AC
Oppose: Juneau/Douglas AC
Mat-Su Valley AC
Seward AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 183 – 5 AAC 75.xxx. New Section. Prohibit use of electric reels as follows:

Add a new restriction to the method and means sections that reads: "The use of power to retrieve fish while sport fishing is prohibited except that an electric reel may be used provided that the angler has in possession a certificate from the Department of Fish and Game stating that the specific model of reel being used does not provide the user any advantage over a typical able-bodied angler using conventional tackle."

The Board shall direct the department staff to determine and publish appropriate limits for the current draw (amps & volts), retrieval speed, battery life, etc. for electric reels that do not exceed the capability of a typical able-bodied angler using conventional tackle prior to issuing any such certificates.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 11, 12, 13, 15, 16, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 26, 29, 35, 39, 48.

Record Comments: RC 25, 34, 51, 52, 69, 79.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- The department is neutral towards the social aspects of this proposal that address the prohibition of power retrieval of sport fish and determining who should be allowed to use electric reels.
- If the board chooses to limit the use of electric reels to people with disabilities, the department suggests that this be administered under existing regulations in 5 AAC 75.038.
- Criteria for the type of electric reels used in the sport fishery should be simple and enforceable, such as those outlined in proposal 180.

Department of Law:

- Found that current statutes and regulations are sufficiently broad to allow the use of powered reels in a sport fishery.

Federal Subsistence Representative: None

Support:

- Not intended to restrict use for any type of angler.
- Define electric reel characteristics relative to a 'normal' angler.
- Pre-registration of charter vessel's electric reel would simplify enforcement.

Opposition:

- Might lead to different definitions based on gender.

General:

- Department stated that pre-registration of electric reels would be problematic due to operators registering one reel and having a different reel on board.
- Department concern on paperwork generated and getting that paperwork to the enforcement.
- Asked if reels had serial numbers that are readily visible – answer was no.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose. Neutral on definition.

AC Positions: Support: Sitka
Oppose: None

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No action.

Substitute Language: None.

PROPOSAL 180 – 5 AAC 75.020. Sport fishing gear. Define electric fishing reels as follows:

(a) Unless otherwise provided in 5 AAC 47 - 5 AAC 75, sport fishing may only be conducted by the use of a single line having attached to it not more than one plug, spoon, spinner, or series of spinners, or two flies, or two hooks. The line must be closely attended.

(1) Power assisted fishing reels may not be used unless:

(A) the power assisted fishing reel is mounted on a fishing rod by means of a reel seat, and;

(B) the power assisted fishing reel assembly, motor, gearbox, fishing line, attached power cord, and any other reel attachments weigh no more than 15 pounds total when detached from the fishing rod.

(C) For the purposes of this sub-section:

(i) “power assisted fishing reel” means a reel used to deploy and retrieve a sport fishing line that is operated or assisted by any electric, hydraulic, or other mechanical power source other than by hand cranking a handle attached to the reel;

(ii) “fishing rod” means a tapered, flexible rod typically used for sport fishing, equipped with a hand grip and a line guide system that guides the line from the reel to the tip of the rod, upon which is mounted a fishing reel used to deploy and retrieve the sport fishing line;

(iii) “reel seat” means an attachment mechanism that holds the fishing reel to the rod using locking threaded rings, sliding bands, or other attachment devices and is designed to allow the reel to be readily detached from the fishing rod.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 11, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 22, 26, 27, 29, 35, 39, 47, 49.

Record Comments: RC 25, 28, 35, 51, 52, 54, 55, 63, 68, 69, 79, 85.

Narrative of Support and Opposition:

Department:

- The department supports clarification of sport fish rod and reel regulations within this proposal.
- It should be noted that proposals 181, 182, and 183 also address the use of electric reels in the sport fishery, so they should be defined.
- If not defined, commercial gear, such as jigging machines would still be allowed.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Add clarification to regulation as to what powered means, where the rod ends, and the power source starts.
- Support for the 15 lb. weight
- Would like language in C(i) to be “to deploy and/or retrieve“.

Opposition:

- A member of the public does not think proposed language is middle ground.
- 15 lb electric reels more efficient than some commercial gear jigging gear (PC 35).
- Should prohibit electric reels for sport fishing.
- Electric reels are not fair gear and do not promote an Alaskan image of sport fishing.
- Charter operators who do not want to use electric reels will be forced to in order to be competitive.

General:

- Board requested definition of electric reel.
- Department research found that electric reels were less than 15 lbs., and commercial jigging machines start at 32 lbs.
- Clarify if battery, power cord etc. is included in wt. definition.
- Electric reels are currently legal gear.
- It is legal to use sport gear in a commercial fishery.
- Concern over use of electric reel in PU and/or subsistence fishery.
- Electric reels are not legal gear in state subsistence fishery, thus a moot point.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Support.

AC Positions: Support: Fairbanks AC
Juneau/Douglas AC
Oppose: Sitka AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language:

(1) Power assisted fishing reels may not be used unless:

(A) the power assisted fishing reel is mounted on a fishing rod by means of a reel seat, and;

(B) the power assisted fishing reel assembly, attached power cord, motor, gearbox, fishing line, reel mounted battery, or other reel mounted attachments weigh no more than 10 pounds total when detached from the fishing rod.

(C) For the purposes of this sub-section;

(i) “power assisted fishing reel” means a reel used to deploy and retrieve a sport fishing line that is operated or assisted by any electric, hydraulic, or other mechanical power source other than by hand cranking a handle attached to the reel;

(ii) “fishing rod” means a tapered, flexible rod typically used for sport fishing, equipped with a hand grip and a line guide system that guides the line from the reel to the tip of the rod, upon which is mounted a fishing reel used to deploy and retrieve the sport fishing line;

(iii) “reel seat” means an attachment mechanism that holds the fishing reel to the rod using locking threaded rings, sliding bands, or other attachment devices and is designed to allow the reel to be readily detached from the fishing rod

PROPOSAL 181 – 5 AAC 75.995. Definitions. Clarify definition of fishing rod and electric reel as follows:

A fishing rod is a tapering, often jointed rod, equipped with a hand grip and multiple line guides, upon which is mounted a hand powered, or electric reel used to deploy and retrieve the (trolling) fishing line.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 11, 12, 13, 16, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 26, 27, 29, 35, 39, 47, 49.

Record Comments: RC 25, 51, 52, 54, 79.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal, but supports clarification of regulations defining allowable rod and reel gear under proposal 180.
- This proposal would clarify that electric reels may be used in the sport fishery, but not to the extent needed to reduce ambiguity over what type of rod and reel gear should be used in the sport fishery.

Department of Law: None

Federal Subsistence Representative: None

Support: None

Opposition: None

General:

- Refer to discussion on proposal 180.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: None
Oppose: None

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 184 – 5 AAC 75.xxx. New Section. Prohibit the use of felt soled wading boots as follows:

Use of footgear with soles of felt, or other absorbent fiber material, is prohibited while wading in freshwater streams in Alaska as of January 1, 2011.

This same proposal will be implemented in Southeast Alaska and should be implemented on a statewide basis.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 3, 8, 9, 10, 11, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 3, 6, 22, 25, 29, 42.

Record Comments: RC 28, 35, 50, 63, 69, 76, 83, 93.

Narrative of Support and Opposition:

Department:

- The department is neutral on this proposal.
- The protection of Alaska's aquatic environments from invasive species cannot be accomplished completely by prohibiting the use of felt-soled shoes by anglers.
- Although felt-soled shoes have been identified as one of the vectors for introducing invasive species, all equipment used in infested waters is a potential vector for transmission of invasive species.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Proposal has merit.
- Proactive; even though felt soles are not the only vector to transmit invasive disease and organisms, it is a start.
- Potential for whirling disease already at state hatchery.
- Cost to anglers, while expensive, will be less than mitigation of invasive organisms.
- Some companies are providing deals such as trade-in that would limit cost impact.
- Felt soles are becoming difficult to purchase and this soon will be a moot point.
- Manufactories are tending away from felt soles.

Opposition:

- Loss of the use of felt soles would be expensive to replace and burdensome to the anglers.

- Felt is very good in icy conditions.
- Not a problem yet in Alaska.

General:

- RC 83: USGS report on whirling disease, stated both stages could survive in Alaska water temperature.
- Would like to see an education program, pamphlets, or website.
- Definition of felt sole may be difficult.
- Bleach will kill invasive organisms.
- Would like to see longer implantation so anglers have time to purchase new footwear, ie., Jan. 2012.
- If passed, encourage board to write a letter to legislature to ban all use of felt soles statewide.

SSFP:None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Neutral.

AC Positions: Support: Seward AC
 Anchorage AC
 Kenai/Soldotna AC
 Craig AC
 Oppose: Mat-Su Valley AC
 Fairbanks AC

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language:

5AAC 75.xxx Beginning January 1, 2012, the use of footgear with absorbent felt or other fiber material on the soles is prohibited in the fresh waters of Alaska.

PROPOSAL 185 – 5 AAC 75.028. Use of underwater spear. (repeal and readopt). Clarify definition of underwater spear as follows:

In salt water, a spear or speargun may be used to take fish, subject to applicable seasons and bag limits, by a person who is completely submerged; the use of a shaft tipped with an explosive charge, commonly known as a bangstick or powerhead, is prohibited in fresh and salt water.

5AAC 75.995. Definitions.

(XX) “spear” means a shaft with a sharp point or fork-like implement attached to one end, used to thrust through the water to impale or retrieve fish, and which is operated by hand; a spear also includes a Hawaiian sling or pole spear which is a shaft propelled by a single loop of elastic material and is not equipped with a mechanical release or trigger.

(XX) “speargun” means a device designed to propel a spear through the water by means of elastic bands, compressed gas, or other mechanical propulsion to take fish; and is equipped with a mechanical release or trigger .

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 29.

Record Comments: RC 63.

Narrative of Support and Opposition:

Department:

- The department submitted this proposal at the request of the Board of Fisheries and considers it housekeeping in nature.
- The department supports this proposal; it is intended to clarify regulations.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Author of proposal 186 supports this proposal.

Opposition: None

General: None

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Support.

AC Positions: Support: None
Oppose: None

Public Panel Recommendation: Consensus to support.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 186 – 5 AAC 75.028. Use of underwater spear. Allow the use of underwater spear as follows:

In salt water, spears or spear guns may be used to take fish, subject to applicable seasons and bag limits, by persons who are completely submerged.”

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 29.

Record Comments: None

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- The department believes Proposal 185 is a better solution to the problem because it provides definitions necessary for enforcement and the public.

Department of Law: None

Federal Subsistence Representative: None

Support: None

Opposition: None

General:

- No action based on proposal 185.
- Author supports proposal 185.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: None
Oppose: None

Public Panel Recommendation: Consensus for no action based on proposal 185.

Board Committee Recommendation: No action.

Substitute Language: None.

PROPOSAL 187 – 5 AAC 75.038. Authorization for methods and means disability exemptions.
Allow the use of bait by disabled anglers as follows:

Statewide: a use of bait provision for all species of salmon with proof of handicap/disability (on person).

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 22, 29.

Record Comments: RC 50, 63.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- Existing regulations provide a reasonable and enforceable avenue for persons with a disability to seek exemptions to existing regulations which prohibit the person from meaningful access to the program, service, or benefit.

Department of Law:

- The commissioner has the right to grant exceptions.

Federal Subsistence Representative: None

Support:

- The Make-a-Wish Foundation has been granted exemptions in the past.

Opposition: None

General:

- A question was asked to determine if mental disability was different than physical. Department staff answered that the state definition included only a physical disability and/or the recipient of a disability pension.
- State is unaware of what criteria are used by other agencies in order to receive a disability pension.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: None
Oppose: None

Public Panel Recommendation: Consensus to oppose.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 188 – 5 AAC 75.067. Limitations for halibut; 5 AAC 75.995(20). Definitions; and 5 AAC 75.070(b). Possession of sport-caught halibut. Modify sport fishing regulations for halibut as follows:

Modify 5 AAC 75.067: Notwithstanding any other provision in 5 AAC 47 – 5 AAC 75, a [A] person may not take or possess halibut for sport or guided sport purposes in a manner inconsistent with the regulations of the International Pacific Halibut Commission or the National Marine Fisheries Service.

Modify 5 AAC 75.995(20): “possession limit” means the maximum number of unpreserved fish, except halibut, a person may have in his possession;

Repeal 5 AAC 75.070(b): [UNTIL BROUGHT TO SHORE AND OFFLOADED, NO PERSON MAY FILLET, MUTILATE, OR OTHERWISE DISFIGURE A HALIBUT IN ANY MANNER THAT PREVENTS THE DETERMINATION OF THE NUMBER OF FISH CAUGHT OR POSSESSED.]

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 8, 9, 10, 11, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 22, 27, 29, 47.

Record Comments: RC 28, 35, 54, 68.

Narrative of Support and Opposition:

Department:

- The changes recommended in this proposal will make state halibut regulations consistent with federal regulations and ensure that future federal changes are mirrored in state regulations without having to continually make regulatory changes through the board process.
- The department submitted this proposal and considers it housekeeping in nature.
- The department supports this proposal.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Concerns were raised that state and federal regulations and definitions would not match.

Opposition:

- State rights issues are raised by this proposal and the state should not defer to federal law.

General:

- Department staff stated that troopers would enforce state law.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Support.

AC Positions: Support: None
Oppose: Fairbanks

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 189 – 5 AAC 75.075. Sport fishing services and sport fishing guide services; license requirements; regulations of activities. Require a client-guide agreement for each client on a sport fishing charter trip as follows:

Require a client – guide agreement between the fishing party and the licensed fishing guide performing the service.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 3, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 2, 6, 7, 22, 29, 39, 48.

Record Comments: RC 28, 34, 35, 63, 69.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- Board regulations must be consistent with applicable statutes AS 44.62.020-.030. The board may not legally adopt Proposal 189.
- Appears to intend to require a written agreement between a licensed guide (rather than, or in addition to, a sport fishing operator) and each client, presumably before guided angling takes place. This requirement would be in conflict with the sport fishing guide license statute, AS 16.40.270(d), which states:

A sport fishing guide may provide sport fishing guide services only to persons who have engaged the services of the sport fishing operator by whom the sport fishing guide is employed. A sport fishing guide may not contract directly with a person to provide sport fishing guide services to a person unless the sport fishing guide also holds a current sport fishing operator license.

Department of Law:

- Board does not have the authority to do this.

Federal Subsistence Representative: None

Support: None

Opposition:

- Board does not have authority to do this.

General:

- Provides competition and competition is healthy.

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: None
Oppose: Fairbanks AC

Public Panel Recommendation: Consensus to oppose.

Board Committee Recommendation: No action.

Substitute Language: None.

PROPOSAL 190 – 5 AAC 75.003. Emergency order authority. Allow crew members to retain fish when clients are onboard as follows:

Charter crewmembers are unguided anglers and therefore their catch is not recorded under guided anglers. The number of lines in the water cannot exceed the number of paying clients on board.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 1, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 22, 27, 29, 46, 47, 49.

Record Comments: RC 28, 30, 34, 35, 54, 63, 68.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- Restricting the retention of fish by sport fishing guides and sport fishing guide crew members has been a flexible and effective tool for managing fisheries within GHs or allocations.

Department of Law: None

Federal Subsistence Representative: None

Support:

- Support with amendment to apply only to nonresident crews as in proposal 164.
- Crews need to buy license but cannot harvest fish which is unfair, especially to nonresident crew members.
- Crew restrictions limit the ability to harvest in terminal harvest areas where harvest is encouraged.

Opposition:

- Crews catch were adding to clients catch.
- Proposal would be discriminatory.
- Would reopen potential avenues of abuses.

General: None

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: Mat-Su Valley AC
Oppose: None

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language:

PROPOSAL 191 – 5 AAC 75.995. Definitions. Define official time for sport fisheries as follows:

Define official time for fisheries regulated by time.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Advisory Committee Comment Tab, AC 8, 9, 10, 12, 13, 16, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 6, 22, 29.

Record Comments: RC 63.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal and defers to the Board Enforcement Specialist for further comment.
- Universal coordinated time is standard protocol.

Department of Law: None

Federal Subsistence Representative: None

Support: None

Opposition: None

General:

- Numerous methods of determining time.
- Current method is effective.

SSFP: None.

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: Sitka AC
Oppose: None

Public Panel Recommendation: No consensus.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

PROPOSAL 192 – 5 AAC 75.995(1). Definitions. Establish a definition of “artificial fly” as follows:

An elaboration the definition of “common methods known as flying tying.” Suggest the definition allude to the fact that the “materials and chemicals designed and produces” for flies must be physically tied or affixed onto the hook proper, utilizing a material different that the fishing line attached to the fly. Another option would be to address that is not acceptable such as yarn (any material) in an egg loop or anything affixed to the hook or above the hook without the application of a tying thread.

Staff Reports: RC 2.

Staff Comments: RC 2.

Deliberation Materials: None

AC Reports: RC 1; Committee Comment Tab, AC 8, 9, 10, 12, 13, 17, 18.

Timely Public Comment: RC 1; Public Comment Tab, PC 10, 22.

Record Comments: RC 35, 63, 69.

Narrative of Support and Opposition:

Department:

- The department opposes this proposal.
- The existing definition of “artificial fly” provides sufficient criteria to encompass the wide variety of artificial flies sold commercially and manufactured by individual anglers.
- Modifying the definition may lead to future modifications of the definition whenever an artificial fly is created that does not specifically meet the existing criteria.

Department of Law: None

Federal Subsistence Representative: None

Support: None

Opposition:

- Current definition is effective.
- A personal choice of the angler.

General: None

SSFP: None

POSITIONS AND RECOMMENDATIONS

ADF&G Position: Oppose.

AC Positions: Support: None

Oppose: Fairbanks AC

Kenai/ Soldotna AC

Public Panel Recommendation: Consensus to oppose.

Board Committee Recommendation: No recommendation.

Substitute Language: None.

RC 89

March 17, 2010

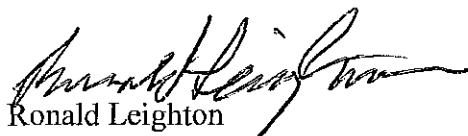
Board of Fisheries
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK 99811-5526

RE: Request for emergency consideration / PROPOSAL 195

The Organized Village of Kasarn (O.V.K.) voted in a council meeting to submit a proposal to close all of District 2. The author of the proposal arbitrarily wrote in to close a portion of District 2. The O.V.K. would not have done this without identifying the portion they wished considered for closure without identifying that portion in detail.

I would hope that the Board of Fisheries would accept this as a clarification and act accordingly.

Respectfully,



Ronald Leighton
Chair of the Customary and Traditional Use Committee

RC 90

March 17th, 2010

Board of Fish
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK 99811-5526

RE: Request for an emergency consideration / *PROPOSAL 195*

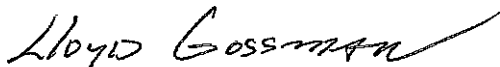
The Saxman AC asks for an emergency closure to summer commercial Dungeness crab fishing. This is for all districts 1 & 2 and revert back to the previous management scheme. October-February and thereby-delinking all of areas district 1 & 2 from the rest of management Area A.

Problem: Closing down only portions of district 2 will further impact the rest of district 2 and all of district 1.

We strongly feel passing proposal 195 as it currently reads, creates an unforeseen, unexpected event that threatens the resource.

Further, any delay would be significantly burdensome to everyone in districts 1 & 2.

Sincerely,



Lloyd Gossman
Vice Chair-Saxman Advisory Committee

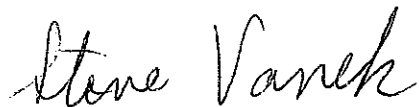
To: Alaska Board of Fisheries

I wish to withdraw my proposal #165.

This seems to be a regional problem and not a statewide issue.

However, I do feel that the Board needs to develop some general policy or guidelines on the "personal use" fishery statewide because there is too much confusion around the state and no standards.

Thank you,

A handwritten signature in cursive script that reads "Steve Vanek". The signature is written in black ink and is positioned below the "Thank you," text.

Steve Vanek

Submitted 3:14 pm on March 17, 2010

Tad Fujioka - Sitka Advisory Com.

RC # 92

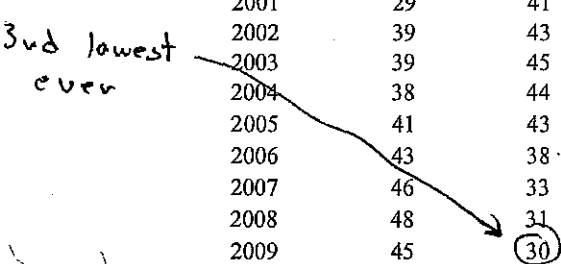
Table 3.11. Regional estimates of sablefish total biomass (Age 2+). Partitioning was done using RPWs from Japanese LL survey from 1979-1989 and domestic LL survey from 1990-2009. For 1960-1978, a retrospective 4:6:9 pseudo-exponential 3 - year average of proportions was used.

Year	Bering Sea	Aleutian Islands	Western Gulf of Alaska	Central Gulf of Alaska	West Yakutat	East Yakutat/Southeast	Alaska
1960	83	99	43	124	39	59	447
1961	84	100	44	126	39	60	454
1962	96	114	50	144	45	69	517
1963	95	114	49	143	45	68	515
1964	94	113	49	142	44	68	510
1965	101	121	52	152	47	73	547
1966	111	133	58	167	52	80	600
1967	112	134	58	169	53	81	606
1968	113	135	59	170	53	81	612
1969	107	128	56	161	50	77	580
1970	98	117	51	148	46	71	530
1971	87	105	45	132	41	63	473
1972	76	91	39	114	36	55	411
1973	71	85	37	107	33	51	384
1974	64	77	33	97	30	46	347
1975	57	68	30	85	27	41	308
1976	54	64	28	81	25	38	290
1977	47	57	25	71	22	34	256
1978	42	52	22	63	20	31	231
1979	55	61	28	87	25	38	294
1980	61	80	32	89	29	44	335
1981	64	89	38	79	33	54	357
1982	75	86	53	100	40	59	413
1983	81	95	71	115	38	55	454
1984	91	113	77	116	35	53	485
1985	100	111	70	121	36	49	486
1986	106	105	68	124	42	53	497
1987	79	105	64	130	48	59	485
1988	47	92	60	144	46	59	449
1989	55	80	48	131	43	53	410
1990	57	61	40	114	43	57	372
1991	39	41	37	111	46	77	352
1992	23	36	25	102	51	85	322
1993	15	34	29	105	54	80	318
1994	18	34	32	97	45	69	294
1995	26	31	28	89	39	61	275
1996	25	27	28	94	33	53	259
1997	24	23	27	98	31	50	254
1998	21	31	27	85	28	50	243
1999	20	41	29	83	27	51	252
2000	20	43	34	87	27	50	260
2001	29	41	41	82	22	45	260
2002	39	43	42	92	23	44	284
2003	39	45	41	99	25	42	291
2004	38	44	36	103	27	41	289
2005	41	43	37	92	25	46	285
2006	43	38	39	83	25	47	275
2007	46	33	28	81	28	46	263
2008	48	31	24	78	24	42	247
2009	45	30	27	73	20	37	232

Low Blackcod Populations throughout Alaska, not just a SE issue

Strong recruitment in '80-'85 due to very good survival of '77, '79 & '81 year classes.

3rd lowest ever



Lowest in 30 yrs, 3rd lowest ever

Lowest in 30 yrs, 3rd lowest ever

Down to less than 1/2 of mid 80's. 2nd lowest ever for statewide total

RC 93



March 1, 2010

Board of Fish Proposal 184, Felt Sole prohibition proposal

Mr. Chairman and the rest of the Board,

As an owner of three sport fishing lodges in Alaska, two in Bristol Bay and one on Kodiak Island, I strongly support proposal 184 for the purposes of eliminating the use of felt soled wading boots in Alaska waters. This proposal is a proactive regulation that should be embraced by the Board as well as the sport fishing industry no matter what the financial consequences are. Invasive species have devastated flowing waters in other states and have crippled sport fishing and industry that depends upon healthy fisheries. Imagine the financial consequences should we have whirling disease outbreaks on the upper Kenai or the NakNek River.

The Board has the great opportunity to take action to help ensure that Alaska's waters continue to productive and healthy. The only allowable change to the proposal in my opinion would be to allow for a phase-out period to have this regulation take affect effective January 1, 2012. This would allow for industry manufacturers to develop new lines of products and will provide consumers with a variety of choices.

I encourage the Board to pass this regulation.

Brian Kraft

Owner

Alaska Sportsman's Lodge - Kvichak River

Alaska Sportsman's Bear Trail Lodge - NakNek River

Kodiak Sportsman's Lodge - Old Harbor, Kodiak

Po Box 231985 Anchorage, AK 99523 (907) 276.7605 www.fishasl.com

Borgeson & Burns, P.C.
100 Cushman Street, Suite 311
Fairbanks, AK 99701
(907) 452-1666
(907) 456-5055 (facsimile)

RC 94

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

THE ALASKA FISH AND WILDLIFE)
CONSERVATION FUND, and)
THE CHITINA DIPNETTERS)
ASSOCIATION INC.,)
)
Plaintiffs,)
)
v.)
)
STATE OF ALASKA, ALASKA)
BOARD OF FISHERIES, and)
ALASKA DEPARTMENT OF FISH)
AND GAME,)
)
Defendants.)

Case No. 4FA-09-966 Civil

MOTION FOR SUMMARY JUDGMENT

Every Alaskan, regardless of income or residence, has a right to harvest salmon to feed his or her family. In 2003, the Board of Fisheries ignored a history of Supreme Court cases defining this right and declared that Chitina salmon stocks have not customarily and traditionally supported subsistence uses. This action caused thousands of Alaskan families to lose legal priority to these salmon in times of shortage. This Court must correct the Board and restore the constitutional rights of over 8,000 Alaskans who annually dip salmon for food at Chitina.

MOTION FOR SUMMARY JUDGMENT

Plaintiffs, the Alaska Fish and Wildlife Conservation Fund and the Chitina Dipnetters Association Inc., through counsel, the law firm of Borgeson & Burns, PC, move for summary judgment. They seek a declaration as to the invalidity of (1) the “eight criteria regulation,” 5 A.A.C. 99.010(b), used by the Board to deny subsistence status to the Chitina Subdistrict salmon fishery; and (2) the regulations promulgated by the Board which classify Chitina as a non-subsistence fishery. The law is clear and there are no genuine issues of fact. Plaintiffs are entitled to a declaratory judgment as a matter of law.

BACKGROUND

This case arises out of the tangled history of joint state-federal management of public resources in Alaska and the refusal of state authorities to abide by the Alaska Constitution, as interpreted by the state Supreme Court, in connection with that management. In particular, many state agencies, including the Department of Fish & Game, Division of Subsistence, and Board of Fisheries, have refused to accept that the Constitution guarantees all state residents equal access to natural resources regardless of their place or residence, whether rural or non-rural. These officials believe that only rural users can engage in true “subsistence” fishing and hunting, and they attempt to implement that belief through tools such as the “eight criteria” regulation, a rule that defines subsistence in terms of characteristics generally associated with indigenous rural communities.

As one consequence of state officials' intransigence on these matters, more than 8,000 Alaska residents who harvest salmon from the Chitina salmon fishery in order to

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feed themselves and their families have struggled for decades to regain official recognition that they are participating in a “subsistence” fishery. In 1999, advocates for these individuals finally persuaded the Board of Fisheries to restore Chitina’s status as a subsistence fishery, only to have that status revoked just four years later after the Board was persuaded by Division of Subsistence staff that the fishery did not meet the requirements of the eight criteria regulation.

The determination to revoke Chitina’s subsistence status was based on regulatory criteria that are inconsistent with both the subsistence statute and the Alaska Constitution. Moreover, that determination was based on a profoundly misleading report furnished by the Division of Subsistence and grievously flawed reasoning by the Board members who voted to revoke the subsistence rights of these Alaskans, as well as by the state officials who advised the Board members. Without judicial intervention, participants in the Chitina salmon fishery will continue to be denied their rightful status under the law and the Board of Fisheries will continue to incorporate a de facto rural preference into its determinations under the subsistence law.

STATEMENT OF FACTS

I. History of Alaska’s Subsistence Laws

On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA).¹ Title VIII of ANILCA, codified at 16 U.S.C. §§ 3101–3126, required that rural Alaska residents be given a priority for subsistence hunting and

¹ Pub. L. No. 96-487, 94 Stat. 2371 (1980).

fishing on public lands.² Congress authorized the State of Alaska to implement the rural subsistence preference by enacting laws of general applicability that conformed to the requirements of Title VIII.³

The legislature adopted Alaska's first subsistence priority statute⁴ in 1978, two years prior to passage of ANILCA. That statute did not expressly limit eligibility for subsistence hunting and fishing to rural residents, as required by Title VIII of ANILCA.⁵ After ANILCA became law, however, the Alaska Boards of Fisheries and Game, whose members were charged with implementing the state subsistence statute, adopted a rural limitation by regulation in order to meet the ANILCA requirement.⁶ The same regulation that instituted the rural limitation also set forth the eight criteria that the Boards of Fisheries and Game would consider in order to identify subsistence uses⁷ —

² See 16 U.S.C. § 3112(2).

³ See *id.* § 3115(d).

⁴ Ch. 151, SLA 1978, reprinted in *Bobby v. Alaska*, 718 F. Supp. 764, 788–91 (D. Alaska 1989).

⁵ The statute provided:

“[S]ubsistence 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[.]

Id. sec. 15.

⁶ See 5 A.A.C. 99.010 (1982), reprinted in *Bobby*, 718 F. Supp. at 794–95. The regulation stated that “subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter, and sharing.” *Id.* 99.010(a)(2) (emphasis added).

⁷ *Id.* 99.010(b). The regulation provided:

Customary and traditional subsistence uses by rural Alaska residents will be

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criteria which, in accordance with the purpose for which they were devised, tilted substantially in favor of rural and indigenous users.

In 1985, in Madison v. Alaska Dept. of Fish & Game,⁸ the Alaska Supreme Court

identified by use of the following criteria:

- (1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;
- (2) a use pattern recurring in specific seasons of each year;
- (3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;
- (4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;
- (5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;
- (6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;
- (7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community of persons, including customary trade, barter, sharing, and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with a historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection; and
- (8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and which provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

⁸ Id.
696 P.2d 168 (Alaska 1985).

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struck down the rural limitation adopted as part of 5 A.A.C. 99.010(a)(2), holding that the limitation “conflict[ed] squarely with the legislative intent” behind the 1978 statute.⁹ For reasons that were not explained in Madison, the Court did not address the eight criteria for identifying customary and traditional subsistence uses set forth in 5 A.A.C. 99.010(b), and as a result these criteria, although they have been modified somewhat over the years, still retain much of their original language favoring rural and indigenous users.

As a result of the Court’s ruling, the State was no longer in compliance with Title VIII of ANILCA.¹⁰ In an attempt to avoid losing its authority to regulate subsistence fisheries under Title VIII, the legislature amended the state subsistence law to provide that “subsistence uses” were limited to uses by rural residents.¹¹ In 1989, in McDowell v. State,¹² the Alaska Supreme Court struck down the rural limitation adopted by the legislature, holding that it violated sections 3, 5, and 17 of article VIII of the Alaska Constitution.¹³ The Court explained that the Constitution guarantees “an equal right to participate in fisheries, regardless of where one resides.”¹⁴

Following McDowell, the Alaska legislature was unable to “resolve the dilemma posed by the fact that Title VIII of ANILCA absolutely required a rural limitation in order for Alaska’s subsistence law to qualify as a substitute for the federal subsistence

⁹ Id. at 176.

¹⁰ See Bobby, 718 F. Supp. at 768.

¹¹ Ch. 52, sec. 10, SLA 1986, reprinted in Bobby, 718 F. Supp. at 791–93.

¹² 785 P.2d 1 (Alaska 1989).

¹³ Id. at 9.

¹⁴ Id.

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scheme, whereas the Alaska Constitution prohibited such a residency requirement.”¹⁵ Notably, in the immediate aftermath of McDowell the legislature rejected several proposals to amend the Alaska Constitution to permit a rural limitation on subsistence hunting and fishing,¹⁶ and in the years since then the legislature has consistently refused to approve any such amendment.¹⁷ As a result, the federal government took over implementation of Title VIII on federal lands, and the state subsistence law, treating all Alaskans equally, continued to apply in areas where the state had jurisdiction.¹⁸

In 1992, the legislature amended the state subsistence law to eliminate references to a rural limitation.¹⁹ In the same bill, the legislature also greatly reduced the Boards’ discretion in interpreting the statutory term “customary and traditional” by explicitly defining that term to mean “the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking

¹⁵ John v. United States, Nos. A90-0484-CV (HRH), A92-0264-CV (HRH), 1994 WL 487830, at *4 (D. Alaska 1994), reversed in part by Babbitt, 72 F.3d 698.

¹⁶ See id.; Frank Norris, Alaska Subsistence: A National Park Service Management History ch. 7 pt. A, available at http://www.nps.gov/history/history/online_books/norris1/.

¹⁷ See Norris, supra note 16, ch. 7 pt. D.

¹⁸ Babbitt, 72 F.3d at 701. In 1990 the Secretary of the Interior promulgated temporary regulations for federal implementation of ANILCA, which became permanent in 1992. See Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990); Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22,940 (May 29, 1992). The federal regulations included a provision very similar to Alaska’s eight-criteria regulation. See 36 C.F.R. § 242.16(b); 50 C.F.R. § 100.16(b).

¹⁹ Ch. 1, SSSLA 1992 (Ex. G).

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into consideration the availability of the fish or game.”²⁰ The eight criteria, however, have remained as a convenient tool for mischief by those who, despite the law, continue to believe that the only true “subsistence” is practiced by rural, indigenous Alaskans.

II. History of the Chitina Subdistrict Salmon Fishery

A. Ancient Times Through the 1990s

The Upper Copper River curves through southeastern Alaska for some 150 miles, following the Tok Cutoff and the Richardson Highway along the border of the Wrangell-St. Elias National Park and Preserve from Slana in the north to Chitina in the south, roughly 250 miles east of Anchorage and 250 miles south of Fairbanks. For centuries the river basin has been home to the Ahtna, who have fished for salmon in the river using dipnets and, more recently, fishwheels.²¹ Archaeological evidence indicates that the Ahtna were fishing for salmon in the Upper Copper River as early as 1,000 A.D.²² The Division of Subsistence (DOS) of the Alaska Department of Fish and Game (ADF&G) reported that in the nineteenth century, “Ahtna fished [for salmon in the Copper River] with long handled dip nets. Fishers stood on rock outcroppings that extended into the river or on platforms built out over the water.”²³ Historical photographs of subsistence dipnetting at Chitina were published in a 2003 DOS staff

²⁰ Id. sec. 4.

²¹ Materials for Dec. 5–6, 2000 Public Meeting of Federal Subsistence Board at 22, 29 (Staff Analysis for Proposal FP01-15) [hereinafter FSB 2000 Staff Report] **(Ex. H)**.

²² Id. at 22.

²³ William E. Simeone and James A. Fall, Division of Subsistence, Alaska Dept. of Fish & Game, Patterns and Trends in the Subsistence Salmon Fishery of the Upper Copper

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report.²⁴

Road construction during World War II²⁵ brought an influx of non-Natives who adopted the traditional dipnet salmon-fishing practices of the Ahtna, in some cases learning about dipnetting from local residents.²⁶ DOS reports that “[r]esidents of Fairbanks began fishing regularly at Chitina in the late 1940s. According to oral tradition, at least one Fairbanks resident fished at Chitina as early as 1938 or 1939, but the fishery did not become popular until after World War II.”²⁷ The first Fairbanksans to fish at Chitina generally used a traditional Ahtna fishing site called Salmon Point, which they learned about from a Chitina Native named Paddy King.²⁸ From Salmon Point the fishery spread down the Copper River toward Fox and O’Brien Creeks,²⁹ and by the 1960s there were two major areas where people fished: O’Brien Creek and Fox Creek.³⁰ At that time, “people camped at O’Brien Creek and canned their fish right

River, Alaska 12 (2003) [hereinafter DOS 2003 Chitina Study] (Ex. I).

²⁴ See James A. Fall & William E. Simeone, Division of Subsistence, Alaska Dept. of Fish & Game, Customary and Traditional Use Worksheet: Salmon: Chitina Subdistrict, Prince William Sound Management Area 31–32 (2003) [hereinafter DOS 2003 C&T Worksheet] (Ex. A to Complaint). All page references to the 2003 C&T Worksheet refer to “master page” numbers.

²⁵ In 1927, the Richardson Highway was opened to automobile traffic, linking Fairbanks with the Copper River Basin; and in 1940, the Glenn Highway was completed, linking Anchorage with the Basin. FSB 2000 Staff Report, supra note 21, at 24.

²⁶ DOS 2003 C&T Worksheet, supra note 24, at 33.

²⁷ DOS 2003 Chitina Study, supra note 23, at 23. The 2003 study contains information obtained through interviews with Fairbanks residents Bud Weise (who first fished at Chitina in 1947), Walter Eberhard (1949), Sam Scott (1955), Charles Crawley (1963), and Stan Bloom (1964). See id. at 23–27.

²⁸ Id. at 23.

²⁹ Id. at 24.

³⁰ Id. at 25.

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there.”³¹

The popularity of the Chitina fishery with nonlocals began to expand dramatically in the 1960s. Between 1960 and 1969, dipnet harvests of salmon in the Upper Copper River rose by a factor of 14, and by the end of the decade dipnets accounted for 74 percent of the total harvest.³² Due to the “increasing number of subsistence fishermen and concern over low escapements,” the State moved in 1966 to reduce the length of the fishing season by two weeks, but strong resistance from the Ahtna caused the Governor to retreat from this plan.³³ By 1970, nonlocal subsistence fishermen had begun to substantially outnumber local Ahtna in the Upper Copper River subsistence fishery, particularly in the roughly ten-mile stretch of river south of the Chitina-McCarthy Road Bridge (the area that is now the Chitina Subdistrict personal use fishery).³⁴

By this time local and nonlocal users were distinguished mainly by gear type: “Local residents used fishwheels and nonlocal residents used dip nets to harvest salmon.”³⁵ Dipnetters could fish more effectively below the bridge, where high canyon walls surrounding a deep, fast river resulted in salmon being concentrated in back eddies. Fishwheelers, on the other hand, found productive fishing above the bridge, where braiding of the river resulted in a slower current and numerous spots where a wheel could more easily be set up, tended, and maintained. Nonlocals generally

³¹ Id. at 26.

³² Id. at 35.

³³ Id. at 35–38.

³⁴ Id. at 39–40; FSB 2000 Staff Report, supra note 21, at 26.

³⁵ FSB 2000 Staff Report, supra note 21, at 26; see also DOS 2003 Chitina Study, supra note 23, at 39–40.

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employed dipnets rather than fishwheels because they were easier to transport and did not require a permanent presence on or near the river, and also because public access to the prime fishwheel sites above the bridge was very limited due to lack of road access and private land ownership. Both groups, however, used the fish they harvested to feed their families, and both were managed under the same subsistence regulations.

This situation, however, was viewed as problematic by State regulators. In an effort “to balance local and nonlocal uses,”³⁶ in 1977 State fishing regulators divided the Upper Copper River District into two distinct subdistricts: the Chitina Subdistrict, consisting of the approximately ten-mile stretch of river to the south of the Chitina-McCarthy Road Bridge, and the Glennallen Subdistrict, consisting of “all the remaining waters of the Upper Copper River District” (roughly 135 miles of river).³⁷ In 1979, the regulators declared the Chitina Subdistrict a dipnet-only subsistence fishery and the Glennallen Subdistrict a fishwheel-only subsistence fishery, further segregating local and nonlocal users.³⁸ In February 1984, the Board of Fisheries “determined that salmon stocks of the Chitina Subdistrict . . . [did] not support customary and traditional uses,” while at the same time making a positive customary and traditional use finding

³⁶ FSB 2000 Staff Report, supra note 21, at 26.

³⁷ 5 A.A.C. 01.605. The Chitina Subdistrict formally extends from “the downstream edge of the Chitina-McCarthy Road Bridge” to “an east-west line crossing the Copper River approximately 200 yards upstream of Haley Creek, as designated by ADF&G regulatory markers.” Id.; see also Division of Sport Fish, Alaska Dept. of Fish & Game, Map of the Copper River Fishery Subdistricts, <http://www.sf.adfg.state.ak.us/Management/Areas.cfm/FA/copperSusitnaChitina.copperMap> (Ex. J).

³⁸ FSB 2000 Staff Report, supra note 21, at 24.

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for the Glennallen salmon stocks.³⁹ In this way, the distinction between local fishwheelers fishing above the bridge and nonlocal dipnetters fishing below the bridge “resulted in the Chitina Subdistrict being reclassified only as a personal use fishery and the Glennallen Subdistrict as a subsistence fishery.”⁴⁰ Under regulations then in effect, the Glennallen subsistence fishery was open only to rural residents, who were free to use either fishwheels or dipnets,⁴¹ whereas non-rural residents were confined to the much smaller Chitina personal use fishery and were only allowed to use dipnets.⁴²

The determination to segregate the subdistricts and deny a subsistence priority to Chitina dipnetters was made based on state regulations which at the time included an unconstitutional rural residency requirement on subsistence uses. After the rural limitation imposed by the Boards was declared illegal, the Board of Fisheries briefly combined the Chitina and Glennallen Subdistricts into a single subsistence fishery open to all state residents.⁴³ When the legislature restored the rural limitation, the Board reinstated the 1984 regulations making the Glennallen Subdistrict a subsistence fishery open to rural residents only and the Chitina Subdistrict a personal use fishery open to all state residents.⁴⁴ After the Supreme Court’s decision in McDowell held that the rural limitation was unconstitutional, the Glennallen subsistence fishery was opened to all

³⁹ DOS 2003 C&T Worksheet, supra note 24, at 17.

⁴⁰ FSB 2000 Staff Report, supra note 21, at 26.

⁴¹ DOS 2003 C&T Worksheet, supra note 24, at 17; FSB 2000 Staff Report, supra note 21, at 24.

⁴² The use of fishwheels was briefly allowed in the Chitina Subdistrict from 1986 to 1989, but from 1989 on, fishing in Chitina was by dipnet only. FSB 2000 Staff Report, supra note 21, at 25.

⁴³ DOS 2003 C&T Worksheet, supra note 24, at 17.

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state residents (although it remained topographically less suitable for dipnetting, the method of harvest favored by nonlocal users). Surprisingly, however, the Board took the view that McDowell “had no effect on the classification of the fishery in the Chitina Subdistrict as personal use.”⁴⁵

Following McDowell, regulatory responsibility for the Upper Copper River District was divided between the Alaska Board of Fisheries, which was responsible for implementing the state subsistence statute in areas of state jurisdiction, and the Secretary of the Interior, who was responsible for implementing Title VIII of ANILCA in areas of federal jurisdiction. State and federal policy with regard to the Chitina Subdistrict salmon fishery ultimately diverged so that today the federal government classifies the fishery as “subsistence” and the State classifies it as “personal use.”

B. State and Federal Board Determinations, 1999–2008

The post-McDowell status quo persisted until December 1999, when the Board of Fisheries adopted Proposal 44 to make a positive customary and traditional use (“C&T”) finding for the Chitina Subdistrict salmon fishery and accordingly issued regulations changing the status of the fishery from personal use to subsistence.⁴⁶

A key element in making this determination was whether continuity existed between the post-statehood urban-based dipnet fishery and the use patterns established by Ahtna Athabaskans and other Copper River Basin residents in an earlier time. Through testimony offered mostly by representatives of the Chitina Dipnetters Association (CDA) the BOF decided there was continuity.⁴⁷

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id. at 20.

⁴⁷ DOS 2003 Chitina Study, supra note 23.

Shortly thereafter the Federal Subsistence Board (FSB), the entity responsible for administering the federal subsistence management program under Title VIII of ANILCA,⁴⁸ made its first positive C&T determination for the Chitina Subdistrict salmon fishery. Unlike state law, federal law requires that C&T determinations “identify the specific community[] or area[]” that is considered to have customarily and traditionally used the fish stocks in question.⁴⁹ In 2000, the FSB unanimously adopted a proposal by the Copper River Native Association (CRNA) to determine that eight communities in the Copper Basin had customarily and traditionally used the Chitina salmon stocks for subsistence.⁵⁰ A staff report prepared for the FSB’s 2000 meeting provided substantial evidence in support of the C&T finding.⁵¹ In 2001, the FSB unanimously adopted another proposal, this time to expand the C&T finding for the Chitina Subdistrict salmon stocks to fifteen additional communities and two additional areas in the Copper Basin.⁵² CRNA supported this expanded C&T determination.⁵³

Despite their organized testimony concerning the customary and traditional use of salmon in the Chitina Subdistrict — resulting in positive federal C&T findings — CRNA and other Copper Basin Native organizations resolutely opposed the state C&T

⁴⁸ See 36 C.F.R. § 242.10.

⁴⁹ Id. § 242.16(a); see also id. § 242.10(d)(4)(iii).

⁵⁰ See Materials for Dec. 5–6, 2000 Public Meeting of Federal Subsistence Board at 15 (Proposal FP01-15) (Ex. H); Transcript of Dec. 6, 2000 Public Meeting of Federal Subsistence Board at 4, 207–08 (Ex. K) (adopting Proposal 15 by unanimous consent), available in full at <http://alaska.fws.gov/asm/pdf/board/001206.pdf>.

⁵¹ See FSB 2000 Staff Report, supra note 21.

⁵² See Transcript of Dec. 11, 2001 Public Meeting of Federal Subsistence Board at 13–17 (Ex. L), available in full at <http://alaska.fws.gov/asm/pdf/board/011211.pdf>.

⁵³ See id. at 14–15 (comments of Gloria Stickwan, appearing on behalf of CRNA).

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finding made in 1999. “Almost immediately” after the Board’s 1999 decision, the Native regional corporation Ahtna, Inc. announced that it was “vehemently opposed” to the creation of a state subsistence fishery in Chitina and asked the Board to appoint a review committee to reconsider its actions.⁵⁴ On March 28, 2000, in response to Ahtna, Inc.’s petition, a three-person subcommittee of the Board held a public meeting in Anchorage to look for “new information that might warrant immediate reconsideration” of the C&T finding.⁵⁵ When the meeting failed to produce any new information, the Board denied the request for reconsideration.⁵⁶

As a direct result of the Board’s actions in December 1999 and March 2000, DOS “decided it was necessary to update information for the [Board of Fisheries] and to focus the survey on the eight criteria for customary and traditional use.”⁵⁷ Therefore, in the summer of 2000 — just a few months after the Board’s decision to recognize a subsistence fishery at Chitina — DOS, in collaboration with CRNA and two other Ahtna organizations, commenced work on a new study examining “patterns and trends” in the Upper Copper River salmon fisheries.⁵⁸ Funding for this study was provided by the Office of Subsistence Management of the U.S. Fish & Wildlife Service.⁵⁹ As the centerpiece of the new study, DOS and the Ahtna organizations conducted a survey of Chitina and Glennallen users with questions that were supposed to “elicit information

⁵⁴ DOS 2003 Chitina Study, supra note 23, at 52.

⁵⁵ Id. at 53.

⁵⁶ Id.

⁵⁷ Id. at 9.

⁵⁸ Id. at 9–10, 76; DOS 2003 C&T Worksheet, supra note 24, at 26.

⁵⁹ DOS 2003 Chitina Study, supra note 23, at 76; DOS 2003 C&T Worksheet, supra

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concerning the eight criteria.”⁶⁰ The study’s authors explained:

While presenting their arguments to reclassify the dipnet fishery as a subsistence fishery in 1999, the Chitina Dipnetters Association (CDA) claimed that the dipnetters were also continuing a pattern of use begun by Ahtna. . . . In other words, it was argued that there was little difference between rural and urban patterns of use. The goal of the survey was to examine to what degree this generalization was true by comparing the contemporary Ahtna pattern of use with the pattern followed by fishermen who lived outside the Copper River Basin.⁶¹

The survey sampling and interview methodology was dramatically different in Chitina, where respondents were selected at random and interviewed by an ADF&G employee who did not disclose the purpose of the questions, as opposed to Glennallen, where there was a deliberate oversampling of well-known, long-term Ahtna users who were interviewed in their homes by staff members of the three Ahtna organizations collaborating in the project and were aware of the survey’s purpose.⁶² Based on the entirely predictable results of that slanted survey, DOS assembled a new Customary and Traditional Use Worksheet (“C&T Worksheet”) to advise the Board regarding whether the Chitina fishery satisfied the eight criteria.

In 2003, CRNA and several other Ahtna organizations sponsored Proposal 42 asking the Board of Fisheries to repeal the positive C&T finding it had made for the Chitina Subdistrict just four years earlier.⁶³ Ahtna, Inc. submitted comments urging the adoption of CRNA’s proposal, noting that “[t]he dip netters, primarily from urban areas,

note 24, at 26.

⁶⁰ DOS 2003 Chitina Study, supra note 23, at 10.

⁶¹ Id. at 76.

⁶² See id. at 11, app. C; infra TAN 134–140.

⁶³ See Alaska Board of Fisheries, 2002/2003 Proposal 42 (Ex. M).

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do not have traditional and customary use determination [sic] of salmon as the Ahtna people. . . . They travel from Anchorage, Fairbanks, or other urban areas, [to] harvest salmon, and they have a lifestyle and income that is much different than Ahtna people.”⁶⁴ By a vote of 4 to 3, the Board adopted Proposal 42.⁶⁵ The Board found that the new C&T Worksheet prepared by DOS, and in particular the new survey data compiled by DOS and the Ahtna organizations, represented “significant new information” that justified reversing its previous decision.⁶⁶ Based on the information in the C&T Worksheet, the Board found that Criterion 8 and, “to some extent,” Criteria 1 and 6 of Alaska’s eight-criteria regulation “were not met in the current pattern of use in the Chitina Subdistrict dipnet fishery.”⁶⁷

Subsequently the Board refused to act on two proposals, one in 2005 and the other in 2008, that asked it to reconsider its determination.⁶⁸ In both cases, the Board found insufficient new information to justify reconsidering its decision. In both 2005 and 2008, the Board relied on the same C&T Worksheet it had utilized in 2003, which DOS resubmitted without substantial changes.⁶⁹ The Board’s current regulatory policy is

⁶⁴ Letter from Ken Johns, President and CEO of Ahtna, Inc., to Alaska Board of Fisheries 2–3 (Jan. 9, 2003) (Ex. N).

⁶⁵ Alaska Board of Fisheries, Summary of Actions Taken at Jan. 31–Feb. 6, 2003 Public Meeting at 6 (Ex. C to Complaint at 6).

⁶⁶ *Id.*

⁶⁷ DOS 2003 C&T Worksheet, *supra* note 24, at 20.

⁶⁸ *See* Alaska Board of Fisheries, Summary of Actions Taken at Dec. 1–6, 2005 Public Meeting at 1 (no action taken on Proposal 3) (Ex. D to Complaint at 1); Alaska Board of Fisheries, Preliminary Summary of Actions Taken at Dec. 1–7, 2008 Public Meeting at 1 (no action taken on Proposal 1) (Ex. E to Complaint at 1).

⁶⁹ *See* DOS 2003 C&T Worksheet, *supra* note 24, at 9, 11.

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embodied in 5 A.A.C. 01.616(a)⁷⁰ and 5 A.A.C. 77.591, the “Copper River Personal Use Dip Net Salmon Fishery Management Plan.”

As a consequence of the Board’s decision in 2003, for the last five years the Chitina fishery has been managed as a personal use fishery with weekly fishing periods and limits established by emergency order.⁷¹ Users are required to have a sport fishing license.⁷² Moreover, because the Chitina fishery lacks subsistence status, its needs are secondary to those of the commercial salmon fishery located at the mouth of the Copper River. Pursuant to the subsistence statute and ADF&G regulations, the commercial fishery must be managed so as to ensure that upriver subsistence harvest needs are met.⁷³ However, because the Chitina personal use fishery lacks subsistence status, its needs are subordinated to those of the commercial fishery. Current ADF&G regulations specify that if the commercial fishery does not open for 13 consecutive days due to weaker-than-expected salmon runs, then the harvest limit for Chitina is automatically slashed to just 50,000 salmon (from a normal level of 100,000 to 150,000).⁷⁴ These regulations have caused fishing periods at Chitina to be reduced

⁷⁰ 5 A.A.C. 01.616(a) contains the Board’s positive C&T findings for salmon stocks in the Glennallen Subdistrict and other fish stocks in the Prince William Sound Area. The positive C&T finding for Chitina salmon stocks was excised in 2003.

⁷¹ Management of the Copper River Personal Use (Chitina Subdistrict) and Subsistence (Glennallen Subdistrict) Salmon Fisheries, <http://www.sf.adfg.state.ak.us/Management/areas.cfm/FA/copperSusitnaChitina.manageCurrent> (last accessed March 10, 2009)

(Ex. O)

⁷² 5 A.A.C. 77.010(a).

⁷³ See A.S. 16.05.258(b); 5 A.A.C. 24.360.

⁷⁴ See 5 A.A.C. 77.591(f). The Board invoked this rule to reduce the overall harvest limit for Chitina during the 2008 season. See News Release, Division of Sport Fish, Alaska Dept. of Fish & Game, Amendment to the 2008 Copper River Personal Use Dip

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and have made the fishery subject to closure on short notice, which presents a serious challenge for individuals who need to make plans in advance to travel to the fishery (particularly those who must take time off from work in order to fish).⁷⁵

A subsistence priority for Chitina would not represent a serious economic threat to commercial fishing interests, because the commercial harvest of Copper River salmon vastly exceeds all other harvests combined. From 1996 through 2005, the commercial fishery harvested an average of 1,535,618 sockeye salmon, 262,844 coho salmon, and 46,814 Chinook (king) salmon per year.⁷⁶ By comparison, the combined harvest of the Chitina and Glennallen Subdistrict fisheries over that same period averaged only 169,881 sockeyes, 2,624 coho, and 6,299 kings.⁷⁷ Nonetheless, commercial fishers (including those who sit on the Board of Fisheries) have been staunch opponents of a subsistence designation for the Chitina dipnet fishery. As a result, not only is the Chitina personal use fishery subject to emergency closures based on the success of the commercial fishery, but if the size of the Copper River salmon

Net Salmon Fishery Schedule (July 14, 2008) (Ex. P).

⁷⁵ See, e.g., Tim Mowry, "Chitina Dip Net Harvest Drops," Fairbanks Daily News-Miner Feb. 12, 2009 (Ex. Q) (reporting that in 2008 "fishing time and harvest limits for dipnetters were cut late in the season"); see also Brochure, Division of Sport Fish, Alaska Dept. of Fish & Game, Fishery Regulations and Public Access for the Chitina Subdistrict Personal Use Salmon Fishery (April 2008) (Ex. R) ("The fishery in the Chitina Subdistrict is open from June 1 through September 30 during periods established by emergency order. . . . Call to verify opening dates and times before traveling to Chitina.").

⁷⁶ See Glenn Hollowell et al., Divisions of Sport Fish & Commercial Fisheries, Alaska Dept. of Fish & Game, 2005 Prince William Sound Area Finfish Management Report 44 app. A1, 46 app. A3, 47 app. A4 (2007) (Ex. S) (calculations based on data presented in report), available in full at <http://www.sf.adfg.state.ak.us/FedAidPDFs/fmr07-33.pdf>.

⁷⁷ See id. (calculations based on data presented in report).

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runs were to drop in future seasons, the Chitina fishery would be at risk of being shut down entirely — while the commercial fleet downriver would be able to continue its harvest without any limit, and the Glennallen subsistence fishery upriver would be able to maintain its limit of 500 salmon per household.⁷⁸

STANDARD OF REVIEW

Summary judgment is proper only where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Alaska R. Civ. P. 56(c). The moving party bears the burden of proof and all reasonable inferences are drawn in favor of the non-movant. Wilson v. Pollett, 416 P.2d 381, 383–84 (Alaska 1981).

ARGUMENT

This motion seeks summary judgment as to the validity of the eight criteria regulation and the validity of the Board of Fisheries' regulatory determination to repeal its positive C&T finding for the Chitina Subdistrict.

Section I demonstrates that the eight criteria regulation is facially invalid because it is inconsistent with the subsistence statute. The regulation does not serve to clarify any ambiguous statements by the legislature, but instead introduces a number of criteria that have no statutory basis and that serve only to bias C&T determinations in favor of residents of rural communities that exist near the resource, and against non-rural users who travel to the resource.

Section II demonstrates that even if the eight criteria regulation is valid, the Board's 2003 determination to repeal its positive C&T finding for the Chitina Subdistrict

⁷⁸ See 5 A.A.C. 01.630(e)(9)(D).

was a legally invalid and constitutionally infirm regulatory decision. The Board's decision was unreasonable and arbitrary for the following reasons: (1) the Board relied on an impermissible and misleading comparison between the Chitina and Glennallen user groups; (2) the Board misapplied each of the regulatory criteria (1, 6, and 8) on which it based its decision; (3) the Board based its evaluation of the Chitina Subdistrict use pattern on percentages rather than absolute numbers, thereby perversely allowing the constitutionally based "all Alaskans" policy to result in elimination of the subsistence fishery; and (4) the Board failed to reconcile its negative C&T finding for Chitina salmon stocks with its positive C&T finding for non-salmon finfish stocks throughout the Upper Copper River Basin.

Section III demonstrates that the disparate treatment of the Chitina and Glennallen Subdistricts by both the Board of Fisheries and the Division of Subsistence violates Chitina users' constitutional rights to equal protection of the law and uniform application of resource allocation laws. The Board recognized in 2003 that similar demographic changes have taken place in both subdistricts; yet while the Board and DOS moved quickly to revoke Chitina's subsistence status based on those changes, they have declined to take any action with respect to Glennallen's status.

I. The "Eight Criteria Regulation" Is Facially Invalid.

A. Legal Standard

Courts in Alaska apply a three-part analysis to determine the validity of

administrative regulations.⁷⁹ First, they ask whether the legislature has delegated authority to the administrative agency to promulgate regulations.⁸⁰ Next, they ask whether “the regulation is consistent with and reasonably necessary to implement the statutes authorizing its adoption”⁸¹ and whether it is “reasonable and not arbitrary.”⁸² On the question of consistency, “the court exercises its independent judgment, unless the issue involves agency expertise or the determination of fundamental policy questions on subjects committed to an agency,” in which case the court defers to the agency’s interpretation “so long as it is reasonable.”⁸³ Finally, the court decides on the basis of a de novo review whether the regulation conflicts with any state statutes or constitutional provisions.⁸⁴ The party challenging the regulation bears the burden of proving it is invalid.⁸⁵

B. The Eight Criteria Regulation Is Invalid Because It Is Not Consistent with, Reasonably Necessary To Implement, or a Reasonable Interpretation of the Subsistence Statute.

In 1982 the Boards jointly adopted the eight-criteria regulation, 5 A.A.C.

⁷⁹ See O’Callaghan v. Rue, 996 P.2d 88, 94–95 (Alaska 2000).

⁸⁰ Id. at 94; see also A.S. 44.62.020 (providing that to be effective, a regulation “must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law”). Plaintiffs concede that A.S. 16.05.251(6) and .255(5) authorize the Boards of Fisheries and Game to promulgate regulations regarding the classification of fish and game into various regulatory categories.

⁸¹ O’Callaghan, 996 P.2d at 94 (quoting Chevron U.S.A. Inc. v. LeResche, 663 P.2d 923, 927 (Alaska 1983)); see also A.S. 44.62.030 (providing, as a requirement of Alaska’s Administrative Procedure Act, that a regulation “is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute”).

⁸² O’Callaghan, 996 P.2d at 94.

⁸³ Id.

⁸⁴ Id. at 95.

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99.010(b), to guide them in making C&T determinations. The regulation was adopted as part of the effort by the Boards to institute a rural limitation on subsistence uses,⁸⁶ an effort that was subsequently declared unconstitutional. But even though the rural limitation has been struck out of the law, the eight criteria regulation designed and implemented to effectuate the rural limitation remains in force with only slight modifications. This discriminatory regulation is not consistent with the subsistence statute and is not reasonably necessary to carry out the statute's purpose. Moreover, the regulation continues to perpetuate an implicit rural preference that is contrary to the Alaska Constitution as interpreted in McDowell.

This Court should apply its independent judgment to determine that the eight criteria regulation is inconsistent with the statute. The regulation does not interpret or clarify an ambiguous term that has not already been defined by the legislature, and therefore it cannot be said to reflect the application of agency expertise to a policy question that the legislature committed to the agency.⁸⁷ That the statute clearly defines customary and traditional subsistence uses makes clear that the legislature did not intend to commit the development of "criteria" to the discretion of the Boards. Even if this Court takes a deferential approach, however, the eight criteria regulation is still invalid because it is not a reasonable interpretation of the subsistence statute. The statute itself is clear and complete, and the eight criteria — with language commonly

⁸⁵ Id.

⁸⁶ See supra TAN 6–7.

⁸⁷ Cf. O'Callaghan, 996 P.2d at 94 (stating that whether a roe stripping regulation issued by ADF&G was consistent with the salmon waste statute "is one of statutory

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used by anthropologists to describe the customs and traditions of Alaska Natives — have only led to confusion and illegal discrimination against non-rural Alaskans.

The subsistence statute requires the Board of Fisheries to identify fish stocks “that are customarily and traditionally taken or used for subsistence.”⁸⁸ It provides clear definitions for each of its operative terms. It defines “subsistence uses” as

the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state⁸⁹ for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, “family” means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis[.]⁹⁰

The statute further defines “customary and traditional” as “the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.”⁹¹

Thus, the statute itself establishes a simple and straightforward test for C&T determinations: there must be a pattern of taking, use, and reliance that is (1) for one of several enumerated purposes, including for direct personal or family consumption as food; (2) noncommercial; (3) long-term; (4) consistent; and (5) established over a

interpretation to which we should apply our independent judgment”).

⁸⁸ A.S. 16.05.258(a).

⁸⁹ Although the legislature has never amended the definition to remove this rural limitation, it is clear that the language has no force after McDowell.

⁹⁰ A.S. 16.05.940(33).

⁹¹ Id. 16.05.940(7).

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reasonable period of time.

These are the only criteria the statute prescribes to identify fish stocks that are eligible for subsistence harvesting. However, under the guise of implementing these simple and straightforward statutory provisions, the Boards have continued to apply the eight criteria regulation (5 A.A.C. 99.010(b)) that they first adopted in 1982, at a time when there was no statutory definition of “customary and traditional” and the Supreme Court had not yet held that a rural preference is unconstitutional. The regulation is a model of administrative complexity; it is rife with ambiguity; it ensures that C&T determinations will be deeply subjective; and it has virtually no basis in the statute. As amended most recently in 1992 and 1993,⁹² the eight criteria regulation provides:

Each board will identify fish stocks or game populations, or portions of stocks or populations, that are customarily and traditionally taken or used by Alaska residents for subsistence uses by considering the following criteria:

- (1) a long-term consistent pattern of noncommercial taking, use, and reliance on the fish stock or game population that has been established over a reasonable period of time of not less than one generation, excluding interruption by circumstances beyond the user’s control, such as unavailability of the fish or game caused by migratory patterns;
- (2) a pattern of taking or use recurring in specific seasons of each year;
- (3) a pattern of taking or use consisting of methods and means of harvest that are characterized by efficiency and economy of effort and cost;
- (4) the area in which the noncommercial, long-term, and consistent pattern of taking, use, and reliance upon the fish stock or game population has been established;
- (5) a means of handling, preparing, preserving, and storing fish or game that has been traditionally used by past generations, but not excluding recent

⁹² For the text of the eight criteria regulation as adopted in 1982, see supra note 7.

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technological advances where appropriate;

- (6) a pattern of taking or use that includes the handing down of knowledge of fishing or hunting skills, values, and lore from generation to generation;
- (7) a pattern of taking, use, and reliance where the harvest effort or products of that harvest are distributed or shared, including customary trade, barter, and gift-giving; and
- (8) a pattern that includes taking, use, and reliance for subsistence purposes upon a wide diversity of fish and game resources and that provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life.⁹³

Criterion #1 includes all of the statutory requirements for a C&T finding (plus a Board-imposed requirement that defines a “reasonable period of time” as being no less than “one generation”). What purpose, then, do the other seven criteria serve? Among other things, they provide that the fish must be harvested with “efficiency and economy” and handled in a manner “that has been traditionally used by past generations”; that fishing “skills, values, and lore” must be handed down “from generation to generation”; that fish harvested must be “distributed or shared”; and that the individuals harvesting the fish must rely upon a “wide diversity” of fish and game resources and must use the harvest as a source of “substantial economic, cultural, social, and nutritional elements of the subsistence way of life.”

These requirements are clearly designed to paint a picture of a rural, indigenous community and to establish that community as the standard against which all activities must be judged to determine whether they are truly “subsistence uses.” The eight criteria allow those who continue to believe in a rural preference to justify comparing

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user groups rather than uses of the fish stock or game population. Yet these requirements have no conceivable basis in the subsistence statute, a statute that carefully and completely defines each of its operative terms.⁹⁴

Until now, Alaska courts have never been asked to review the validity of the eight criteria regulation. In Payton v. State,⁹⁵ the plaintiffs challenged the Board's interpretation of the eight criteria regulation as requiring a familial relationship between current users and prior generations of users. Importantly, the Court in Payton commented that under the "plain language of A.S. 16.05.258(a) and A.S. 16.05.940(7)," the focus in C&T determinations is on "whether the use has occurred consistently for an extended period of time."⁹⁶ The Board's kinship requirement was therefore invalid, and the Paytons' challenge was upheld. Plaintiffs in this case are asking the Court to take the next logical step and invalidate the entire eight criteria regulation on the ground that the regulation, like the interpretation struck down in Payton, "inappropriately restrict[s] [Plaintiffs'] ability to establish a subsistence fishery"⁹⁷ by imposing standards that shift the focus of the C&T inquiry from the statutory requirements of consistency and duration to unrelated considerations such as the cultural, social, and economic context in which the harvest takes place.

⁹³ 5 A.A.C. 99.010(b).

⁹⁴ Arguably, "long-term," "consistent," and "reasonable period of time" are ambiguous and could benefit from regulatory or judicial clarification; but the requirements set forth in the eight criteria regulation cannot possibly be understood as reasonable interpretations of those terms.

⁹⁵ 938 P.2d 1036 (Alaska 1997).

⁹⁶ Id. at 1043.

⁹⁷ Id.

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An interpretation of “customary and traditional” that adheres to the plain language of the subsistence statute, and bars consideration of the hazy factors listed in the eight criteria regulation, is consistent with the legislature’s intent. When the legislature amended the subsistence statute in 1992, the bill it ultimately adopted was a compromise between the proposal submitted by the Governor’s Subsistence Advisory Council and alternative bills drafted by individual legislators. Notably, however, the definition of “customary and traditional” that the legislature adopted in 1992 was very similar to that proposed by the Advisory Council.⁹⁸ The Council’s proposal did not include any language attempting to limit “customary and traditional” uses to those that took place in a particular cultural context, but required only that such uses be noncommercial, consistent, and established over a sufficient period of time. The Council explained, “The intent of this definition is that any stock or population that is presently used for subsistence be classified as such, but classification not occur just because there have been incidental or random takes for subsistence at some time in the past.”⁹⁹ In other words, the definition was designed to exclude uses that were not sufficiently long-term and consistent. However, there is no indication that the Council intended for its definition of “customary and traditional” to be used to exclude uses that

⁹⁸ The Advisory Council’s bill would have defined “customary and traditional” as “the noncommercial, long term, consistent, and ongoing dependence on the taking and use of fish or game in a specific area and the use patterns and harvest levels of that fish or game that have been established over at least one preceding generation of users.” Governor’s Subsistence Advisory Council, “An Act Relating to the Taking of Fish and Game for Subsistence; and Providing for an Effective Date,” sec. 6 (1992) (Ex. T).

⁹⁹ Governor’s Subsistence Advisory Council, “Governor’s Subsistence Bill: Section-by-Section Description” at 18 (Feb. 21, 1992) (Ex. U).

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did not conform to a certain idea of the cultural, social, and economic patterns that define a “subsistence way of life.” As a compromise, the Council proposed legislative findings that recognized the social, cultural, and spiritual significance of a “subsistence way of life” that “originated with Alaska Natives” and was subsequently “adopted and supplemented by many non-Native Alaskans”; but the Council’s bill did not authorize the Boards to consider these factors when identifying subsistence uses.¹⁰⁰ This compromise position was reflected in the bill ultimately adopted by the legislature, which retained the Council’s findings verbatim and also adopted the Council’s definition of “customary and traditional” with only minimal revisions.¹⁰¹ The legislature rejected an alternative proposal that would have defined “customary and traditional uses” as “those uses that have historically been made by residents of rural Alaska.”¹⁰²

The eight criteria regulation is a relic that has been held over from a point in time when the Boards of Fisheries and Game felt immense pressure to institute a rural limitation on subsistence uses in a desperate effort to conform state law to Title VIII of ANILCA in order to preserve state authority to manage subsistence uses on federal lands. Their efforts in this regard, however noble in intent, ultimately were doomed to failure because the Alaska Constitution guarantees all Alaskans an equal opportunity to participate in subsistence harvests and therefore does not permit rural limitations or

¹⁰⁰ See Governor’s Subsistence Advisory Council, “An Act Relating to the Taking of Fish and Game for Subsistence; and Providing for an Effective Date,” sec. 1 (1992) (Ex. D).

¹⁰¹ See Ch. 1, sec. 1, SSSLA 1992 (Ex. G).

¹⁰² See House Bill 600, 17th (1991–1992) Legislature, sec. 8 (Ex. V).

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preferences.¹⁰³ To the extent the eight criteria regulation does more than simply echo the language of the subsistence statute (which it does in Criterion 1), it has no arguable statutory basis. It is not consistent with the subsistence statute, nor is it reasonably necessary to carry out the statute's purposes, and it is therefore invalid.

C. Striking Down the Eight Criteria Regulation Will Require the Boards to Make Nondiscriminatory C&T Determinations According to the Legislatively Prescribed Test.

Striking down the eight criteria regulation will not result in confusion or disarray in the subsistence management arena. Instead, the Boards will be required to make positive C&T determinations when presented with a documented pattern of use, taking, and reliance on a fish or game resource that is for an enumerated purpose, noncommercial, long-term, consistent, and established over a reasonable period of time. This is the test the legislature intended the Boards to apply for classifying fish stocks and game populations, as evidenced by the plain language of the statute. It is much simpler and much clearer, and it would help to put an end to the unconstitutional residence-based discrimination that consistently results from the Board's application of the eight criteria regulation.

The clear legislative intent was to base C&T determinations on the purpose and duration of the observed use pattern, rather than on extraneous factors such as the "cultural importance" of the use and whether the users exhibit various characteristics of a "subsistence way of life." This legislative intent is evident in the plain text of the statute, which sets out straightforward definitions of the terms "subsistence" and

¹⁰³ See Alaska Const. art. VIII, §§ 3, 5, 17; McDowell, 785 P.2d at 9.

“customary and traditional” that do not make reference to the cultural and lifestyle elements which feature so heavily in the eight criteria regulation.

The intent of the legislature is also evident from the legislative history of the original subsistence statute, which specifically identifies the Chitina Subdistrict salmon fishery as the type of use that should be protected under the subsistence laws. In Madison, the Supreme Court discussed the House debate on the 1978 statute:

Another part of the House debate serves to clarify the statute’s meaning. Representative Parr expressed concern that the board might use A.S. 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 [(the bill’s floor manager)] 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.¹⁰⁴

As the Supreme Court recognized, the House Debate shows that the legislature understood “customary and traditional subsistence uses” as a concept that was broad enough to incorporate use by urban residents who “make it a custom” to travel to the Chitina Subdistrict and harvest salmon in dipnets for personal and family consumption. Representative Anderson’s use of the word “custom” in this context is consistent with

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the definition of “customary and traditional” that the legislature adopted in 1992,¹⁰⁵ which focused on the duration and consistency of the use pattern rather than factors such as the users’ cultural background and their participation in a nebulous “subsistence way of life.”

D. There Is No Genuine Dispute That the Chitina Subdistrict Salmon Stocks Are Traditionally and Customarily Taken or Used for Subsistence as Defined in the Statute.

Once the eight criteria are declared invalid, this Court should apply the clear statutory standard for C&T determinations to the Chitina Subdistrict salmon fishery. As is evident from the extensive administrative record, there is no genuine dispute that there is a pattern of taking of, use of, and reliance upon the Chitina salmon stocks by Alaska residents that is (1) for the purpose of direct personal or family consumption as food; (2) noncommercial; (3) long-term; (4) consistent; and (5) established over a reasonable period of time.

There is nothing in the record to suggest that the Chitina salmon stocks were not being used for personal and family consumption or that they were being used for commercial purposes. Furthermore, it has been clearly documented that the Ahtna have a consistent tradition of harvesting salmon at Chitina with dipnets going back hundreds of years¹⁰⁶ and that the Chitina salmon fishery has been used by Alaska

¹⁰⁴ Madison, 696 P.2d 168, 176 (Alaska 1985) (alterations and emphasis in original).

¹⁰⁵ Ch. 1, sec. 4, SSSLA 1992 [Ex. C]. The original version of the statute did not define “customary and traditional.” See Madison, 696 P.2d at 173.

¹⁰⁶ See DOS 2003 C&T Worksheet, supra note 24, at 29–39; FSB 2000 Staff Report, supra note 21, at 22–24.

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residents throughout the twentieth century.¹⁰⁷ (Fishwheels are a relatively recent technological innovation, introduced by immigrants from Washington State.) This is confirmed by the legislative history cited above, which indicates that as early as the 1970s, the Chitina salmon harvest had already established itself in the minds of legislators as a customary and traditional subsistence activity.¹⁰⁸ It is further confirmed by the Federal Subsistence Board's determination that 25 villages and two areas in the Copper Basin exhibit customary and traditional use of the fishery and by CRNA's own statements in support of the federal findings.¹⁰⁹

II. Even If the Eight Criteria Regulation Is Facially Valid, the Board's Application of It In This Case Resulted In an Invalid Regulatory Decision.

A. Legal Standard

In determining whether a regulation is unreasonable and arbitrary, the court's role is to ensure "that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making."¹¹⁰ A regulation will not pass muster under this standard if it is "the product of capricious or insufficiently deliberative decision

¹⁰⁷ See DOS 2003 C&T Worksheet, supra note 24, at 33–40; FSB 2000 Staff Report, supra note 21, at 24–27.

¹⁰⁸ See supra TAN 104.

¹⁰⁹ See, e.g., Materials for Dec. 5–6, 2000 Public Meeting of Federal Subsistence Board at 15 (Proposal FP01-15) (Ex. 11) ("The community of Chitina Elders says that the area was used historically and use only stopped when the State forced local people out, and also due to being forced out of the area by over crowding [sic] conditions. Many subsistence users from Chitina, AK left this area because outsiders coming to this area to dip net [sic] forced them out. People from Fairbanks, AK began to use the area in the early 1960's.").

¹¹⁰ Libertarian Party of Alaska, Inc. v. State, 101 P.3d 616, 622 (Alaska 2004).

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making,”¹¹¹ or if it “fail[s] to consider an important factor.”¹¹² “Under this standard, when no facts material to the Board’s decision are disputed, the ultimate issue of reasonableness presents a question of law capable of summary adjudication.”¹¹³ The court should not “substitute [its] judgment for the judgment of the agency” on matters of policy committed to the agency’s discretion;¹¹⁴ instead, the court focuses on the “process” by which the agency made its decision.¹¹⁵ The Board’s interpretation of its own regulations will be upheld if it has a “reasonable basis,” but “insofar as [the court’s] review requires [it] to determine the meaning of ‘customary and traditional’ in A.S. 16.05.258,” the court will exercise its independent judgment.¹¹⁶

B. The 2003 Decision Was Unreasonable and Arbitrary Because the Board Based Its Determination on an Impermissible and Misleading Comparison Between Users of the Chitina and Glennallen Subdistricts.

The C&T Worksheet that DOS provided to the Board in 2003 (and again in 2005 and 2008) focuses unremittingly on contrasting the primarily urban users in the Chitina Subdistrict with the primarily rural users in the neighboring, but much larger, Glennallen Subdistrict. Specifically, the Worksheet presents data drawn from a federally funded survey of Chitina and Glennallen users that was conducted in 2000 by DOS and several Copper River Basin Native organizations, including CRNA.¹¹⁷ The Worksheet

¹¹¹ Id. at 627.

¹¹² Alaska Survival v. State, Dep’t of Natural Res., 723 P.2d 1281, 1287 (Alaska 1986).

¹¹³ Rutter v. State, 963 P.2d 1007, 1008 n.3 (Alaska 1998).

¹¹⁴ Libertarian Party, 101 P.3d at 622.

¹¹⁵ Interior Alaska Airboat Association, Inc. v. State, Bd. of Game, 18 P.3d 686, 693 (Alaska 2001).

¹¹⁶ Payton, 938 P.2d at 1041.

¹¹⁷ See DOS 2003 C&T Worksheet, supra note 24, at 26.

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compares the “harvest patterns” of Chitina and Glennallen users based on a variety of characteristics, including local versus nonlocal residency,¹¹⁸ length of Alaska residency,¹¹⁹ number of years participating in the fishery,¹²⁰ frequency of fishing in the fishery,¹²¹ months fished in the fishery,¹²² whether they felt their fishing sites belonged to their families,¹²³ methods of preparing salmon,¹²⁴ who taught them to fish in the fishery,¹²⁵ how they learned about the fishery,¹²⁶ patterns of sharing their catch (whether, with whom, and how much),¹²⁷ the importance of salmon and wild foods in their diets,¹²⁸ employment characteristics,¹²⁹ and whether they took time off from work to fish.¹³⁰ In all, the Worksheet contains nearly two dozen charts and graphs purporting to compare Chitina and Glennallen users based on the percentage of users who answered a survey question in a particular way. This mode of analysis fatally tainted the Board’s decisionmaking process.

First, no statute or regulation authorizes the Board to make C&T determinations by comparing harvest patterns observed in one region to those observed in another region. Nor does any statute or regulation establish the harvest pattern in the

¹¹⁸ Id. at 53 fig.22.

¹¹⁹ Id. at 53 fig.23.

¹²⁰ Id. at 54 fig.24.

¹²¹ Id. at 55 fig.25.

¹²² Id. at 55 fig.26.

¹²³ Id. at 66 fig.33.

¹²⁴ Id. at 68 fig.34.

¹²⁵ Id. at 68 fig.35.

¹²⁶ Id. at 70 fig.36.

¹²⁷ Id. at 70 fig.37, 72 figs.38–39, 73 figs.40–41.

¹²⁸ Id. at 75 figs.42–43.

¹²⁹ Id. at 76 figs.44–45.

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Glennallen Subdistrict as an appropriate baseline for defining subsistence use. The Board was given no evidence whatsoever that the use pattern in Glennallen was typical of all subsistence fisheries in Alaska. Moreover, the Board was required to make its determination by applying the eight criteria to the information that had been provided about the Chitina fishery and not by comparing the Chitina fishery with other subsistence fisheries in the state, let alone one particular subsistence fishery.¹³¹ The advice given to the Board on this issue by the Department of Law (DOL) was equivocal at best: Lance Nelson, the Assistant Attorney General present at the meeting correctly cautioned members that “the Glennallen subdistrict use patterns are not the legal standard that you need to apply here,” while at the same time stating that the information about Glennallen “might be helpful,” before finally opining, “I don’t think it’s inappropriate for you to compare.”¹³² After receiving this inconsistent legal advice, some of the Board members urged their colleagues not to use Glennallen as a baseline for defining subsistence;¹³³ however, the record indicates that some members found the comparison inescapable.¹³⁴

¹³⁰ Id. at 79 fig.48.

¹³¹ Three of the seven board members stated on the record that they felt the comparison to Glennallen was inappropriate, but only one of these three voted in favor of the proposal to repeal the positive C&T finding for Chitina. See Transcript of Feb. 5, 2003 Board of Fisheries Meeting at 120–21 [hereinafter BOF 2003 Transcript] (Lx.W) (comments of Larry J. Engel); id. at 124 (comments of Ed Dersham); id. at 125 (comments of Rupe Andrews). Thus, three of the four “yes” votes did not state on the record that they were attempting not to be influenced by the comparison.

¹³² Id. at 76 (comments of Lance Nelson).

¹³³ See id. at 120–21 (comments of Larry J. Engel); id. at 124 (comments of Ed Dersham); id. at 125 (comments of Rupe Andrews).

¹³⁴ See, e.g., id. at 137 (comments of Art Nelson) (“Now again, you know, trying to avoid

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Furthermore, the survey data on which the comparisons were based was woefully misleading due to the different sampling methodologies used to survey users in the two subdistricts. In Chitina users were selected and interviewed at random by DOS employees who did not inform respondents of the survey's purpose.¹³⁵ In Glennallen, however, DOS worked with members of CRNA and other Native organizations to identify and interview long-time, consistent, indigenous, local-resident users who were fully informed about the purpose of the survey.¹³⁶ In contrast to the random sampling of Chitina users, DOS engineered a deliberate oversampling of Ahtna fishers and other local users who were deemed to be "most knowledgeable about . . . the pattern of use that is established in the Glennallen subdistrict."¹³⁷

Dr. James A. Fall, representing DOS, attempted to justify the survey methodology:

[W]e deliberately focused on the Ahtna participants in this [Glennallen Subdistrict] fishery for several reasons. One is that the Ahtna fishers — participants in that fishery best represent the consistent, long-term pattern of use in the Glennallen subdistrict. It is a pattern of use that the Board of Fisheries used in the early 1980s to establish the C&T finding — the positive C&T finding for Glennallen.

Although this group represents perhaps 15 to 20 percent of the total participants in that fishery now, it is the most representative of that traditional pattern. We didn't want that pattern to be obscured by — by not interviewing a

the pit of comparing the two subdistricts, I do see that the difference is rather striking. And without, you know, trying to use the Glennallen subdistrict as the bar that these — that the Chitina district has to get over, it's quite a striking difference there.").

¹³⁵ See *id.* at 36 (comments of Dr. James A. Fall).

¹³⁶ See DOS 2003 Chitina Study, *supra* note 23, at 11, app. C.

¹³⁷ See BOF 2003 Transcript, *supra* note 131, at 35 (comments of Dr. James A. Fall); see also *id.* at 38 (comments of Dr. James A. Fall) ("We didn't look at past records — harvest records to select any kind of random sample. It was basically knowledgeable, active fishers.").

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lot of those people.¹³⁸

Under questioning from board member Engel, Dr. Fall explained that the oversampling of Ahtna and other active local users in Glennallen was designed to give the board “a good description of a customary and traditional-use pattern.” Dr. Fall confidently offered his own legal opinion about the appropriateness of considering this information, stating that it was “extremely relevant for the board performing its task”¹³⁹ — thereby adding his personal view as to the importance of village-based subsistence to the equivocating opinion offered by DOL. Yet the oversampling resulted in board members having a dramatically skewed picture of actual use patterns in the Glennallen Subdistrict and gave members no way to determine whether the overall use patterns in Chitina and Glennallen actually differed in any meaningful way. It further appears that neither DOS nor the Board considered that there may be customary and traditional use patterns that differ from those practiced by Ahtna elders but that also meet the statutory criteria.

Despite these serious flaws in DOS’s survey comparison methodology, the same C&T Worksheet was resubmitted without any change or clarification in both 2005 and 2008 — each time with the statement, “We believe that this 2003 staff report remains an accurate summation of the relevant information pertaining to the eight criteria for the

¹³⁸ Id. at 16 (comments of Dr. James A. Fall); see also id. at 44 (comments of Dr. James A. Fall) (“[T]he subsistence division is trying to give you a good view of traditional-use patterns, and we don’t want that traditional-use pattern statistically to be swamped by what happens under the law, which is that it’s open to everyone.”).

¹³⁹ Id. at 45–46 (comments of Dr. James A. Fall).

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state-managed Chitina Subdistrict fishery.”¹⁴⁰ There is no evidence that the Board was able to overcome the fact that the report on which it based its decision was biased at its inception, grievously misleading in its implementation, and targeted to achieve an unconstitutional result.

C. The 2003 Decision Was Unreasonable and Arbitrary Because the Board's Evaluation of Criterion 8 Did Not Reflect Reasoned Decision-Making.

The four Board members who voted to repeal the positive C&T finding for Chitina based their decision primarily on Criterion 8, which requires the Board to consider whether there is “a pattern that includes taking, use, and reliance for subsistence purposes upon a wide diversity of fish and game resources and that provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life.”¹⁴¹ Mel Morris, one of the “yes” votes for repealing the positive C&T finding, first voiced his doubts about whether Criterion 8 was satisfied¹⁴²:

I'm having a little problem with No. 8, in I haven't heard social aspect of the subsistence way of life spoken to me yet. What is social?

I read in the transcripts of the 1999 meeting that social consisted of a lot of people. It can be families that went down to the Chitina river. It could be mothers, fathers, grandmothers, and whatnot, and had get-togethers. And this was considered — this was considered social.

But I'm not sure that it relates to a subsistence way of life. I think you get together in your back yard and have a barbecue and that would be social, and it wouldn't — because you got your whole family or other people together, that necessarily was a social outing or a social bonding, or whatever it would be called, that related to a subsistence way of life.

¹⁴⁰ DOS 2003 C&T Worksheet, *supra* note 24, at 9, 11.

¹⁴¹ 5 A.A.C. 99.010(b); *see* Alaska Board of Fisheries, Summary of Actions Taken at Jan. 31–Feb. 6, 2003 Public Meeting at 6 (Ex. C to Complaint at 6).

¹⁴² Of the four Board members who voted “yes,” Morris was the only one who did not clearly state that he was placing primary reliance on Criterion 8, as opposed to Criteria 1 and 6, about which he and other members also expressed concern.

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And again, it — you know, it's sort of an ambiguous thing that requires me to decide on those issues not with any definitive information, but how — how does it play out in what I've heard.¹⁴³

Chairman Ed Dersham, who had voted against the positive C&T finding in 1999, explained the basis for his vote in favor of repealing that finding as follows:

So when I look at 1 and 6 — when I looked at 1 and 6 three years ago, I was kind of right on the point of the knife in deciding which way to go based on those two.

And am I a little more on one side of the knife? Yeah. I'm a little more leaning towards no on those two. But I'd still hate to make this decision based on those two alone.

Criteria [sic] 8, that was the deciding factor for me three years ago. I felt that that criteria best defined for me what the whole question of subsistence and is this subsistence.

And I just want to refer — I think I've lost it. I want to refer back briefly to the final comments I made three years ago, because they're pretty much the same now about that one issue.

The last thing I said before we voted on this was: ["Mr. Chairman, I just want to flesh out my own personal record in this issue a little more. . . .

["I mentioned earlier that a majority of my reliance was on answering the question in criteria No. 8, specifically where it talks about reliance and the phrase it provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life.

["And once you make sure in your own mind that it is meeting the test of and following the statute and the policy that guides us in this decision, I think the question comes down to your personal definition of what is a subsistence way of life.

["I certainly respect (indiscernible) reasoning in his decision, but I am going to stick to my guns and vote no, Mr. Chairman.["]

And you know, I'm still in that same position.¹⁴⁴

¹⁴³ BOF 2003 Transcript, supra note 131 (comments of Mel Morris).

¹⁴⁴ Id. at 148–49 (comments of Ed Dersham) (emphasis added); see also id. at 78 (comments of Ed Dersham) (“But to meet criteria 8 was very important, because I kind of see criteria 8 as a microcosm of the whole debate on subsistence that’s been going on in the state for many years. And your definition of subsistence kind of determines how you see — how you answered question No. 8. And that over-arching definition that, you know, I’ve come to find what is subsistence, that guided me in my final — in my decision. And I didn’t think that uses at Chitina met criteria 8, and caused me to vote no.”).

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Art Nelson, who provided another “yes” vote, responded:

Thank you, Mr. Chair. You know, I have appreciated all the comments that have been made so far. But I’ve got to say I most agree with your assessment on — your assessment, Mr. Chair, on 8, particularly looking at that last part of it dealing with the economic and cultural, social, and nutritional elements of the subsistence way of life.

And in many of those aspects, you know, economic, cultural, social, nutritional, relate back to several of these other criteria in different manners. But it comes down to that final part, the subsistence way of life. And it does depend on your perspective with that.

You know, I still have some concerns with some of the other criteria, as well, but it really does boil down to 8. And I don’t feel the fishery meets, under 8, and I have concerns over the other criteria.

And with that, I will be voting — make sure I get it right — yes on the motion.¹⁴⁵

And John Jensen, the fourth and final vote for repealing the C&T finding, stated simply, “Yeah. My feelings are pretty much the same of what Art [Nelson] just said, especially on No. 8. I’m probably — I’m going to vote yes on this proposal.”¹⁴⁶

The comments of these four Board members demonstrate that they understood Criterion 8 to require evidence that the users of the Chitina Subdistrict salmon fishery were engaged in a “subsistence way of life,” but not one of them was able to articulate any meaningful definition of this “subsistence way of life.” The comments of Board member Larry J. Engel, who voted to retain the positive C&T finding, are instructive on this matter:

¹⁴⁵ Id. at 153–54 (comments of Art Nelson) (emphasis added); see also id. at 137 (comments of Art Nelson) (describing criterion 8 as “kind of the whole enchilada in a lot of ways”); id. at 155 (comments of Art Nelson) (“But I — just in my gut opinion and in looking at a lot of these other criteria, again, it comes back down to 8, because it has so many different aspects.”).

¹⁴⁶ Id. at 156 (comments of John Jensen).

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Again, it goes back to there are many people perhaps that are taking advantage of this fishery that would not fit the eight criteria.

But there are a small percentage, which means a lot of people, that probably in my experience do. They have lived a life — whatever subsistence lifestyle that — we all know it, we see it, but it looks different to each of us, just like defining beauty.¹⁴⁷

Rupe Andrews, another member who voted to retain the positive finding, similarly captured the Board's inability to define the "subsistence way of life" standard it was trying to apply when he stated, "Mr. Chairman, very quickly on criterion 8, the word 'cultural' is included in that definition. And to me, that means living an Alaskan lifestyle. But it could mean just about anything to anybody else. But that's the way I'm going to interpret it."¹⁴⁸

The Board members, both those who voted to repeal the C&T finding and those who voted to retain it, freely admitted that they did not understand how to apply Criterion 8. They understood that they were being asked to measure the pattern of use at Chitina against some platonic ideal of a "subsistence way of life," but they acknowledged that this "could mean just about anything"; that it was "like defining beauty"; that it "depend[s] on your perspective"; that it "comes down to your personal definition"; that it was "sort of an ambiguous thing"; and that it required them to decide without "any definitive information." A decisionmaking process in which agency officials openly admit that they cannot articulate the standard they are applying is the antithesis of reasoned decisionmaking.

Much of the blame for this flawed process lies with the eight criteria regulation

¹⁴⁷ Id. at 150–51 (comments of Larry J. Engel) (emphasis added).

itself and with its mandate that the Board consider vague cultural factors not prescribed by the statute, such as whether users exhibit a “subsistence way of life.” The Board members in this case appear to have been struggling in good faith to apply a standard that they did not understand, and perhaps could not reasonably have been expected to understand. The record of their deliberations demonstrates the need for this Court to strike down the eight criteria regulation and restore the more straightforward statutory test for C&T determinations. However, if the eight criteria regulation is to remain, the Board cannot be allowed to rest its determinations on an ill-defined and inherently subjective evaluation of whether the users of a resource are engaged in a “subsistence way of life” (a term that is not defined by statute, whereas “subsistence use” is clearly defined). In this case, three out of the four members who voted to repeal the C&T finding for Chitina indicated that this was the deciding factor in their minds, and none of them offered a reasoned explanation for why the Chitina dipnetters were not engaged in a subsistence way of life. Under these circumstances, this Court must protect the rights of Alaska citizens by overturning the Board’s decision as unreasonable and arbitrary.¹⁴⁹

D. The 2003 Decision Was Unreasonable and Arbitrary, as Well as Constitutionally Infirm, Because the Board’s Evaluation of Criterion 8 Was Based on Irrelevant and Constitutionally Impermissible Considerations.

Although the Board members who voted to repeal Chitina’s C&T finding struggled to articulate reasons why they did not believe Criterion 8 was satisfied, the

¹⁴⁸ Id. at 154 (comments of Rupe Andrews) (emphasis added).

¹⁴⁹ Cf. Payton, 938 P.2d at 1045 (stating as one ground for reversal of Board’s negative C&T determination that “the Board failed to explain adequately” why it determined that

record strongly suggests that they were influenced by impermissible considerations advocated by DOS and Dr. Fall. These unlawful considerations led the Board to apply a de facto rural preference in violation of the Alaska Constitution. Both the C&T Worksheet Dr. Fall co-authored and the presentation he made to the Board emphasized ways in which Chitina's primarily nonlocal users did not integrate their subsistence fishing activities into a broader way of life in the same way as local, rural users of the Copper Basin.

The section of the C&T Worksheet addressing Criterion 8 bizarrely begins by contrasting the overall per capita harvest of wild foods by Copper Basin residents (more than 100 pounds per person per year) with the overall per capita harvest of wild foods by Fairbanks, Anchorage, and Mat-Su residents (roughly 20 pounds per person per year).¹⁵⁰ These figures were also highlighted by Dr. Fall in his presentation on Criterion 8.¹⁵¹ It is not clear how these figures, even if accurate, could have any legitimate relevance to a C&T determination for the Chitina salmon stocks, since the substantially lower numbers for the non-rural areas reflect usage by all residents of those areas, including many who do not engage in any subsistence activity whatsoever.¹⁵² It is completely illogical and inconsistent with the subsistence statute to suggest that

Criterion 5 did not favor a positive finding).

¹⁵⁰ DOS 2003 C&T Worksheet, supra note 24, at 74.

¹⁵¹ See BOF 2003 Transcript, supra note 131, at 111–12 (comments of Dr. James A. Fall).

¹⁵² See, e.g., Robert J. Wolfe & Victor Fischer, Methods for Rural/Non-Rural Determinations for Federal Subsistence Management in Alaska 10–12 (2003) (EX), available in full at <http://www.iser.uaa.alaska.edu/Publications/Rural%20Final%20Report2.pdf>.

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because a stock is fished primarily by individuals from Fairbanks, and because the population of Fairbanks as a whole has a low per capita harvest of wild foods, therefore the stock is not being used for subsistence purposes. Furthermore, this sort of muddled logic inevitably leads to C&T determinations being biased in favor of fisheries frequented by rural users and against fisheries frequented by urban users, a bias that violates the Alaska constitution as interpreted in McDowell.

The C&T Worksheet goes on to discuss (as supposedly relevant to the Board's evaluation of Criterion 8) Chitina and Glennallen users' statements concerning the importance of salmon and wild foods in their diets and their employment characteristics.¹⁵³ These statements also featured prominently in Dr. Fall's presentation on Criterion 8.¹⁵⁴ Based on the information presented by Dr. Fall, it appears that randomly sampled Chitina users were almost as likely as users in the carefully selected Glennallen sample to report that salmon and wild foods were important in their diets (63 percent of Chitina users said salmon was "very important" and 60 percent said wild foods were "very important," compared with 74 and 80 percent in the Glennallen sample).¹⁵⁵ Chitina users were somewhat more likely than users in the Glennallen sample to hold some form of wage employment or be retired, although the difference was not staggering. Among Chitina users surveyed, 87 percent reported being employed (almost all full-time), 11 percent reported being retired, and only 2 percent

¹⁵³ DOS 2003 C&T Worksheet, supra note 24, at 74–79.

¹⁵⁴ See BOF 2003 Transcript, supra note 131, at 112–13 (comments of Dr. James A. Fall).

¹⁵⁵ DOS 2003 C&T Worksheet, supra note 24, at 75 figs.42–43.

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reported having no job; whereas among the Glennallen users surveyed, 62 percent reported being employed (almost all full-time), 17 percent reported being retired, and 21 percent reported having no job.¹⁵⁶ In addition, Chitina users were somewhat more likely than Glennallen users to report that they took time off from work to fish (51 percent versus 30 percent)¹⁵⁷ — a difference which is obviously the result of Chitina users having to travel to the resource and using dipnets rather than fishwheels (which can be left unattended). However, based on these statistics, the C&T Worksheet concluded that “subsistence fishing in the Glennallen Subdistrict is integrated into the round of economic activities in the Copper River Basin, in contrast to the predominant pattern in the Chitina Subdistrict where fishing is more likely to be a break from work activities.”¹⁵⁸

This conclusion, which was apparently meant to support a negative finding on Criterion 8, in fact does no such thing. For one thing, it exaggerates the statistical differences between the Chitina and Glennallen users surveyed — differences that were relatively modest despite the deliberate overrepresentation of rural Ahtna users in the Glennallen sample. Moreover, the notion that a resource is not being harvested for subsistence if those harvesting it (1) are employed in the cash economy and (2) take time off from their jobs to participate in the harvest lacks any grounding in the

¹⁵⁶ *Id.* at 76 figs.44–45.

¹⁵⁷ *Id.* at 79 fig.48.

¹⁵⁸ *Id.* at 77; cf. BOF 2003 Transcript, *supra* note 131, at 31 (comments of Dr. James A. Fall) (“[M]any [of the Glennallen users sampled] were not working in the summertime, seasonal, or are working part time. Also, they’re living closer to where they’re fishing, so the fishing can occur in evenings and weekends pretty efficiently. And there’s evidence that that use pattern is incorporated into a local economy, a local subsistence way of life.”).

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subsistence statute and would, if generally adopted, have the practical effect of making the “subsistence” label unavailable to resources that are harvested by a substantial number of non-rural Alaskans. This would contravene the clear directive of the Supreme Court in McDowell that the Alaska Constitution forbids the State from applying a rural limitation or preference in the management of subsistence hunting and fishing.

Therefore, not only was the Board’s discussion of Criterion 8 marked by the absence of any clear standard, but in addition, the information that DOS presented to the Board as bearing on Criterion 8 was irrelevant and promoted an unconstitutional rural preference. This is a further reason for this Court to hold that the Board’s evaluation of Criterion 8 did not reflect reasoned decision-making.

E. The 2003 Decision Was Unreasonable and Arbitrary Because the Board’s Evaluation of Criterion 1 Was Based on an Erroneous Interpretation of the Statutory Requirements.

The Summary of Actions issued by the Board of Fisheries’ designated reporters following the Board’s January–February 2003 meeting explained that the Board had based its decision to rescind the positive C&T finding for Chitina on Criterion 8 and “to some extent” Criteria 1 and 6. Because the Board chose not to make specific findings on each criterion (as it had done in 1999),¹⁵⁹ it is necessary to examine each members’ comments to discern which criteria were important to their decision. As set forth above, all four members who voted “yes” said that Criterion 8 was important to their decision, and three of the four indicated that it was the most important factor. However, some of

¹⁵⁹ See BOF 2003 Transcript, supra note 131, at 83 (comments of Ed Dersham and Lance Nelson).

the members also appear to have been concerned about Criterion 1,¹⁶⁰ and they traced their concern directly to two sets of statistics presented by DOS. Those statistics were legally irrelevant to the application of Criterion 1, and the Board's reliance on them in making its determination was error meriting reversal.

The C&T Worksheet prepared by DOS, in its presentation of "Findings from the 2000 Survey related to Criterion 1," emphasized data regarding individual users' (1) history of involvement in the fishery and (2) frequency of participation in the fishery.¹⁶¹ The Worksheet stressed that Chitina users had shorter personal histories with the fishery than users in the skewed Glennallen sample (although 43.5 percent reported having been involved with the fishery for more than 10 years) and were less likely to use the fishery "every year" (although 44 percent said they used the fishery every year and another 32 percent said they used it "most years"). Dr. Fall highlighted these statistics in his presentation to the Board on Criterion 1¹⁶² and thereby provoked an important exchange, which began when Board member Art Nelson asked whether "long-term" and "consistent" in Criterion 1 applied to the pattern of use of the fishery or

¹⁶⁰ See id. at 140 (comments of Mel Morris), 147–48 (comments of Ed Dersham); see also id. at 96, 99, 133 (comments of Art Nelson) (expressing doubts about Criterion 1 but ultimately concluding that "the fishery probably fits that criteria"). Criterion 1 requires

a long-term consistent pattern of noncommercial taking, use, and reliance on the fish stock or game population that has been established over a reasonable period of time of not less than one generation, excluding interruption by circumstances beyond the user's control, such as unavailability of the fish or game caused by migratory patterns.

5 A.A.C. 99.010(b)(1).

¹⁶¹ See DOS 2003 C&T Worksheet, supra note 24, at 54 fig.24, 55 fig.25.

¹⁶² See BOF 2003 Transcript, supra note 131, at 90–91 (comments of Dr. James A.

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the individual users. He said:

Are we looking at users or uses in this instance? Clearly looking at it in this way, it looks like the vast majority of users haven't been participating in the Chitina subdistrict for a long period of time. And as was pointed out earlier, 42-odd percent have been doing it less than five years.

So I'm not sure where to look on this. Are we looking at uses or are we looking at users when it comes to this point, or is it fair to look at both?¹⁶³

Lance Nelson, the representative from DOL, surprisingly replied that the statute was ambiguous on this point:

I think legally you could interpret probably this criterion and even the statute a number of different ways. It's probably ambiguous as to whether or not the use has to keep reoccurring or the use has to be by the same person over a long period of time. I mean, I think both — both questions probably have some merit as to determining what the long-term pattern of use is.¹⁶⁴

Dr. Fall concurred with Nelson's assessment, urging the Board to consider the statistics in the C&T Worksheet regarding the length of individual users' involvement with the fishery and the frequency with which particular individuals used the fishery.¹⁶⁵ Art Nelson was apparently persuaded:

Yeah. That's — thank you, you both clarified it for me quite a bit. Because if you look solely at the use, you know, obviously the Chitina — salmon stocks at Chitina have been used for a long time, and they've been used consistently every single year.

But when you start to look at the users, you know, as I pointed out with figure 24, the long-term part when you're looking at users, it appears to be on the shorter term, most of them under 20 years in the Chitina subdistrict.

And then the following one on page 21 of RC 139 shows that 44 percent of the Chitina subdistrict users, only 44 percent, fish every year. So I guess that gets to long-term, consistent use.¹⁶⁶

Fall).

¹⁶³ Id. at 96 (comments of Art Nelson).

¹⁶⁴ Id. at 96–96 (comments of Lance Nelson).

¹⁶⁵ Id. at 98 (comments of Dr. James A. Fall).

¹⁶⁶ Id. at 99 (comments of Art Nelson).

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A short time later Board member Mel Morris echoed Art Nelson's concerns:

I'm having a little problem with the long-term, consistent pattern and understanding how 42 percent can be under five years in the fishery, only 20 percent can be — you know, are between 10 and 20 years.

And I don't know exactly what long-term means again, whether that actually tells me that — you know, five years certainly doesn't sound like long term to me, but again, it's — there's nothing that tells me what is long term or what isn't.¹⁶⁷

As a result of the advice that was provided to the Board by both DOS and DOL, the members clearly believed that the statistics about the length and consistency of individual users' participation in the fishery militated against a positive finding on Criterion 1, and thus against a positive C&T finding for Chitina.

Contrary to DOL's advice, the plain language of the law clearly indicates that the characteristics of individual users are irrelevant to the C&T determination. In the statute, the words "long-term" and "consistent" modify "taking of, use of, and reliance upon fish or game";¹⁶⁸ in the regulation, they modify "pattern of noncommercial taking, use, and reliance."¹⁶⁹ Consistent with this language, the Supreme Court has repeatedly held that the statutory phrase "customary and traditional" refers "to 'uses' rather than 'users.'"¹⁷⁰ Yet the Board, following the advice of Dr. Fall and the Assistant Attorney General, required particular users to exhibit a long-term and consistent involvement with the fishery, instead of simply examining whether the overall pattern of use of the

¹⁶⁷ Id. at 140 (comments of Mel Morris).

¹⁶⁸ A.S. 16.05.940(7).

¹⁶⁹ 5 A.A.C. 99.010(b)(1).

¹⁷⁰ Payton, 938 P.2d at 1042; State v. Morry, 836 P.2d 358, 368 (Alaska 1992); McDowell, 785 P.2d at 9 n.19; Madison, 696 P.2d at 174.

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fishery was long-term and consistent (which it plainly was). This approach to applying Criterion 1 was erroneous and warrants reversal of the Board's decision.

F. The 2003 Decision Was Unreasonable and Arbitrary Because the Board's Evaluation of Criterion 6 Was Based on Inadequate and Misleading Information and on an Erroneous Interpretation of the Statutory Requirements.

As already noted, the Summary of Actions for the Board's 2003 meeting stated that the Board based its determination on Criterion 6 "to some extent."¹⁷¹ In fact, the transcript shows that three of the four members who voted "yes" expressed some concern about Criterion 6. These members were plainly troubled by DOS's survey data on responses to the question, "Who Taught You How to Fish on the Copper River?" The data showed that 43 percent of Chitina users reported being self-taught, 44 percent reported having being taught by a friend, and nine percent reported having being taught by a parent, sibling, or other relative.¹⁷² Dr. Fall highlighted these responses in his presentation to the Board on Criterion 6, although he reminded the Board that the low number of users who reported having been taught by a relative "can't be used to deny that [intergenerational transmission of knowledge] occurs because of Payton."¹⁷³ Board member Art Nelson was the first to voice doubts:

No. 6, this is one that I kind of pick on a little bit. According to the survey,

¹⁷¹ Criterion 6 requires "a pattern of taking or use that includes the handing down of knowledge of fishing or hunting skills, values, and lore from generation to generation." 5 A.A.C. 99.010(b)(6).

¹⁷² DOS 2003 C&T Worksheet, supra note 24, at 68 fig.35. This was in contrast to the deliberately skewed Glennallen sample in which 68 percent reported having been taught by a parent, sibling, or other relative; 24 percent reported being self-taught; and 22 percent reported having been taught by a friend. Id.

¹⁷³ BOF 2003 Transcript, supra note 131, at 104–06 (comments of Dr. James A. Fall).

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a large majority, in fact I believe it was almost half of the users in the Chitina district, taught themselves how to fish. And the other large majority, 40, 50 percent, learned from a friend.

And some of that I'm sure is intergenerational. To what extent, I don't know. It's probably a lower proportion of that, but I certainly don't want to fall into a trap of trying to guess at what that proportion might be.

But when looking at the intergenerational transfer, I think that's a pretty low proportion of the Chitina subdistrict of users that have learned their ability to harvest the fish from a different generation.¹⁷⁴

Member Mel Morris agreed:

I'm — I do have some questions about No. 6, the handing down of knowledge. I — I've heard that it can be done by a younger and older person, but I — I see that 84 percent of the Chitina dipnetters have been taught by themselves or by friends how to do it, how to dipnet.

And I don't — you know, I don't know whether they were older or younger or whatever. But I understand that it doesn't particularly matter if it's intergenerational.¹⁷⁵

And Chairman Ed Dersham stated:

Criteria 6, information there is — strikes me as a little different than I would expect it. It comes down to what do you do with that percentage that says friend? How much of that is intergenerational. I don't know. But I suspect at least some of it, a fair amount of it, isn't.

So when I add that to the self-taught, that's an interesting fact for me to consider.¹⁷⁶

As already noted, it is not clear how much of an influence Criterion 6 had on the Board members' ultimate determination (Criterion 8 was obviously more important to them). But the fact is that the information before the Board was completely inadequate to make any meaningful finding with respect to Criterion 6. In Payton, the Supreme Court held that Criterion 6 only required the Board to determine “whether current

¹⁷⁴ Id. at 136 (comments of Art Nelson).

¹⁷⁵ Id. at 139 (comments of Mel Morris).

¹⁷⁶ Id. at 148 (comments of Ed Dersham).

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residents had learned subsistence traditions from prior generations of persons who had used [the fish stock in question] for subsistence” and that the Board could not require “a familial relationship between current residents and those prior generations.”¹⁷⁷ Yet, inexplicably, the only data collected by DOS and presented to the Board for its consideration in connection with Criterion 6 was the proportion of users who had learned from relatives versus those who had not. DOS made no effort whatsoever to identify patterns of intergenerational transmission that might exist between unrelated users of the Chitina Subdistrict. The Board recognized this deficiency, but it nonetheless relied on the deficient data to find that Criterion 6 militated against a positive C&T finding, apparently on the baseless assumption that a sizeable amount of the learning that was characterized as “from a friend” would not qualify as intergenerational. This was error under Payton.

Moreover, the data was inherently misleading because of the phrasing of the survey question, which asked who had taught the respondents “how to fish on the Copper River.” This is an inherently confusing question, since no doubt many of the respondents learned to fish elsewhere — often, no doubt, from parents and other elders — and applied those skills on the Copper River. An individual who fit this description would clearly be a recipient of intergenerational knowledge transmission, but such an individual could reasonably have responded to the survey question by stating that she had taught herself “how to fish on the Copper River” (even though she had not taught herself how to fish). In other words, the wording of the survey question implies that

¹⁷⁷ Payton, 938 P.2d at 1042.

intergenerational transmission of fishing knowledge, values, and lore must take place in connection with the particular fish stock in question. But this limit is just as arbitrary and unjustified as the limitation struck down in Payton that required the transmission to take place within families. The subsistence statute and the eight criteria regulation must be interpreted in light of the Alaska Constitution, which provides that all residents — rural and urban, Native and non-Native — can participate in the broad spectrum of subsistence hunting and fishing opportunities that are available in the state. An individual whose parents or elders taught her about subsistence methods and traditions in Anchorage, Fairbanks, Mat-Su, or anywhere else — even outside the state — is entitled to bring that knowledge to bear on the subsistence harvest at Chitina or any other subsistence harvest in Alaska. By reporting only on the intergenerational transmission of knowledge concerning Copper River subsistence fishing, and not on transmission of knowledge concerning subsistence fishing in general, DOS implicitly discounted participation in the fishery by nonlocal subsistence users. This biased question wording is an additional reason why in 2003 the Board did not have any reliable data on non-familial intergenerational learning that might have satisfied Criterion 6.¹⁷⁸

¹⁷⁸ Of course, the Board could have found that the long tradition of dipnetting at Chitina was proof per se of intergenerational transmission of knowledge, since the fishery could not have survived for so many decades without such transmission taking place in some manner. On this view, the regulatory requirement of intergenerational transmission of knowledge merges into the statutory requirement of a long-term, consistent pattern of use. This may be the soundest way of interpreting the regulation in harmony with the statute, but it was not reflected in the approach to Criterion 6 taken by the Division of Subsistence and, in turn, by the Board.

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Therefore, to the extent the Board based its judgment on a negative finding concerning Criterion 6, the Board's decision was unreasonable and arbitrary and reflected legal error.

G. The 2003 Decision Was Unreasonable and Arbitrary Because the Board Based Its Evaluation of the Chitina Use Pattern on Percentages Rather than Absolute Numbers.

Even if the Board members somehow managed to ignore the C&T Worksheet's steady stream of comparisons between users of the Chitina and Glennallen Subdistricts, they could not have avoided basing their determination on the Worksheet's presentation of data about the Chitina Subdistrict in the form of percentages rather than absolute numbers. DOS clearly believed and represented to the Board that it should base its determination on whether a large proportion of Chitina users exhibited a use pattern that satisfied the eight criteria, rather than whether there was a substantial core user group that satisfied those criteria. This approach to applying the subsistence statute is illogical and inconsistent with the statute's purposes.

At the 2003 meeting, Board member Engel pointed out that reliance on pure percentages could be misleading: "In these large populations, there are a number of people [whose use patterns satisfy the eight criteria], small percentage perhaps, but the total number exceeds some of the rural areas that we find very easily."¹⁷⁹ In other words, there could be 1,000 Chitina dipnetters whose use patterns satisfied the eight

¹⁷⁹ BOF 2003 Transcript, supra note 131, at 122 (comments of Larry J. Engel); see also id. at 123, 128–29 ("So that's a difficult thing looking at a 40 percent, 20 percent, because it, in a major population, may be a lot of people that we'd be excluding because we're looking at percentile [sic] rather than total numbers, Mr. Chairman."),

criteria and only 100 local Glennallen fishwheelers whose use patterns satisfied those criteria, but if these numbers were only expressed as a percentage of a much broader population, the 1,000 qualifying dipnetters could be denied their rightful opportunity to participate in subsistence harvests. Engel's views on this point, however, do not appear to have been shared by other Board members, and in fact were expressly rejected by at least one other member.¹⁸⁰ Further, DOS did not modify the C&T Worksheet to address Engel's point when it resubmitted the Worksheet in 2005 and 2008.

Engel's comments at the 2003 meeting illustrate a major problem with the totally percentage-based analysis employed by ADF&G and the Board in determining that the eight criteria were not satisfied with respect to Chitina. Alaska's subsistence law provides that if a particular fish stock or game population has been customarily and traditionally used for subsistence and there is no shortage of the resource, then all Alaskans can participate in "subsistence" harvests of that resource.¹⁸¹ This is referred to as "Tier I" eligibility. Only when the resource is in short supply (and other uses have been eliminated) can the Board restrict participation in subsistence harvests based on the statutory "Tier II" criteria.¹⁸² The effect of this law is that a core group of subsistence users who harvest a resource in a manner consistent with the eight criteria will result in

150–51.

¹⁸⁰ See id. at 141 (comments of Mel Morris).

¹⁸¹ See McDowell, 785 P.2d at 9 n.19 (the eight criteria regulation "defines customary and traditional uses but does not state that first-tier subsistence rights can be limited to customary and traditional users"); Morry, 836 P.2d at 367–68 (upholding "all Alaskans policy" because "after McDowell there are no statutory standards for determining those individuals who are ineligible to participate in subsistence hunting and fishing").

¹⁸² See A.S. 16.05.258(b).

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a positive C&T finding for that resource. The resource will then be available to all Alaskans who wish to participate in a “Tier I” subsistence harvest, including users whose personal use pattern does not meet the regulatory criteria for a subsistence use.

Under the Board’s approach, if enough Alaskans take advantage of their legal right to participate in the subsistence harvest so that users who do not satisfy the regulatory criteria eventually outnumber those who do, the C&T finding will have to be revoked so that no one will be able to use the resource for subsistence. In other words, the Board’s percentage-based approach sets up the following sequence of events:

1. Establishment. — A core user group establishes, over an extended time period, a pattern of use of a particular stock that satisfies the regulatory criteria for subsistence.
2. Recognition. — The Board enters a positive customary and traditional use finding for the stock, resulting in the creation of a subsistence fishery.
3. Expansion. — All Alaska residents are eligible to participate in “Tier I” subsistence harvests of the stock, regardless of whether their personal use patterns meet the regulatory criteria for subsistence.
4. Dilution. — The original core user group maintains its traditional use pattern, but due to the all Alaskans policy, its members represent a diminishing proportion of all participants in Tier I subsistence harvests.
5. Revocation. — As a direct result of the subsistence harvest being open to all Alaskans, the Board revokes the positive C&T determination and terminates all state-recognized subsistence harvests.

This is clearly contrary to the statutory scheme. That scheme contemplates that a resource which is customarily used for subsistence by a core user group will be available to all Alaskans so long as it is sufficiently plentiful, and if it becomes scarce, its use will be restricted based on specific additional criteria. The broad eligibility produced

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by the “all Alaskans” policy should not in the natural course of events result in the total elimination of the subsistence fishery. Yet this is the logical consequence of the flawed process by which the Board revoked its C&T finding for the Chitina salmon stocks. The Board’s application of the statute and regulations in this manner, basing its determination entirely on proportions and percentages without so much as considering absolute numbers of users whose activities conform to the regulatory criteria, is unreasonable and arbitrary and merits reversal.

H. The 2008 Refusal to Revisit the 2003 Decision Was Unreasonable and Arbitrary in Light of the Board’s Failure to Reconcile That Refusal With Its Concurrent Positive C&T Finding for Non-Salmon Stocks In the Upper Copper River Basin.

At its December 2008 meeting, the Alaska Board of Fisheries predictably rejected Proposal 1 to reinstate a positive C&T finding for the Chitina Subdistrict salmon stocks. In a baffling display of administrative inconsistency, however, the Board adopted Proposal 2, submitted by the Ahtna Tene Nene’ Customary and Traditional Committee, and made a positive C&T finding for all non-salmon finfish stocks in the Upper Copper River/Upper Susitna River area, an area which includes the Chitina Subdistrict.¹⁸³ These two determinations are inconsistent, and the Board’s failure to make any effort to reconcile them renders its decision on Proposal 1 unreasonable and

¹⁸³ See William E. Simeone, Division of Subsistence, Alaska Dept. of Fish & Game, Customary and Traditional Use Worksheets: Upper Copper and Upper Susitna River Area Nonsalmon Finfish Species and Prince William Sound Salmon 2 fig.1 (2008) [hereinafter DOS 2008 Nonsalmon C&T Worksheet] (Ex. Y), available in full at <http://www.sf.adfg.state.ak.us/FedAidpdfs/sp%202008-11.pdf>.

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arbitrary.¹⁸⁴

At the 2008 meeting, DOS submitted a C&T Worksheet for Proposal 2 documenting the existence of a pattern of customary and traditional use of non-salmon finfish stocks in the Upper Copper River Drainage. The report stated that non-salmon finfish species had traditionally been very important to the Ahtna inhabitants of the Copper River Basin because “they were a reliable source of food that could be harvested at practically any time of year, and because they could be relied upon as an alternative to salmon if the salmon runs failed.”¹⁸⁵ This statement is consistent with the reality that Copper River salmon are more desirable, easier to catch, and more bountiful than the various non-salmon species addressed by Proposal 2 (such as trout, char, grayling, burbot, whitefish, and pike), making it almost inconceivable that over any particular period of time, non-salmon stocks in the Chitina region would be harvested for subsistence while salmon stocks in the same region were not. Therefore, it stands to reason that the communities that engaged in subsistence harvest of non-salmon species in the Chitina region also engaged in subsistence harvest of salmon in the same area.

III. The Board’s Disparate Treatment of the Chitina and Glennallen Subdistricts Violates the Equal Protection Clauses of the Alaska and Federal Constitutions and the Uniform Application Clause of the Alaska

¹⁸⁴ Ahtna organizations have been remarkably effective at securing hunting and fishing priorities for their members. Recently the Board of Game, in disregard of the constitutional guarantee of equal rights for all Alaskans, created a special subsistence caribou hunt open only to residents of selected Ahtna villages. See Associated Press, “Game Board Rights New Rules for Nelchina Hunting,” Fairbanks Daily News-Miner Mar. 8, 2009, at B3 (Ex. 7).

¹⁸⁵ DOS 2008 Nonsalmon C&T Worksheet, supra note 183, at 3.

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Constitution.

A. Legal Standard

The Alaska Constitution provides that all persons are “entitled to equal rights, opportunities, and protection under the law.”¹⁸⁶ This provision is a “command to state and local governments to treat those who are similarly situated alike,”¹⁸⁷ and it is “at least as protective as the Federal Constitution’s corresponding guarantee.”¹⁸⁸ The Alaska Constitution also contains a “similar clause specifically concerning natural resources,”¹⁸⁹ which provides that “[l]aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.”¹⁹⁰ In McDowell, the Court suggested that the analysis of a claim under this “uniform application clause” would be the same as that under the equal protection clause.¹⁹¹

To determine whether a statute or regulation denies equal protection, the

¹⁸⁶ Alaska Const. art. I, § 1.

¹⁸⁷ Pub. Employees’ Ret. Sys. v. Gallant, 153 P.3d 346, 349 (Alaska 2007) (quoting Gonzales v. Safeway Stores, Inc., 882 P.2d 389, 396 (Alaska 1994)).

¹⁸⁸ Alaska Inter-Tribal Council v. State, 110 P.3d 947, 963 (Alaska 2005); see id. at 963 n.63 (citing cases).

¹⁸⁹ McDowell, 785 P.2d at 12 (Moore, J., concurring).

¹⁹⁰ Alaska Const. art. VIII, § 17.

¹⁹¹ See McDowell, 785 P.2d at 13 (Moore, J., concurring) (“I do not believe that the court can find a violation of article VIII, § 17 without a full equal protection analysis.”). Because Justice Moore’s vote was necessary to obtain a majority for the Court’s “alternative” equal protection ground of decision, his concurrence is controlling as to the interpretation of the Court’s holding on that issue. Justice Rabinowitz agreed with Justice Moore’s interpretation of the Court’s holding. See id. at 19 & n.12 (Rabinowitz, J., dissenting) (“The court holds the state subsistence laws unconstitutional on equal protection grounds. . . . The majority opinion employs article VIII section 17 and the concurring opinion of Justice Moore uses article I section 1. As Justice Moore points

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“threshold question” is “whether similarly situated groups are being treated differently.”¹⁹² Once the claimant makes a threshold showing of unequal treatment, the court conducts a “three-step analysis” in which it considers (1) “the weight of the individual interest at stake”; (2) “the importance of the government’s interest”; and (3) “the closeness of the fit between the statute and the government’s objective.”¹⁹³ The court then applies a “sliding scale approach” to determine the validity of the claim:

We analyze equal protection claims under a sliding scale approach which places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. If the right impaired by the challenged legislation is not very important, the State need only show that its objectives are legitimate and that the legislation bears a substantial relationship to its purpose. At the other end of the continuum, legislation that impairs one of the most important individual interests will be upheld only if it furthers the State’s compelling interest and if it is the least restrictive means available to achieve the State’s objective.¹⁹⁴

In the middle of the continuum, a classification that burdens a right which is “important,” but is not among the “most important individual interests,” receives “close scrutiny”: the classification “must be justified by an important governmental objective, and there must be a close nexus between that objective and the means chosen to accomplish it.”¹⁹⁵

B. Board Regulations Granting Positive C&T Status to the Glennallen

out, the method of analysis in either case is the same.”).

¹⁹² Black v. Municipality of Anchorage, 187 P.3d 1096, 1102 (Alaska 2008); Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 397 (Alaska 1997).

¹⁹³ Glover v. State, Dep’t of Transp., Alaska Marine Highway Sys., 175 P.3d 1240, 1256 (Alaska 2008).

¹⁹⁴ Id. at 1257 (quoting C.J. v. State, Dep’t of Corrections, 151 P.3d 373, 378 (Alaska 2006)); see also Premera Blue Cross v. State, Dep’t of Commerce, Cmty. & Econ. Dev., Div. of Ins., 171 P.3d 1110, 1121 (Alaska 2007).

¹⁹⁵ Bridges v. Banner Health, No. S-12559, 2008 WL 5273930 (Alaska Dec. 19, 2008); Gallant, 153 P.3d at 350; State v. Enserch Alaska Constr., Inc., 787 P.2d 624, 633 (Alaska 1989).

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Subdistrict Salmon Fishery But Denying That Status to the Chitina
Subdistrict Salmon Fishery Violate the Equal Protection and Uniform
Application Clauses.

The Board's regulations classify the Chitina and Glennallen Subdistrict salmon stocks differently, resulting in disparate legal treatment of individuals who harvest salmon for food in the respective subdistricts. The Chitina stock is classified as not having been customarily and traditionally used for subsistence, and Chitina users can only participate in a personal use fishery and not a subsistence fishery. When the same salmon swim upstream into the Glennallen Subdistrict, however, they are classified as having been customarily and traditionally used for subsistence, and Glennallen users can participate in a subsistence fishery. As a threshold matter, Plaintiffs must establish that the disparate treatment afforded to the Chitina and Glennallen Subdistricts represents "similarly situated groups being treated differently." To do this, they must show that Chitina and Glennallen users are "similarly situated."

The record of the Board's deliberations in 2003 reflects the reality that the user groups for the Chitina and Glennallen Subdistricts were substantially comparable. As discussed above, DOS was able to draw a false and misleading distinction between the two groups by contrasting the characteristics of a random sample of Chitina users with a dramatically skewed sample of Glennallen users that deliberately oversampled long-time, local, and Ahtna participants in the fishery. Yet both Dr. Fall (DOS's representative) and members of the Board acknowledged that the overall composition of the Glennallen user group was similar to that of the Chitina user group. Dr. Fall admitted that DOS viewed the "traditional-use pattern in the Glennallen subdistrict" as

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having been

largely . . . established by the Ahtna and other long-term residents there, 300, 400 permits year after year for that. By law, it's opened up to all other Alaskans. We now have 1,200 Alaskans participating in the Glennallen subdistrict, many of whom take advantage of that and go up there to participate. And they're learning about it in a variety of ways.¹⁹⁶

Dr. Fall further admitted that DOS had oversampled Ahtna users in its study because it didn't want "that traditional-use pattern statistically to be swamped by what happens under the law, which is that it's open to everyone."¹⁹⁷ Board member Engel elaborated on this point, noting that between 1988 and 2003, the Glennallen Subdistrict had switched from being almost entirely used by local residents of the Copper Basin to being "dominated by other area fishermen in all categories, dipnetters and [fish wheelers]."¹⁹⁸ Engel explained:

I see the same pattern happening that happened in Chitina perhaps that's occurring in the Glennallen subdistrict. A few years ago, 98 percent of the fish wheels in that district were local residents that had long ties to traditional and customary use of that resource, almost 100 percent as recently as 1988

And looking at the dipnet fishers in that Glennallen subdistrict in the last — since 1988, they were up to like 99 percent of those were local people. And both classes contained of these were almost totally dominated by local users [who] were Ahtna people.

Now, what's happened today? . . . The great majority of people that dipnet in there now are — the great, great majority. The figures are — are non-local people.

The majority of the fish wheel permits in the Glennallen subdistrict are now out-of-area people. . . .

Over a period of about ten years, we see something that goes from 99 percent local to — it's now 71 percent of the permits issued at Glennallen district go to non-local people, 71. And just ten or 12 years ago, that was the reverse. . . .

¹⁹⁶ BOF 2003 Transcript, *supra* note 131, at 43–44 (comments of Dr. James A. Fall).

¹⁹⁷ *Id.* at 44 (comments of Dr. James A. Fall).

¹⁹⁸ *Id.* at 45 (comments of Larry J. Engel).

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So what's going to happen in the next decade? We're going to have the same situation, so therefore we say that the people that are most dependent because they are a small percentage are denied that because the majority of the newcomers, because the state law is going to dictate that some future board or something will say, well, 70 percent of the people now don't fit that pattern.¹⁹⁹

The reality that Dr. Fall and member Engel both acknowledged is that during the 1990s, the Glennallen Subdistrict salmon fishery underwent the same transformation in the overall composition of its user group that resulted in the Chitina fishery losing its positive C&T status. The core group of subsistence users was in the process of being “statistically swamped” by out-of-area users who lacked the long-term personal and cultural connection with the fishery exhibited by the core users. According to data compiled by DOS and included in the C&T Worksheet, the percentage of Glennallen subsistence permits issued to nonlocal users (i.e., individuals not residing in the Copper Basin) climbed from just 3.4% in 1988 to 70.7% in 2001.²⁰⁰ Undoubtedly this trend has continued since then, but it has been conveniently ignored by the Division of Subsistence.

As a result, Board member Engel recognized that an equitable and consistent

¹⁹⁹ Id. at 151–53 (comments of Larry J. Engel).

²⁰⁰ See DOS 2003 C&T Worksheet, supra note 24, at 42 tbl.10, 43 tbl.11. These figures reflect that in 1988, ADF&G issued 315 fishwheel permits for Glennallen, of which 12 went to nonlocal users, and 101 dipnet permits, of which 2 went to nonlocal users. By contrast, in 2001, ADF&G issued 832 fishwheel permits, of which 513 went to nonlocal users, and 407 dipnet permits, of which 363 went to nonlocal users. Id. The increasing use of fishwheels by non-locals results from a variety of trends, particularly the erection of fishwheels by nonlocal groups and organizations on a sandbar near the Chitina-McCarthy Road bridge and the acquisition by nonlocals of private riverfront property above Gakona for setting up fishwheel camps. See also DOS 2003 Chitina Study, supra note 23, at 55 (“Non-local fishers now dominate both the fish wheel and dip net fisheries.”).

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application of the subsistence laws would probably require DOS and the Board to revoke Glennallen's subsistence status if it revoked Chitina's subsistence status. Of course, this has not happened. Just one year after the Board's positive C&T finding for Chitina in 1999, DOS collaborated with various Native organizations to conduct an extensive study that was clearly designed to refute that finding based on the overall composition of the Chitina user group. Yet ADF&G has yet to take any similar action with regard to the Glennallen fishery. DOS has not conducted a new survey of Glennallen users based on random sampling, but instead has continued to rely on its admittedly skewed 2000 survey. Nor has the Board revisited its C&T determination for the Glennallen salmon stocks, despite data that clearly call into question the ability of the Glennallen subsistence fishery to survive the mode of analysis that the Board applied to the Chitina fishery in 2003.²⁰¹ Despite this glaring inconsistency, the Board has repeatedly refused to reconsider the status of the Chitina fishery, necessitating judicial action to ensure that Chitina users receive equal treatment under the law.

Thus, the threshold requirement of unequal treatment of similarly situated users is plainly satisfied. Further, this unequal treatment impairs Plaintiffs' individual interest in "access to wildlife for subsistence purposes," which is "a species of the important

²⁰¹ Recently, however, the Board has identified three separate "zones" within the Glennallen Subdistrict. See Alaska Board of Fisheries, Summary of Actions Taken at Dec. 1-6, 2005 Public Meeting at 13 (Proposal C carried) (Ex. D to Complaint at 1) Some observers, including Plaintiffs in this case, believe this action is a prelude to an attempt to eliminate subsistence uses in the two zones utilized primarily by urban residents.

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right to engage in economic endeavor.”²⁰² Therefore, the state must show that the divergent classification of the Chitina and Glennallen Subdistricts is “closely related to an important state interest.”²⁰³ No important state interest could possibly justify the Board’s disparate treatment of Chitina and Glennallen users. Since Plaintiffs have met their threshold burden of demonstrating unequal treatment, the burden is now on Defendants to identify an important state interest that bears a close relationship to the challenged classification.²⁰⁴

CONCLUSION

The history of subsistence law in Alaska demonstrates that the Board of Fisheries has repeatedly and consistently misapplied the law and violated the constitutional rights of Alaskans. The Board has been aided by a Division of Subsistence that continues to promote the idea that subsistence is an activity that can only be legitimately practiced by rural villagers. The Board has failed on two occasions to correct the mistake it made in 2003. It is now necessary for this Court to step in and ensure that Chitina dipnetters are treated fairly under the law and are not subject to unconstitutional discrimination.

DATED at Fairbanks, Alaska, this ____ day of March, 2009.

BORGESON & BURNS, P.C.
Attorney(s) for Plaintiffs

By: _____

²⁰² McDowell, 785 P.2d at 13 (Moore, J., concurring).

²⁰³ Id.

²⁰⁴ See, e.g., Glover, 175 P.3d at 1257.

Michael C. Kramer
ABA# 9605031

Certificate of Service

I hereby certify that on the ____ day of March, 2009
a true and correct copy of the foregoing document was
provided to the following attorneys/parties of record:

Mail Hand Delivery Courier Telefax

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Steven A. Daugherty
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1031 W. 4th Ave., Ste. 200
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(907) 269-5100

By: _____
Legal Secretary

F:\305948\100029375.DOC

MOTION FOR SUMMARY JUDGMENT

Alaska Fish and Wildlife Conservation Fund et al. v. State of Alaska et al.

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Victoria O'Connell - ALFA

In light of the understanding that the Department can allow any gear for use by disabled anglers we suggest the following substitute language for 180 + 182:

(a) Unless otherwise provided in SAAC 47-5 AAC 75, sport fishing may only be conducted by the use of a single line having attached to it not more than one plug, spoon, spinner, or series of spinners, or 2 flies, or 2 hooks. The line must be closely attended.

(1) Power assisted fishing reel or power assisted line retrieval may not be used to retrieve fishing line.

RC 96

The Alaska office of Trout Unlimited amends our Proposal 184 as follows:

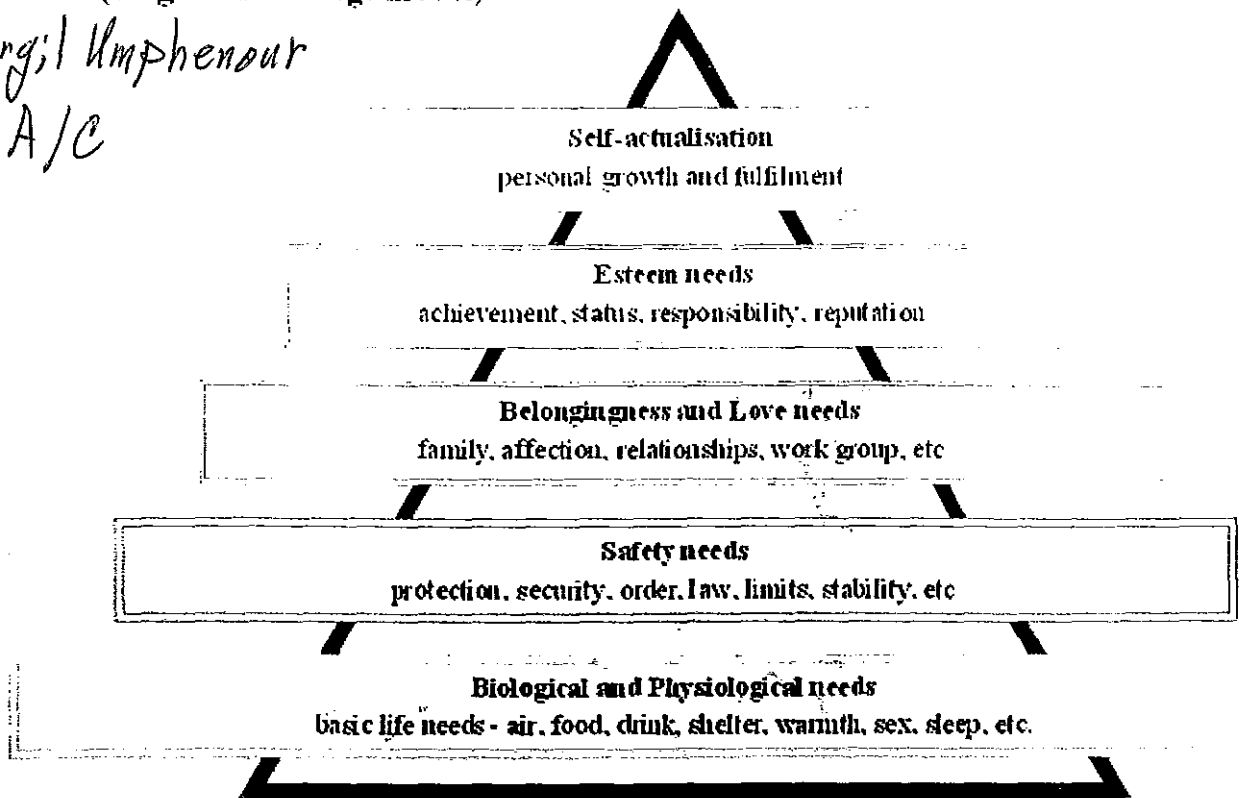
Proposal 184 – 5 AAC 75.xxx. New Section. Prohibit the use of felt soled wading boots as follows:

Beginning January 1, 2012, the use of footgear with absorbent felt or other fiber material on the soles is prohibited in the fresh waters of Alaska.

RC 97

Maslow's Hierarchy of Needs
(original five-stage model)

Fm Vingil Umphenour
Fbx A/C



PROPOSAL 200 - 5 AAC 99.0XX. Board of Fisheries subsistence finding standards. Adopt subsistence finding standards as follows:

Add a new section in 5 AAC 99 as follows:

5 AAC 99.0XX. Board of Fisheries subsistence finding standards. In the identification by the Board of Fisheries of fish stocks or portions of fish stocks that are customarily and traditionally taken or used by Alaska residents for subsistence uses under 5 AAC 99.010 (b), "subsistence way of life" means a way of life that is based on consistent, long-term reliance upon the fish and game resources for the basic necessities of life.

Amended proposal:

PROPOSAL XXX - 5 AAC 99.0XX. subsistence finding standards. Adopt subsistence finding standards as follows:

Add a new section in 5 AAC 99 as follows:

5 AAC 99.0XX. subsistence finding standards. In the identification of fish or game stocks or portions of fish or game stocks that are customarily and traditionally taken or used by Alaska residents for subsistence uses under 5 AAC 99.010(b), "subsistence way of life" means a way of life that is consistent with the long term use of fish and game resources, when available, to supplement the basic necessities of life.

3/3/2010

RC98

Ref: Prop 172 – Escapement Goal Policy Definitions

For the purpose of establishing a better notification process for both the Board of Fisheries and the public I am offering additional language (or similar language) to be added to the Escapement Goal Policy;

When the department establishes an escapement goal or wishes to modify an existing escapement goal where there is existing data and adequate fishing power to manage the goal, they will notify the Board of Fisheries for discussion and (or) direction.

Sponsor: Dwight Kramer

RC 99

March 18, 2010

Mr. Vince Webster, Chairman
Alaska Board of Fisheries
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, Alaska 99811-5526

Re: Amendment to Proposal 168

Dear Chairman Webster and Board Members:

I originally submitted Proposal 168 to the Board and since then there have been additional concepts explored relating to this proposal. I would therefore like to amend my proposal in order to reflect these additions:

When the additional Salmon Restructuring Proposal form was submitted to you last October it contained a brief statement regarding the possible use of multiple permits in order to fish a vessel longer than 58 feet. In PC 34 for this meeting there was further mention of the concept. I realize that the concept was not included in my original proposal so I would like to amend it to present this idea:

5 AAC 39.117 Vessel Length

1. A salmon seine vessel may not be longer than 58 feet overall length except vessels that have fished for salmon with seines in waters of the state before January 1, 1962, as 50-foot, official Coast Guard register length vessels.
2. A fishermen wishing to introduce a vessel longer than 58 feet in salmon seine fisheries shall hold two entry permits for the area they intend to fish and notify CFEC. CFEC would then permanently remove one of the permits from the fishery and issue a document or some other clarification noting permission to use a longer vessel so enforcement officials could be made aware that the fishermen had held two permits and therefore the vessel was legal to fish. This would apply to vessels, new or used, which have not previously participated in salmon seine fisheries.
3. If an existing vessel of 58 feet or less that is already permitted to fish salmon in any area is made longer then it would be exempt from the requirement of purchasing and relinquishing and additional permit as specified in above section 2. If a vessel does not meet the requirements of this section it would be subject to the requirements of section 2.
4. Salmon seine vessels falling under sections 2 and 3 above may not be longer than 79 feet overall length.

I am not sure how to present the proper legal terminology or if this would require a new section or subsection in regulation but hopefully the concept is clear. It is described more clearly in PC 34. HB 251, "An Act authorizing the Board of Fish to adopt regulations regarding fishing by a person who holds two entry permits for a salmon fishery", was signed into law on June 28, 2006. I believe the Board has the ability to implement this type of regulation. CFEC would have to determine if this would require a change in their regulations. CFEC indicated it was possible to do this. This may be similar to a "Non-State Buy Out of Entry Permits" as described in CFEC's 1998 publication titled "Outline of Options for Fleet Consolidation in Alaska's Salmon Fisheries". This describes additional permits being purchased and then forfeited to the state.

Additionally, the proposal is amended to include a new maximum length limit. Paying attention to the testimony it is clear that there is a great concern over how much the length of salmon seine vessels will increase. My original feeling was the vessel length would limit itself because, as pointed out in PC 34, there is a limit to where the vessel will begin to not function efficiently as a seiner. In an effort to further alleviate these concerns Proposal 168 could include a length limit of 79 feet.

Although a past proposal indicated a length limit of 75 feet I feel a 79 foot length should be used as there are existing federal regulations which use this length as a point of reference. Here are a few:

46 CFR 69, Subpart E which deals with tonnage measurement.

46 CFR 28.260 pertains to electronic positioning devices.

46 CFR 28.345 pertains to electrical wiring standards.

46 CFR 28.560 pertains to watertight and weathertight integrity.

There are also pending EPA regulations regarding water discharges.

Allowing vessels up to 79 feet to seine salmon would allow for many of the benefits outlined in PC 34 to be realized. There is a point where a vessel can become economically inefficient in seining salmon and this length is below that point. I understand there is still going to be concern over length increasing by any amount but at least this creates an upper bound. To micro manage this or split hairs over a few feet really may take away from the intent. It would be unfortunate to complete all the work and realize it didn't reach far enough.

Finally, I would like to add that Proposal 168 was presented to the Board as a Statewide proposal. Section 7 of the proposal, "List any other solutions you considered and why you rejected them", stated the following:

I submitted a proposal similar to this last year. Some board members viewed the proposal as a statewide issue which is why I am resubmitting it as such. I still feel that it will be better dealt with on an area by area basis (i.e. Southeast only) and have not rejected that option.

I believe that this proposal would be a benefit if it were implemented on a statewide basis. I think that some areas would embrace this opportunity and some would not. This belief is based on the fact

that every seine fishery in the state is different. Some fisheries have never used a great proportion of larger vessels because it is not advantageous to do so. I don't feel this would change in any of these areas or there would be a greater amount of limit vessels participating now if that were the right thing to do. In the end at least fishermen in every area could have the option to operate their businesses with more flexibility and develop new ideas. That being said I realize that, to some, changing statewide may seem like too much too soon so the thought of slowly phasing in a change would be more palatable. If this is the case I would still urge the Board to support this on a regional basis.

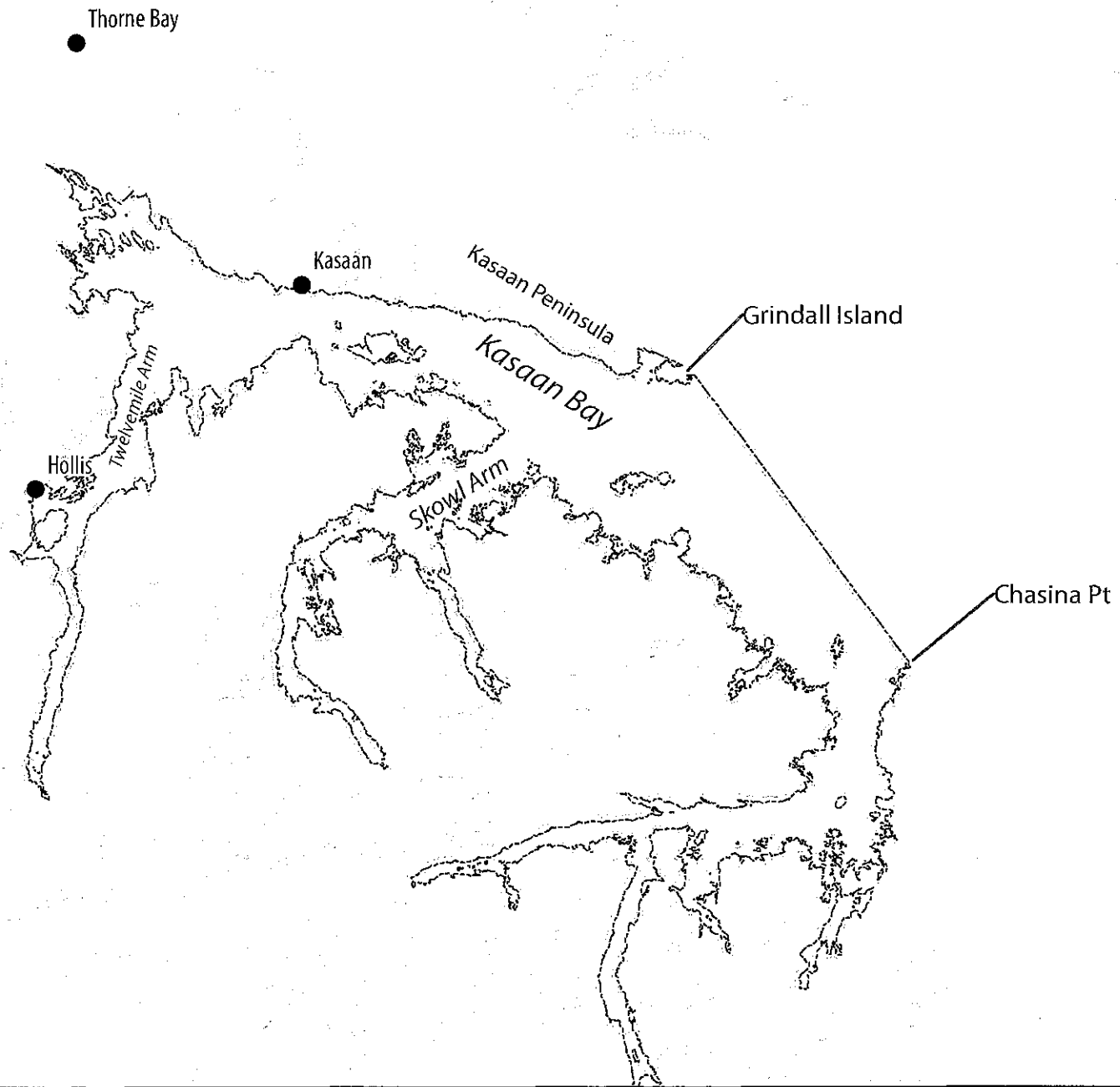
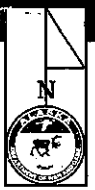
The salmon seine business is in decline and this proposal is an important step for the industry to begin to realize opportunities that are not available under the current length limit. The salmon seine business needs the ability and encouragement to move forward and explore new ideas to increase value to the fishery. With the amendments and ideas mentioned above I feel that the addition of new vessels, which is a concern to some, will be gradual but more importantly existing fishermen can benefit immediately from some of the economic and safety benefits this proposal would provide and begin to try new ideas so the seine industry can start moving forward.

Thank you for your time.

Regards,

Darrell Kapp

RC-1w



5 AAC 02.108. Customary and traditional uses of shellfish stocks.

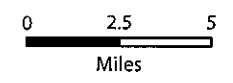
(3) shellfish, except shrimp, king crab, and Tanner crab

(E) in District 2 north of the latitude of the northernmost tip of Chasina Point and west of a line from northernmost tip of Chasina Point to the easternmost tip of Grindall Island to the easternmost tip of the Kasaan Peninsula.



District 2 C and T shellfish

RC 100

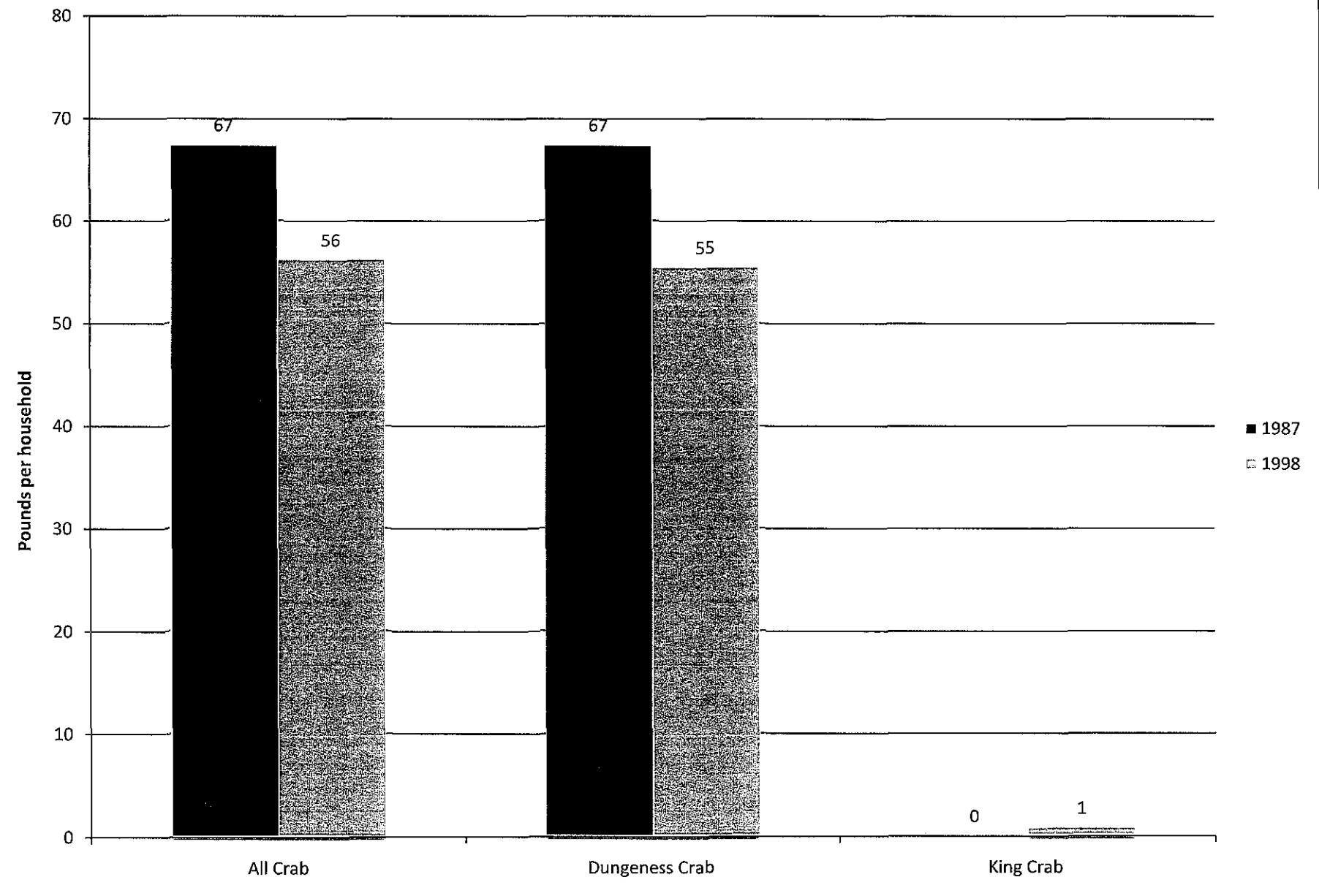


Kasaan ha of crab, 1987 & 1998

Project Name	Study Year	Resource	Percent				Reported Harvest	Estimated Harvest	Estimated Pounds Harvested	Average Lbs Harvested per Household	Per Capita Lbs Harvested	
			Percent Using	Attempting to Harvest	Percent Harvesting	Percent Giving Away						Percent Receiving
Tongass Resource Use Cooperative Study 1987	1987	All Crab	92.9	nd	50	35.7	71.4	715	715	944	67.414	23.6
Tongass Resource Use Cooperative Study 1987	1987	Dungeness Crab	92.9	nd	50	35.7	71.4	715	715	944	67.414	23.6
Tongass Resource Use Cooperative Study 1987	1987	King Crab	0	nd	0	0	0	0	0	0	0	0
Prince of Wales 1998/1999	1998	Crabs	85.7	50	50	21.4	78.6	786.9	1012	1012	56.21	23.14
Prince of Wales 1998/1999	1998	Dungeness Crab	85.7	50	50	21.4	78.6	588	756	998	55.44	22.83
Prince of Wales 1998/1999	1998	King Crab	7.1	7.1	7.1	0	0	2	3	14	0.77	0.32

Source: Community Subsistence Information System, 2010, Division of Subsistence, Alaska Department of Fish and Game

Kasaan harvest of crab, pounds per household, 1987 & 1998



RC 101

RC: Proposal 168

To: Alaska Board of Fisheries

Submitted by: Stanley Mack

March 18, 2010

My name is Stanley Mack. I'm the Mayor of the Aleutians East Borough and a longtime resident and commercial fisherman of Area M.

This is my personal testimony that Proposal 168 would devastate the local small fishing fleet in Area M and other areas that have small fishing boats. We see the impact of this activity in the parallel fishing in the cod fishing season and the crab season. The larger boats that are allowed to fish in adverse weather conditions the area have been able to catch the largest portion of the quota.

I strongly request that the Board of Fisheries consider all species of fish that could be affected by the repeal of the 50-foot limit.

This RC is supported by several fishermen in Area M.

Division of Spill Prevention and Response

Contaminated Sites Program



State of Alaska > DEC > SPAR > CSP > Site Summaries > Southeast > Salt Chuck Mine

Salt Chuck Mine, Mill Area

[Description](#)[Health & Environment](#)[Current Status](#)[More info](#)

Location



Summary Date: March 2010

[View detailed information from database on this site.](#)

Status: Active

Database Name: USFS Salt Chuck Mine

Location: Prince of Wales Island, AK Latitude/Longitude: See database entry, above

DEC Contaminated Sites Contact: [Anne Marie Palmieri](#), Project Manager - 907-766-3184

NOW AVAILABLE FOR PUBLIC COMMENT: Draft Engineering Evaluation/Cost Analysis. [See below.](#)

Description

The Salt Chuck Mine is an abandoned historic gold, silver, copper and palladium mine located on the southeast side of Prince of Wales Island. The site is 4.5 miles from Thorne Bay, Alaska and is accessible by a half-mile trail from the road or by water.

The mine and mill operated from 1905 – 1941, processing over 326,000 tons of ore. The mine openings are uphill and about a half mile from the mill area, which is on the northern shore of Salt Chuck Bay near the mouth of Lake Ellen Creek. The remnants of at least 25 of the mill's structures are present at the site as well as two large diesel tanks and four banks of diesel engines.

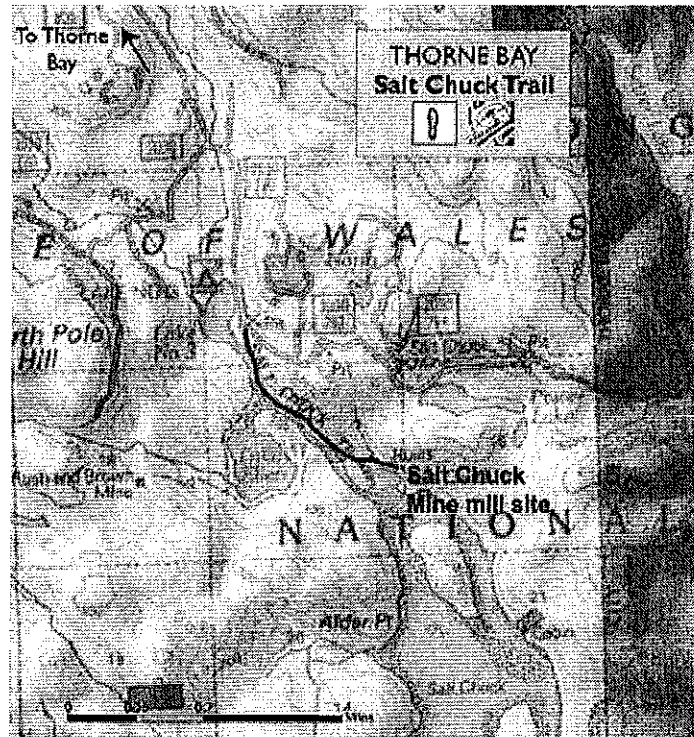
An extensive tailings deposit of an estimated 100,000 cubic yards is located mostly in the inter-tidal zone south of the mill, on State-owned tidelands. Additional tailings are located in the upland area, managed by the U.S. Forest Service. As with other abandoned historic mines, the sources of contamination at the mill area are a result of standard practices from an era before environmental regulations, when mines operated without today's permits and reclamation requirements.

The Alaska Department of Natural Resource's Prince of Wales Area Plan identifies the area around the site as "intensive public recreation use." The Forest Service has public use cabins and a campground in the area, and Salt Chuck Bay is used for subsistence clamming and crabbing. Lake Ellen Creek supports five species of anadromous fish. The U.S. Bureau of Land Management (BLM) first investigated the Salt Chuck Mine's mill in 1995 – 1998. Those investigations led to a more in-depth one conducted by the Forest Service from 2002-2007. Their draft Engineering Evaluation/Cost Analysis was released in 2007 and summarized the previous sampling results.

DEC, the Alaska Department of Health and Social Services (DHSS), and the U.S. Environmental Protection Agency (EPA) reviewed the Forest Service's draft Engineering Evaluation/Cost Analysis. All of the reviewing agencies agreed that additional site characterization and an evaluation of all ways in which people and the environment might be exposed to contamination need to be conducted with an assessment of the resultant risk. This effort would provide the basis for cleanup levels and actions sufficiently protective for multiple uses of the land in the future. DEC and EPA have been working with the Forest Service to try to address these issues. The Forest Service has not finalized the draft analysis or conducted additional investigation or cleanup at the site due to funding constraints.

Public Health and Environmental Concerns

The draft Engineering Evaluation/Cost Analysis outlined several areas of contamination both in the uplands and the inter-tidal



Map showing a portion of Prince of Wales Island with the Salt Chuck Mine. The area of concern is the mine's mill site. Map courtesy of SeaTrails - www.seatrails.org.

area. The levels found were high enough for DEC and DHSS to believe that there is a risk to human health. The site characterization, however, did not provide enough data to be sure whether or not food gathering or other activities should be officially restricted.

Polychlorinated biphenyls (PCBs) are present in the tailings around the mill and suspected to be from former electrical equipment. Copper, lead, and mercury were found in the soils around the former assay shop, and lead from batteries was found in the soils around the electric locomotive. Petroleum-contaminated soil is present near the aboveground storage tanks, drum caches and in the sludge on the floor of the mill. The sludge has also migrated to the tailings and intertidal area. Several piles of tailings exist in the uplands area near the mill and next to the unnamed stream that flows through the site. Elevated levels of copper were found in all of the tailings, and mercury, selenium, and PCBs in tailings in various locations.

In the intertidal area, the main contaminants of concern in the extensive area of tailings are copper and vanadium. Samples were collected of tailings, sediment below and downgradient of the tailings, and biota, including several species of clams and mussels. PCBs are present in the tailings closest to the mill and tend to be less prevalent farther into the bay. The sediments below the tailings and out in Salt Chuck Bay also showed elevated levels of copper and vanadium as well as arsenic and isolated hotspots of mercury, PCBs and polycyclic aromatic hydrocarbons. In general, the contaminant levels decreased as the sample locations extended into Salt Chuck Bay. The surface water of the bay showed levels of arsenic, copper, mercury, nickel, and selenium significantly higher than samples collected from uncontaminated background locations.

Butter clams, little neck clams, softshell clams and blue mussels were collected and the tissue analyzed for metals and PCBs. No PCBs were found. Arsenic, copper, mercury, selenium and vanadium were found in all of the samples. Arsenic and vanadium were found in several samples at levels which exceed the human health risk based screening level for ingestion. Copper was found at levels which exceed the ecological risk based screening level. It was noted that no bivalves were present in the most contaminated tailings which are closest to the mill.

Current Status

In the spring of 2009, DEC conducted an informal sounding of public opinion about resolving lingering contamination issues and the delayed cleanup progress by giving the site Superfund status through placement on the U.S. Environmental Protection Agency's National Priorities List. In July 2009, DEC's commissioner Hartig sent a letter on behalf of Governor Sarah Palin to EPA saying that the state did not object to placement of the site on the [National Priorities List](#). EPA held a public comment period on the proposed listing.

On March 2, 2010, the U.S. Environmental Protection Agency announced that it added the Salt Chuck Mine site to the agency's National Priorities List. The listing makes the site eligible to receive federal funds for long-term cleanup while EPA seeks to recover costs from the responsible parties. Community involvement and tribal participation is also an important part of EPA's Superfund cleanup process. Background information on the Salt Chuck Mine site and other documentation is available on [EPA's website](#).

EPA will soon assign a Remedial Project Manager to this site. Based on availability of funding, EPA will conduct some additional field work, filling in the data gaps from the Forest Service's work in 2006. Field work is more likely to occur in the summer of 2011 than in 2010.

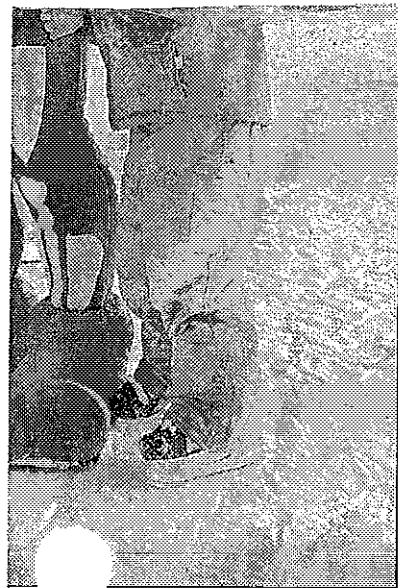
The Forest Service has received funding from the American Recovery & Reinvestment Act to conduct a non-time critical removal action on the uplands. ([See more information on this process at EPA's website](#)). The Forest Service has released a draft Engineering Evaluation/Cost Analysis for a 30-day public comment period in early March. The preferred alternative is to build a road to the site, remove building debris/drums/tanks, excavate 4000 cubic yards of petroleum-contaminated soil and metals-contaminated tailings, and dispose of the excavated material in a permitted landfill out of state. The Forest Service removal should occur in summer 2011.

More Information

FOR PUBLIC COMMENT: Draft Engineering Evaluation/Cost Analysis, U.S. Forest Service. Comments are due April 10 to Michael Wilcox at mrwilcox@fs.fed.us, 907-586-9379.

The **Engineering Evaluation/Cost Analysis** is available for public review along with accompanying administrative record for the mill area cleanup at the District Ranger Office in Thorne Bay, Alaska; Craig Ranger District in Craig, Alaska; Tongass National Forest Supervisor's Office in Ketchikan, Alaska; and at the Regional Office in Juneau, Alaska. These documents are available for public inspection during regular business hours. DEC offers the electronic versions here, separated to allow for easier download.

- **Draft Engineering Evaluation/Cost Analysis**, without Figures, Photos or Appendices ([PDF 1 MB](#))
- **Figures**, ([PDF 3.3 MB](#))
- **Photos**, ([PDF 1 MB](#))
- **Appendices A and B**, ([PDF 7.2 MB](#)) Additional appendices are lengthy and the file size is quite large. If you would like an electronic version of the full set of appendices, please contact DEC's [SPAR webmaster](#).



ERIK HILL / Anchorage Daily News

Wednesday at Rogers Park
are setting out to earn donations

tracts approximately 15,000
applications each year at \$10
apiece and the state issues
only about 100 permits, de-
pending on herd size.

The game board is holding
a 10-day meeting in Fairbanks
to change hunting and trap-
ping regulations in the Inte-
rior.

— The Associated Press

JUNEAU

Prison opens program for sex offenders

A sex offender treatment

not released in Juneau.

— The Associated Press

KODIAK

Marmots, rabbits are targeted on islands

The U.S. Fish and Wildlife
Service will eradicate invasive
mammal species on uninhab-
ited islands near Kodiak and
Akutan.

In January, the service
asked for comments on the
removal of hoary marmots
from Sud Island in the Barren
Islands north of Kodiak, and
European rabbits on Poa and
Tangik islands east of Akutan.

Kodiak radio station KMXT
reported shooting and trap-
ping will be used in the eradi-
cation process.

Steve Delahanty is the
director of the Alaska Mari-
time National Wildlife Refuge,
based in Homer. He said of
the 16 comments received, 14
were supportive of the plan.

A field camp is now be-
ing set up on Poa Island so
the eradication project can
be completed before puffins
return.

— The Associated Press

ANCHORAGE

Parnell worries bills aren't being funded

Gov. Sean Parnell said he's

consideration, though some
House members question the
administration's commitment
to the project.

— The Associated Press

PRINCE OF WALES ISLAND

Contaminated mine area is Superfund site

An old Prince of Wales
Island mine near where clams
and mussels are contami-
nated with arsenic and heavy
metals has been added to the
federal list of Superfund sites
for priority cleanup.

The Environmental Pro-
tection Agency added the Salt
Chuck Mine to the list.

EPA regional administra-
tor Dan Opalski says the Su-
perfund listing "will provide
a healthier future for Kasaan
Bay and for Kasaan tribal
members."

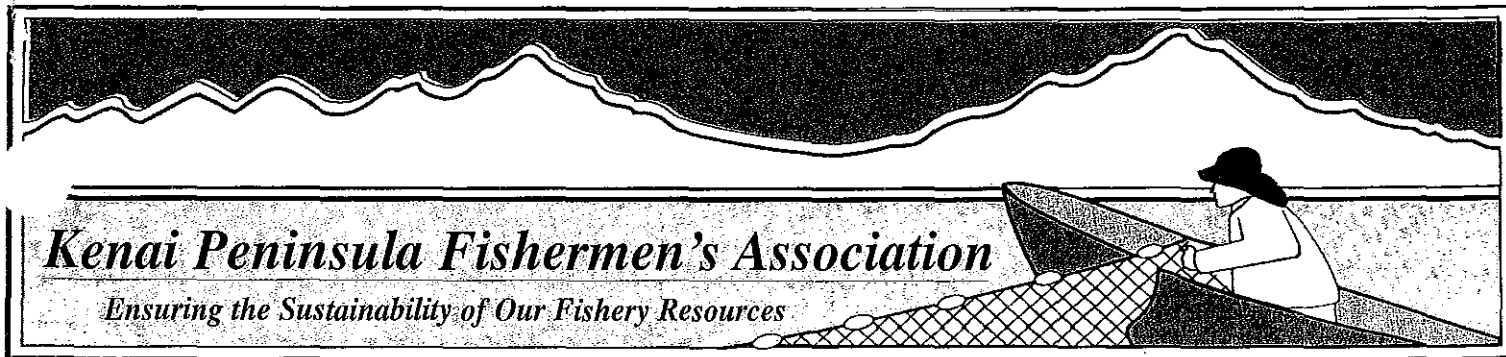
The copper, gold, silver and
palladium mine operated from
the early 1900s to the 1940s in
the Tongass National Forest
on Prince of Wales Island.

Arsenic and heavy metals
from waste rock dumped in
the intertidal zone have con-
taminated salmon and shell-
fish in Kasaan Bay. The bay
is important to commercial
fishermen and to locals who
rely on its food.

— The Associated Press

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March 18, 2010

Boards Support Section
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK. 99811-5526

PC 103

ATTN: Alaska Board of Fisheries

Chairman: Webster

PROPOSAL 172 / New Language

Comments: We appreciate the additional work by the department on defining and improving an SEG. We still have serious reservations on having any goal where no range is associated with the escapement goal. A range supplies the flexibility that is necessary for goals that are most of the time based on limited knowledge and more art than science.

To be scientifically defensible requires direct involvement for a particular system; it is not enough to say we flew over the system at thousands of feet and saw some fish. We do not believe that waiting for surveys from the public 18 months later is a reasonable way to manage. *We encourage the ADF&G to be more vocal as area and regional managers to request adequate funds in the budget process to accomplish whatever is necessary to accomplish biological assessments that allow the best science to support in season management.*

We object to any attempts to manage from the "arm chair" or "post season management". We believe this to be a violation of the tenets to sustainable fisheries.

We understand the lower bounds and agree to some point that establishes a number above the SET, critical for sustained management. Our belief is that the department should place this number *above the lower bounds of the BEG*. To place it under the BEG range would not allow for the variables and unknowns that the department has used to justify as a definition of lower bounds. If you don't know what the point of no return is then why

flirt with disaster, apply the PP and set your lower point high enough to ensure as close to BEG as is possible.

The high point of an SEG is just as important if we are to ensure that we remain as close to the goal of the BEG/MSY. Over escapement or exceeding the carrying capacity of a given system is destructive for achieving harvestable surpluses. Denying the public or restricting the public access to the resource because the inability to assess the carrying capacity is inexcusable. It makes the BOF process more complex because it would require some conservation steps and thus allocation: more users request for a reasonable opportunity than the system at MINimum Sustained Yield (MINSY) will supply on a continuum basis.

If it is necessary to use an SEG then we would encourage the Department to determine a *wide range to encompass most estimated returns*. If there is scientific support for the establishment of a lower bound point, average estimates of total range is possible. Example of tools to accomplish may be in using spawner to return ratios, relative system performances, species characteristics, etc. that are acceptable in the fishery science world.

No point goals established within ranges in our opinion is “no management at all”.

MODIFIED LANGUAGE AS FOLLOWS:

5 AAC 39.222. Policy for the management of sustainable salmon fisheries. (f) (26) “sustainable escapement goal” or “(SEG)” means a level of escapement, indicated by an index or an escapement estimate, that is know to provide for sustained yield over a 5 to 10 year period used in situations where a BEG cannot be estimated due to the absence of a stock specific catch estimate; The SEG is the primary management objective for the escapement, unless an optimal escapement or inriver run goal has been adopted by the board, [AND] **the SEG** will be developed form the best available biological information, **and should be scientifically defensible on the basis of that information;** the SEG will be determined by the department and will be stated as a range “(SEG RANGE)” or a **lower bound and upper bound “(Lower Bound SEG and Upper Bound SEG”** that takes into account data uncertainty; the department will seek to maintain escapements within the bounds of the SEG Range or above the level of a Lower Bound SEG and below the Upper Bound SEG; **the department will continue their mission by: increasing fishery harvests and harvest opportunities of fish through the investigation of maximum sustained yield for individual and aggregate populations.** (This language is from the paragraph titled, “Contribution to Department’s Mission”, pg. 2, SOA FY2011 Governor’s Operating Budget, Central Region Fisheries Management)

KPFA remains available for discussion on this or any other Proposal that the Department of Board of Fisheries member wish to discuss.

Thank you,

Joel Doner/Board Member KPFA

RC 104

**BOARD OF FISH Prince William Sound (all finfish)
Valdez Alaska**

**Date: 12/5/99
Time: 1:03 p.m.**

(Tape: 13B)

(This portion is not requested)

(104)

CHAIRMAN: Dr. Fall, Proposal 44 to the record, sir.

DR. FALL: Yes, Mr. Chairman, Proposal 44, 5AAC 01 616,

Customary and Traditional Uses of Fish Stocks.

UNKOWN: Move to adopt.

UNKOWN: Second.

CHAIRMAN: Mr. Engel.

MR. ENGEL: Mr. Chairman, just a point. I think it would be well

for you to kind of outline for the board, you seem to be the person that has the best grasp, best knowledge of these subsistence issues and our responsibility to the law and the procedures, I think it would be appropriate for you to lead the subsistence issue. I certainly will provide the comments, information that we've received from the committee, but as far as the process and procedure you might want to outline at this time and if you would, as you have in the past, kinda move us along those lines, I think that would be the approach I would prefer Mr. Chairman.

MR. CHAIRMAN: Thank you sir. Board members please get RC 1, your black book and under the subtab "Subsistence" or under the tabs "Subsistence" please

get your guidelines for integrating statutory and procedural requirements and rulemaking for subsistence considerations. Does everyone have those? Mr. Umphenour? OK gentlemen, the deal is, I'm going to sit here, and I'm going to try to get us on a good procedural course, and I want everyone to be satisfied with the procedural choices that I have made, and I want everyone to have clarity, and I'm going to sit here until everybody's satisfied that they've got this drill correct. So looking at that, we now have a motion to adopt, and basically that motion is a positive finding on that motion would give us a positive C&T finding, but in order to do that we first have to deal with the area, number one, in which you find the stock, and then we have to know what the status of the regulation is at this time, which be advised, there is no positive C&T finding at this time. After that discussion, we have to make a determination of whether there is a need to address a C&T finding at this time. I will reference you at this time if you have your pens available what we get to at that time, and that would be RC 26 staff comments in your yellow book, RC two tab five, which is your C&T worksheet and RC 96, Page 2, which is Mr. Engel's committee report that has discussion points on it. In this general discussion at this time when we have all the materials before us and we've decided whether or not we indeed going to do the C&T finding at this juncture, then I will have Mr. Engel report from committee on discussion points that the committee feels are pertinent for our consideration using the committee process as the way to glean information and to get this Board focused. That, I don't think at this juncture is the place to have this substantive discussion on those points. I

think the place to have substantive discussion on those points is under C&T when we go through the eight criteria. But I will be asking Mr. Engel after his comments are concluded to defer to Law to give us an overview at that time before we go into the specific C&T findings. At this juncture, we will go to the C&T findings, and we will approach them one-by-one on the eight criteria. You have a body of knowledge before you, RC 26, RC 2 tab 5, and RC 96 Page two; you've heard Dr. Fall's oral presentations. The committee had the benefit of his presentation, and you have papers before you. The first question I will ask you under each criteria is the following question; is there a consensus for a positive C&T finding for this number one through eight criteria? A board member will indicate, a "no" at that juncture, will indicate to the Chair that that Board member wants further discussion, and that's where you can raise your points that were not only discussed in Mr. Engel's committee, but any other points that you wish to have. When we have exhausted that discussion, I will again ask whether there is consensus or not, and if there is not consensus at that time in a Board member's mind, he will say "no" and that "no" means he hasn't made up his mind yet, he wishes to hear all the entire criteria and be able to continue to integrate all material as an entirety, and the Chair will request that there will be no voting until we get to the end of our consideration of all eight criteria. When we have finished our discussion of the eight criteria and the question's called, we are going to be voting once on a C&T finding in its entirety. Then we will pose by motion the considerations of items 3, 4, 5 on pages 13 and 14 of the material you have before you in RC 1's contained under the

Subsistence tab as Roman numeral five. Long winded, but I hope that we have a clear path. Are there questions? Mr. Engel, please.

MR. ENGEL: Mr. Chairman, when we're evaluating the eight criteria, could somebody from the Department of Law or Subsistence or yourself refresh my memory as do we have to find positively or view it positively each criteria. How do we, is this a subjective judgement of all eight and some may not fit and the majority do, and do some have enormously more weight in the Board member's minds and that would influence some plurality or majority assessment of the eight. Could somebody just, for my assessment, Mr. Chairman?

MR. CHAIRMAN: In my discussions with the Subsistence Division and Law, and I'll get this straight right now, that our consideration as an entirety is perfectly allowable and we do not have to have a vote on each particular criteria. Ms. Pete or Dr. Fall to the record.

MS. PETE: Mr. Chairman, that's correct.

MR. CHAIRMAN: Mr. Nelson from Law.

MR. NELSON: Mr. Chairman, I agree with the way the regulatory language reads. I think that's the proper interpretation. Also, by some of the, as you read some of the criteria they don't even necessarily call for a yes or no vote on some of this.

MR. CHAIRMAN: Thank you sir. Mr. Engel you have the floor.

MR. ENGEL: That's very clear, thank you sir.

MR. CHAIRMAN: Mr. Nelson from the Board.

MR. NELSON: Thank you Mr. Chair. It's just a question on the papers. I can't seem to find RC 96, Mr. Chair.

MR. CHAIRMAN: RC 96 should be Committee, Committee F report.

MR. NELSON: Yes, Mr. Chair, I realize that and I still can't find it.

MR. CHAIRMAN: It's not in the red folder?

MR. NELSON: Got one now Mr. Chair, thank you.

MR. CHAIRMAN: Thank you Ms. Woods. Director Mecum?

(Indiscernible – Someone talking in background, inaudible on tape)

MR. CHAIRMAN: Oh, other questions? Is everyone all right? Are we ready to proceed or do we need more time for clarity? Let's go. First question before us is whether or not this stock occurs in a non-subsistence area. Dr. Fall.

DR. FALL: Mr. Chairman. This stock occurs outside of the non-subsistence area as established by the joint Board, so it is subject to subsistence regulations, or open to subsistence regulations if the Board so chooses.

MR. CHAIRMAN: Thank you Dr. Fall. Board members, it's the information from staff that the answer to this question as "yes." Is there a consensus on accepting the Department's insight into this matter? Does anyone object or find otherwise? Seeing and hearing none, let the record so show that there was unanimous consent in its agreement with the Department at this time. Dr. Fall, could you give us a

overview of the present customary and traditional use on the stock that the proposal (addresses please.

DR. FALL: Mr. Chair, I would first refer the Board to RC 26, which are staff comments on Proposal 44. This proposal would establish a positive customary and traditional use findings for the salmon stocks of the Chitna subdistrict. Regarding the current regulations, customary and traditional uses of salmon stocks in the upper Copper River district are recognized only in the Glennallen subdistrict based on a negative customary and traditional use determination for the stocks of the Chitna subdistrict adopted by the Board in 1984. Subsistence fishing for salmon in the Chitna subdistrict is closed and the dipnet fishery takes place there under personal use regulations. If the proposal is adopted, there would be a positive customary and traditional use finding fo (salmon stocks of the Chitna subdistrict and, as required AS 16.052.58, the Board would then next determine what portion of harvestable surplus of these stocks is necessary, reasonably necessary, to provide for the subsistence uses and would adopt regulations providing for these uses. There's a series of regulations that would then require modifications including waters closed to subsistence fishing, lawful gear and gear specifications, permits and the, on the end of subsistence salmon fisheries management plan and then there's also provided for under the law, the Board would need to determine if regulations governing other uses of these stocks need to be modified to provide for the subsistence uses at the amount necessary determined by the Board and provide for sustained yield. Information, background information on the stocks in (

question appear in staff reports in RC Number two, including the oral reports, tabs one, two and three and the written reports, tabs one, five and six. And I would also refer to RC 22 prepared by the Division of Sportfish with additional background materials. And finally, I would add that the Department is neutral on this proposal because the outcome effects the allocation of fishery resources. The Department does recommend that the Board review the information regarding the eight criteria presented in the customary and traditional use worksheet and supplement that staff report with information provided during public testimony, and the Department also recommends that the subject fishstocks for this determination be defined as the salmon stocks of the Chitna subject subdistrict. Mr. Chair.

MR. CHAIRMAN: Thank you sir. Bcfore we go any farther this is the problem with the Chair and the Chair's alleged mastery of procedure here. We're going to step down for five minutes. Dr. Fall, will you get that list of papers on a sheet of paper? Do we have any way to reproduce them? Get it reproduced and then give everybody five minutes to get that because that wouldn't be on the scope of the papers that I was, that I had included for people's consideration, so people, we need help from you on what those are and people have the time to get them, so we're going to step down for five minutes to avoid this problem right here.

(Recessed)

MR. CHAIRMAN: Find RC 1, RC 128 before you with complete listing of papers that you should have before you. The Chair would like to recognize and

welcome Representative Harris. Thank you for coming. We appreciate when people (such as yourself come to see how we do business. It certainly helps other times when you have to consider what we do, so thank you very much sir for coming. At this time with these papers before us, Mr. Engel, report from committee, please, sir. Dr. Fall, were you finished?

DR. FALL: Mr. Chair, I had a bit more to (Indiscernible – simultaneous talking)...in response.

MR. CHAIRMAN: My apologies. Please proceed.

DR. FALL: I refer you back to RC 26, staff comments on this proposal to remind you, remind the Board a little background. From 1960 through 1983 the dipnet and fish wheel fisheries of the upper Copper River district were classified as (subsistence fisheries under state regulations, and in 1984 the Board applied the joint Board's subsistence criteria to identify C&T uses of upper Copper River salmon. The Board made a positive finding for the stocks of the Glennallen Subdistrict, which remains to be subject, which remains subject to harvest under subsistence regs, made a negative finding for the stocks of the Chitna subdistrict, and adopted personal use regulations to provide a harvest opportunity for those stocks. Since 1990, both the subsistence and personal use fisheries have been available to all Alaska residents. In 1992, the Board determined that the subsistence regulations in place for the upper Copper River district are consistent with the newly revised State subsistence statute passed in 1992, and the Department has prepared a written report in the form of a (

customary traditional use worksheet and that again is RC 2, color tab five, which summarizes the information previously available to the Board for its earlier actions and is supplemented with updated information about both subsistence and personal use salmon fishing, fisheries of the upper Copper River and previously I, in my oral report I gave you the highlights of that, of that worksheet, which I also reviewed for the committee. Thank you Mr. Chair.

MR. CHAIRMAN: Thank you very much. Mr. Engel to you, as Chair of the committee. Report from Committee, please.

MR. ENGELS: Thank you Mr. Chairman. Board members, Committee F report on Proposal 44 is found in RC 96, on Page 2 of that document. Initially, the committee reviewed the four questions that Dr. Fall had posed to all of us earlier in this meeting. I'm sure you'll recall what they were, but I'll read them to you.

“Have the rules changed that the Board followed for a C&T determination since 1984? Question one.

Question two: is there new information available now to suggest that the 1984 finding were in error?

And three: did the regulatory changes of the 1970's change the character of the fishery at Chitna before the 1984 findings?

And number four: is there new information that suggested that the fishery now meet the eight criteria that had not met earlier.”

So those four questions focused the initial discussion of our committee. And the discussion points amongst those that were there were, were users the focus of the 84 decision as opposed to identifying C&T findings for the use of the stocks. So the question was user versus use of the stock, and then there was some discussion there that maybe we shouldn't have went back to 1984, we should have looked at what the Board

was looking at in 1996 also, so the focus kind of drifted between 1984 and 1996 around this question of use of the stock versus the user characteristics. Another great deal of discussion focused on the Payton decision and other decisions like McDowell also entered into the discussion and how they apply to interpreting the criteria for customary and traditional use, and as one might think, there was difference of opinion in that regard, but we had a good discussion of pro's and con's, and everybody had a somewhat different opinion to a certain degree. And then there was a, also, quite a bit of discussion Board members on a recent C&T finding for the Chitna area subdistrict by the federal subsistence board that is now identified in the Federal Register. And, we had a representative from the federal subsistence board there to give us some insight. They were unable to tell us when and how this C&T finding occurred, but they did tell us that there could possibly be some people fishing there this year, although there are no regulations in the federal government to provide for fishing activity in this area that they determined C&T findings for. But a person could apply by a process called a "special action request" to the subsistence board, and if that was looked upon favorably, they would be allowed to fish in this area that has been identified for customary and traditional by the federal board. So that's perhaps a new piece of information to each of the Board members that you didn't receive that we did in the committee, Mr. Chairman. And we had a discussion to the stocks above and below the bridge, the McCarthy Bridge, be identified as separate stock for the purpose of C&T findings. Again, there was difference of opinion there. I think we're pretty much split, but we had a good

discussion, people explaining why or why not this should be the case. And then there was a great deal of discussion on whether or not there was reasonable opportunity provided currently, for the subsistence opportunity. As we all know, that the Glennallen subdistrict immediately above Chitna is a traditional and customary area. I think there's roughly a 140 miles of Copper River is currently open for customary and traditional findings and people participate in subsistence fisheries in that area, and likewise in the mouth of the Copper River, residents from Cordova have a similar C&T finding and participate in a fishery there. So that was another issue that we discussed. And then there was a lot of discussion about the continuity between the earlier fisheries at Chitna and the use pattern that has occurred both before and after the 1984 decision. Dr. Fall led us through, it's the same material as all of you have in your packet that he showed us, overheads of some of the sights where the fishwheels were at and discussed changes of locations and some of them were in his judgement, his research indicated what were voluntary in nature and some of them were by regulation. So, Mr. Chairman we had a good discussion of that. That information however has been made available to all the Board members in the material identified here in RC 128, so I'm not going to dwell on it. What consensus points did we come to? Well the group did agree that the Payton case did reflect or change perhaps our assessment of the rules that we didn't have in the past. Of course, the Payton case, I'm not going to get into that, we did have the benefit of Mr. Nelson advice and counsel when we discussed the Payton case relative to any changes that may be pertinent to what we have before us, so I'm sure he'll discuss that.

Of course, his comments are in our black book, RC one, under the Law tab. We referred to several times so he essentially didn't provide us new information but he clarified some of the things for the panel that's relative of that issue. So there was agreement the Payton case probably changed, did change the (Indiscernible) or, should I call it a directive assessment of the Supreme Court some of the failures of how the Board addressed certain issues in the past, but I won't go into those. We did discuss them in detail in committee, but Mr. Nelson will explain I'm sure those things, and there was agreement that focus should be on the use of fish stock rather than fishery users, so everybody concurred with those two aspects. And the third thing that, as I recall, everybody agreed on, that there was a historical native fishery with fishwheels and dipnets at Taral and O'Brien Creek. I don't think there's any question. We've seen pictures of these things and so the committee agreed with that. In summary then there was several non-consensus points, no agreement on whether earlier Board findings inappropriately focused on user rather than uses of the stock, a basic issue. The panel could not agree on that and some stakeholders made it very clear they could not support this proposal, Proposal 45, 44, that's before us, because many of the older Native participants were actually replaced, just, you know, moved out of the area because of the use patterns of newcomers to the area. So Mr. Chairman, I would ask Mr. Dersham if there, who is my committee companion, to add anything that I, may have forgotten in this whirlwind tour through our committee report and stop and entertain any questions from other Board members. Mr. Chairman.

MR. CHAIRMAN: Mr. Dersham.

MR. DERSHAM: I think Mr. Engel covered the committee process that we went through thoroughly. I don't have anything to add on that Mr. Chairman.

MR. CHAIRMAN: Thank you sir. Board member's questions of Mr. Dersham and Mr. Engel. I have a question for Mr. Engel and Mr. Dersham. At this juncture do you think it would be important for the full Board to have a, the overview presented by Mr. Bos to you all and to afford him the opportunity to speak to the full Board about the petition that you spoke to specifically.

MR. ENGEL: On this particular issue I think yes.

MR. CHAIRMAN: Is there any objection, Board members? Mr. Bos, could you come forward sir and help us out here please. Mr. Engel, you help me frame this question correctly. I think what we wish to hear Mr. Bos is the nature of the C&T finding and the possible regulatory actions that could occur this summer. Is that it in its entirety, Mr. Engel?

MR. ENGEL: Well they could certainly, Mr. Bos could clarify that issue. Have they received any applications, what would be the process, what might be the likelihood, if you can speak for the Board, I don't know? This is all new. All we know for sure right now is there is a traditional and customary finding on the federal body, the exact issue that's before us right now, Mr. Chairman.

MR. CHAIRMAN: Mr. Bos, that finding of the federal body and its spatial definition too would be very helpful, what portions are all of the drainage, any

time considerations, species considerations, sir. Sir, do you have enough clarity from Mr. Engel and I to address our question?

MR. BOS: Mr. Chair, yes I believe so.

MR. CHAIRMAN: Please proceed, sir.

MR. BOS: Thank you. In the final federal subsistence fishery regulations that became effective October 1, there was a C&T determination that includes all of the waters of the Copper River if you interpret it literally. However the Board did not make a customary and traditional use finding, to that determination. I'm not sure what the basis of that change was from existing state regulation. As you may know, the federal program essentially duplicated, for the most part, the State's subsistence regulations in its final regulations in the federal board's final regulations that became effective October 1. The wording of that – give me just a moment, I'll find it – in its regulations in the section that identifies customary and traditional uses it says, 'The Glennallen subdistrict of the upper Copper River district', and the key words here are 'and the waters of the Copper River'. It being the weekend I wasn't able to contact the person most knowledgeable about that change, however, I think the information that was provided to the committee as far as regulations for the coming year, weren't quite accurate. There is a specific provision in the federal regulations that would not allow subsistence fishing for salmon in the Chitna subdistrict. It's possible that subsistence users could request a special action by the federal board to allow a subsistence fishery in that area. If in fact the C&T determination in these regulations is accurate, that is not in

error. Error of possibly transposition and that's a piece of information I'm trying to obtain for you. So as things stand now if you read the C&T determination literally it's the entire main stem of the Copper, however subsistence fishing under the federal regulations excludes the Chitna district, subdistrict, from subsistence fishing and that's, the, if you need more clarification, if I can provide it I'll try.

MR. CHAIRMAN: Board members, questions for Mr. Bos please. Mr. Dersham.

MR. DERSHAM: Thank you Mr. Chairman. We've heard about the possibilities under a special action request, if a proposal came through the regular process, and if an action was taken based on that proposal, would the likely effective date of that be 2001?

MR. BOS: Mr. Chair, yes, in general I think the Board is not interested in making changes to the regulations through special actions in this coming year. And we've deferred request for proposal for regulatory changes to the normal regulatory cycle that is scheduled to begin in January with the solicitation proposals and moving through the process to final adoption by the federal board in December of the year 2000 to be effective for the season 2001.

MR. CHAIRMAN: Mr. Dersham.

MR. DERSHAM: That's all I have right now Mr. Chairman.

MR. CHAIRMAN: Mr. Miller for Mr. Bos, please.

MR. MILLER: Well, thank you Mr. Chair. My question is, if you could explain for me, I hope you didn't just do this, the difference between the C&T determination that they've made and the fact that there's not a finding. What does that mean exactly, if you've made a determination but not a finding?

MR. BOS: Mr. Chair, I characterize it as an adoption of the state's previous actions, in most cases, what the federal regulations contain for C&T determinations are the determinations made by the state as of 1990 and any subsequent changes to those at the state, the Board of Fish in this case, may have made. This particular situation is one that doesn't fit that description and again, I don't have an explanation of why that change was included in the final regulations and as soon as I'm able to determine that, I can pass that on to you. But, in practical terms it will not result in the fishery on, in the Chitna district in the coming year unless the Board chooses to respond to any special action request that may be submitted.

MR. CHAIR: Mr. Miller.

MR. MILLER: That's all I have right now.

MR. CHAIR: Board members, questions please for Mr. Bos. Mr. Engel for Mr. Bos.

MR. ENGEL: Thank you Mr. Chair, just a quick question Mr. Bos. You indicated if you find that there is an error, how do errors get corrected in the federal register. Does that take formal action or just somebody take a white-out and say we

made a mistake, whoops, what would be the course, I guess I'm ask (sic), if that's the case. Mr. Chairman.

MR. CHAIRMAN: Mr. Bos for Mr. Engel.

MR. BOS: Mr. Chairman, the course of action for an error is just, just to issue a federal register notice of the corrected amendment. It does not require federal board action, those corrected amendments generally are passed through the Solicitor's office, reviewed to ensure they in fact can be corrected in that manner.

MR. CHAIRMAN: Mr. Engel, you have the floor sir.

MR. ENGEL: Thank you for that clarification, Mr. Bos, thank you Mr. Chairman.

MR. CHAIRMAN: Other questions, Board members, for Mr. Bos.

MR CHAIRMAN: Mr. Bos, what, could you give me a practical example of an error of transposition. Or, I could even be more narrow in the question, what would you perceive to be a possible error of transposition in the situation before us.

MR. BOS: Let me retrieve the state subsistence booklet and I can give you the circumstances that may have arisen for transposition here.

MR. CHAIRMAN: Sure. Is this a transposition of the state's regulatory finding on subsistence in its entirety and then how it was transpositioned into federal law?

MR. BOS: Yes, Mr. Chairman. I want to stress that I don't know that this is what occurred in this case and I don't want to make a deduction that this is an error that will be corrected through an amendment and we need to determine exactly what the basis of it was and I'm unable to give that information to you.

MR. CHAIRMAN: You're not hung out, sir, I appreciate your difficulties with the weekend.

MR. BOS: Okay, the, the regulation in the state's subsistence personal use regulations in this case, reads 'The Glennallen subdistrict of the upper Copper River district describe in 5 AAC 01.605(2), and the waters of the Copper River, described in 5 AAC 01.647(i)(3), which are, was the Batzulnetas area for subsistence. The federal regulation at issue here is essentially verbatim, that is, 'Glennallen subdistrict of the upper Cooper River district and the waters of the Cooper River', but it stops there, it doesn't go on to say, described in 5 AAC, the description for the Batzulnetas fishery and maybe that was just inadvertently dropped out, I don't know. And I think careful examination of the regulations will find minor typographical errors that can change the meaning of regulations and I have found at least one other in the Prince William Sound area that, that would have an effect like that. The placement of a comma or semicolon can make a difference in interpretation of regulations.

MR. CHAIRMAN: Thank you sir. Other questions, Board members? Mr. Engel are you ready for Mr. Nelson at this time? Mr. Bos, thank you very much sir for your insights. Are you ready?

MR. NELSON: Yes.

MR. CHAIRMAN: Mr. Nelson, as to the discussion points in the document and any discussion post McDowell and post Payton, sir. Mr. Nelson from Law.

MR. NELSON: Mr. Chairman I'd first like to touch on the differences between the legal standards in place in 1984 when the original negative determination was made and the legal standards now, and then after that, I'll briefly discuss any changes since '96, since the last reaffirmation of the negative finding by the Board, if that's okay. I would refer you to table A1 in RC 2, colored tab five, and if you want to follow along with me I'm going to be discussing the 5 ACC 99.010, the version of that regulation that was in effect in 1984, briefly. Table A1.

MR. CHAIRMAN: Questions on the papers, Board members do have any?

MR. NELSON: It will probably be page, page number eight-five. Well it's about one, two, three, four, about the sixth page in from the beginning. It's the sixth page of RC 5, Page 6, RC 5, I'm sorry, RC 2, color tab 5.

MR. CHAIRMAN: RC 2, color tab 5. Mr. Umphenour, are you ready?

MR. UMPHENOUR: Is it page numbered 6?

MR. NELSON: No, Mr. Chairman no, I counted pages by hand.

MR. UMPHENOUR: Is that including the index?

MR. CHAIRMAN: Dr. Fall.

(Tape 14A)

DR. FALL: ...sorry, but there, we are indeed missing a page number there, but if you start at A4 it's two further on.

MR. CHAIRMAN: Mr. Miller.

MR. NELSON: Mr. Chairman, actually it's the page before that that I'm referring to. It's table A1, the regulation as opposed to the statute.

MR. CHAIRMAN: Ok, Groucho, Mr. Umphenour, are you ready? Mr. Nelson from Law please.

MR. NELSON: If you look there on the left hand column of the text there, you'll see under (a)(2) that 'Each Board will identify subsistence uses of fish and game resources, recognizing that subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, clothing,' and then under (b) as well, 'Customary and traditional subsistence uses by rural Alaska residents will be identified by use of the following criteria.' The most obvious difference between the standards then and the standards now that with the McDowel decision and the 1992 subsistence law, because of the McDowel decision, the Board is no longer limited to looking at customary and traditional uses by rural residents, but is required to look at customary and traditional use or potentially customary and traditional uses by all Alaska residents, and that was obviously different in 1984 than it is now. Another aspect of it, if you go down to (b) (3), it says 'The use pattern consisting of methods and means in harvest

which are characterized by efficiency and economy of effort and conditioned by local circumstances.’ In comparing that, I’ll read the current version of that, that the Board would look at, looked at in 96 and would look at now. ‘A pattern of taken or use consisting of methods and means of harvest that are characterized by efficiency and economy of effort and cost,’ but there’s no condition by local circumstances after that, that’s been changed. To (b)(4), if you look at it in the ‘84 version, ‘The consistent harvest and use of fish and game which is near or reasonably accessible from the users residence;’ that last portion is different than ‘near or reasonably accessible from the users residences’ is no longer in the standards now and the current version reads, ‘The area in which non-commercial long term and consistent pattern of taking, use, and reliance upon the fish stock or game population has been established.’ They lift..., is the area generally no requirement or no criteria that it be near or reasonably accessible from the user’s residence. Under (a), or (b)(5), also, well first of all to (b)(7), it starts out, ‘A use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others,’ and then that has a phrase within it, ‘definable community of persons.’ Under the current version there is no such requirement having a definable community of persons. Also down at the end of (b)(7) it also talks about, ‘A community may include specific villages or towns with an historical preponderance of subsistence users, encompasses individuals families or groups who in fact meet the criteria described in the subsection.’ That’s again referring to the rural resident, rural community, community-based as opposed to all-Alaska based, determinations they were

performing at that time. And also under (b)(8), another difference is that, the last line of that, you'll see it talks about elements of the subsistence users' life. In the current version it basically drops that out and says, 'elements of the subsistence way of life,' as opposed to the particular users' way of life. Those are all things that you might, that could be considered differences in the standards in '84 than the current standards. And would, may or may not make a difference in determination made then and now. It doesn't necessarily require a different result, but the Board might, the Board, needs, should be aware of those differences. And the Board met in 1996 in Cordova and looked, reviewed the 1984 determination that the Board had made and decided that, it was, decided not to change it at that time and leave the negative C&T finding in place. Since 1996, the Supreme Court of Alaska in the Payton case, and I would refer you to the last page of RC 1, Department of Law tab, that has a one page outline and it's entitled up at the top of the page 'Payton Decision, Impact on Board of Fisheries' and it's attached to the Department of Law's specific comments on proposals to the Board of Fisheries for Prince William Sound meeting memo dated November 29th, 1999. There are two, there are several, the way I read it anyway, there are a couple of factors that we just went over that will be effected by the eight criteria, that would be effected by the Payton decision. In other words, the Payton decision might require a different or broader interpretation of those criteria than the Board might have made and been looking at in 1996. And, the ones I would refer you to probably the most are possibly long-term consistent pattern of use, under (b)(1). The means of handling, preparing,

preserving and storing fish or game which has been traditionally used by past generations. Under (b)(5), also (b)(6), 'The use pattern which includes the handing down of knowledge of fishing or hunting skills values and more from generation to generation.' And, those are the criteria that may be effected by the Payton decision. And I'll just, if I have, the Board will like me to, I'll go over briefly the summary that I did for the Board, or else you can look at it yourselves and review it as well.

MR. CHAIRMAN: Please proceed sir.

MR. NELSON: Thank you Mr. Chairman. As you know, the Payton decision dealt with a salmon fishery in the Skwentna area, and one of the criteria that the Board cited in its finding in finding a negative C&T finding for Skwentna area salmon was that there was a lack of evidence in the record to show multi-generational use in family situations. So that was one of the points that was challenged by the plaintiffs in that case. In that case the court ruled that 5 AAC 99.010 can't be interpreted to require finding that current users of salmon be related to past generations of users. The Board can determine if users of salmon currently practice methods of catching, preparing, and sharing salmon that were handed down from age-to-age or from prior generation, but the Board cannot require familial relationships between current users and prior generations. Also there's no requirement that the current users be related by blood to past generations who used fish in exactly the same way. The focus is whether the use has occurred consistently for an extended period of time. The legislature did not limit the meaning of C&T uses to those passed from parent to child

or relative to relative. Another aspect of the Board's negative determination for Skwentna salmon for C&T was that they found a lack of uses in exactly the same way as the past generations. And in addressing that, the Supreme Court ruled that in order to qualify as a C&T use fish need not be prepared or preserved in exactly the same way as past generations. Users could stop using certain techniques because of technological advances and still have qualifying C&T use. For example, where previous methods were drying, smoking and fermenting, later uses of smoking, canning and jarring and freezing salmon out of doors but not drying can still be qualifying use. One of the, one of the situations there too is that the Board cited uses by the residents of Tyonek and other areas, villages in Cook Inlet where there were different types of, for examples of different types of storing and handling of, and preparing of fish, and the Board, the court basically ruled that the Board didn't necessarily have to require, have to find that the uses be the same in both areas of Cook Inlet. And the other thing that the court ruled on was that part of the challenge, or part of the argument was in the Payton case was that the Board of Game had a positive finding for C&T finding moose, and yet the Board of Fisheries had a negative C&T finding for salmon. And the court ruled that positive C&T determinations by the Board of Game on wildlife populations in the same area did not bind the Board of Fisheries C&T determinations. The court held that the Boards have separate statutory authority and could reach different conclusions, and also ruled that the joint Board's decision that an area was not within a subsistence area did not automatically mean that the uses of fish and game within the area were customary and

traditional. And your process recognizes that already, and I don't think there is any problem there, but, so those are the differences outlined, I think, in the Payton decision, especially dealing with family ties and methods of preparing and handling and storing, an interpretation that's been basically overlaid on your criteria that clarify it, clarify the criteria the way it should be applied according to our Supreme Court. If anybody has any questions, I'd be happy to answer them.

MR. CHAIRMAN: Mr. Dersham for Mr. Nelson from Law.

MR. DERSHAM: Thank you Mr. Chairman. Mr. Nelson could you gives us a revised version of (b)(4) from the policy panel. I missed it, I missed some of it.

MR. NELSON: The 1984 version?

MR. DERSHAM: No, the revised version.

MR. NELSON: Okay, I'd be happy to. Right now, as you know, it reads, the old version read 'The consistent harvest', well, you can see it. The new version reads, 'The area in which the non-commercial long-term and consistent pattern of taking, use, and reliance upon the fish stock or game population has been established.' In other words, you need to consider the area. It doesn't, that factor doesn't, you know, illuminate your determination very much, but it's quite a change from the '84 factor.

MR. DERSHAM: Thank you. Thank you Mr. Chairman.

MR. CHAIRMAN: Other questions for Mr. Nelson from Law. I have Mr. Engel for Mr. Nelson please.

MR. ENGEL: Thank you, Mr. Chairman. Mr. Nelson, did the Supreme Court in the Payton case make any references to the impact of state regulations on customary and traditional practices in that Skwentna area, and by this I mean, when the state took over from the territory, they eliminated shortly thereafter fish wheels and other, gill nets and other practices that had been used for subsistence and of course that changed patterns by your types to a large degree. Did the court mention anything about disrupting, if you will by law, traditional and customary patterns?

MR. CHAIRMAN: Mr. Nelson. Mr. Engel.

MR. NELSON: Patterns of use as opposed to patterns of means, handlings, storing, etc.? Patterns of taking, I mean?

MR. ENGEL: Well, by changing the gear type I mean, Mr. Chairman, is that, if people are going to continue to use, store and gather whatever they had to do so under the new set of standards, and in that case and that system, the traditional methods of fishwheels and gill nets were no longer, denied shortly after statehood, so those people that wanted to continue had to perhaps use, rely more heavily, in total, essentially, on a different form of gear to provide for these, this food gathering and traditional sharing and so on and so forth. In that case it would be rod and reel. Mr. Chairman.

MR. CHAIRMAN: Mr. Nelson from Mr. Engel.

MR. NELSON: Mr. Chairman, I, you know I could review the case again, but I don't recall that being a major factor or major point of challenge, and I think the Board's finding actually, for the Skwentna area took that into account and didn't necessarily penalize them, penalize the local users, the current users of that area or the, because of that regulatory prohibition that had occurred there.

MR. CHAIRMAN: Mr. Engel.

MR. ENGEL: Thank you.

MR. CHAIRMAN: Other questions, Board members? Anything in addition Mr. Nelson?

MR. NELSON: The only caution I would urge, my recommendation is you do a thorough C&T finding here, because I can't, for one thing, I can't remember exactly how thorough your '96 decision was, but also because of the Payton decision, I think it, it lays a pretty good argument that things, centers have changed and it would be a good idea to review it because of that, so I would recommend that. The other thing I would caution you, as you Board members well know, when you deal with Native use and non-Native use, you're not allowed to make any shortcuts there, the Board doesn't have the authority to rate use higher or more qualifying because of, on a racial basis at all, but it, in other words, whether there Native uses existed or not in the area doesn't mean there's customary and traditional use or not. Although you can, you're certainly allowed to look at the types of use that went on there and many times, as history shows, Native use in many areas of the state is, tends to be customary and traditional, but I

probably don't need to warn you of this, but don't, you shouldn't rest on the fact that Native use existed or didn't exist to decide whether there's customary and traditional use has taken place on a stock.

MR. CHAIRMAN: That's it sir? Board members I guess I find where we are is a discussion among ourselves about whether or not we should heed both the professional advice of Dr. Fall and the advice of counsel, that we should make a thorough C&T finding at this time. That's where I find us. Is there any objection to that, heeding those recommendations? Seeing and hearing none, let's step down for ten minutes, get our papers organized. When we come back Dr. Fall, we'll have you lead us through the discussion of the eight criteria and I will once again try to express clearly how we will consider those eight criteria when we come back. Any questions? We'll step down for ten minutes.

(Recessed)

MR. CHAIRMAN: Come back to the record please, show it's 2:41, this day December 5th. Come back to the record, please show that there's six of seven Board members present. Mr. Coffey's been excused for illnesses in his family. We're ready to proceed. Board members, please remember my initial discussion about how we wish to go through the eight criteria. Dr. Fall will read the criteria. After he finishes reading the criteria I will ask if there is a consensus on a positive finding on that criteria. A no by any Board member at that time means they wish to have further discussion. It is not the Chair's intent that in that discussion people declare at that time their up or down in

any way on the merits of that criteria. If they wish to have further time to consider the criteria, they should indicate "no." And that will mean they do not wish to consider the criteria in the context of the other criteria, but, more time will be, they need more time to be able to consider that before a final vote. A yes at that time would demonstrate unanimous consent for positive finding on that criteria at that time. At the end, I will provide time for deliberation by Board members on any of the criteria that they wish to document for, to the record, on how they are making their vote in consideration of the criteria. Is this clear to everyone? If we get sideways on this, I'll ask for order. And if people object to my request for order then their objection to my request for order should be for clarity on my ruling. Having said that, are we ready to proceed? Dr. Fall, the first of the eight criteria sir.

DR. FALL: Mr. Chairman, take a look at page A 11 in RC 2, color tab 5, my report, criteria number one, 'A long term consistent pattern of use and reliance on the fish stock or game population that has been established over a reasonable period of time, excluding interruption by circumstances beyond the users' control such as unavailability of the fish or game caused by migratory patterns.

MR. CHAIRMAN: Board members, Mr. Nelson from Law.

MR. NELSON: Mr. Chairman I just note that, that doesn't, that leaves out one phrase that is in the codebook for that criteria. After a reasonable period of time, in the current regulations it's of not less than one generation.

MR. CHAIRMAN: That's correct sir. You'll find that, Board members, if you go further into your package and you find the joint Board subsistence policy and you find the criteria there it's noted correctly, is it not Mr. Nelson? Board members, is there a consensus for a positive finding on criteria one? If the Chair hears a no he will note the consensus on a positive finding for criteria one. Mr. Engel.

MR. ENGEL: Mr. Chairman, can I pose a question right now relative to this criteria.

MR. CHAIRMAN: That would, you would indicate that by saying no, there is not a consensus.

MR. ENGEL: No, I do not.

MR. CHAIR: Mr. Engel.

MR. ENGEL: Mr. Chairman, I guess I, an issue that Mr. Nelson brought up, has there been any court definition of what a generation is? Or is this like one of those, you know, not real significant trade, customary trade? Can you give me any clarification, I guess, what is a generation legally?

MR. CHAIRMAN: Mr. Nelson from Law.

MR. NELSON: Mr. Chairman there isn't that I, there isn't anything that would mandate or direct your interpretation of that phrase or that term in this case that I'm aware of. I have been present at Board meetings for the Board of Game where they talked about a generation being at least 20 years but I'm not, I maybe, the subsistence

division would have more light on that I would really. But I've heard that discussion of at least being 20 years from parent, as being kind of a normal parent to child minimum.

MR. CHAIRMAN: Mr. Engel through the Chair, do you wish to hear from the division?

MR. ENGEL: Mr. Chairman, this is rather pivotal to me as far as making connection with this criteria, what is a generation? This is a change from the 1984 law, when it went away from the rural situation, so anything that the subsistent division staff could provide would be useful for me, Mr. Chairman.

MR. CHAIRMAN: Director Pete, please.

MS. PETE: Thank you Mr. Chairman. Yes, sort of the anthropological definition if you will of transmission of knowledge from one generation to the next is sort of been in the ballpark of 25 to 30 years when you consider the age of teachable children, that if you start having your children at about age 20 you start to enculturate them when they are about five to six years old, so that spans a generation. Mr. Chair.

MR. CHAIR: Mr. Engel. In addition for Ms. Pete.

MR. ENGEL: That's helpful in terms of some definition of this thing, so that somebody that may have participated in terms of a long-term fish pattern use pack, as recently as the mid-70's or something may fit this criteria. Is that what you're suggesting to us? Mr. Chairman.

MR CHAIRMAN: Director Pete for Mr. Engel.

MS. PETE: Mr. Chair, if I may it brings in the notion of a, inter-
generational transmission, so it's more than time, there's a notion of transmission to the
next generation.

MR. CHAIRMAN: Mr. Engel for Director Pete.

MR. ENGEL: That's all I have for now, Mr. Chairman. Thank you for
indulging me a little.

MR. CHAIRMAN: Other no's, is there any further need for discussion.
Hearing none, Mr., oh excuse me, Mr. Miller, please.

MR. MILLER: Thank you Mr. Chairman. I guess I, I'm not real clear on
the importance of each aspects of this criteria, but, I need to get closer, but I am
concerned about the word reliance and how much, how much we should base our, our,
how much we should base our decision on the various aspects of this criteria. I guess
maybe somebody, either Dr. Fall or Ms. Pete or someone that could help me with that. I
don't have a problem with taking and use, I have some questions about reliance. And if
I'm off base, Mr. Chair, I wish you would help me with that as well.

MR. CHAIRMAN: No, you, all you had to do was indicate a no, like Mr.
Engel and then you guys are playing by the rules. Mr. Miller, for clarity sake, are you
specifically directing your question to the word "reliance," sir, as Mr. Engel did to
generation.

MR. MILLER: Yes, I am.

MR. CHAIRMAN: Thank you sir. Dr. Fall, on the word "reliance" for Mr. Miller.

DR. FALL: Thank you Mr. Chairman. Again, we don't, we don't have a specific number in terms of production or pounds of food produced, or anything like that, to give you an index so to speak of how reliance could be defined. In the past, this is one of many terms that the Board has defined in relation to other things, comparing use patterns and harvest levels of one fishery with another fishery or in the case of non-subsistence areas where this also comes into play, comparing a variety of indexes, and even there we don't have, I mean indices, but we don't have actual numbers. If you look at, and also to note that reliance as a concept fits into at least one other criteria in criterion eight as well, so this is an important piece in your analysis. If you take a look at the, the staff report on page A 21, you can get some idea of how the Board, back in 1984, looked at this particular question and it did note that, that in the Chitna subdistrict fishery at that time, that there was basically an intermittent use and a fairly short-term use which would indicate less reliance on those stocks, than, than was the case of the stocks of the Glennallen subdistrict where there was a longer term and consistent pattern of use among most participants in that, in that fishery, so one, indicating, indicator of reliance is, is consistency of use over time, that evidence of that would indicate that people rely on that resource. Other evidence is in harvest levels and seasonal averages so, of fisheries and what the Board learned in 1984 is that the Glennallen subdistrict fishery produced, on average, far more salmon per families than did the Chitna

subdistrict fisheries. So there was again, more reliance in the use patterns of the, of the Glennallen stocks. And under criterion eight would be further guidance as to how to look at this, the research that we did and reported to the Board in 1984 found that participants in the dipnet fishery that, that use patterns did involve using salmon from other fisheries in the state. This is one of a, of a set of fisheries that the people used to harvest resources while, for the stocks in the Glennallen subject district, it was typical for, for those stocks to be the sole source of salmon for people engaging in that use, so again, more, more specific reliance on those stocks, so those are some of the things that, that have been used in the past to understand reliance.

MR. CHAIRMAN: Mr. Miller for Dr. Fall.

Mr. Miller: Thank you Mr. Chair. I guess I was listening and I wasn't sure if I heard in there, but is also then reliance would be relative to the consideration of alternative sources available of other types, of totally other types of food?

MR. CHAIRMAN: Dr. Fall.

DR. FALL: Mr. Chair, that is indeed correct and that comes out in criterion eight again, too, that you would weigh the harvest level of, of salmon, the production of salmon associated with that use pattern with, with other things you know about, about really the participants in that fishery as we mentioned in staff report, there's no getting away, that customs and traditions are carried by people and it is appropriate to talk about those, those individuals as a group, not as individuals, but as a group and what their pattern of use and is, and what we found in the early 80's is that, (

the use pattern for the dipnet fishery was engaged in, or was associated with more wage employment, more employed household members, use of the fishery on weekends as breaks from work, and so forth, while the use pattern for the Glennallen subdistrict, was associated with low employment, low income, and use of the resource throughout much of the summer, at fish camps to put up large quantities of fish for food.

MR. MILLER: Thank you Mr. Chair.

MR. CHAIRMAN: Board members, other discussion? Well, I'll put a "no" on myself at this juncture until I can understand what I might not have heard, so I'll ask the question directly. There's been two requests for definitions, there are no definitions, and part of the reason for that lack of definition is that Board members can exert elasticity in interpretation here around many different experiences they may face, many different places in the application of this criteria, in different subsistence fisheries throughout the state. Am I correct about that Dr. Fall, and then Mr. Nelson from Law.

DR. FALL: Mr. Chair, I think that's exactly right, that these are exercises in comparison and the Board brings to this discussion its knowledge of other subsistence fisheries, recreational fisheries and other personal use fisheries in weighing each criteria.

MR. CHAIRMAN: Mr. Nelson from Law.

MR. NELSON: Yes, I'd probably agree with that Mr. Chairman. I'm, one thing I would say about the, one, not less than one generation term that was questioned by Mr. Engel was that it, that's used under the long-term consistent pattern

of non-commercial taking and use, and then later on there's also transmission from one generation to another generation, that isn't, but doesn't require that that occur over a certain period of time. I think it's, you should be careful to distinguish between the long-term pattern you're looking for and the transmission from generation to generation because that can occur instantly, not necessarily over long generations, or long patterns, or long term situations.

MR. CHAIR: Thank you sir. Board members, other no's in need of further discussion? Mr. Dersham.

MR. DERSHAM: Mr. Chairman, I'm getting a little fuzzy about the rules of the game here. You know, when you asked for consensus and the first Board member says no, I'm still thinking it over and then have questions or doesn't have questions. This, that obviously kills the consensus. For example, in this criterion, I'm still thinking it over. Do you need me to register that on the record each time we come to a criteria I'm not sure about? Or does one Board member kill the consensus and then that's all you need to continue.

MR. CHAIRMAN: Thank you sir. Okay, lets do this one more time everybody. I'll start the discussion around each criteria with a question whether there is consensus for a positive finding on that criteria. If nobody, if no one says "no," then that means that there's a positive, there's a consensus for a positive finding on that criteria. If people still have elements of discussion they should register, they wish to have more discussion, they should say "no" at that juncture. And any time throughout (

the discussion they should register a “no” to demonstrate that they, that there is not a consensus for positive finding on this and then when they, discussion is exhausted, then I will say is there consensus for a positive finding. At that juncture, hoping we can avoid duplicitous discussion on this ad nauseam at the end when we speak to our final record. That’s what I’m trying to accomplish here. And then, if there, if people satisfied their need for discussion and they do wish to see a positive finding on that criteria, and all six of us see that, then we would have consensus and we would move forward. Does that help Mr. Dersham?

MR. DERSHAM: I think so. Let’s try it.

MR. CHAIRMAN: Mr. Miller.

MR. MILLER: Thank you Mr. Chairman. I guess along the same lines I’d need a little clarification. If at the time that we announce a no from any individual Board member, is that the time then, and the only time that you’ll be able to gather information and ask questions, or is it possible for a person who does not feel comfortable with the information he has to wait for more discussion, or will there be no more discussion?

MR. CHAIRMAN: I’m not going to constrain the discussion, Mr. Miller. If people still have, I want you to hold your discussion within the criterion, we make time at the end for summary comments. That should also be considered time when you people can ask further questions or clarifications. I’m not going to constrain it and I can

see the ambiguity of my direction. Thank you sir. Is there further discussion on this criterion? Is there consensus for a positive finding on this criteria at this time?

MR. DERSHAM: No.

MR. CHAIRMAN: No, by Mr. Dersham. Let's proceed. Criteria number two. Dr. Fall.

DR. FALL: Mr. Chair, criteria number two is use pattern recurring in specific seasons of each year.

MR. CHAIRMAN: Board members, is there a consensus for a positive finding on this criteria? Is there any objection? Let the record so show that there's a consensus for a positive determination on this criteria. Dr. Fall, number three please.

DR. FALL: Mr. Chairman, criteria number three, a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost.

MR. CHAIRMAN: Board members, is there a consensus on this criteria?

MR. MILLER: No.

MR. CHAIRMAN: Mr. Miller, you have the floor sir.

MR. MILLER: Thank you Mr. Chair. I guess I would like to hear some discussion about efficiency and economy of effort relative to how and from where the participants in this, and how efficient the effort actually is, and how much cost is involved to participate.

MR. CHAIRMAN: Dr. Fall, for Mr. Miller.

DR. FALL: Mr. Chair. I'll start out by referring the Board to page A 33 in my report and first refer to the information that was provided to the Board for the original finding back in 1984. And Mr. Chair, I forgot to mention this before, and I should have, that the tables that you see after each criterion, for example, after criterion three its table A 13 and it's called 'Information Pertaining to Criterion X Provided to the Board of Fisheries by ADF&G, 1984.' This is verbatim, what I provided to the Board in 1996. So this represents what the Board had before it in 1996 when it last looked at this question. I'm sorry I didn't mention that sooner, take a look at that. What the Board heard about the use pattern about the stocks of the Chitna subdistrict is that generally the use pattern was associated with long, relatively long distance travels of up to round trips of 500 miles or more over highways. That, in contrast the, and again, this is a criterion that calls for some comparison and looking at things in relative terms, it was noted that, that, fish wheels were used primarily in a pattern of local use, from camps, in a set, set of areas, it was also noted, really more on the discussion of criterion one, that there had been a shift over time, actually, it was a fairly rapid shift from dipnets to fish wheels in the Copper River fishery in the 1910's, almost entirely related to the higher efficiency of the fish wheel. Another factor that the Board looked at then was the relative harvest by fish wheel, the choice that if a person wanted to harvest salmon in larger amounts, the fish wheel is generally the choice that was made. And that's been, that's certainly been true since, since the fishery's been open to all Alaskans, and of course it was opened up to all Alaskans in the 70's and early 80's

when these choices were being made as to which gear type to use. That said, the Board also noted that the, that in terms of comparing catching salmon at the dipnet fishery at the Chitna, comparing that to purchasing salmon in a store, that there were, it was much, it was quite cost efficient to travel to Chitna, and if you were successful and took about the average number of fish, of 15 or so, you were coming out ahead in the terms of the amount of money that you were spending, and I did an update of that in table A 14, and you can take a look at that and you'll see that it is a whole lot cheaper to get your salmon by dipnetting than buying it. Not a particularly surprising finding, and this is why the Board of Fishery's in 1984 realized that this did not, the use pattern at Chitna did not fit a recreational pattern in entirety, that it was something different, and it chose to use the personal use category to characterize the fishery and provide that opportunity.

MR. CHAIRMAN: Mr. Miller.

MR. MILLER: Thank you Mr. Chair, that's all I have for now.

MR. CHAIRMAN: Board members. Is there any other need for discussion as registered by further no's. Mr. Dersham, to your "no."

MR. DERSHAM: I have a question to staff, Mr. Chairman. The considering this criterion, is the fact that say, if you find that majority of the use doesn't fit this criterion, but a portion of the use does, as in your data that you presented about, from the survey about how long people plan to stay and so forth, what is the significance of finding that the majority of the use doesn't and a portion does. Do we

focus on the portion that does or is it a factor that we can use in our decision that we feel a majority doesn't?

MR. CHAIR: Dr. Fall for Mr. Dersham please.

DR. FALL: Well, Mr. Chair, I think that's entirely up to, at the Board's discretion, however, do note that, that the criterion says a use pattern, which is characterized by efficiency and economy of effort and costs. So my reading of that, and I think past Board application of these criteria, is that, that, the efficiency characterizes the basic pattern of that fishery, it's the rule rather than the exception in that fishery.

MR. CHAIRMAN: In addition, Mr. Dersham.

MR. DERSHAM: That's all Mr. Chairman.

MR. CHAIRMAN: Board members, other need for further discussion? Board members, is there consensus for a positive finding on criteria three?

MR. MILLER: No.

MR. CHAIRMAN: You've got to let her rip Mr. Miller. No. No. Show no consensus. Number four, Dr. Fall.

DR. FALL: Mr. Chairman. Criteria number four on the top of page 835: 'The area, in which the noncommercial, long-term and consistent pattern of taking, use and reliance upon the fish stock or game population has been established.'

MR. CHAIRMAN: Is there consensus on criteria number four? Board members? Do you people need more time? I need a no or I'm going to move to five. I hear no "no's," show consensus on four. Number five, Dr. Fall.

DR. FALL: Mr. Chairman, criteria number five, 'The means of handling, preparing, preserving and storing fish or game which as been traditionally used by past generations, but not excluding recent technological advances where appropriate.'

MR. CHAIRMAN: Board members, is there a consensus for a positive finding on criteria five? Does anyone need more time? Please indicate so. Show a positive, show consensus on criteria number 5.

(Tape 14b)

(Part of discussion not captured when the tape was turned over.)

(Tape log indicates consensus reached on criteria number 5.)

DR. FALL: ...patterns which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation.'

MR. CHAIRMAN: Board members, is there a consensus for a positive determination for criterion number six? Is there a need for more time?

MR. MILLER: I'd like a little more time, Mr. Chairman.

MR. CHAIRMAN: Do you wish to step down or do you wish to ask a question, Mr. Miller?

MR. MILLER: Let me think for a second. Actually, I wouldn't mind stepping down, Mr. Chair.

MR. CHAIRMAN: How long would you like sir?

MR. MILLER: Five minutes.

MR. CHAIRMAN: Five minutes. Step down for five minutes from the record.

(Recess)

MR. CHAIRMAN: It's 3:18, 3:18 p.m. Mr. Miller, you have the floor sir.

MR. MILLER: Thank you Mr. Chair. I guess I'll just take a stab at this, the thing that I'm trying to shake around and get an idea of, is that, there's obviously been some changes in the characteristics or makeup of the actual users over time, and my question is, is whether those interruptions have actually constituted a break in the pattern of handing down information.

MR. CHAIRMAN: Dr. Fall for Mr. Miller.

DR. FALL: Mr. Chair. First of all regarding the break in the communities and families in, that used the Chitna subdistrict, as you read in our report, we think such a break did occur, that the, that the fishery that developed at Chitna in the 60's and 1970's replaced the fishery that had been there previously over the span of about 15 years, and the maps of the fish wheel locations demonstrate that. What happened is that the older pattern of use which was associated with traditional sites and salmon racks like we saw in the photograph were placed under substantial stress by the influx, with the construction of the highways, of people how were coming there to dipnet salmon for food, and the, the people who were camping in that area and living in that area, moved upriver. And they were gone by the mid-1970's. Their traditions,

their customs went with them to the North and were shared with people that they fished with. What has, what then happened, with the, with the development of the fishery there was a pioneering effort by the first people who learned about the area and probably did observe, and other local people dipnet fishing there. I don't have any evidence to suggest that the pattern that developed in the dipnet fishery at Chitna in the 60's and 70's was based upon a set of knowledge that was transmitted by earlier, by the earlier participants in that fishery that moved upriver. That is not to say that the pioneering people in that fishery didn't tell other people, demonstrate how they were learning about that fishery, where the good places were, what the good techniques were, that certainly started to happen in the 60's and 70's and continued. But, specifically to your question, there was a break between those earlier traditions and what happened later on.

MR. CHAIRMAN: Thank you. Mr. Miller.

MR. MILLER: Just a follow up then, in terms of the current group of users, how much turnover is there? How many new guys show up, relatively speaking, and how much of, is, is a learning process passed on, or is that, is there any way to determine that?

MR. CHAIRMAN: Dr. Fall for Mr. Miller. Dr. Fall.

DR. FALL: Thank, thank you Mr. Chairman. I almost forgot the question, as I was flipping through, could you repeat? I'm think I'm on the right page, let's make sure.

MR. CHAIRMAN: Dr. Fall, that's very encouraging. That's the first demonstration of the fact that sometimes you can sink to the level of the Board without having a complete and total command of the matter, so I appreciate that humanness.

Mr. Miller.

MR. MILLER: I may have forgotten the question now myself.

MR. CHAIRMAN: Good, then. (Laughter) It's the Chair's job to move us along, if that's the situation. Mr. Miller, thank you.

MR. MILLER: The question was, what is the turnover, how many, how many new people arrive in this fishery, and what percentage are new people that would actually need to have a learning process.

MR. CHAIRMAN: Dr. Fall for Mr. Miller.

DR. FALL: Mr. Miller, you're absolutely right that this is, a tough question to answer with a lot of numbers. We did ask the question though, back in the early 80's and you'll see the responses to our work on page A 21. This actually shows up under criteria number one. We found at the time that 41 percent of the people participating in that fishery were there for the first time, and that 72 percent had participated for five years or less. We also found that many of those interviewed, and I'm reading now from our report the same information I provided in 96. 'Many of those interviewed indicated that since they first dipnetted at Chitna, there have been intervening years when they have not participated due to employment, being out of state, involving them in another salmon fishery, or having enough salmon from the

previous year.' So linking into your question, there did appear to be a short-term use pattern and an intermittent use. That said, people of course are going with other people, and so we cannot conclude that there isn't, that there isn't transmission of knowledge. Whether that is characteristic of the fishery in a multi-generational sense, it wasn't in the early 80's. I note in the report that as 15 years have passed, it does add time to the history of this fishery. What we, what we also know is that the level of participation in the, in the fishery does fluctuate with abundance and, and with, with openings and so forth and you'll see that as the, as the available salmon goes up so does the participation in the fishery. Through word of mouth people will hear about the fishery and go down there, which, but if, if runs aren't particularly good, people go elsewhere, which would be indicative of a lack of consistency of use as well as some, a break in the context for sharing information and knowledge about the fishery.

MR. CHAIRMAN: Through the Chair, I have Mr. Nelson from Law for Mr. Miller. Mr. Nelson.

MR. NELSON: Mr. Chairman, Mr. Miller, the one thing I would point out about criteria six specifically, is that it isn't prefaced with the language long-term consistent pattern of use. It just says a pattern of taking or use. So I, you should be careful to distinguish that difference between criteria one, that says long-term consistent pattern and criteria six where that isn't, long-term consistent isn't a requirement, just a pattern.

MR. CHAIRMAN: Mr. Miller, you have the floor sir.

MR. MILLER: Well, thank you Mr. Nelson for pointing that out. I have no other questions at this time.

MR. CHAIRMAN: Do we have consensus at this -- Mr. Umphenour please.

MR. UMPHENOUR: I'd like to ask Dr. Fall a couple of questions, that is, Dr. Fall you mentioned that the people that had been subsistence fishing at Chitna in the 50's and, say from 1910 or so, until 1950, that they were displaced in the 60's and 70's. And when you were answering Mr. Miller's question about the knowledge of fishing and hunting and you said that they moved upriver with their drying racks. Now, my information is that they had drying racks for one reason. To dry salmon to feed to their dogs for their dog teams. And, currently, I've talked to staff and there are no drying racks in the Glennallen subdistrict, so these people quit drying salmon because they're not feeding them to dogs any more? Why had they quit drying salmon?

MR. CHAIRMAN: Dr. Fall for Mr. Umphenour.

DR. FALL: Mr. Chair, I think our report would suggest different information. There were reports from the 1910's and 1920's which I could flip through about 20 pages of my paper and site the page. An observation from a Bureau of Fishery's employee at that time, that the vast majority of salmon taken in the Copper River were not fed to the dogs, salmon that were dried were used for human food, and our report that we presented in 1996, Simeone and Fall, was based upon a summer of field work that Bill Simeone and our staff did in collaboration with the Copper Native

Association and there were case studies of households in there which described the various methods of using salmon, and not as much salmon is dried today that was in the past, but it's still used along with smoking salmon as a combination of methods that people continue to use in continuity with the past history of that fishery.

MR. CHAIRMAN: Mr. Umphenour, please, your additional questions, sir.

MR. UMPHENOUR: Thank you Mr. Chair. For Dr. Fall, you said the people moved upriver because they were displaced in the 60's and 70's. And they had drying racks there, and so my question is, and you've partially answered it, is you said there that they're not drying fish as much as they were, that they're smoking, but are they drying fish on drying racks at fish camps upriver? That's what my question is.

MR. CHAIRMAN: Dr. Fall for Mr. Umphenour.

DR. FALL: Mr. Chair, I would need some time to look back in our report Fall, and Simeone, and see if one of our case studies specifically mention drying racks. I do know that we told, we reported to the Board in 1984 regarding criterion number five that 45 percent of the Copper Basin fish wheel operators dried salmon. So, that's a fairly large percentage and I suspect that if we did that survey over again it might be a little bit lower now, but as to the drying racks I'd really need to double check some of my sources, but drying does continue to be done.

MR. CHAIRMAN: Anything in addition, Mr. Umphenour.

MR. UMPHENOUR: Nothing further. Thank you Dr. Fall, Mr. Chair.

MR. CHAIRMAN: Board members, other need for discussion as noted. No around consensus. Board members is there consensus for a positive determination on criteria six at this time? Hearing no "no's" let the record show Ms. Cody. Number seven please, Dr. Fall.

DR. FALL: Criterion seven, Mr. Chairman, 'A pattern of taking use and reliance where the harvest effort or products of that harvest, are distributed or shared, including customary trade, barter and gift giving.

MR. CHAIRMAN: Board members is there consensus for a positive finding on criteria seven at this time? Is there a need for more time? Is there a need for more time? Do I hear a no? Let us show a consensus around criteria number seven. Number eight, Dr. Fall.

DR. FALL: Mr. Chairman, criterion number eight, 'A pattern that includes taking, use and reliance for subsistence purposes upon a wide variety of the fish and game resources and that provide substantial economic, cultural, social, and nutritional elements of the subsistence way of life.'

MR. CHAIRMAN: Board members, is there a consensus for a positive finding on criteria eight at this time?

MR. DERSHAM: No.

MR. CHAIRMAN: No. Mr. Dersham you're recognized sir.

MR. DERSHAM: I don't really have any questions at this time, Mr. Chairman, I just don't have consensus.

MR. CHAIR: Ok, Board members are there other needs for questions.

Mr. Engel, notes no.

MR. ENGEL: Mr. Chairman, perhaps somebody could explain the definition of the subsistence way of life for me so I better understand that phrase. Either a legal definition or a definition somebody feels comfortable giving to me.

MR. CHAIRMAN: Are you ready Dr. Fall? Dr. Fall for Mr. Engel.

DR. FALL: Mr. Chair, if we pull out the, the so-called cookbook, the subsistence finding procedures and RC 1, under the tab Subsistence, we will find a definition of subsistence there, which is relevant to subsistence uses and that's on page six. There's one portion of that that is, that is, should be stricken from that, but subsistence uses are 'Non-commercial, customary, traditional uses of wild renewable resources.' This old definition says 'Resident domiciled in the rural area of the state.' That's no longer applicable. 'For direct personal or family consumption for a variety of purposes, including food, shelter, fuel, clothing, tools, or transportation' and so on. Another relevant portion of this is the, the section of the, of the 92 law which refers to non-subsistence areas. So, in some ways the legislature in 92 decided to define subsistence in terms of what it isn't, so it did give the joint boards the, the directive to identify non-subsistence areas, which are areas of the state where subsistence hunting and fishing are not a principle characteristic of the economy. So, a subsistence way of life is a way of life that takes place in a context of long term patterns of uses of wild resources, relatively large harvests of wild resources, a pattern season around a harvest

that's linked to the availability of fish and game, a use pattern that's linked to oral traditions, and more recent traditions, of an area, it's a subsistence way of life is one of which, that the contributions of subsistence harvesting are major in comparison to purchased food stuffs and other purchase of raw materials. So it's a, it's a combination of, of attributes that, that define it. So in this, it's referenced in this particular criterion for that very reason, that what the, what the joint board was looking for in criterion eight was this, this context. Does this use pattern take place, is the uses of these stocks part of a wider range of uses of fish and game, of hunting and berry picking and, and of a variety of resources that support that, that way of life characteristic of communities and areas of the state. And that's a long answer to a short question.

MR. CHAIRMAN: Through the Chair, Mr. Nelson from Law for Mr. Engel.

MR. NELSON: Mr. Chairman, I generally think, agree with Dr. Fall's comments, the only cautionary note I would insert is, be careful not to judge uses by communities of residence where the users live. I don't think the court would uphold a decision on that basis. I think it's perfectly fine to look at the users and their uses, and you know, what kind of uses are going on, and the diversity of their uses, but I wouldn't do it based on where they live because it probably is, is, would be found arbitrary and not reasonable because it wouldn't be tied to the use patterns. The nature of the subsistence use by a community doesn't dictate what use patterns of people are actually using this particular stock.

MR. CHAIRMAN: Mr. Engel, you have the floor sir.

MR. ENGEL: All right, since we're on criteria eight, I'll tell you one of the things maybe someone can help me clear it up. Criteria eight seems to almost in some ways fly in the face of criteria one, because it calls for the reliance of a wide variety of fish and game resources and Dr. Fall just mentioned somebody that gathers berries, picks, grows a garden, or does all these different things, shoots a moose, wide diversity of reliance. In criteria one it says 'A long-term consistent pattern or use, reliance on a fish stock,' so it seems like to me that in one case the person that is satisfied with staying in one place or can meet their needs is penalized because, or a person that is a diverse food gatherer that moves and does a lot of things to maintain a desired subsistence lifestyle gains benefit under 8, but that same person might be penalized because they're not relying on a single stock, like we're talking about here. In other words, a person that utilizes other stocks within the Copper River Valley, other than the Copper River would fit nicely with the diversity of harvesting under eight perhaps, and lose out under my evaluation of reliance on a fish stock, like, if we define that as the Chitna area. So it seems like one flies in the face of the other; reliance on a diversity, and a reliance on a stock. This is something I've had difficulty in trying to -- I guess it's subjective. You place balance on what you, you get points for one, and you lose points on the other. I don't how to deal with that and it's been mulling around my mind. Maybe somebody could help me. Thank you Mr. Chairman.

MR. CHAIRMAN: Dr. Fall for Mr. Engel.

DR. FALL: Mr. Chair, I'll give it a shot and maybe Mary Pete would also like to add to this. One thing to keep in mind I think in looking at, at reliance in the history of the criterion and certainly in what the Board and the legislature is trying to accomplish with providing for subsistence uses is that reliance of course goes beyond food value, beyond economic value, I think we also look at reliance in terms of the carrying on of traditions and knowledge. So, a resource might very well be harvested in the very small, relatively small amount, but, but for the preservation of a way of life and a tradition associated with a, with a community or an area, they could be very, very reliant on that resource for that, for that purpose. Secondly, I think when you look at the patterns of subsistence use in Alaska, you see that it is very rare in areas outside the non-subsistence area to find, to find annual harvests dominated by one or two resources. That, that the, so when comparing or contrasting a use, it might be a personal use or a recreational use, in comparison to a traditional use. One of the clues that the joint board developed as well, is this resource used in combination with a lot of other things, like we see in a subsistence way of live as referred to in criterion eight. And the Board, back in '84, made a contract there between the two, two use patterns of the different stocks. I'll sum up by saying that the criterion as a whole, were put together as a package to try to capture what a traditional use looks like in Alaska and characteristic of an Alaskan traditional use is one that is part of a bigger package. That if it's a, if it's something that's one or two things that people do for supplementing their food supply that, that use pattern looks like a personal use and could be provided for under those regs, as opposed

to a subsistence use which is imbedded in this, this wider variety. That would be my explanation of why it appears, might appear to be a contradiction, but in the analysis that we would do of the pattern, it is not.

MR. CHAIRMAN: Director Pete, anything in addition?

MS. PETE: No, thank you.

MR. CHAIRMAN: Mr. Engel, you have the floor. Through the Chair, Mr. Nelson from Law for Mr. Engel.

MR. NELSON: Mr. Chairman, the only other thing I would add was that, as everyone understands, the history of this regulation was prior to the McDowell decision used to identify communities that had C&T use of a particular stock, and some of this language sounds, you know, was contained in the earlier version, and then was changed to avoid community determinations, and shift to the possibility of any C&T use by any Alaskan resident. I think that's the part of the lack of clarity. It made more sense I think, when you were using this criteria for communities, deciding which community had C&T use of a particular stock or a game population.

MR. CHAIRMAN: Mr. Engel, you have the floor sir.

MR. ENGEL: I haven't got anything further at this time. I'm still confused but I'm listening, so I'll learn. Thank you Mr. Chairman.

MR. CHAIRMAN: Board members, is there a need for further discussion? Is there a consensus on criteria eight at this time?

MR. MILLER: No.

MR. CHAIRMAN: Show no consensus. Board members, at this time I'd like to open the period for discussion and questions on all eight again. Do not feel constrained by the consensus or lack of consensus. You can revisit those things. It's the Chair's intent that you have an enormous volume of material before you, that we have all reviewed and I would like to see Socratic questions posed to interject material from the record that's already before us into the building a record by asking questions and playing dumb. We know what the record is, so let's don't build the record with the obvious record, but if you have genuine questions and efficiency in the use of our time here, it's to go back over these things, get your questions asked about any of the eight criteria. When we finish that discussion, the Chair will start to feel the press of the agenda, he will tell you that, and I'll start to look for summary deliberations on the eight criteria and to call for the question. Are there any questions on how I wish to go forward? Floor is open for general questions before final deliberations and the call for the question. Mr. Engel.

MR. ENGEL: Mr. Chair, just so my notes are correct, we find that there was no consensus on criterion one, three, and eight. Is that correct?

MR. CHAIR: Madam Executive Director.

MS. COTE: Mr. Chairman, criterion one, criterion three, and criterion eight.

MR. ENGLE: Correct.

MR. CHAIRMAN: Mr. Engel, you have the floor.

MR. ENGEL: Then it's my assumption those are the three criterion that we would be looking at in more detail perhaps, although they all fit in, they seem to have some general comfort level with five of them, but three, we've got some problems with. And of those, two of those three we have just a questions of reliance in there. And I, the reliance, two of those are somewhat still contradictory in my mind. Because of the diversity on one hand and it seems like you get points for a greater dependency if you will, reliance on something that you get full utilization on, so that's where I am at, is this question of reliance. The other one is the question of consistent methods and means of harvest characterized by efficiency, economy of effort. That's another one the we have some question on and, there I get into a situation that's almost as Mr. Nelson indicated, this is a throw-over from the original law that talked about rural. You're penalized if you live a distance away and have no other alternatives whether you live in a non-subsistence area or another rural area where you have salmon of this level and the salmon of dipnetting, you may not be able, it may cost you more to drive from Chickaloon, where you have no salmon dipnet fishery or anywhere else for that matter that's still within a non-subsistence area and I would have to, because I travel further than somebody else, I may lose points in my mind. Qualification, because the alternatives aren't there, and so therefore it costs me more to participate, but I have no other alternative perhaps. And so I have a problem with that. And again, a lot of this gets down interpreting this, it looks like somebody, that somebody was the legislature, took a former law that was designed primarily for rural and kind of played around with

it, took part of it out to clear it up but left a lot of the attributes of that, or subjective attributes of that. So, that's where I'm at right now on those issues, and if any other Board members could help me with those, how they view this efficiency because a person is penalized for listing, you know, and drive more miles, and so on and so forth, or you can't use a fish wheel because you don't live on the river and can't haul one down there, but nonetheless you could drive down there and dip, (Indiscernible) an urban type thing, you're penalized for costing more. So, I'll stop with that, I'm repeating myself, but that's where I'm at, reliance and this efficiency of use. Mr. Chairman.

MR. CHAIRMAN: Mr. Engel may request another Board member, so that Board member wish, wish to speak to Mr. Engel's questions specifically, is that your? Mr. Umphenour for Mr. Engel.

MR. UMPHENOUR: Ok, I'd like to speak to efficiency and economy of effort. And in this situation there's, we've compared this fishery, or the staff compared the Chitna region with the Glennallen region, but failed to compare it with the Cordova subsistence fishery as far as efficiency, reliance, and economy of effort. Now when I look at economy of effort, and I'm speaking as a person that has operated fish wheel commercially, and my son still operates one commercially, and as person that has personally dipnetted as well at Chitna. The effort to build a fish wheel is great, even though they use mini fish wheels here on the Copper River compared to a commercial fish wheel on the Yukon River, but still, there's an expense to it. It's a fairly large

expense to build the fish wheel. There's a lot of work to build a fish wheel. And sure it's efficient. But your bag limit is only 30 salmon. And that's what it, that's all it is at Chitna, in the personal use fishery. And if a person, there's a question of how many salmon can a family eat in a year. Many families, only 30 salmon is all they need because they may go get a mouse or a caribou or something else and 30 salmon's all they need. If it's these salmon here, that might be a 150 pounds of salmon if it's all sockeye. Ok, and so the fish wheel's very expensive to build. It takes a lot time and effort to set it up, and so I compare this to a dipnet. The dipnet is 20, 25 bucks, whatever it costs. It's an efficient means of harvesting. If a person is diligent, they can go down there, stand on the bank, and they can catch their 30 fish for their household. And so it's an efficient and cost effective method of harvesting fish, and that's how I look at the criteria that talks about efficiency and economy of effort when I compare the fish wheel to the dipnet.

MR. CHAIR: Thank you sir.

MR. UMPHENOUR: And the reliance, when I look at reliance, there's a number of fisheries in the state that people can participate in. But there's very few fisheries such as the one at Chitna. Many families cannot afford to go purchase commercial-caught Copper River salmon, be they sockeye or Chinook. And in some areas of the state, and many of the participants that participate in this fishery at Chitna, might participate in the personal use fishery out of Fairbanks. However, its been closed the last two years, so there's been no other fishery that they can go participate in unless

they want to drive all the way to Kenai, and that fishery is not a predictable fishery. And the chances of them going down there and employing economy of effort, and, and actually saving money are slim. Whereas if they go to Chitna and their diligent, they actually are going to save money, and they're going to pass down all these other things that are mentioned in what a subsistence lifestyle is, teaching the children, generation to generation and all this other stuff. And so, and so that has to be as far as reliability goes and reliance goes. That has a bearing on it as well, in my mind, the other alternative fisheries that they could participate in because many of these have been closed. I don't know if that helps you Mr. Engel or not, but that's how I look at it.

MR. CHAIRMAN: Anyone else in addition for Mr. Engel. Mr. Engel, I don't know if this will help you, but it kind of, it's what's in my mind right now. There's a question here about, let them eat pinks in Nome, and long term use of sockeye salmon. I guess I look to Dr. Fall to answer to answer this question for me before I violate the first rule (Indiscernible). Maybe I should quit digging. Is there anywhere that the ability to efficiently harvest red salmon is closer and more predictable than the dipnet fishery at Chitna? I'm not talking about harvesting for subsistence in Fairbanks on different species, I'm talking about the long-term harvest pattern in the Chitna area for red salmon. Is there anywhere else it would be more efficient to participate in a subsistence fishery than Chitna?

DR. FALL: Well, Mr. Chairman, the first fishery that comes to my mind is the subsistence fishery in the Glennallen district.

MR. CHAIRMAN: Thank you. That's the best I can do Mr. Engel. Mr. Nelson from Law.

MR. NELSON: Mr. Chairman, I probably should have stated this at the beginning when I was talking earlier, but because of the historical development of the question you had before you, you're comparing, you find yourself often comparing uses in the Chitna subdistrict of dipnets to upper Copper River dipnet and fish wheel uses, in judging what's customary and traditional. One thing I would urge caution in in doing that, I don't think the Board has adopted the standards that they found were meant by the upper river fishery as a minimum for finding C&T use. The standards that you are applying are the standards in the criteria and you made C& T findings all over the state and I caution the Board members not to, not to take as a minimum standard a C&T finding that you did on the upper river unless you specifically feel that way, that that's the bare minimum so no other uses have met that at that level, but be careful when comparing them, that that's not the end of the question, and you still need to decide wide-term basis, you know, whether of not there's customary and traditional use.

MR. CHAIRMAN: Thank you Mr. Nelson, and if I provoked that response then maybe I confused Mr. Engel, who I was trying to help also. I'm saying that as far as efficiency and reliance goes on a stock, there's been a use pattern on that stock for efficient reasons that brought people to use that stock across time. And one of the reasons might be is cause it's the closest stock in proximity for the efficient use of that stock considering all the other seven criteria also, that it might not just be the

efficient use on that stock with the dipnet, but also there may be information passed across generations and other eight criteria in combination that make up the most efficient use of the stock. Is that close for Mr. Nelson? I'm not saying I'm right, I'm just saying you better understand me.

MR. NELSON: Mr. Chairman, yes. Actually your question didn't provoke my response, the overall discussion today has provoked my concern because, it might be easy to say, well this isn't the same as the fish wheel fishery, so it's not C&T. That isn't the standard, unless you decide that the, the fish wheel fishery is the minimum or that you need to find for C&T.

MR. CHAIRMAN: Are there other people that wish to address Mr. Engel's question. Did you have anything in addition sir?

MR. NELSON: No, Mr. Chairman.

MR. CHAIRMAN: Mr. Engel in addition.

MR. ENGEL: No, Mr. Chairman, I'm still listening for other Board members. I may be more confused than I was before, but I'm looking for their help.

MR. CHAIRMAN: Your reputation has been received from many sectors, confusion more than bringing light.

(Indiscernible – simultaneous talking and laughter)

MR. CHAIRMAN: Mr. Umphenour, do you have questions sir? Do you have something for Mr. Engel? This period is devoted to questions, Mr. Engel, or Mr. Umphenour, it's not final action.

MR. UMPHENOUR: I know that Mr. Chair. I wanted to ask you a question.

MR. CHAIRMAN: Ok, Mr. Umphenour. Flip it on me.

MR. UMPHENOUR: Ok, I know it's not final action, but, maybe it would be helpful if I went through the criteria and pointed out what I think are the highlights of the criteria and that might help some other Board members, I don't know, or it might provoke some other questions. But I'm willing to do that, but that's up to you. I'll just sit here like a bump on a log till everyone else is finished asking questions and then do it at the very end, whatever you want me to do.

MR. CHAIRMAN: Well, here's the way I rule on that, Mr. Umphenour, you just sit there like a bump on a log, buddy, and I'll reserve for you the number one space when we get to final deliberations and you can go first for the benefit of everyone else. Does that take care of you?

MR. UMPHENOUR: That's fine.

MR. CHAIRMAN: Are there other questions and discussion at this time? Are we ready for final action, Board members? Move it along. Mr. Umphenour, your discussion on final action.

MR. UMPHENOUR: Thank you, Mr. Chair. I'd like all the Board members to get the customary and traditional use work sheets, that's in, that's colored tab five, in RC 2, that's this book. It's also the one Dr. Fall sent me in the mail. I don't know if all the rest of you got one or not.

MR. CHAIRMAN: To the papers, Board members if you have your papers, lets wave at me. Does everybody got everything? Mr. Engel, do you? Please proceed Mr. Umphenour.

MR. UMPHENOUR: I'd like everyone to turn to page A 10. It says, table A 4, is on page A 10. On that page it has the populations, and in 1950, Anchorage was 11,000, Fairbanks 19,000. In 1960, Anchorage 54,000, Fairbanks 15,000. The Copper River census, although they don't tell us what Chitna is, it would be helpful if we knew what Chitna was, but, was 2100 in 1960. I point that out to show how much the population has changed in a short period of time and that can cause different use patterns. Ok, then I turn over and here's criterion one staring us in the face. And it says, 'Not less than one generation,' that's what Mr. Nelson from Law had us write in there, about the long-term consistent pattern of use and reliance on the fish stock. Okay, after I look at that, we've got another, some other ones that I want to look at that relate to that, so that would be on page A 25 and A 26, they relate to criterion one. Page A 25 is Figure A 9, 'Number of subsistence and personal use fishing permits issued under the Copper, upper Cooper River, 1960 to 1999.' That's A 25. Then A 26 is number of permits issued Chitna subdistrict, 1960 to 1999. And then on the bottom half is the number of salmon that are harvested. And the reason why I wanted to look at the population of the area first and then look at the number of permits is you can see, because in the staff report, it was stated that, that the fishery has changed and that one user group, you know we're not supposed to be using user groups, we're supposed to

making a determination on the stocks, but somehow part of the department feels the nature of the fishery changed.

(End of Tape 14, Side B)

(Tape 15, Side A)

MR. UMPHENOUR (Continued): On page A 26, that's just for Chitna, but if you look at the numbers of people that participated, and then if you look at the catch figures, you'll see that there's very little difference between the Chitna subdistrict and the upper Copper River, which leads me to believe that there was not that much effort in the upper Copper River as compared to the Chitna subdistrict. The majority of effort has been in the Chitna subdistrict all the way from when they've been keeping records in 1960 until the present time. Many more people have fished there, and something else that I'd like to point out.

MR. CHAIRMAN: Mr. Umphenour.

MR. UMPHENOUR: Yes.

MR. CHAIRMAN: For the Chair and maybe others (Indiscernible – simultaneous talking).

MR. UMPHENOUR: Press of the agenda, okay.

MR. CHAIRMAN: Press of the agenda, number one. Number two, if you specifically cite the criteria that you're speaking to sir, in your final summation, then it would seem at the end of that you would then be able to tell us your intentions in how you're voting, which is good parliamentary procedure. Thank you sir.

MR. UMPHENOUR: Okay, Mr. Chair. But anyway, I brought that out, I wanted the Board members to look at those two charts, because it shows the number of people that were fishing and then we flip all the way back to the, Appendix A, which is A 42 is the page. And there it starts out, 'In 1958' and it says 'reference RG 370, National Marine Fishery Service Annual Reports' and this is from 1958 and if you could read that short little paragraph there, it just gives the names of people and what they caught. How many fish they caught. And the names with Bell, a Mrs. Bell fished at O'Brien Creek, someone named Patty King at Fox Creek, George Miller and Pop Miller at Chitna Airfield and then it says, 'Dipnetting reported to be carried on by tourists and local residents of the Chitna area.' Then it says, 'This is the first reference we have found to non-local dipnetting. Most of the netting was done along the Clishna (ph.) or the mouth of O'Brien Creek about four miles below Chitna on the old railroad right-of-way. Dipnetters caught approximately 1,000 fish.' And then they tell how many the fish wheels caught. You turn over to page A 43 and it says, '1990, 1963 reference unknown.' But it lists the residents and the number of dipnetters and I'd like to put that on the record. From Delta Junction - 48, Eagle River - 12, Chitna - 9, Valdez - 2, Clear - 11, Palmer - 4, Kenai - 1, Tok - 3, Glennallen - 18, Anchorage - 195, Fairbanks - 796, and total - 1,126. That was in 1963. I personally know several people that have been dipnetting in Chitna since the 1950's, and they still dipnet today, that are Fairbanks area residents. So, I see that there is a long-term consistent use of the fish stocks at Chitna by Alaska residents. And what I just went through shows how it

grew with the population of the state to what it is today. I intend to vote in the affirmative for a positive C&T finding, and that's all I have for right now. Mr. Chair.

MR. CHAIRMAN: Thank you sir. Board member's, other discussion within the final deliberations, final action. Mr. Nelson, from the Board, sir.

MR. NELSON: Thank you Mr. Chair. I'm in agreement with Mr. Umphenour and have looked at all this information and will be voting in the affirmative, Mr. Chairman.

MR. CHAIRMAN: Other discussion Board members? Mr. Dersham, please.

MR. DERSHAM: Mr. Chairman, obviously I (Indiscernible) my comments. As we went through the criteria, I'm focusing on criterion one and criterion three and criterion eight to make my decision. I have, there's a lot of close calls about trying to make a decision about criterion one and criterion three. I think the reason a person could argue either way on those two criterion. Criterion eight is, I cannot find the pattern of use we're looking at, and the recent 30 or 40 years in this area meets the criteria of criteria number eight, and I'm going to vote no, Mr. Chairman.

MR. CHAIRMAN: Thank you, Mr. Dersham. Board members, further discussion please. Mr. Miller.

MR. MILLER: Thank you, Mr. Chairman. Well, I have struggled with this considerably and I too have some questions on criteria one, three, and eight. But I also still have even more I didn't speak in opposition to six. I still have some

issues of concern within six. In criteria one, I'm not convinced that the users are reliant on the resource. I do believe that there are a small percentage that are reliant on the resource to a degree, but I feel that overall the resource is supplemental and additional, but not something they rely on. In criteria three, I believe that most the users are relatively inexperienced, currently and the harvests are likely well below bag limits. And considering the distances traveled and the cost involved for most of those that are participating, I don't believe that it is an efficient or economical use. And in criteria six, I do believe that some pattern exists to pass on information, but the turnover of participants to me indicate a loss of interests resulting either from a large learning curve or limited results in harvesting. And as far as characterization of the users in number eight, it does not fit my concept of people who derive from the resource, what provides, that the resource provides to them substantial economical, cultural, social, or nutritional elements of the subsistence way of life. Now that feeling on those four puts me on the edge of how I want to vote. And I feel I could go either way. Those four things are probably debatable in a lot of people's minds, but for me when I'm on the edge like that and I have to find myself in a situation where I'm torn on an issue, I have to step back and consider the overall effects and ramifications of, of what the action means and how I would vote and I guess I'm very concerned that something that is working now and all the users that are currently meeting the needs, all of the users, I have trouble with changing that. And I think that to do that, to change this, would create more risk, reduce stability in many fisheries in the area, and create a certain amount of unrest

among the other users. And, that sort of tips the balance for me, Mr. Chair. I'll be voting against a positive finding.

MR. CHAIRMAN: Other Board members? Mr. Engel please.

MR. ENGEL: Mr. Chairman, I, I too have been toying with the same concerns that Mr. Miller has expressed, and I try to put it out of my mind what this might tip the balance in, because I'm supposed to be looking at traditional and customary use, not the impact on other, destabilization of other, this is the priority use, if indeed it fits that way, and yet I know if it goes one way, it will change the way we do things. It could and I appreciate that. It's very difficult for me to say I can't look at positive T & C findings because it may change the balance of the way we manage fisheries adjacent to it. Another thing other Board members haven't indicated, and I'm sure its gone on in their minds, is that, here we got the same fish swimming up the same river and downstream we got a traditional and customary finding, certain use patterns have been established. Immediately above this area you've got that and we've got this area in question in between. Same stock of fish, but not for the question necessarily in stock that's recognized by subsistence uses, but the same fish. And over the years we've regulated this fishery one way or another that has influenced use patterns. It's difficult to say how much, how little that has done. We've seen changes in the types of gear. We've heard people have moved in and moved out for whatever reason, social reasons, changes in drying fish or whatever it is, they move from this place to that. And that's characteristic of a lot of fisheries. We see patterns change all over the state. Dog

teams require more fish for their subsistence needs than a snow machine. A snow machine changes the pattern of harvest, is that pattern the snow machine brought about transmissions of people before 'em or some outsiders come in. How did the fish wheel come into the Copper River to start with. It came from the Columbia River probably, or somewhere. Somebody brought it in and somebody used it and then, is that a consistent transfer of this harvesting technique? I don't know, but all those things fit into this, this, fishery. I guess where I really get a problem, biggest problem is reliance upon, and there's where I come down on this fishery I guess, and I can't really, I place myself in that classification. Many, many of the people that probably fish the mouth of the river have no more reliance than somebody else, particularly the mouth of the Copper River. It takes substantial investment and equipment and so on and so forth to get there. People that fish, have room to fish, or access to fish through the other subsistence fishery just above it, are they more reliant, all of 'em, most of 'em, or is that pattern changing? Patterns do change there too, I suspect their reliances changes. So the whole nature of the fishery is, is, has changed. I'd be the first one to admit probably that when I dealt with this issue in 1996, I was looking more at the user, and that's part of the issue too, granted the use of the stock, and yet we know Mr. Nelson and others have clearly indicated that we look at the use of stock, we look at the eight criteria relative to that rather than the characteristic of it totally on the user side, which we pretty much did in the past. Saying all those things, I, and again I tried to put it completely out of my mind what impact it would have on other fisheries, I'm going to

vote no on traditional and customary findings. And that's a tight fit Mr. Chairman, but have to come down to, I can't support it for the reasons I stated. Mr. Chairman.

MR. CHAIRMAN: Mr. Umphenour.

MR. UMPHENOUR: Thank you, Mr. Chair. Every time I look at the hunting regulations and I see Tier Two for Unit 13, for caribou, it just aggravates the hell out me when we go to the West Coast International Inn and the barmaid and her husband get a Tier Two permit for caribou every year for Unit 13, which is this same area. But that's a caribou Tier Two permit, and they get that because when they fill out that paperwork, they say they are reliant on that, getting the caribou in that area. And so when I look at criterion one and it says reliance on the fish stock, there are very few places in the Interior of Alaska where the average person that doesn't make a lot of money, that might work at a gas station or whatever he does, work at a hotel or something, doesn't have a large income, cannot go to the Fred Meyer in Fairbanks and pay \$13.99 a pound for a Copper River salmon. They can't afford to do that. So, when I look at reliance, there's only one place they can do that and comply with efficiency and economy of effort and cost. They can hop in their old beater vehicle, with their 25-dollar dipnet, and if they're willing to work hard, they can drive to Chitna, they can take some bologna and a loaf of bread, and they can camp out down there, under a tarp if they want, and it won't cost them a lot of money. And if they're diligent they'll come home with what would cost them in excess of a thousand dollars, if, there any other they could get 'em, of Copper River red salmon. So to me, that answers efficiency, economy

of effort and cost. That answers that question, which is criterion three and as far as reliance goes, there's no other option if they want to get salmon to eat. There's no other option, and it's because of the economy, efficiency and economy of effort and cost. Even if there was a chum salmon run in the Tanana River and there was a personal use fishery, which there has not been for the past two years, they would have to catch those fish with either a gillnet or a fish wheel. The current in the Tanana River is almost as the bad as the current in the Copper River. It would require a boat, but this poor guy and his young wife, they, he works in a gas station, she's a waitress or whatever. They cannot afford a river boat that might cost, if you get a cheap one, five or six thousand dollars and that's with a little 20 horse kicker stuffing, so they can go set a gill net in a 13-knot current in the Tanana River, and they sure cannot afford to go build a fish wheel top rate in there. So that also addresses efficiency, economy of effort and cost. That answers that, or that to me addresses that question, cause I'm looking at the alternative way they're going to get salmon to eat. They've got one way, go to Fred Meyers and buy it for \$13.99 a pound, or they can go catch a chum salmon, if there was a chum salmon season, which there hasn't been for the last two years, or a king salmon personal use fishery, they can't, they haven't been able to do it. But even if they could, I want to reemphasize this, they would have to have a boat in order to participate in that fishery or find someone that would take them in a boat. And so to me, driving down there in their vehicle, camping out with the tarp, eating bologna sandwiches, whatever they want to do, they could cook up one of their Chitna sockeyes if they catch and

barbecue it there on the beach, but to me that, that addresses that criterion. And the last criterion, which is a pattern that includes the taking, use and reliance again, for subsistence purposes, upon a wide variety of fish and game resource that provides substantial economic, cultural, social and nutritional elements of the subsistence way of life. These people might have a couple of children. They take their children down there with them. I know lots of people that do that. They camp out, they take their Coleman stove and a home canner and they can up their salmon as they catch 'em, after they mark 'em off on their harvest report, lot of 'em can 'em down there, or they just put 'em in ice chests they stop on the way down, if they go early, down by Summit Lake and gather up some ice cause there's normally still ice on the lake when that opens. They're doing all of these things. It's a cultural thing, it's an educational thing for their children the family's bonding together, that's what they're doing. That meets criteria number eight to me. And most importantly, there is a long-term, consistent pattern of use on this fish stock. A very long-term consistent pattern of use and it's right here in the staff reports. That's why I went through that list of where all the participants were from in 1963, and you'll notice that the majority of 'em were from the Fairbanks area, and why are they from the Fairbanks area? Because this is the only place that they can, that they can use criteria number three, which is what most people are going to use, which is efficiency, economy of effort and cost, that's the only way they can go get this quality of salmon, otherwise their family and their children are going to do without it period, cause they can't afford \$13.99 a pound to buy it in a grocery store. And they can't

afford to drive all the way down to Kenai and, and compete with all the people from Anchorage down there in that personal use fishery at the mouth of the Kenai River. I'm still going to stick to my guns because I believe that this does meet the criteria. I know there's no doubt in my mind that there's not been a long-term consistent pattern of use and reliance on this stock of fish. Mr. Chair.

MR. CHAIRMAN: Mr. Dersham please.

MR. DERSHAM: Mr. Chairman I just want to flesh out my own personal record on this issue a little bit more. I, I agree with all the issues that Mr. Miller and Mr. Engel stated in their reasoning. And they're the exact same issues that I've been mulling over and over and over. This is a very tough issue and I've spent a lot of time, I'm sure all the other Board members have too. It's kept me awake at night thinking about it. I mentioned earlier that a majority of my reliance was on answering the question of criteria number eight. Specifically, where it talks about reliance and the phrase, "that provides substantial economic, cultural and social and nutritional elements of the subsistence way of life." And once you make sure you're, in your own mind meeting the tests of, and following the statute and the policy that guides us in this decision. I think that question comes down to your personal definition of what is that subsistence way of life. I certainly respect Mr. Umphenour's reasoning and his decision, but I'm also going to stick to my guns and vote no, Mr. Chairman.

MR. CHAIRMAN: Other discussion? Board members, I'm going to be voting in the affirmative and the reasons for that are, I do believe there is long-term

consistent pattern of taking and use. I agree with Mr. Umphenour's assessment of the 1960's data. I share knowledge of other people in the Fairbanks area have utilized this stock for even longer than that and told me of a longer use pattern. I agree with Mr. Umphenour about pattern of taking around efficiency and economy of cost and effort. There was a question asked earlier today about, and I've heard it asked throughout the last several days, about this discussion that, that, this can't be economical, how could anybody drive that far for these fish. Well, there are economic times and there's relative abundances of fish that would dictate that, that there are times when it is even more economic than others, during hard times to go there. And I think in my appreciation of travel for subsistence harvest, I know people who travel 400 miles by boat, open boat, to hunt moose, and its been suggested that moose are moose, and salmon are salmon and salmon, come to you. There aren't any sockeye salmon coming to the people of Fairbanks, and if you suggest that they should be efficient and harvest chum salmon, then I wrestle with the same problems that we had to address in Nome about alternative use of stocks. People were harvesting a stock. And I base my judgement on that stock and all of the eight criteria as it effects the use of that stock by different people across time. Because of that I will be sharing an affirmative vote with Mr. Umphenour and Mr. Nelson. Is there any other discussion, Board members? Mr. Engel.

MR. ENGEL: Mr. Chairman, I said earlier in this discussion that I needed advice on three as..., three criteria. Mr. Umphenour, in yourself, you've given me a lo

to think about. I may be changing my vote, Mr. Chairman, based, if I do on, on your still thinking about it. If anybody could help me a little bit more in that regard, I'm right, I'm that close on this issue, given, I do listen, I do respect my other Board members, I do ask for your advice. I don't always listen to it, but you've made compelling arguments, so if anybody would like to sway me one more time and, I'm listening, I'm gathering information right down to the bloody end, because it's difficult Mr., we all know it's a difficult thing, I don't have to say that, but I'm trying to apply the standards, the reasonable aspect of the decision making, fair, consistent and I'm, I don't know exactly which way to go on this, so if anybody's got anything else, I'd just point that out, I don't want to belabor it, somebody can call the question and I'll make my mind up in the next 30 seconds, 'cause that's where I'm at. It's that tight an issue, and you've all responded to some of my concerns and added a few (Indiscernible) and targeted those, those particular criteria that was bothersome to me. So, Mr. Chairman, thank you for, speak my mind.

MR. CHAIRMAN: Thank you sir. While people are thinking of any further responses to Mr. Engel, the Chair calls upon the parliamentarian to note that the rules on voting and the rules before us on tie votes. Executive Director Cote?

MS. COTIE: Mr. Chairman, there's a statute that talks about quorum for the Board and it talks about a majority of the members of the Board constitute a quorum, and then there's a portion of the statute that specifically speaks to, well the wording says, ' The majority of the full Board membership is required to carry on

motions, regulations and resolutions.’ We’ve received help from the Department of Law in the past in the form of a memo that helped interpret this statute to mean in this case with a seven-member Board, a majority is four members. Mr. Chair. Mr. Chair, further, in light of that, a tie vote, three – three in this case, with one absent, the motion would fail in that case. Mr. Chair.

MR. CHAIRMAN: Are there any questions on procedure and clarification for the Department of Law. Mr. Nelson from Law.

MR. NELSON: Mr. Chairman, I agree completely with what Executive Director Cote has stated as far as what’s required to, for action in this situation.

MR. CHAIRMAN: Thank you Mr. Nelson. Anything in addition Board members? I have Mr. Nelson from the Board, and then Mr. Umphenour.

MR. NELSON: Thank you Mr. Chair, and I guess this is just to help Mr. Engel along a little bit on criteria number three with, I recall during the Kodiak Board meeting where we were talking about Perryville and the Chignik subsistence, and I recall the distances that they have to travel with their boats to, to get subsistence fish when it’s not within their immediate area, Mr. Chair.

MR. CHAIRMAN: Mr. Umphenour.

MR. UMPHENOUR: Thank you Mr. Chair, I don’t know if I can help Mr. Engel anymore or not, but on criteria number three, which is the efficiency and economy of effort and cost. A lot of people in the, that live in the Fairbanks area, and

that live in the area where you live as well. I know that a lot of people work. They don't, they're seasonal workers. They're not year-round workers. And some years, they have a better year than others. We have, you know, people that work for BLM, they're seasonal workers working fire-fighting and then we have people that work construction, and there's a lot of people that don't have full time jobs. And so for these people, especially when they're unemployed, and a lot of 'em have families, and they're raising families, that when they're unemployed, if the fish are running at Chitna, or if they can go to Chitna to go fishing and get a bag limit or get a substantial amount of these sockeye salmon that they can't really get any place else, they can make that trip and they can camp out down there and they can bring their children, and they're actually saving money, their putting these good quality fish away for the winter for their family to use. And a lot of times that might mean a lot to a, especially a younger couple that does not have a very large income. And I don't know whether that helps you any or not, but that is an, if a person is diligent, they can go harvest their fish and put those good quality fish away, but many people just cannot afford to buy 'em. They just don't, that's not their, they're people that are go buy hamburger most of the time to eat. They can't afford to pay \$13.99 a pound and that's what these fish cost in Fairbanks this last year, it's right in the staff report. And then the criterion number eight, I think this is an important criteria and, and it's very applicable in this sense, because like Dr. White said, I know people, I know families that have been going to Chitna since the 50's, and I know that you know some of 'em as well, that I know, and then they've passed this on

to their children and their grandchildren. I know that they've passed this on to them, going to Chitna, harvesting the fish, taking care of the fish, putting the fish away and preserving the fish. But I know people that are, you know, at least the third generation right now and, and so that's a very cultural and social thing with these families.

Because they do this every year. And I know that there may be some turnover. One of the things that happens at Chitna, and it's mentioned in the staff report as well, is a lot of military people go there. Well, the reason why is the majority of the population in this state, especially if you're around Fairbanks, there's two military bases there.

There's an Army base and an Air Force base, but a lot of people come up here in the military. They get out of the military, and they stay here, and then a lot of people that have been stationed in Alaska, get discharged in the lower-48, you know, retired or just get out, and they move back to Alaska. But I would, especially in the Fairbanks area, at least 50 percent of the people there, came there in the military and stayed, or left and came back after they got out of the military. And so a lot of these people learned to participate at Chitna when they were in the military and a lot of people in the military do go to Chitna, I'm not going to deny that. But anyway, I don't know if that's helped you or not, but as far as criterion eight, the reliance for subsistence purposes and the person has to define what subsistence is, and to me it says right here, 'that promotes a substantial economic, cultural, social, and nutritional element of the substance way of life', and when someone goes to Chitna, the economic part of it, because these are the most expensive salmon in the world, they're never going to be able to afford to buy 'em

and that's the only place they can conceivably, in an efficient manner, go get sockeye salmon, that answers the economic part of it, and the cultural, social and nutritional element, that's a family going and doing something together. That's the father and the son and the daughter and the wife and everyone doing something together that's bonding that family together, and to me that's a very important part of it, aspect of it, and I know lots of families do this. I hope that's helped you Mr. Engel. Thank you Mr. Chair.

MR. CHAIRMAN: Thank you. Board members, further discussion? Chair will hear the question. The question is noted but not heard. I look to Ms. Pete and Dr. Fall about the adequacy of our record and any errors or omissions that you wish to note at this time.

MS. PETE: None, Mr. Chairman.

MR. CHAIRMAN: Thank you. I look to the Department of Law. Mr. Nelson from Law, errors and omissions in our deliberations and considerations, from Law.

MR. NELSON: I have one concern after listening to the deliberations and that, are several references to, or decisions being influenced by what would happen if we vote one way or the other and I listened to the Board in Nome last year talk about understanding that it might be an undesirable situation but, anyway, I'm worried about the record, because of those statements.

MR. CHAIRMAN: I'll take care of that one. I too heard Board members allude to consequences. I also heard other Board members allude to the fact that the matters before us were not the consequences, it's the consideration of the eight criteria and any one who spoke outside of the criteria wish to correct their record? Mr. Miller.

MR. MILLER: Thank you Mr. Chair. I believe I was one that that did speak about things were outside of the eight criteria, I guess I would just like to reiterate that the four points within the criteria were very much hang-ups for me in deciding this. They were split, it was decisive. I believe that when I look at those four things it is very difficult for me to make a decision either way. In thinking about the overall discussions that have taken place here, I think things tend to lend more credence to the four criteria and some of those things were considerations that people's needs may not be met, and I heard a lot of that. I don't know if that's outside of the criteria, but if it is I guess we need to be careful with that also. I guess I just feel that the, the points that I made within criteria are points that still carry me to vote in opposition to it, basically.

MR. CHAIRMAN: Thank you sir. Mr. Nelson from Law, any additional comments sir?

MR. NELSON: No, Mr. Chairman.

MR. CHAIRMAN: Board members, additional comments? Lets go to your question as heard on the final action.

MS. COTE: On Proposal 44, define positive, customary and traditional use. Miller?

MR. MILLER: No

MS. COTE: White?

MR. WHITE: Yes.

MS. COTE: Umphenour?

MR. UMPHENOUR: Yes.

MS. COTE: Engel?

MR. ENGEL: Yes.

MS. COTE: Dersham?

MR. DERSHAM: No.

MS. COTE: Nelson?

MR. NELSON: Yes.

MS. COTE: Motion carries four/two, one absent Mr. Chair.

MR. CHAIR: We'll step down for ten minutes.

CERTIFICATION

I, Anne Williams, hereby certify:

That the forgoing pages number 1 through 81 contain a full, true and correct transcript of proceedings of the Board of Fish meeting held in Valdez, Alaska on December 5, 1999, transcribed by me to the best of my knowledge and ability from four tapes identified as follows:

PWS 1999 Valdez Tape 13 Copy, Side B Logs No. 104 through end;
PWS 1999 Valdez Tape 14 Copy, Side A and B;
PWS 1999 Valdez Tape 15 Copy, Side A and B;
PWS 1999 Valdez Tape 16 Copy, Side A Logs No. 000 through 470

DATED at Anchorage, Alaska this 30th day of January, 2003.

SIGNED AND CERTIFIED BY:

Anne Williams, Legal Secretary

RC 105

BOARD OF FISH
Cordova, Alaska

Date: 2/5/2003
Time: 11:10:11 a.m.

(Tape: 2B)

(This portion is not requested)

(Back on record, seven of seven seated, beginning Committee A work, found in RC 119, Chaired by A. Nelson)

CHAIRMAN: Back on the record at 11:10 a.m. Wednesday, February 5th, Alaska Board of Fisheries, Prince William Sound, Copper River Upper-Susitna Finfish meeting, seven of seven seated board members are present. We're in deliberations, we're about to begin work on Committee A. The report from Committee A is found in RC 119. Committee A was chaired by Mr. Art Nelson. Mr. Nelson.

MR. A. NELSON: Thank you, Mr. Chair. Just, board members, the materials I that you should have before you, obviously, RC 119, which is the report for Committee A. Other relevant materials that might be useful throughout the discussions would be RC 90, which is the C and T worksheet, which is also RC 2, Tab 7. I'm going to refer to it as RC 90, because it was stapled and portable and I didn't have to carry this big book around. RC 89, is some deliberation materials that summarizes some new information from the Subsistence Division. Also, RC 139 was just submitted this morning. I believe this is a collection of overheads that may used in our discussions around Proposals 42 and 43. And, also, RC 151, were some very detailed notes, and right up front I'd like to thank the Department for preparing those. I know its not the norm, but it could be helpful for folks to look through and see kind of where the discussion

went around certain issues. It's certainly not intended to be a verbatim transcript of the meeting, though. So, if members want a minute to get those papers, or if they are ready.

MR. CHAIRMAN: Did you mention RC 126, Mr. Nelson? The transcript of deliberations from 1999?

MR. A. NELSON: No, I didn't. Thank you. That is very relevant.

MR. CHAIRMAN: Is everybody ready to go? Go ahead, Mr. Nelson.

MR. A. NELSON: Well, the first proposal in our deliberations was 42. I'd like to have that read to the record.

MR. CHAIRMAN: Proposal 42 to the record, please.

UNKNOWN: Mr. Chairman. Proposal number 42. 5 AAC-01-616, Customary and Traditional Use of the Fish Stocks. Mr. Chairman.

MR. ENGLE: Move to adopt.

MR. JENSEN: Second.

MR. CHAIRMAN: Mr. Nelson.

MR. A. NELSON: Well, Mr. Chair, I was prepared to offer a ...

MR. CHAIRMAN: Why don't you offer maybe substitute language with your ...

MR. A. NELSON: Yes, I guess I'd like to offer substitute language for Mr. Engle's motion to adopt. I offer a motion to find grounds for reexamination of the Board of Fish's 1999 Customary and Traditional Use determination on Chitna subdistrict salmon stocks.

MR. CHAIRMAN: Is there a request for unanimous consent on the substitute language?

UNKNOWN: I'd rather vote on it, Mr. Chair.

MR. CHAIRMAN: On getting the substitute language before us, you'd like to vote on that? Okay. All right. We have a motion. Mr. Nelson, do you have a comment?

MR. L. NELSON: I was just going to speak to, give you some comments, before you might want to consider the substitute language rather than a straight motion to adopt.

MR. CHAIRMAN: Yes, good.

MR. NELSON: I refer you to my Department of Law memorandum in your Board book, and my comments reference Proposal 42 and 43, and my discussion there about these proposals being a little bit different from the normal proposals you look at and also, to copy of a letter from the Attorney General, Gregg Renkes, that's in there as well. We would encourage maybe a two-step process here, because of the already presumption of validity in favor of the current regulation and your affirmative duty to apply the criteria of the Subsistence Statute, and the factual finding that you've already made in this case. We recommend that you use something like the substitute the language offered by Mr. Art Nelson to decide whether or not a reexamination of the earlier finding would be appropriate. Procedurally and legally I think it would strengthen the record if you did that.

MR. CHAIRMAN: Thank you Mr. Nelson from Law. Mr. A. Nelson, any further comment? My understanding board members is if we have a affirmative vote right here this will put the substitute language before us, and the substitute language will give us the ability to consider the Department of Law's comments and cautions about how to proceed with this proposal and if we do vote positively on Step 1, then that will lead us to Step 2, which would be to consider the proposal pretty much as written, so, make sure everybody is clear on that. Any other comments, board members?

MR. ANDREWS: Mr. Chair?

MR. CHAIRMAN: Mr. Andrews.

MR. ANDREWS: I wonder if we could just briefly go over that one more time. I'm not really 100 percent clear on it.

MR. CHAIRMAN: You bet. Mr. A. Nelson.

MR. A. NELSON: Thank you. Again, the substitute language, instead of Mr. Engel's motion to adopt, the substitute language would be a motion to find grounds for reexamination of the Board of Fish's 1999 Customary and Traditional Use determination on Chitna Subdistrict Salmon stocks.

MR. CHAIRMAN: My understanding of that, Mr. Andrews, is that a board member would consider whether they find either new information or that the Board erred in its determination in 1999 and before voting, but not voting right now, whether to have this substitute language before us, but before voting eventually on that substitute language, yes or no, those would be the two things you would be considering if this language gets before us. Mr. Andrews.

MR. ANDREWS: Mr. Chairman. Then a 'yes' vote would confirm the 1999 findings of the Board.

MR. CHAIRMAN: Not right now. All a "yes" vote will do right now, Mr. Andrews, is put the language that Mr. Nelson suggested before us, and if we get that language before us, that will allow us to consider factors such as new information and/or that the Board erred in its findings, decision, in 1999. A "yes" vote on that, if there were at least 4 "yes" votes to that substitute language after it's before us, then that would lead to the proposal, pretty much as written, being before us, for a decision of whether or not to overturn the customary and traditional finding. So right now, what we're voting on is Mr. Nelson's language to put before us for debate. Mr. Andrews.

MR. ANDREWS: I think I've got it straight, Mr. Chairman. Thank you very much.

MR. CHAIRMAN: I don't want anybody to be not clear on this. If there's any questions, keep asking them, because we want everybody to be clear. Mr. A. Nelson.

MR. A. NELSON: Maybe I'll just make a stab at clarification on this myself. The intent was, and particularly with the guidance provided to us by Mr. Nelson from Law, is that if the Board was to reconsider the C and T determination, it should be based on either an error or new information before the Board. (Tape 3A) So the intent was to set that question out in front of the Board first. Is there new information and a reason [indiscernible] that is the intent of this motion, that two step process. We go through this thing, we make, you know, we'll debate it eventually and decide the reason to reexamine the C and T classification. And then, of course if we found positive there,

then we would go into the criteria and the C and T examination. So, the two step process sets it up clearly based on laws, guidance and, now, it's kind of a three-step process.

Thank you.

MR. CHAIRMAN: Other board members?

MR. R. NELSON: Question?

MR. CHAIRMAN: Mr. R. Nelson.

MR. R. NELSON: Thanks, Mr. Chair. Will all the information I've looked at, I haven't been able to find a place where there was error. I've seen some stuff you may call new information, but I don't...

MR. CHAIRMAN: Mr. Nelson, you're not on the subject here. You're talking as though we had the substitute language before us and we don't. You're just voting right now, Mr. Nelson, on whether you want to have the substitute language before us for debate.

MR. NELSON: Okay, thank you Mr. Chair.

MR. CHAIRMAN: Anybody else? Question's heard, Mr. Marcotte.

MR. MARCOTTE: Okay, on the motion to substitute the language, Mr.

Morris?

MR. MORRIS: Yes.

MR. MARCOTTE: Russell Nelson?

MR. NELSON: No.

MR. MARCOTTE: Mr. Jensen?

MR. JENSEN: Yes.

MR. MARCOTTE: Mr. Engel

MR. ENGLE: Yes.

MR. MARCOTTE: Art Nelson?

MR. NELSON: Yes

MR. MARCOTTE: Mr. Dersham?

MR. DERSHAM: Yes.

MR. MARCOTTE: Mr. Andrews?

MR. ANDREWS: No.

MR. MARCOTTE: The motion carries, five in favor, two opposed.

MR. NELSON: Mr. Chair?

MR. CHAIRMAN: Alright board members the language is before us. Mr.

A. Nelson.

MR. A. NELSON: Thank you Mr. Chair. That opens it up for us now to debate receive information from the department in order for us to judge whether the new information, or if an error has been found, whether we want to examine the proposal on its merit and go through the eight criteria, so I think at this point, I can go through some of the committee discussions on this. We went through each of the eight criteria, not in any effort to, certainly not to try and find consensus among the public members, but just to get information, and we centered all that discussion, I tried to keep it focused on what's new and relevant to each of the eight criteria and what might be different from what was before the Board in the past. And you can see that there was certainly a lot of disagreement among the public panel members on almost everything. There were

obviously the two sides to the arguments, but the Department staff provided some good information to us, and I think at this time, I'd like to ask Dr. Fall to briefly go through the new information that we have and what in that information you see as significant and/or different from what was before the Board in 1999.

MR. CHAIRMAN: Dr. Fall.

DR. FALL: Thank you Mr. Chairman. The RC's that I will be referring to in addressing Mr. Art Nelson's question, include RC 89, RC 90, and RC 139, specifically. Before I start on Subsistence Division's new information, I would just note that the other source of new information, of course, for the Board, and potentially significant new information, is the information received at this meeting through RC's through public testimony and through the committee process. RC 139 is a complete set of the overheads that are in our PowerPoint projector, PowerPoint presentation, which most of them derived from Figures that are in RC 90 and RC 89, so it's information that we did go over in committee. There are a couple of new ones that I'll point out, and if you'll just indulge me for a second, I'm going to skip ahead of much of this since you are looking for specifically new information that may be of significance. And here we are. And this is page 19 in RC 139. A primary source of new information at this meeting, are the results of a study that the Division of Subsistence conducted in 2000, focused on characteristics of the Copper River subsistence fisheries, subsistence fishery as it occurs in Chitna subdistrict and the subsistence fishery as it occurs in the Glennallen subdistrict. This was a collaborative effort funded by the Office of Subsistence Management of the U.S. Fish and Wildlife Service. Primary data gathering methods were two 510 face-to-

face surveys were done with 2000 fishery participants and there were also some in-depth interviews with some long-term dipnet fishers at Chitna. The description of this study, you'll find some of it on page 10 in RC 90, and some more detail on page 4, in RC 89. I should spend a little time bit of time giving you some background on how we structured this study, because this was discussed at length in committee. Our goal in 2000 was to update the kinds of information that the Division had collected in the early 1980's, about patterns of use of fish stocks as those uses occur in the Chitna subdistrict and the Glennallen subdistrict. The information that was collected in the early 1980's was fundamental to the Board of Fishery's decisions about C and T status of both subdistricts, the stocks in both subdistricts. In 1999 we had not had, we did not have updated study results, so we still were depending upon those findings from the early 1980's. So we decided in 2000 to try to update that information. The information that we collected is pretty much standard for a study, although we did not know at the time that we would be doing this here today and reconsidering the C and T finding. It is fair to say that the Division of Subsistence in conducting its research always has Board of Fishery's and Board of Game applications in mind, including C and T determinations. So I think it is fair to say that this study was anticipating further discussion of this issue and we collected information that we thought would be new and directly relevant to further discussions. The way we did it regarding the survey, face-to-face interviews, and it's described on page 10, the same form, survey form, was used for all 510 participants, no matter where they fished. And in the Chitna subdistrict is what we call a sample of opportunity, or a opportunistic sample. Our surveyor walked around over the course of

much of the summer and interviewed people as they were at the Chitna subdistrict dipnet fishing, and that was 313 participants in the Chitna subdistrict fishery were interviewed. We feel that this is a representative sample and I think the consensus at the committee was that the results that we're presenting here now, were pretty good representation of that use pattern at Chitna. The balance of the interviews, about 196, were participants in the Glennallen subdistrict subsistence fishery and of those, 109 were Ahtna from communities in the Copper River Basin. Because the participants in the Glennallen subdistrict are not always at their fishwheel sites and we did want to talk to active participants, the strategy was to track known, active participants in that fishery down, and interview them with the same form. It is very important to note, that we deliberately focused on the Ahtna participants in this fishery for several reasons. One, is that the Ahtna fishers participants in that fishery best represent the consistent, long-term patterns of use of the Glennallen subdistrict. It is the pattern of use that the Board of Fishery's used in the early 1980's to establish the C and T findings, the positive C and T finding for Glennallen. Although this group represents, perhaps, 15 to 20 percent of the total participants in that fishery now, it is the most representative of that traditional pattern. We didn't want that pattern to be obscured by not interviewing a lot of those people. The question really, was, is that pattern changed? Is that pattern moved to where it resembles the Chitna subdistrict, which it hadn't before. The other reason we did focus on that group is that, indeed, that was the information we had in 84 and would give us the best information to compare. I think the last piece of background is just to remind the Board and the public, is that what we're trying to do here in our study, is to describe a pattern of

use. And, in order for the Board to meet its statutory obligation to identify fish stocks or portions of those stocks, that are customarily taken or used for subsistence purposes, and in order to apply the eight criteria, which talks about patterns of use of these fish stocks, customary and traditional patterns of use, we must talk to and document the patterns as they are established by groups of people. We're describing human activities, human values, human beliefs, in describing that use pattern. There is no other way to do it. Okay, with that as background...if there are questions about the methods or anything, I can field those at any time, so let's just see what is new. And, as you do know in the worksheet, the way we, RC 90, the way we set this up is that the new information tends to be towards the end of our discussion of that criteria, so that you can see what earlier Boards, including the Board in '84 had to look at when it made the negative finding for Chitna, what the Board had in '99 when it made the positive finding for the Chitna subdistrict, and then you can see what new information we've provided from our study for this meeting. On criterion one, we have the following new information. Criterion one is a long-term, consistent pattern of use, consisting of -- I'm not going to read it exactly, but just to remind you -- a long-term, consistent pattern of use of more than one generation, considering interruptions beyond the users control. So new information that we, we did have information in '84, but not in '99 about how long participants in both fisheries had been using that fishery, so we updated that in this study by asking people the when they first started participating in the fishery. And, this is the finding. So if you look at the stipple bars you will see that 14% of the people we talked with fishing in the Chitna subdistrict, were fishing there for the first time, and that 28% had participated for

5 years or less. In fact the way to look at that is really to add 14% and 28% to see about 42% of the participants were relatively new participants in that fishery. On the other side if you add the columns 21 to 30, 31 to 40, and so on, you'll see that less than 20% of the participants in that fishery had been fishing there for more than 20 years. So, this finding was similar to what we found in '84, where the pattern was one in which a large majority of the fishers were relatively new participants in that fishery. We did find some evidence of more fishers fishing there for longer period of time, but that's not surprising given the passage of time period. But we didn't have that information before, and my own analysis was that I was a little, I was expecting a higher percentage of long-term users than what we found here. This one asked, "how often do you fish in the Copper River?" So, this gets at the question of the long-term consistent pattern of use and whether the use is intermittent or is an annual event. Subsistence fisheries are characterized by annual involvement in the activity. And, you will see that 44, the dark bar, 44% in the Chitna subdistrict sample, said that they did indeed fish every year. 32% said most years, and 10% said infrequently. There was a higher percentage of every year participants for the people we talked with fishing in the Glennallen subdistrict. Again, with a large percentage of those people being Ahtna people. Stop me if there are any questions. And I can go into more detail. What I think what I'm again, trying to do, is address the specifics of the question about, what is new and why I think it might be of significance. This one, I think on number two, I'm just going to skip it. It's new information I think the committee thought that when people fish was not particularly significant. I'm going to skip that one. Number three, which I don't have a slide for, has to do with efficiency

and economy of cost and effort. There was substantial discussion in committee about that one. In part the discussion, which I think constitutes some new information, focused on the Table in RC 90, on page 43, Table 15; where, and this is exactly the same Table as we presented to you in 1990, which had to do with the cost of getting, participating in the Chitna fishery, and comparing that to the cost of buying fish, and there was some disagreement expressed in committee about the cost of salmon that were used in this Table and I suspect that warrants further discussion. But we don't have any real new information on that particular topic, although I do think you do have some new information in some of your public information that you received. Criterion four addresses the area that's fished and what I noted in committee is that this is one that usually isn't very controversial. It doesn't by itself, help the Board make a C and T finding. It really helps the Board when it's crafting regulations to provide for a reasonable opportunity to focus the regulations on the area that's fished. However, we think that some of the information we've collected on criteria four might also be applicable to criterion eight. I'll just skip ahead and remind you what criterion eight is, because I am going to refer to that a couple times before we actually get to it. Criterion Eight is a pattern that includes the taking, use and reliance for subsistence purposes upon a wide variety of fish and game resources that provides substantial economic, cultural, social and nutritional elements of the subsistence way of life. So in reviewing the information that you have before you, under the Joint Board Regulations, you're looking for evidence that the fishery and wild resources provide substantial economic, cultural, social and nutritional elements. And, you can find some of that evidence in information

that's put together for the other criteria. For example, when we asked people, does your fishing site belong to your family, of course no one in the Chitna subdistrict fishery said yes to that because the fishery occurs off of public lands and sometimes, across private lands through the payment of access fees. But what the pattern of use in that fishery does not involve fish camps or long-term family or group ownership, either formal or informal, with sites. And the Glennallen fishery does. How's that related to eight? Well, think about the type of activities that can occur at a fish camp that's occupied for many days or weeks, it's a focus of oral tradition, it's a focus of cultural traditions, and social tradition, so it is some evidence that a fishery provides those kinds of elements you're looking for in number eight, although it does address the area in number four. I think that's new information, especially that that kind of pattern has persisted in a nearby subsistence fishery and I don't think that our Division has really explicitly stated that kind of application of that information, perhaps as well as we could have in past deliberations. Criterion five asks for information about methods of preserving and preparing subsistence foods, not excluding recent technological advances, where appropriate, so again, this criterion is recognizing that you are looking for evidence of long-term, consistent pattern of use, and one of the characteristics there in the subsistence fishery is that someplace in its long-term consistent pattern, there has been a wide variety of traditional methods used, although it can change. And, here we found that the pattern as expressed by the Ahtna people for the most part, but other people too, in the Glennallen subdistrict is to dry a substantial portion of their catch and to salt some and to kipper some. But also, to smoke and freeze and can. While we do find a narrower range

of uses, mostly freezing and smoking for the pattern in the Chitna subdistrict; I should make a little segue here to number 89. We haven't, I don't intent to get into 89 here, but if you are wondering how other people in the Copper River basin participate in these fisheries compared to the Ahtna pattern in '89 in our findings, you can find that discussion in number 89. And what you do find is that other residents of the Copper Basin and other residents of the Copper Basin and the Ahtna over the last ten years or so make up about half of the participants in the Glennallen subdistrict. They look like the Ahtna in some things, and their sort of halfway in-between the Ahtna and participants in the Chitna subdistrict in other things, which is kind of what you would expect. That is, people move into that area and participate in the fishery. They basically inculturate to the traditional pattern up to a point. So if you are wondering about that, that was something that was discussed in committee; take a look at 89. Moving on to criterion six, which has to do with the intergenerational transmission of knowledge, preface this one by noting that this is, was a criterion that was directly addressed in the *Peyton* decision, which makes it clear that the Board cannot insist that intergenerational transmission of knowledge be passed down along lines of kinship. However, the criterion stands that you still do look for evidence of intergenerational transmission of knowledge and I believe that criterion also basically implies that this handing down of knowledge takes place over a period of time, that there are significant aspects of the use, cultural, social, nutritional and economic, that are passed down and this doesn't happen in an instant, nor does it happen in a day. It's something that takes place through consistent interaction between elders and older people and younger people. That said about kinship, kinship relations

and how you learned about a fishery are certainly good information that intergenerational transmission of knowledge is taking place, so we still ask about that. It's not absolutely necessary, but it certainly adequate to demonstrate that. And you will see that that is indeed the pattern that characterizes the Glennallen subdistrict fishery. When asked who taught you how to fish on the Copper River for the Chitna sample, the pattern was, self-taught for about 43 % of the people, and being taught by a friend about 44 % of the people. Transmission of knowledge through kinship, even though not a negative thing that you can focus on, is still rather small for that pattern of fishing there. Regarding sharing, we asked, do you share your catch, and we did, uh, this is new. I'm just going to go back to six. This is new information again, and I would say that it is significant in that we didn't have these kinds of percentages in '99. We did have some of this in '84, where many people participating in the Chitna fishery reported begin self-taught or hearing about it through word-of-mouth. We didn't know how that might have changed as families continued to go down to Chitna. We didn't find that it really changed a whole lot, and that is new information. Not surprising, most participants in both fisheries share a portion of their catch. That's not news. What is new information, I think, and information the Board might use in this criterion, also eight, is that we asked people for an estimate of the percentage of their catch that they shared, and you will see that 74 % of the participants in the Chitna subdistrict shared less than half of their catch. Now, what we heard in committee, of course, is that the average harvest in that subdistrict is 14 or 15 fish, which might not be a whole lot, and when you put that up for your, for your family's use, you might not have a whole lot to give away, so even though you give away some, it

really isn't surprising that you wouldn't give away half. On the other hand, what is interesting here is that over half of the participants in the Glennallen subdistrict, give away more than half of their fish. And their giving away more than half of a larger harvest of 80 to a 100 fish on average for this group. That links into number eight, where you look at the economic and nutritional significance of the resource, the social significance, the more frequency of sharing indicated by the larger number of fish being shared. Sorry, Mr. Chair, if you could take a look at RC 90, page 57, we lost a slide here, I think this is significant new information. It has to do with sharing. We asked about who you shared with, with family and with friends, and most participants in both fisheries share with family, share with friends. What we found interesting was that when we asked, do you share with people who aren't related to you and aren't really friends, people that you interact with fairly regularly, 27 % in the Glennallen subdistrict, yes to that. And we heard in committee what the context for a lot of that, is, it's potlatches and sharing with elders and first salmon ceremony and that kind of thing that is evidence that pertains to criterion eight, the cultural significance and reliance. Although we found 3 % of the Chitna subdistrict participants, participating in that, we can't say that that characterizes the pattern that we found for that fishery. Sorry, we left that out of this overhead. Getting to number eight, I've been addressing number eight as I've gone along with information that I think is new and significant. number eight is, I've read it before, and one thing we asked people is to assess the importance of salmon in your diet, whether it's very important, moderately important, not very important. It's a subjective question, certainly, it's a subjective assessment and not surprising, most participants find, reported

that salmon is either very important or moderately important. Not very many people said it was unimportant. Number eight also addresses a variety of fish and game resources, and again, the majority of responses were very important to this particular response. Again, that is in their own judgment in relative terms, although the pattern was for slightly more Glennallen subdistrict participants to report 'very important' as the role of a wide variety of fish and game. And I think this is new in that the Glennallen subdistrict persistence, or that level of importance is something to take note of. Number eight really is a context, in looking at reliance for economic and nutritional significance, you are looking at that fishery in a context that involves economy and culture, and so, looking at economy, we do ask about employment and how that works out and that's similar to what we did in '84. We did find that 62% of the Glennallen subdistrict participants were employed, compared to 87% in Chitna subdistrict, so the pattern in Chitna is one in which the participants are employed. And the pattern also is that they are employed year-round, full-time, 93%. We couldn't provide this kind of information about, that you might use to evaluate reliance here. I mean, we couldn't provide that in '99; we can provide it now. Sorry. Employment type, yeah, we were interested in actually looking at how, what the role of the fishery might be in the local economy of the Copper River Basin, so this was a different split of the responses and here we found for those people who lived in the Basin, only 53% of those who were employed, were employed year-round, so there was a much higher incidents of part-time and seasonal employment for those people. In contrast, the people who were traveling to participate in those fisheries from outside the area are mostly, again, employed. We also asked, 'do you take time off

from work to fish' and the pattern in the Chitna subdistrict to the far right there, on the Table, is about 51% said that that's what they do, and others, of course, would be coming down on weekends to participate there. We found it interesting that the Glennallen subdistrict people said 'no' to that and only 30% said yes, 70% said no. There are a few reasons for that, again, many were not working in the summer time, seasonal or working part-time. Also, their living closer to where their fishing, so the fishing can occur in the evenings and weekends pretty efficiently and it's evidence that that use pattern is incorporated into a local economy, a local-subsistence way of life. This is a new one. It is additional results from our survey. In listening to the discussion at the committee and talking about what is reliance and how can we look at that, we recall that we did ask people about, and this was the question we asked. "How many salmon would you like to be able to harvest?" One of the, the reason why I think this is significant, is when the Board is looking at reliance, it's going to look at such things as how much food does the fishery provide, and of course, how many fish people can take in the fishery, is capped by the seasonal limit. And the seasonal limit in the Chitna subdistrict is 30 for a family of two or more, and sometimes people can get an additional ten depending upon the strength of the run and the availability of fish, but if their needs are being restricted by that regulation, then reliance might be artificially under estimated. So we asked people this, and the results for the Chitna use pattern are dark in this overhead. And you will see that the largest, it's 48.6% of the respondents said that 30 or less is what they were after. That was good for them. And the largest group actually said 30, that they thought catching 30 salmon for their family was what they were satisfied with. And it is

interesting that the next largest group, over 30%, would like to get up to 40. If you add those first four columns together, you get 80.5% of the participants, basically said that their needs were met with 40 fish or less. You can see the contrast for the Glennallen fishwheel fishery, where the limit is 500, and by far most people, 38% of them all, said that they'd really like to get that 500. So that, again, is new information, and I think it directly addresses the question of reliance in criteria eight, and it's not information that we had before. In fact we've never asked this question before. And, that's my overview of new information from our survey and my assessment of its significance to the Board's deliberations today.

MR. CHAIRMAN: Before I ask the questions, I just want to make an announcement. The reports for Committees E and F are out and available to the public. They have been for almost an hour now. Anyone who wishes to comment on those two committees and get their written comments back to us, with the assurance they'll be before board members before we might begin deliberations on either one of those committees, should have their written comments back to us by 3:00 p.m. today. All right, board members, questions for Dr. Fall? Mr. Engel.

MR. ENGEL: Mr. Chairman, I have several questions to ask, and certainly I, if committee members will bear with me, I wasn't there when this was being discussed, but for my own edification, I need to have some clarification of a couple things. What, starting first, I would ask to have a better understanding of the strengths or weaknesses of the information you're providing as to terms of new or significant. That's one concern, because I certainly agree, there is new information. We've got three years

of harvest and participation. That's new. We've got your survey information. That's new. And one piece of information that you didn't speak to yet, was that we now have a competing, if you will, subsistence fisheries in the Chitna area that we didn't have in '99. We had word that it might be there. It happened on a weekend, and we weren't sure, but now we know we have new information. We have, the federal government has corroborated, if you will, the traditional and customary finding for the Chitna area, which I presume you've much of the same information we heard from some of the same people, we've heard at these meetings to some conclusion, and have indeed set-up seasons and that has been prosecuted. So there's three pieces of new information in my mind. Getting to your survey. I see words like "systematic interviews," "chosen opportunistically" and just a minute ago, you said, "walked around most of the summer interviewing fishermen." What did you mean by "systematically?"

MR. CHAIRMAN: Dr. Fall.

DR. FALL: Mr. Chair, Mr. Engel. We mean by "systematic" that we ask the same questions of every person, and in addition, that we had a goal of interviewing several hundred of the Chitna dipnetters to get what we felt was an adequate representation of the use pattern there. In the Glennallen subdistrict, it was systematic in that we consulted with people who know the fishery about which participants would be most knowledgeable about the pattern of use that is established in the Glennallen subdistrict and would give us the best representation of that use pattern, as established by mostly the Ahtna and some other local residents, for the reasons that I gave earlier.

MR. ENGEL: Okay, so systematic was, everybody got asked the same questions.

DR. FALL: Yes.

MR. ENGEL: There was no sampling in terms of a certain percentage of this occurred in June and July, August, like a normal sampling program, or was weekends or weekdays considered in terms of your sampling. I guess your data doesn't show me what seasonal period it occurred on, nor when I make evaluations between weekend and weekday when you talk about whether you took days off work or not. These are important considerations I found in my own survey work in other fisheries, so how do you do that? Mr. Chairman.

MR. CHAIRMAN: Dr. Fall.

DR. FALL: Mr. Chair, Mr. Engel. My understanding is that the interviewing at Chitna took place over the course of ten weeks. It occurred during weekdays and weekends. You're right that we did not in any way stratify the design to talk to weekend fishermen or fishermen during the week. I think the strategy was to stretch it out, so we got a broad spectrum of the, that fishery. And I would just state again, that I think there was consensus in the committee that our findings did give a good representation of the characteristics of that fishery, and comparing it to the earlier findings and descriptions that we have access to, I concur with that.

MR. ENGEL: Thank you, but I wasn't convinced, so I kind of coming to the same conclusion the other people have, and I have to know the process, the quality of data, could be strongly influenced by biases in sampling, both in asking

questions, the timeliness of them, in terms of seasonality. You ask a person, if you wait at all, on the weekends, you might get a totally different response to many of your questions that you would on weekdays and I guess you didn't divide that out, so, I understand that, and likewise, if you sample heavily in June, when the fishery may not be very productive, you may get a different (indecipherable) of people. Maybe that's the novice comes there, and the old-timers know how, when the fish are running. All these things are important for me to understand and evaluate your information. None of these questions are being asked that I find fault in, so I gather information so I can place worth and value and understanding of how you went about your sampling. I guess I would ask when you selected the people from the Glennallen area, you must have had some criteria. You indicated you weighted heavily in terms of the Ahtna. What made you go to one household versus another household? Was there some sampling strategy there? Did you look at the number of fish they took in fishwheel permits in the past, or how did you go about doing this?

MR. CHAIRMAN: Dr. Fall.

DR. FALL: Mr. Chairman, Mr. Engel. The basic sampling strategy was to speak with active participants in the fishery. Again, there wasn't a stratified design or any deliberate effort to talk to people who caught a lot of fish or a few fish or, we didn't look at past records, harvest records to select any kind of random sample. It was basically knowledgeable, active fishers.

MR. ENGEL: Thank you for that.

MR. CHAIRMAN: Mr. Engel.

MR. ENGEL: Mr. Chairman, there's one other thing I'd, there's several other things as a matter of fact, when you interviewed these people, these 313 or 196 in respective districts, did you interview the permit holder, or did you just interview people? I cannot find that in your report.

(Tape 3b)

MR. CHAIRMAN: Dr. Fall

DR. FALL: Mr. Chairman. Mr. Engel. My understanding, we interviewed the people who were fishing so it would be the permit holder. The idea was to interview the person who was holding the permit and who was knowledgeable about that group on the permits, fishing history, and so forth.

MR. ENGEL: I appreciate that and that's what I would have expected, except your report didn't identify that. I would have been really clear if your report said that it interviewed permit holders. But, now I understand. When you're RC 89 you reference that you are comparing local native fishers in the Glenallen subdistrict and non-native local people. You had 18 participants, pretty small sample. And I was trying to figure out where they fished at. Did they fish, were they all in the Glenallen, cause this is just a local not. Did they all fish in the Glenallen subdistrict, these 18 people that were reflected with non-basin participation? Where did they fish at?

DR. FALL: Mr. Chair. Mr. Engel. I think that the 18 non-native basin residents that you are referring to are participants in the Glenallen subdistrict. There were other non-native basin residents participating in the Chinta subdistrict that were also

in the sample. With a few minutes I could find out what that number was, but that 18 specifically is Glenallen subdistrict.

MR. ENGEL: The reason I ask I have come to a different conclusion. But I don't have the raw data and that could make a difference in my assessment. Because you indicated that you, five of the people you interviewed in the Chitna area were non-locals. Then I subtracted the difference between 122 and whatever it was 130 and I come up with 18 people would make 5 in Chitna and 13 in Glenallen subdistrict. And that is on page 10, I think it is of the report. And that becomes somewhat important to me later, when I would like you to cooperate with how did you that.

DR. FALL: Mr. Chair. Mr. Engel. 313 interviewees, 308 non-local and five local were fishing in the Chitna subdistricts, so five out of 313 are local, that is a little over 1 %. It is interesting that matches almost exactly the permit records. I think it is 1.5 % local. So we did a pretty good job of representing the composition of that. And then, we have 196 local and 74 non-local in the Glenallen subdistrict and those are the ones that are all in my, in the Glenallen bars that we see there. So 109 were Ahtna and I assume that most of those Ahtna almost all of them, we could verify this, are local people participating in the Glenallen subdistrict.

MR. ENGEL: I concur and one of the reasons I, you've already referenced it. If you sampled 5 out of the local 308 non-local, that comes out to close to the same percentage as what the permits were issued. Predominately non-local, which would suggested that that sample might have been reflective of the composition in that fishery.

And that fishery has stayed like that since 1984. Again the difference between 109 Ahtna and 122 local is 13 add the 5 and that comes up to 18. Is that correct?

DR. FALL: Mr. Chair. Mr. Engel. I think you're right.

MR. ENGEL: I just wanted to so I can come to the same conclusion that you did. Mr. Chairman I don't want, I have a number of other questions but I want to, we need to get some of these things clarified and the reason of course is that we just found out the sampling scheme seemed to be reflective of the resident or the local and non-resident, non-local in the Chitna district and that is of course not the case at all in the other fishery. So when we are comparing using bar graphs, such as Chitna and Glenallen, we're not comparing, because we are comparing Ahtna dominated sample with the other sample. Am I not correct? I mean I can give you your figures if you'd like me to that.

DR. FALL: Mr. Chair. Mr. Engel. I think that we have been really clear on that, that our sampling goal for the Glenallen subdistrict was to weight heavily Ahtna participation, because if we didn't we thought that we would really not truly get a representation of the long term consistent pattern of use as it exists in that subdistrict. We really wanted to re-evaluate the information we had from '84. The only way we could do that is to focus heavily on Ahtna. But you are right that the results there, if we did do a random sample or some kind of much larger sample in the Glenallen subdistrict for all the Alaskans who go there, we would get some different statistics. Let's remember, what's happened here is that the Board of Fisheries has acknowledge a traditional use pattern in the Glenallen subdistrict largely as established by the Ahtna and of the long term residents there. 300, 400 permits year after year for that by law it's

opened up to all other Alaskans we now have 1200 Alaskans participating in the Glenallen subdistrict. Many of whom take advantage of that and go up there to participate and they are learning about it in a variety of ways. The Subsistence Division is trying to give you a good view of traditional use patterns and we don't want that traditional use pattern statistically to be swamped by what happens under the law, which is that it is open to everyone. So that is again why we went that, in that strategy, that design.

MR. ENGEL: I wasn't faulting the strategy, Mr. Chairman. I am trying to understand the sampling procedure. When one fisher you sample according to local/non-local and the other one you dominate it with, but when you compared your bar graphs one has to realize it is not Glenallen subdistrict compared to Chitna. It's a group of people in there that have a longer tradition of use. If we were to have compared the year 2000, the two fisheries, which you do, its hardly different results. Is that correct?

DR. FALL: Likely, Mr. Engel, probably.

MR. ENGEL: Likelihood.

DR. FALL: Likely.

MR. ENGEL: Very strong likely.

DR. FALL: We can see that from the permit numbers. The growth from the permit numbers in the Glenallen subdistrict over the last ten years, more than doubled.

MR. ENGEL: That's correct. The participation in the Glenallen subdistrict is now dominated by out-of-area fisherman, in all categories, dipnetters and in the other

categories. But you were trying to select those to compare long term uses both back in the 1984 findings and then you turned around and use it in the year 2000 to compare it. And so I guess then the question would be, 'Do you consider the bar that the Board should examine subsistence fisheries are on that group people that have the longest indigenous people standing in the fishery?' or do you think that's the proper approach to this? And if so, why do you think that?

DR. FALL: Mr. Chair. Mr. Engel. I do think that that information is extremely relevant for the Board performing it's task. The Board is identifying the customary and traditional uses according to the eight criterion as I note in the worksheet, you do make comparisons in, the criteria are relative, long term and consistent what is that? There is no cut-off time reliance, again, there is no number above or below, so what we're trying to do is characterize a nearby fishery that no Board is ever said isn't customary and traditional and see how that being the Glenallen subdistrict and seeing how that is changed. Because you are also looking at how the Glenallen subdistrict is changed over time and again what we have found is that that core representative aspect of that pattern of use is not changed that much and it gives you a reference point to make your finding on. Is that the least common denominator to meet? No. We wouldn't suggest that at all. I think that the Board certainly wants to bring it's own knowledge about, or ask us about other subsistence fisheries perhaps in the state and how they might compare. But I do think that the Board needs a good description of a customary and traditional use pattern and I think the one that we have provided for the Glenallen subdistrict, is just that.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: Thank you, I am getting a better sense of what your goals were and I have a much better understanding under the sampling process that you used and why you did it the way you did do it. Because it is somewhat different than some of the sampling that I am used to and so that somewhat helps me. I have several other questions but not necessarily related to the data at this point. Mr. Chairman. I think what we are looking for is new information or some faulty assumptions that the Board made back in 1999. So I have been looking at the new data to try and understand that better and I understand now why this sampling scheme was directed at the way it was conducted.

DR. FALL: Thank you Mr. Chair. Mr. Engel also correctly pointed out that I guess another new piece had been, [timer rang] I guess time is up. Is that correct? Another new piece of information is that the Federal Subsistence Board did act on a proposal to make a positive finding for the Chitna subdistrict and that collaborate the Board of Fisheries earlier decision using the same information. I would just maybe clarify that a little bit, maybe encourage the Board to discuss this a little bit, mainly the relevancy of that finding for your decision here. I do comment on federal board staff recommendations, specifically on this one and the Federal Board did not consider most of the information that you have before you here. Federal Board immediately disqualifies 98.5% of the participants and the use pattern that they've established in the Chitna subdistrict and focuses in then on the local rural residences and what they have done.

It's a very, very different standard they are focusing in on what I think the evidence

shows historically was a very, very different pattern of use. It's still, both might still be subsistence, that is up for you to decide, but what they are looking at is that older pattern is established by Ahtna people and some others there. I don't think that they heard or were considering the same information that you are considering now and they really had a very different task in front of them in some ways. Thank you.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: Mr. Chairman, I had this question I was going to ask later, but since Dr. Fall brought this up, I'll ask it now. Given that there was some federal subsistence fishery this past year, what level of participation from local people took advantage of under federal permits utilizing the Chitna under customary and traditional findings for the federal government?

MR. CHAIRMAN: Mr. Probasco

MR. PROBASCO: Mr. Chair, I'd ask Eric Veech to come forward to give you the number for participants in that fishery.

MR. VEECH: Mr. Chairman. Mr. Engels. Eric Veech, National Park Service, Federal Subsistence Fisheries biologist for the Copper River. There was, we issued 123 permits to households to participate in the Chitna subdistrict for the fishery under federal regulations. Of those, 18 households actually, successfully harvested salmon.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: Mr. Chairman, do you have a breakdown between fishwheel permit and dippers?

MR. VEECH: Mr. Chair. Mr. Engels. Under the federal system users are able to alternate between fishwheels, dipnets, and rod and reel, and of that I think that we had approximately four households, maybe three or five, but approximately four households that actually did harvest fish with fishwheels. The rest of the households were harvested with dipnet. At this point we had about 68 permits returned, none of them were harvested with rod and reel.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: This is my final question for now, Mr. Chairman. That seems to be fairly large interest in local participation in Chitna compared under the state system. These people all already had opportunity to fish in the Glenallen. Do you have any reason why 123 people took out permits, when I think in recent times in the state program there was 40 or 30 or something like that? Is there any explanation for that?

MR. VEECH: Mr. Chair. Mr. Engels. I'd like to just mention that under the state system users have had to choose whether they wanted to fish in the Glenallen subdistrict or in the Chitna subdistrict, under the federal system they are allowed to fish in both subdistricts. I think that a lot of folks obtained a permit simply because it was convenient for them to get both permits at the same time and that just provided them the option. Like I said, very, of the permits that have been returned, 68 out of 123, only a small portion of those actually did harvest fish. But I think the reason that we saw a 123 permits obtained, it was just convenient.

MR. ENGEL: Thank you. Thank you, Mr. Chairman.

MR. CHAIRMAN: Have Mr. Morris and then Mr. Andrews. Mr. Morris.

MR. MORRIS: Mr. Chairman, quite awhile ago, and I was at the time concerned with the issue of the 1984 and 2000 surveys having some relevance, I didn't think that was being answered at the time. I have no question.

MR. CHAIRMAN: Mr. Andrews

MR. ANDREWS: My question's been answered, Mr. Chairman, thank you.

MR. CHAIRMAN: Questions for Dr. Fall, board members, other board members? I think that this might be a good time to stop for lunch and return at 1:30 and roll on. So we'll step down til 1:30.

MR. CHAIRMAN: Back on the record, 1:40 pm, Wednesday, February 5. Alaska Board of Fisheries, Prince William Sound, Copper River Upper-Susitna Finfish Meeting seven of seven seated board members present. We are in deliberations on committee A: Copper River Subsistence. We are on Proposal 42, specifically we are on motion to find grounds to reexamination of the 1999 customary and traditional finding. We have had a report from Dr. Fall, we have had some questions from board members. We'll start out by seeing if we have additional questions for Dr. Fall on his data around new information. Mr. Morris.

MR. MORRIS: Dr. Fall, on page 20 of your handout RC 139 and on page 26, you show patterns of use and sharing of. Could you comment on those two graphs, only as it would pertain to the Chitna subdistrict, irrespective of the Glenallen district?

MR. DERSHAM: Dr. Fall.

DR. FALL: Mr. Chair, Mr. Dersham. Mr. Morris. The graph on page 20 is responses to the question "number of years since first participation in the fishery" and it shows for the Chitna subdistrict participants 14% were fishing for the first time there and 28% for five to one years. So as I mentioned before about 42% of the participants, five years or less, while less than 20% were more than 20 years. So that would be the kind of information that the Board, new information, that the Board could use to help answer the question whether there is a long-term consistent pattern of use. On page 26 is a graph that shows responses to the questions about sharing. Actually this is, sort of the one that I was looking for before. It shows that in the Chitna subdistrict, the majority, 86% did share and of those 89% shared with relatives, 62% shared with friends. I'm sorry I'm reading the wrong one, 80% shared with anyone, 72% of those shared with relatives, 71% of that 80% shared with friends and 3% shared in other contexts. I also had noted in sharing the next one on 27, having to do with the relative quantities of fish that are shared. And I suggest that this information pertain to eight as well as to seven.

Mr. Chair.

MR. CHAIR: Mr. Morris.

MR. MORRIS: Thank you Mr. Chairman. Dr. Fall, could you also comment in the same regard on page 25, criterion number six.

DR. FALL: Mr. Chairman. Mr. Morris. Criterion six is handing down knowledge across generations and that particular graph showed responses to the question "who taught you how to fish on the Copper River?" And for the Chitna subdistrict, we found that 43% of the respondents were self-taught, 44% had learned from

a friend and about 9 % had learned from a parent or other relative. I did note that the Board certainly cannot require intergenerational transmission through lines of kin and these results suggest that is not particularly prominent characteristic in this use pattern. And then you would look at whether 43% from self and 43% from friend would be evidence as to whether this criterion of intergenerational transmission is met. Mr. Chair.

MR. CHAIRMAN: Mr. Morris.

MR. MORRIS: Mr. Chairman. Dr. Fall. Was any of this information available to the Board in 1999?

DR. FALL: Mr. Chair. Mr. Morris. No, all the information that I just summarized, in response to your questions, is information from the survey we conducted in the year 2000.

MR. CHAIRMAN: Other board members, questions? Alright, sounds like we are about to proceed into our deliberations about how we want to vote on this motion. I would encourage board members to build as complete a record as possible about this issue and if we do go beyond this, to continue to build a good record here. We've heard from Mr. Nelson about the advice through the Department of Law and I think that no matter how we go here, it is very important, I would encourage that board members give reasons for their votes, if possible. Sometimes a board members going to be on the fence about an issue right up til the time they vote, but even if that is the case, before we vote, I would like to hear that. Because I would like to build a really good record and that would include either knowing why you are voting the way you are or the

fact that you are still considering voting either way right up to the last minute and why that is. With that, Mr. A. Nelson from committee would you like to lead off?

MR. A. NELSON: Certainly, Mr. Chair, thank you. I'll start off, of course, I was one of the committee members that made the recommendation that I found the new information, in the 2000 survey, done by the subsistence division to contain considerable amount of new information that wasn't available to the Board in 1999. In particular, some of the ones that I found the new information compelling on was in relation to criteria one, six, seven and eight and referring back to RC 126, which was the transcript from the 1999 meeting. Criteria one and eight and six to a lesser degree, certainly were the more discussed and the more, or the ones that didn't necessarily have consensus around them and that is where a lot of the discussion focused. I'd also note that one of the RC's we received from the public RC 160 was also from a member of the public, it was on the committee for the public panel, stated their concerns about it that 1999 Board of Fish meeting in Valdez, that there were reasons that a fair number for Ahna individuals weren't able to participate in that meeting. I believe they were at another meeting and they feel that, some of that information was absent and not available to the Board and we have received a lot of that benefit through testimony, RC's, and the committee discussions. So, like I say, I am in favor of bringing it up for reconsideration. Thank you.

MR. CHAIRMAN: Mr. Nelson from Law, a comment?

MR. L. NELSON: Not on Mr. Art Nelson's comments but I just wanted to address another thing if I could. You talked about potential grounds for taking another

look at this determination and so far all the information has been addressed toward the, whether or not there might be new information that would warrant reexamination of that earlier determination. The other grounds might be that you find an error in the 1999 action and that could be, I mean there are several potential ways you could do that possibly, but I'd like to address and kind of follow up on my earlier advice and why I don't think there was a legal error in the 1999 determination and why it was approved. And to do that a little bit I'd just like you, to give a little bit of background what standard, standards, what legal standards you're required to apply when you make a C and T determination. First of all AS 16.05.258 requires that the Board, Board of Fisheries and Board of Game shall identify the fish stocks and game populations or portions of stocks or populations that are customarily and traditionally taken for use for subsistence. So the Board has an affirmative the duty to identify those kind of uses. There is a statutory definition that you're required to follow in making a C and T determination. And if you want to follow along that's in you black book, that's page 60 and I am looking at AS 16.05.940, paragraph seven. It is a definition of customary and traditional. And this is what statutorily required for you to find to make a C and T determination. Customary and traditional means the non-commercial, long-term and consistent taking of, use of and reliance upon fish or game in a specific area and use patterns of that fish or game then have been established over reasonable period of time, taking into consideration the availability of the fish or game. That's your primary, mandatory guideline that you have to follow, in making a C and T determination, basically it's gotta be non-commercial, long-term, consistent use and reliance upon a fish or game in a specific area and use

patterns that have been established over reasonable period of time, taking into consideration the availability of the fish or game. Since, along with that, the joint Boards have adopted a regulation on page 917 of the black book that we have been referring to, the eight criteria regulation 5AC 99.010 and they're found in subsection B of that regulation. And I won't read all the criteria but they're, you should have them handy for your reference, whether they're in one of the other materials you've been given for the consideration here or keep your black book out, but what I'd like to explain about this is that it requires you to, well I'll read the preface language. Each Board will identify fish stocks or game populations or portions of stocks or populations that are customarily or traditionally taken or used by Alaska residents for subsistence uses and then it says, by considering the following criteria. And then, so it would be appropriate for the Board in making that determination under the statute whether uses have been customary and traditional to consider the eight criteria. What our legal position is in considering those criteria it doesn't necessarily mean that you have to make a positive finding as to each of those criteria to make a positive C and T determination. I am going to give you caveat there, especially if you look at number one, if you read that criterion then look at a statutory definition, they are very specific, or are very similar almost identical, number one is long-term consistent pattern of non-commercial taking use in reliance on the fish stock or game population has been established over a reasonable period of time and the criterion adds of not less than one generation, excluding interruption by circumstances beyond the users control, such as unavailability of fish or game caused by migratory patterns. And then the, there are a lot of other criteria obviously in there as well, but you,

it would be, I think it would be difficult to make a negative finding in your mind or to justify your vote on alternative one, or criterion one and be consistent with the statutory definition and make a positive finding without positive finding on criterion number one. Arguably there are other parts of these parts of other criteria that might be helpful as well. Criteria number eight also talks about a pattern that includes taking, use and reliance for subsistence purposes, similar to the statutory language, although criterion number eight specifically is, discusses taking, use and reliance for subsistence purposes upon a wide diversity fish and game resources as opposed to the necessarily that particular stock as identified in criterion number one. So that, and then there might be others that might help be identical to statutory definition as well, but I just wanted to lay that out, the legal standards for it, when you consider criteria it's sort of like considering the allocation criteria when you make allocation decisions. You don't necessarily have to make a positive finding for each one, but each board member when they vote should satisfy themselves at customary and traditional uses have been established under the statutory definition and also in deciding whether or not that occurs consider all the criteria listed in 99.010. That being the standard then, I and reviewing the record in 1999, and deciding whether or not it could be approved as being consistent with the subsistence statute and regulations, Department of Law did find in 1999 that the Board record justified and was consistent with subsistent statute in applicable regulations as well. And I reviewed, I haven't reviewed the entire record, I don't think anybody has of the 1999 determination because the entire record would be not only deliberations, not only the reports by then furnished the department by public testimony discussions and committees and other

things and we just didn't have the time and resource to provide that to you and you probably wouldn't have had the time to review it all but given the legal standards and what I have reviewed of the record and what I remember from that meeting then, we were satisfied that the finding then was consistent and no legal error was made. It might still be within your providence to decide based on new information that it might have been some kind of mistake or inaccuracy in the earlier information given to the Board that might justify reexamination of that determination as well. But that would be probably a separate determination from when there not, a legal error was made, although you still have the right to, that's just my advice, you have the right disagree with my advice and decide on your own, your own mind whether a legal error was made, but that's just our position and our report on that issue. I would be happy to answer any questions.

MR. CHAIRMAN: So when you say from, in your opinion no legal error occurred, is that the standard when we consider error under this motion, is that the same standard we're suppose to look at?

MR. L. NELSON: That would be one aspect of error, and if you can identify a legal error and satisfy yourself a legal error is made, then I think that would probably warrant and maybe even require re-examining this to make sure that you correct any legal errors. I think it is possible for you to also look at the possibility of factual error that was made. I don't mean an error in judgement, evaluating the evidence that was in front of the Board, but I mean, if you could show that the evidence given to the Board at that time was actually was inaccurate or false or something like that, that would, I think that would legally justify you in reconsidering the prior determination.

MR. CHAIRMAN: The reason I asked, I am kind of in a unique position because I am the only board member that three years ago voted 'no' for the C and T finding, that is still on the Board so, you know. I hear you saying that just me looking back three years ago and thinking about the information that was before us and the fact that I came to a decision of 'no' and four board members came to the decision of 'yes', that's not enough for me to say that the Board erred just because they voted differently than I did. Is that correct?

MR. L. NELSON: I would agree with your assessment of that. I think, I think you can still, if I was a voting member I wouldn't rest only on that, because actually the Board was whatever the majority voted on and you may have disagreed with their assessment of things but it would be strong, better if you were able to point out actual errors as, for example, legal errors or relying on inaccurate or false information or something like that.

MR. CHAIRMAN: Thank you Mr. Nelson. Mr. A. Nelson

MR. A. NELSON: Thank you Mr. Chair. I guess for Mr. Nelson from Law. And I know I mentioned this to you a little bit earlier during one of the breaks. Something that came up during and I believe some folks mentioned it in their testimony and was also discussed during the committee meeting. I am not sure if could rise to what would be an error with inaccurate information or not but in relation to Table 15 in the C and T worksheet RC 90 on page 43. The one that estimates costs to participate in the fishery. Quite a few folks speak to those figures, probably not representing what it costs to the average guy to go and dipnet in Chitna. Right now we don't have different

information or anything that has been based on a survey or something like that but heard considerable information about that and I would note that in the transcript the deliberations in 1999 one of the board members relied heavily and mentioned several times the cost, for their alternative to go out and buy salmon from Fred Meyer at \$13.99 a pound, many folks that that was an incredibly high price and kind of wanted to get your input on that. Error? No error? Grey area?

MR. L. NELSON: Mr. Chairman. Mr. Nelson. I don't think I would, I don't think it is my place to decide whether or not that's error or not, that's yours. But, I would say this about that, I don't think, I think that the information, and I think that we have the author of the information here to talk to if you want to, but, and can tell you about the accuracy. But I don't think, I don't think that, everyone understood that information was a snapshot in time and that some people found helpful and some people probably didn't, but I don't think it purported to be the, it didn't purport to be the be all end all as to cost for participating in the fishery. And I think that Dr. Fall could, you know explain more about it. But, I think it's pretty common for the Board to get information about what is happening in any point in time and rely on that to a certain degree and those facts change and I didn't think it was error at the time and I still don't think it was error at the time for the Board to or board members if they chose to rely on that information to decide whether or not some of the criteria were satisfied in their minds.

MR. CHAIRMAN: Mr. Nelson

MR. A. NELSON: I personally kind of agree with the fact that it might not rise to the full level of error, but certainly I think could constitute consideration you know if we get to that step and looking at it maybe considering that it was maybe not accurate, maybe not particularly applicable across the full spectrum of users in the Chitna subdistrict and I'd also like to note that criteria three which that cost estimate kind of relates to was the one of the other sticky points for the criteria in the 1999 deliberation were there wasn't consensus.

MR. L. NELSON: Just a quick response. Just a point of clarification, according to transcript, look at transcript one, three, and eight where the criteria were, didn't have a positive consensus, actually six was a positive consensus that there wasn't any objection to that.

MR. CHAIRMAN: Mr. A. Nelson

MR. A. NELSON: My read of that as it went through when six brought up the first time there was consensus on it, but if I recall correctly one of the board members later when they got further down the line in deliberations brought it up that he actually had a problem with that and it was discussed a little bit more on the record.

MR. NELSON: I think, I think that's correct.

MR. CHAIRMAN: I've got Mr. Morris and then Mr. Engel.

MR. MORRIS: Yes, Mr. Nelson from Law. In reading the transcript this, the fact that it was very efficient evidently to go down and get some fish, the \$1.38 a pound as opposed to \$13.69. One of the comments made by our board member who actually voted in favor of this, was that you could take an old beater of a car and a tarp

and a bologna and some stale bread and you could go down there and catch a lot of fish and come home and I believe that being said in reference to the actual cost involved in prosecuting this fishery does in fact give it credibility toward the cost issue. In my mind it does. And especially since we have seen pictures and have heard testimony that the real world is that there's a lot of, you know, four-wheelers, new trucks and motor homes and those kinds of things that probably lead us to believe that that comment which did refer to a price per pound was and maybe other comments, I know that there were other comments made in that regard the cost, in what it costs to prosecute the fishery was in error and certainly could be construed to misleading and I am just wondering if we don't bridge the gap with that particular concept. As to whether it's an error or not in there.

MR. CHAIRMAN: Mr. Nelson.

MR. L. NELSON: Mr. Chairman, I think those kind of determinations are probably within your discretion. You are going to need to look at that. I would, I don't know, I would caution a little bit to, I think that you need to be careful in deciding cost and efficiency when you do that you can look a lot a range at different things. I don't think that you should necessarily look at either the cheapest way of doing something or the most expensive way to do something, but probably look for something that is more representative of the fishery or something. That's only one of the things you can take into use, I don't think it was, I am confident that it wasn't in error for the Board consider that in 1999. And I have yet to hear credible evidence that it wasn't accurate as prepared for at the time.

MR. CHAIRMAN: Mr. Morris.

MR. MORRIS: No more questions.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: Mr. Chairman. I guess I could probably try to provide what I think an error in regulation was or is and maybe what new information means to me as a board member who has sat through this issue twice. I was there in 1996 and I voted one way and then I had additional new information or error in regulation brought to my attention in 1999. One of the errors in regulation in 1999 came to my attention because the Supreme Court made a ruling on *Peyton*? And that was one of those things of intergenerational transmission of skills and techniques and so and so forth and it did not have to be tied to family, kinship type thing. And that was certainly missing in the *Peyton* thing when I looked at that before so that was a new piece of information that we've seen here that a lot of people from one of area learn from friends or reading books or whatever and that is not requirement, so that was a new piece of information. Probably an error, in my judgement at least, when I dealt with it in '96. And there were other things that I think I might have had some inappropriate views when we looked at types of preparing and preserving the fish where you saw the high drying of one class of fisherman and the Chitna dipnetters use more modern techniques and although the regulation was the same in '96 that was probably new information that I didn't pick up on. Maybe that's, I think also, in part then, the new information to a large degree was, came from the courts. As I learned, I think I got more familiar with getting away from the user and look at the use of the fish stocks. I think I didn't have that firmly in mind, so I think when you look at that it's up to a board members view, its, you know it when you

see it, but they look different to each of us. But I think certainly passed down by the Supreme Court is a, just think what the difference was in 1984, when the Board looked at this issue for the first time and decided for the first time that this was not a subsistence fishery. They looked at a law that was in rural based and the language throughout that was rural type thing. When Boards looked at that after '92, that rural base was not there, so that would be new information or new approach or new assessment. I don't know if that is helping you, but I don't think that anybody can put a finite sub-standards, what is new information or what is an error in regulation, very easily, but certainly you can if the Supreme Court, I guess, if you agree that the Supreme Court is the ultimate decision making, I guess that you could go to the federal court and say that's the ultimate, but that's one thing that has played into my mind in terms of finding error in regulation or error in reproach. Mr. Chairman.

MR. CHAIRMAN: Thank you Mr. Engel. Other board members. Mr. Engel.

MR. ENGEL: Chairman, I have another real quick thing I'd liked to have clarified on the record relative to customary and traditional. Mr. Nelson, I am going to ask this question of Mr. Nelson. Page 60 it talks about customary and traditional means of non-commercial, long-term and then it goes on has been established over a reasonable period of time. 99.010 that same criteria, gives additional definition why inserting reasonable period of time is not less than one generation. We've heard a number of times from subsistence staff relative to this as recently as a couple of weeks ago in southeast Alaska, long-term generation may be 20, 30 years, something in that

range, by the time the anthropologist talks about a youngster being able to learn until that somebody gets to be breeding age, or something like that. Mr. Nelson, the question would be then "has there been any legal assessment from courts or anything that would suggest that is a reasonable standard?" Has this been brought to their attention? Have they, was it part of some of the findings or whatever that was brought to, and they didn't comment on it, or have commented on. Anything like that would be useful, Mr. Chairman.

MR. CHAIRMAN: Mr. Nelson from Law.

MR. L. NELSON: Mr. Chairman. Mr. Engel. I hope I understand your question. Are you asking whether or not the 20 to 30 year standard has been ruled upon as being a generation or are you asking whether the least one generation is appropriate as a reasonable, long-term, reasonable period of time.

MR. ENGEL: Both.

MR. L. NELSON: Okay. There isn't any court decision that I am aware of or anything else that, the only thing it interprets that particular in any definite way that it interprets that particular term in the statute. Long-term, consistent taking, use of, reliance upon fish or game over reasonable period of time is the regulation that the joint Boards adopted, that we looked at that says at least one generation. I think, and it is up to you to decide what a probably a generation is, I think that the explanation that you have been given from 20 to 30 years is pretty reasonable. I think that it has been relied on by both Boards in the past to be a period of 20, 25, 30 years, I think would be a minimum of

20 normally and probably no more than 30 in the sense that or something in there, and it's up to you but, I don't think that there is anything particularly enlightening that has occurred since the last time you looked at this to help you in your decision-making process.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: Thank you, Mr. Nelson. Thank you, Mr. Chairman.

MR. CHAIRMAN: Other board members? Mr. Nelson from Law.

MR. L. NELSON: I'm sorry Mr. Chairman, I had one more comment on a different subject. To further explain why we didn't find a legal error. One important point might be to remember that while the use of subsistence, while the patterns of subsistence use in an adjoining area, like the Glenallen subdistrict compared to the Chitna subdistrict, might be helpful in your evaluating whether or not there is C and T use in the Chitna subdistrict, that Glenallen subdistrict use patterns are not the legal standard that you need to apply here, the legal standards are found in the statutes and then as expanded in the regulatory criteria, but I don't think it's inappropriate for you to compare, but you need to exercise some caution as not taking that as a legal standard that a legal minimum standard that you have to meet in order to find C and T use. One of the things in the *Peyton* case that was an example of that was the Board had determined that the methods of storing and preserving were more narrow and fewer different kinds of methods were being used in the Skwentna area than other parts of Cook Inlet where subsistence use is more established and the Board sited that as one of the reasons for that comparison for as one of the reasons for not finding C and T use in Skwentna, in the Skwentna area and

then court found a legal error there and specifically noted that the joint Boards criterion allows you to quit using different kinds of methods and means as technological advances occur and that you have to explain yourself pretty carefully if you are going to use that as a to make a negative finding. That was one of the issues that was decided in that case.

Thank you.

MR. CHAIRMAN: Well I was just about to address this, the thing about comparing the Glenallen subdistrict to the Chitna subdistrict. I'm going to make some comments first about whether I see error, then I'll get to that. In looking at what we did three years ago and trying to determine first what my standards should be for seeing error and then whether I see it or not. I read the transcript, fully, and I have a pretty good memory of the things before us and the things we considered. I remember that I focused on criterion one and three and eight. In that long day of deliberations three years ago, and at the end really focused on criterion eight, because I felt that it wasn't demonstrated and I felt that for me it was very important. I recognized Mr. Nelson's comments about the following criterion and how it is kind of similar to the way we use the allocation criteria about which ones we focus on and not having to find all eight or seven, in our case the allocation in which we make a decision and I agree with that. For me criterion eight was very important, because I kind of see criterion eight as a microcosm of the whole debate on subsistence that has been going on in this state for many years. And you're definition of subsistence kind of determines how you see, how you answer question number eight and that over-arching definition that I have come to find. What is subsistence? I've guided me in my decision and I didn't think that uses at Chitna met the

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criterion eight and caused me to vote no. Well, I've looked at the record, I've looked at the transcript of the record and I think that the case for criterion eight was pretty weak. It was mainly carried by one board member and I felt that we need really try towards the end to address criterion eight and slipped back into addressing criterion one and didn't address parts of eight that are different than one. But as far as do I, would I make a yes vote, right here on this motion based on err, no I would not because like I say I remember that deliberation pretty well and I remember how much we all agonized and I know that Mr. Engel, even though he didn't speak criterion eight at the end specifically was that his reasons for supporting that criteria, I know he was extremely deliberative in making his decision. So I, if I had to make this decision about this motion based strictly on err I would not be able to. When I consider new information, first of all I didn't not use a standard of comparing the survey results from the Chitna subdistrict to the Glenallen subdistrict because I heard early on at committee work from Mr. Nelson from Law that that, shouldn't use that as a bar to see that the fishery passed. So I didn't do that, I, the way I viewed that information was comparing it to what I thought was before us three years ago and how my mind set was regarding answering those questions three years ago. And when I do that and look at the survey results, I do find new information in criterion one, on both pages 20 and 21, and criterion six on page 25. I was surprised by some of the results that were different than kind of what I would have guessed that those percentages might be based on what I knew three years ago in both cases, they would weigh a little stronger towards a no finding by me in those criteria. I do think that there is

new information that would make it appropriate for this Board to reconsider it, and thus that would be my basis. Other board members?

UNKNOWN: Question?

MR. CHAIRMAN: Question is called Mr. Marcotte.

MR. MARCOTTE: The motion defined grounds for re-examining the 1999 customary and traditional finding. Russell Nelson.

MR. R. NELSON: No.

MR. MARCOTTE: Mr. Jensen

MR. JENSEN: Yes.

MR. MARCOTTE: Mr. Engel

MR. ENGEL: Yes

MR. MARCOTTE: Art Nelson

MR. A. NELSON: Yes

MR. MARCOTTE: Mr. Dersham

MR. DERSHAM: Yes

MR. MARCOTTE: Mr. Andrews

MR. ANDREWS: No

MR. MARCOTTE: Mr. Morris

MR. MORRIS: Yes

MR. MARCOTTE: Motion carries. Five in favor, two opposed. Mr. Chair.

MR. CHAIRMAN: Alright, I believe now that the appropriate motion

would be a motion to adopt the proposal as written.

UNKNOWN: Second

UNKNOWN: I move and you second.

UNKNOWN: Second

MR. CHAIRMAN: Okay the proposal is before us. What that means board members; this proposal asks us to reverse the findings from three years ago about a customary and traditional usage determination in which would in effect turn this fishery back into a personal use fishery. The, what that means is that a "yes" vote would be finding against customary and traditional and making it back into a PU fishery. A "no" vote would be to maintain the customary and traditional finding and keep it as a subsistence fishery. Mr. A. Nelson from committee.

MR. A. NELSON: Mr. Chair, if you don't mind I'd like to ask for a just couple minute break to get my papers in front of me again to go through this discussion now.

MR. CHAIRMAN: We'll take a ten-minute break.

(Return from break)

MR. CHAIRMAN: Back on the record 2:40pm, Wednesday, February 5. Alaska Board of Fisheries, Prince William Sound, Copper River Upper-Susitna Finfish Meeting, seven of seven seated board members present. We are in deliberations of Committee A, Proposal 42. Before we proceed the deliberation of the eight criteria, I'd like to get board members feelings and Mr. Nelson from Law's feelings on how we might proceed. Three years ago, we proceeding through a discussion of the eight criteria and chairman at the end of each discussion asked if there was consensus for a positive finding

of each criteria. We kind of leaned towards not doing that positive finding at the end of each. The way you, Mr. Nelson, had described the way we should consider the eight criteria, it seems to me that it would be beneficial to go through these one by one and have our discussion, but as far as seeking consensus, I think that maybe just go through them in a discussion, build a record and then deliberate on how the board members feel on the overall customary and traditional finding. Mr. Nelson.

MR. L. NELSON: Mr. Chairman, I agree with you completely. I think that's, probably either way is an acceptable approach, but the way you just described is legally is fine.

MR. CHAIRMAN: Other board members, any comments on that? Alright, Mr. A. Nelson you want to lead off with criteria number one.

MR. A. NELSON: Well I think that

MR. CHAIRMAN: Or would you like Dr. Fall to?

MR. A. NELSON: My thoughts would be that maybe Dr. Fall could give us a brief run down on the information as it pertains to the eight criteria as we go through it. Not necessarily just new information but a summary of all the information we have pertinent to the issue of criteria.

MR. CHAIRMAN: Dr. Fall, criterion one.

DR. FALL: Mr. Chair, criterion number one which is on page 13 in RC 90, a long-term, consistent pattern of use and reliance on the fish stock or game population has been established over a reasonable period of time, including of not less than one generation, excluding interruption by circumstance beyond the users control.

which is unavailability of the fish stock caused by migratory patterns. I want to start out by just reiterating something that I mentioned earlier. The second bullet here in this overhead which is also in RC 90, that we as just heard the Board is charged with identifying stocks of fish or portions of stocks with customary and traditional uses. It examines information about use patterns that have been established by a groups of people, including uses in the past and uses in the present. It is charged with finding customary again find stocks that are customary and traditional use. It is necessary to discuss how people harvest and use the stock in the described fishery. Boards making no determination about who may participate in these fisheries or any other subsistence fishery. The board is identifying C and T uses and a pattern of use. It is not identifying users, and the entire worksheet is organized to describe a pattern of use as established by Alaska residence. I wanted to cover some of the history, so this is not new but I think it is still relevant, it comes out in RC's, it comes out in committee and we need I think to have it part of this record. Within the entire Copper River prior to 1910, there was a dipnet fishery including in the Chitna subdistrict. Fishwheels were introduced around 1910 and rapidly replaced most but not all use of dipnets. At statehood, the entire drainage was open to subsistence fishing, Copper River drainage in 1964 fishing was limited to the main stem of the Copper river up to ~~Stein river~~?. The subdistricts were created in 1977, in 1979 fishwheels were prohibited in the Chitna subdistrict, it became dipnet only. In 1984 as we know, there was negative C and T finding for the Chitna subdistrict and creation of the personal use fishery, and in 1999 a positive finding which we now have as our regulations. We were requested to make this graphic to show when,

requested by the public, to create this graphic that shows when the fishery in the Chitna subdistrict was operating under subsistence rules and when it was operating under personal use rules. This is not new information, Mr. Chairman. I think that the board was just fully cognoscente of the regulatory history before but just to address this concern that this isn't clear, that up until, it had been pre-statehood under whatever rules that were which weren't many it was operating under federal personal use/subsistence rules and up until and through the 1983 year, of course in the '60's and '70's we just had subsistence, we didn't have personal use and it wasn't until '78 that we had seen the customary and traditional adjectives attached to subsistence uses. As you know, when the Board first addressed this question '84 which is the first thing hatched, that year was personal use. '85 we [indiscernible] *Madison* decision and went back to subsistence and from 1986 through 1999, people fishing there were people fishing under the personal use rules and of course from 2000 on under the subsistence use. Again, notice that in the past fishing that was called subsistence and it looked very much like the fishing in the Glenallen subdistrict did occur in the Chitna subdistrict largely from dipnets operated from platforms. The fishwheel was introduced, and this fishwheel is being operated in what is now the Chitna subdistrict, and drying racks and other forms of putting up salmon did occur in this district. This again Mr. Chairman is not new information these were part of our presentation in 1999 and the Board in 1984 was cognoscente of the fact that Ahtna people had used the Chitna subdistrict for hundreds of years. There are more maps in the RC 90 that I won't go through, this just reiterates the point from traditional Ahtna place names that Ahtna oral traditions and history, very well documents traditional uses in the

past in this area including uses of fishwheels and dipnets. This particular map shows where we know fishwheels were being operated up until 1974 and it was about in the late '60's and early '70's that the last Ahtna people operated fishwheels and finally moved to the north above the bridge to sites outside of the Chitna area and we have many RC's that address why that happened. In a nutshell, people moved because of the crowded conditions that were created by the growth of the dipnet fishery. By 1978 use of these were the fishwheels now being operated in here the last year that they were legal and our information suggests that all of these were being operated by people traveling to this area from outside the region and they were relatively new fishwheels, that were being established for the first time in these places. So there really was, in our assessment of the historical information, a clean break between the Ahtna pattern and the pattern that was developing in the Chitna subdistrict starting in the late '30's and moving on. Let's skip these two just as useful to see once again the trends in the Chitna subdistrict permits required since statehood and it's important to know the growth the spurt, so to speak, that occurs around 1990, when good access was first developed with the improvements of the road into Chitna. The decline in growth in actual reduction reflecting poor return in the mid-70's, rapid growth due to good return in the late '70's and early '80's and then steady growth after declines in mid-80's up until the present, where we, the department now issues about 10,000 permits for this fishery. The harvest basically displayed the same kind of pattern [inaudible] And we also know that the vast majority of Alaskans who participate in this fishery come from Fairbanks about 35% from Mat-Su about 13% came from Anchorage about 43% and then other about 9%. This is the fourteen year

average, less than 1% are from the local. We're not talking about Glenallen, so I'll skip that. Now we're up to new information and some old information on criterion one. In RC 90 your first presented with background I gave you about Ahtna presence in the area. None of that is new, we talked about the break in the patterns of the fishery, there moving on the, have included some new information, starting on page, about page 35 is when we start to, in the text address the new information that we've collected in our survey and then page 36 specifically to criterion one. I've already gone over these, but I'll just point out again that this is Figure 24 in RC 90 and it addresses length of participation in the fishery on page 38 in RC 90 and you can use this to assess long-term consistent pattern of use. Where that characteristic of a use pattern of this fishery and note that 42% of the people that we interviewed have participated in five years or less and less than 20% have participated for more than 20 years. And the other new information was Figure 25 which addresses the consistency of the pattern where 44% said they fish every year and then 32% most years, but not every year, not an annual use and then 10% infrequently. So that gives you a quick summary of the information that we assembled with emphasis on new the information that was described in more detail earlier.

MR. CHAIRMAN: Comments board members on criterion number one.

[inaudible] go on Dr. Fall.

DR. FALL: Criterion two is a use a pattern recurring in specific seasons of the year. I think we've already noted that this not one, I think that there has been very much controversy over the new information is just asking people when they fish, it's nothing really new and reflects for the Chitna subdistrict a lot of it has to do with

when the fisheries are open and when the fish are available and these people are traveling [indiscernible].

MR. CHAIRMAN: Board members, comments/questions on criteria two?
Go ahead Dr. Fall.

DR. FALL: Again I don't have a directive on three which is a use pattern consisting of methods and means of harvest which are characterized by efficiency of economy of efforts and cost. You could note that new information is that the pattern of choice remains the dipnet for people who travel to that area not the fishwheel which they do have the option doing, Glenallen subdistrict. I would also note that we have not updated the Table 15 and I would comment, there was some discussion of that earlier and I would comment that the reflection I with this Table, in our worksheet in '99 again here is, is incomplete it gives you some of the costs associated with traveling. It is pretty much a travel costs in comparison for traveling from Anchorage, Fairbanks and Palmer to Chitna and just using math to figure out how much producing a pound of fish with just traveling there costs and we know that it didn't include a lot of other costs associated with going there, which would perhaps, which would definitely add some to that cost. I would also note in reviewing the transcript myself that I did note that the cost of fish that was cited a number of times in the transcript by board members was \$13.98 per pound and it is pretty clear on the Table that that's not what we were suggesting the, to be used in the comparison that we have collected some information about the price of whole fish, fillets and canned fish, which range between about \$6.00 and \$8.00 a pound when we collected that information which is substantially lower than \$14.00 for fresh Copper

River sockeyes early in the season. But I think that is all I really have on this one, except for to note that earlier Boards have spent time comparing the relative efficiency of the dipnet and fishwheel, dipnet fished the Chitna after traveling considerable distance to go there versus fishing with the fishwheel established near ones residence or established along the river at a traditional site that you have permission to access. That is pretty much what we have on criterion three.

MR. CHAIRMAN: Board members. Mr. A. Nelson

MR. A. NELSON: Thank you Mr. Chair, I apologize for not jumping in with comments and questions over criterion one, but I was jamming some notes down on my pad here. I would like to step back and address that and two as well, my thoughts on it. But while we are on three, I wanted to talk about that and of course there was some discussion in the committee, I think I mentioned this earlier, people's concerns that Table 15 in the C and T worksheet probably represented a very low end of the spectrum of costs to participate in that fishery. I'd like to point out to the board members about RC 161, as a member of the public, and I believe that on the third page of that it offers what would probably be a very high end of the spectrum to participate in that fishery. Where's the middle point? I don't know, I'm still mixed as whether I feel the fishery meets criteria three and I look to other board members for their thoughts before I can try to make a decision on that one. Backing up slightly to criteria two, I think that's of course from the '99 record that, that was a consensus issue and I think particularly when you are dealing with salmon stocks you are always going to be applying the specific seasons of the year especially fresh water. Although I would note that there were some differences between

the two districts as to when they targeted their harvest throughout the seasons, when each activity was. However I certainly feel that the Chitna subdistrict fishery meets the criteria two for the harvest and patterns which occur there [indiscernible]. Backing up one further, the long-term pattern of use and reliance. This is one I know, as Mr. Nelson from Law mentions that the description of this criteria really closely matches the statutory definition of customary and traditional. And part of when you're looking at this one, get stuck perhaps when looking at use versus users. And a lot of time to examine use, you have to look at users, especially when we look at patterns of use. But the, on page 20 of RC 139 Figure 24, it shows number of years that individuals have been participating in the fisheries by district. You know, under 20 years was by far the majority of them, with less than 20% and about 17.6%, 18.6% participating 20 years or longer, part of that gets to that question of how long is a generation are we looking at users or uses in this instances, clearly looking at it in this way, it looks like the vast majority of users haven't been participating in the Chitna subdistrict for a long period of time and it was pointed out earlier, 42 odd percent have been doing it less than five years. I am not sure where to look on this. Are we looking at uses or are we looking as users at this point, or is it fair to look at both? I guess that's a question to Mr. Nelson or Dr. Fall if they have input on that.

MR. CHAIRMAN: Mr. Nelson from Law.

MR. L. NELSON: Mr. Chairman I would agree with to a certain extent at least with Dr. Fall's earliest comments, it is impossible not to look at users sometimes to decide what use is occurring. I think that it is important to dwell on patterns of use, I

think legally you could interpret probably this criteria and even the statute a number of different ways. It is probably ambiguous as to whether or not the use has to keep reoccurring or the use has to be by the same person over a long period of time. I think that both, both questions probably have some merit as to determining what the long-term pattern of use is. I think that what, when they, when the court is cautioned, is not to talk about users, we have some specific examples from court decisions, I don't think that you can decide that because somebody lives in a community that isn't characterized by heavy subsistence use that you can ignore their use. You can't classify them by their place of residence. I don't think that you can classify them by race. I think that would be illegal and err of Constitution and would be inappropriate. I think that, and there are, you can't classify them family relationships. We know that from the *Peyton* case. Passing down between generation doesn't have to be between families. So you know we've got some general guidelines, but the court also recognized in the *Peyton* case that you couldn't look at use without looking at the users and how they were using things as well. I am sure that doesn't help very much, but it's the best I can do.

MR. CHAIRMAN: Any additions Dr. Fall?

DR. FALL: Thank you Mr. Chairman. I agree with everything with Mr. Nelson from Law has said about this balancing that board needs to do here to be real careful to make it clear that you were focusing on evidence of a long-term consistent pattern use and we know from public testimony as well as a number of RC's that we have, that there is evidence that this fish stock is used by non-Ahtna people and well into the '40's and probably earlier than that and moved slowly and then very rapidly in the

'70's and '80's and on. So I think that we should take that into account when looking at the pattern of use and of course part of that is not only long-term but also consistent and I think the reason why we ask people how about long they've been using and how frequently the user has been using it is to see whether the fishery, the pattern of use of that fishery is characterized by people really going down there and relying on that year after year no matter what, no matter whether the runs are good, the runs are bad, or if they have work, they don't have work, they still go down there and do that, and then it is something that has been done by people substantial number of people it characterizes that pattern of use. It doesn't have to be a 100%, it probably doesn't have to be 60%, but it's your call as to what percentage of that is, defines the characteristic of that use, along with the other criteria. So I hope that helped.

MR. A. NELSON: Yeah that's, thank you, you both clarified it for me quite a bit. If you look solely at the use, you know obviously the Chitna salmon stock at Chitna have been used for a long time and they have been used consistently every single year. But when you start to look at the users, as I pointed out with Figure 24, the long-term part, when you are looking at users it appears to be on a shorter term, most of them under 20 years in the Chitna subdistrict and then the following one on page 21 of RC 139, shows that 44% of the Chitna subdistrict users, only 44% fish every year. So I guess that gets the long-term consistent use. Don't know if other board members have thoughts on this before I try to frame a position on this.

MR. CHAIRMAN: Dr. Fall

DR. FALL: Mr. Chair, just one more small thing again to remind the board members, what you are looking for evidence about is to identify fish stocks or portions of stocks that are customary and traditional in taking for use by Alaskans. So what you are looking is a pattern as it exists now and then looking back at time and seeing the evolution of that pattern of development and try to decide if there is tradition there and custom there and whether it's been consistent. So again it's not whether any particular user has been there 1 year or 20 years, that doesn't matter. What matters is that the use patterns characterized by the long-term and consistent use.

MR. CHAIRMAN: Mr. Nelson as far as when you characterize your position it's, that's-as far as I am concerned you can do it as we come to the criteria if you are ready to do that or you can do it at the end. But the main thing that I want is that I would like each and every board member before we vote on this to build a record for why they are going to vote the way they are, if possible. Or if they are on the fence until the last minute, I can say that is understandable sometimes, but at least discuss your feelings about the criteria before we get the final, final, final answer. Mr. Nelson.

MR. A. NELSON: Thank you, Mr. Chair. You know I kind of outlined my thoughts on one, two and three, I still have some questions and concerns on one and three. Two I don't have a problem with, feeling the fishery meets that criteria. But I guess maybe I will just hold off a little longer and let us move through more criteria and maybe we'll get a little more discussion going on a little later.

MR. CHAIRMAN: Anybody else? Alright, criteria four, Dr. Fall.

DR. FALL: Mr. Chair, criterion four is the area in which the non-commercial long-term and consistent pattern taking use is reliant on the fish stock and game population has been established. [Indiscernible] of the Chitna and Glenallen subdistricts that's not new information. As I pointed out before we did ask about ownership of fishing sites, I suggested that had some relationship to eight as well as four but also I would note that pre-1999 which was not a criterion that was [indiscernible].

MR. CHAIRMAN: Board members? Okay Dr. Fall, criterion number five.

DR. FALL: Mr. Chair, criterion five is the means of handling, preparing, preserving and storing fish and game which has been traditionally used by past generations, but not excluding recent technological [indiscernible] where appropriate. So our new information is that we did ask people in the subdistricts how they prepared their fish. You will see that freezing and smoking is used by the majority of Chitna subdistrict participants. They were the only two used by the majority, although quite a few also canned. One thing that I think that you could do is to look at the variety uses in a comparative perspective and that's why we did show the Glenallen subdistrict there and it is also what the previous Board have done. I also suggested that this particular graph does have some application to number eight as well, in terms of cultural reliance and social reliance and knowledge on how to do these things [indiscernible] because of using a variety of preservation applications, methods. I think that is a quick summary of what I have on that one.

MR. CHAIRMAN: Board members? Mr. Nelson from Law.

MR. L. NELSON: Mr. Chairman, just want to caution that the example, this is the criteria from the *Peyton* case where the Board was cited by the Supreme Court as erring and that is just one note of caution that to compare, to base a negative finding on this criteria on the fact that there are fewer uses in the Chitna area than the Glenallen would probably be fatal, so be careful on that.

MR. CHAIRMAN: Dr. Fall

DR. FALL: Mr. Chair, [indiscernible] another aspect of this is we're looking for customary and traditional patterns here so we can also look at the history of the fishery in the past and see whether there has been a variety of methods of handling and preserving salmon that's been characteristic of that pattern and then of course they might change, which is another reason why we collect this kind of information.

MR. CHAIRMAN: No other board members so go ahead Dr. Fall, criteria six.

DR. FALL: Criterion six, Mr. Chair, is a use pattern which includes the handing down of knowledge of fishing or hunting skills values and more from generation to generation. And there is some text there that does note some of the early instances of non-Ahtna fishing in the Copper basin and that is some new information there that you might take a look at. In addition, well somewhat new and we have known that previous boards that the dipnet fishery in its use by people from some of the Alaska cities dates to the '40's or early '30's. I, Figure 35 addresses this question too, as I went over before who taught you how to fish on the Copper River. And again

absence of being taught by a parent or other relative, is not because of the *Peyton* decision a reason to make a negative finding on this, although it would be a reason of finding that, that that is the pattern would be a reason to make a positive finding on this. What we did find is that 43% of the participants were self-taught in the Chitna subdistrict pattern and 44% had been taught by friends and that is new information that we didn't have previously.

MR. CHAIRMAN: Could you repeat what you said just before the part about self and friends?

DR. FALL: About relatives?

MR. CHAIRMAN: No, about not being a reason.

DR. FALL: Oh okay, what I said is that the reason we still ask about who you learn from and are reporting to you whether people learned from parents or other relatives, is that if indeed the fishery was characterized as the Glenallen subdistrict is with a large number of people being taught by parents or other relatives that would be sufficient evidence to demonstrate intergenerational transmission of knowledge. But it is not necessary evidence because of the *Peyton* decision. So if you are doing this for Glenallen and you saw that a lots of people learned from parents and other relatives you could stop there you wouldn't have to ask about learning from non-relatives because you would have plenty of evidence. For the Chitna subdistrict, only 9% reported learning from parents, siblings or other relatives. That's small and probably doesn't characterize the fishery from these results. So it doesn't demonstrate that intergenerational transmission of knowledge, but it can't be used to deny that it occurs because of *Peyton*,

so that's why the Board would need to look at the other two columns on the right about being taught, self-taught or being taught by a friend. And that is what characterizes the transmission of knowledge in this fishery, the criterion asks for intergenerational transmission of knowledge reflecting that subsistence are traditional fisheries and traditions are passed down over time.

MR. CHAIRMAN: Board members? Comments on number six. Mr. Nelson from Law.

MR. L. NELSON: Just one question to clarify for the record for Dr. Fall, if I may add, although it's a little bit unorthodox. On the fourth column there on friend, was there any clarification whether the friends meant people of the same generation or different generation or was that asked at all?

MR. CHAIRMAN: Dr. Fall

DR. FALL: Mr. Chair. Mr. Nelson. No, we do not know whether the friend was older, younger, or a different generation or not.

MR. CHAIRMAN: Thank you Mr. Nelson. I have been mulling that same thing over in my mind because I mentioned in the finding of new information I mentioned this is one of the piece of information that I did find to be new and was different than what I had in my mind three years ago, and I, you know, I am very surprised by the low number of relatives of any type that appear in the Chitna subdistrict findings here, but I certainly understand the caution and the circumstances of this fishery, how long it's been going on as it currently exists. So I, you know I am trying figure out exactly what these figures mean, but they definitely are new and different information for

me to mull over and I am a little surprised that just in the one percentage of 43% that are self-taught and then I had no idea how to proportion the 44% friend, but I assume that at least a part of that is not intergenerational transmission. Mr. Andrews.

MR. ANDREWS: Yes, Mr. Chairman. I would like to have Dr. Fall help me out a little bit in looking at this graph. It's all percentages and not numbers, when you look at Chitna district for self-taught, it's 43%, what does that equate to in numbers compared with the Glenallen subdistrict and I can't read it, 26% of whatever it is.

MR. CHAIRMAN: Dr. Fall

DR. FALL: Mr. Chair, the sample size for the Chitna subdistrict was 313, so 43% of 313. I don't have my calculator handy, but that would be the number from our sample that, the number of responses for self-taught; 43% of 313. And for the Glenallen subdistrict, self-taught would be 24% of 196. We did 196 interviews in the Glenallen subdistrict, but 24% of those were self-taught. Does that answer the question, Mr. Andrews?

MR. ANDREWS: Yes that makes it clearer for me, thank you Dr. Fall.
Mr. Chairman.

MR. CHAIRMAN: Other board members? Mr. A. Nelson.

MR. A. NELSON: Thank you Mr. Chair. I had some similar thoughts and question with the friend category that taught the individual to fish. I'd like to note that during our committee discussion that one of public panel members, of course, pointed that out that that can be intergenerational, older to younger, or maybe even go backwards go the other way with the younger teaching an elder how to participate in the fishery. So

obviously a portion of that is, but unfortunately we don't have any data to quantify it, so thank you.

MR. CHAIRMAN: Anybody else on criteria six? Dr. Fall, criteria seven.

DR. FALL: Mr. Chair, criterion seven is a pattern of taking use and reliance where the harvest effort or products of that harvest are distributed or shared including customary trade, barter, and gift giving. And this graphic actually combines information from RC 90 Figure 37, Figure 38, Figure 39 and Figure 40 and it shows that in the Chitna subdistrict 80% did share some of their catch according to their report in 2000. That of those 72% shared with relatives, 71% shared with friends and 3% shared in other kinds of situations. And in addition getting at the reliance aspect of criterion seven, we asked 'relatively how much of your catch do you share?' and 74% of the respondents said less than half and then 26% were about half or more than half. And I reminded the Board that to qualify that, where the average catch is 15 fish, perhaps it is not surprising that less than half of those are being shared. Well, just to note that, and then to also note the or recall the graphic that is coming up later about the assessment of that of harvest limits and harvest, well harvest limits and harvest goals, that it's somewhere between 30 and 40 fish, is what people in the subdistrict are looking to, in the Chitna subdistrict are looking to take. So, if indeed the harvest level is being impeded, or the need, meeting the need is being impeded by the current regulation it's probably not by a whole lot, given that finding and that would reflect the assessment of reliance in this particular criteria. Mr. Chair.

MR. CHAIRMAN: Board members? See nothing. Criterion eight, Dr. Fall.

DR. FALL: Mr. Chair, criterion eight is a pattern that includes taking, use and reliance for subsistence purposes on a wide variety of the fish and game resources, and that provides substantial economic, cultural, social and nutritional elements of a subsistence way of life. And so, a couple of things on this one, first of all, on page 58 in RC 90 there's some older and new information in the first paragraph under Table 41, trying to put the harvest and then this fishery in a context, but again, trying not to characterize users but a pattern of use. We do know that the pattern of use in the Chitna subdistrict is characterized by participation from people from Fairbanks, from Anchorage, from the Mat-Su borough, so we did include some estimates of total harvest, based upon department records for those places. And we reported to you in 1999 that we had an estimate for Fairbanks/Delta 16 pounds per person, Mat-Su about 27 pounds per person and Anchorage about 19 pounds per person. The new information helps verify that earlier information, analysis of updated data from the late '90's provides an estimate of 18 pounds per person for Anchorage, Fairbanks/Northstar borough 21 pounds per person and Matanuska-Susitna borough about 25 pounds per person. So where the criterion references reliance substantial reliance economic reliance, this is one way to try to try gauge that, and we noted that for example the harvest estimates in the Copper River Basin are about 110 to 140 pounds per person, so quite a bit higher than those others. Other new information, when we did ask people whether they, how important salmon was in their diet, most Chitna subdistrict participants it was very important and most of

the rest said it was moderately important. When asked how important other wild foods were in their diet about 60% said very important and 23% said moderately important and 17% said not very important. So this is their own estimate of significance based upon their own definition of what significance might mean. Try to put this in an economic context as I went over before we do find that the pattern for the Chitna subdistrict is for participants to be employed which is what this one shows, 87% and for those people to be full time employed. And I should say here cash employed or wage employed, I was reminded during the lunch break by an individual, that when I said that subsistence fishers were unemployed that that was really misleading, of course subsistence is certainly work and certainly employment and I apologize for that mis-statement, but when I am talking about here is cash employment and wage employment. Subsistence is our principal characteristic of Alaska's economy and people are certainly employed in it this is wage employment. [timer rang] Mr.Chair I think that means we can go home.

UNKNOWN: You wish.

DR. FALL: And this just shows that the pattern is full time wage employment for the participants and that it is about 51% take time off from work to head down to Chitna to fish. And the last graphic on this, is the one that I was talking about before. If you are looking at reliance, and the economic role you might look at average and maximum harvest. And the average we know is about 15 fish per permit. The seasonal limit 30 for a family of two or more, with opportunities for taking 10 or more if the escapement past the counter is at a certain level, so the question becomes, well is this 15 average or even 30 an artifact of regulation, and if people were, had no limit would

they be taking more fish. In other words, should we use that average to gauge reliance? I think that this result suggests that you can, that the expectations, the need if you will of the families participating in this fishery most, well not most, but the largest number almost 45% said that they were hoping to get about 30 fish, that that would be fine for them. And the next most said that they'd like to get about 40 fish and adding those two together, 80% were pretty satisfied with an opportunity to take up to that. So that would be a way to gauge reliance the amount of fish that that is and the pounds that that might provide the food value, and it is different from other, some other subsistence fishery; such as the Glenallen subsistence fishery, where the goals are indeed much higher which would suggest a more frequent use of salmon a more prominent use of it in the diet. And that's the end of that except for to say that I noted that criterion eight addresses social and cultural significance as well, and I pointed out how you can look at some of the other results regarding sharing, regarding ownership of fishing sites and so forth as a way to look or gauge the significance of the cultural and social significance of, within that use pattern. Mr. Chair.

MR. CHAIRMAN: Board members? Alright we've gone through the eight criteria, received stop comments on those, it is time to get it on the record how you feel about things. Who wants to go first? Mr. Engel.

MR. ENGEL: Well Mr. Chairman, before I go too far into it, I want to say I've been involved in a number of C and T findings throughout the state, as recently as last week and Petersburg and Wrangell and looking at these things, and never have I seen where you're looking at the eight criteria where you are comparing user groups to

make that determination that are fishing side by side if you will for the same fish. We've looked at the eight criteria relative to uses and things like that, but here we are being influenced to some degree I have to continue to put it out of my mind, does this meet the criteria as compared to the Glenallen person, and subdistrict and furthermore that is particular information that is largely indigenous people. We don't hold the standard, as I can recall, in other places. We look at the uses, and make those judgements and that's what we have to do here too, I think. I don't, certainly a pattern of use might be indicative in the Glenallen subdistrict if we had all users, and I suspect a lot of these things, the short-term nature, that have we had sampling of full constituency we'd have had quite a bit of difference. I guess in my mind it is useful to look at the pattern in Glenallen, but I've never had that opportunity to look at, for example the people that live in Petersburg, their indigenous people to see how the more recent arrivals, customary and traditional practices or patterns of use compared to that. Likewise, when I had to deal with places like Point Baker, and Point Possession, that did not meet standards of subsistence traditional and customary use when we had prior to *McDowell*. I didn't measure that against other people that were there, these are new communities that were logging camps, that were, so I looked at the use of the stock and it occurred over a period of time and I didn't measure that against somebody else. Nor did I measure when I dealt with something in Sitka, measured against how that compared with the users in a nearby time, whether it be Prince of Whales Island or some place like that. I looked at the information and I said well there is a use through time, so I guess to start this off, I think that we've got somewhat of a different approach here. In terms of being influenced by

what is traditional and customary use, by comparing an adjacent area using the same stock of fish as it moves through this political boundary or regulatory boundary, and certainly that, as we've gone through this we've continually compared this use which is by some standards, some people's view is the standard to use, long-term indigenous people. But I've never had that ability to use that, that I can recall anyplace else, so I judged it simply on at looking the information as to the use, was it long-term, was it consistent, did it occur in the same area in the same time, was there [indiscernible] information show, transfer of knowledge; and how the fish prepared, and in cases looking at what the alternative and diversity of fish and wildlife uses were. But I have never had to sit there and compare an area using the same stock, side by side that I can recall, particularly, to a large extent comparing a more recent use, to a long-standing uses are, because of the nature of the study and the information we have before us. I am not faulting that, I am just saying that I have never had to do that, and I am trying to look as a board member at how I look at every one of these. Is there a use? Not the user, although you have to consider the user to a certain extent and does one culture pass down through reading, different techniques, because you had come from another area, in my case, for example, I come from a family, my background is from users of wild resources. I grew up in the State of Washington, and I harvested animals down there, my folks were a commercial fishing family, so we got fish from our commercial, we caught them other ways within the law, we lived off of deer for many, many years, we grew a garden, we had chickens, we lived off the land. In fact we lived in an area called Vultureville as a kid. My parents grew up in the depression so they had different view points on

utilization and so on and so forth. I came to Alaska and I had to learn many of these things from, I didn't have my parents up here, so I learned them from other people. It's an intergenerational transfers because my of culture was different than perhaps other people and I learn here to become a moose hunter. I have never missed a single moose hunting opening day in like 40 plus years of living in Alaska. Although I have missed work because of that, usually I took vacation time and I have been very successful, if I'd say how many moose I've gotten in those 40 years would be bragging, so I won't say that. I have eaten a lot of fish and how to catch these fish, I didn't have parents or anybody here to pass on these intergenerational transmissions, I watched other people and I read and learned to adapt and learned to be reasonably successful, so fish are a very important part of my life. Participated in dipnet fisheries and these sort of things and here I continue to the practice of living off the land, by growing a garden and that is important to me, and I picked a lot, my wife and I, I say, I use the word I, my wife and I, and we've passed these things on to our children, but so the point is, I am not a subsistence user because I live in an area that is declared non-subsistence, but my way of life is a subsistence life to a certain degree, not the dependency of somebody that lives in western Alaska community where they don't have some of these alternatives. And my reliance certainly would be different than somebody else. But how do I weight that when comparing to one community, again, I am getting at my urban type. My background, from coming, being born in another state and trying to apply that to what we are doing right here when we are looking at an adjacent area and saying hey you don't fit the mold, you've been fishing here, you haven't fished as long, and all these other things, that's a

difficult thing for me to make that judgement. So when I am looking at this I am blocking out the information to a large degree that we got from the Glenallen subdistrict. Yes that shows the long-term standard pattern of use, but is that the bar or the standard I have to look at and I come to think that it is not the standard that I looked at throughout the rest of the state because I never had any information to evaluate and I place myself in a situation where you look at people in these large cities that are amongst those people, there are probably very, very reliant, very, very dependant upon these resources. Their total numbers may exceed the people in Chitna in terms of, so when we look at the pounds of fish or something like, I have to, or wild foods, you have to put that into perspective. That's the average, and most of those people don't fit a standard somewhat like mine or even far more dependant than mine. And I look at some of these years, the number of years used, and I look at the, the different percentages and some of those people had long, looking at the numbers of people, they far exceed, they far exceed the people we looked at the Glenallen subdistrict. Maybe a small percentage but it's still a number because it's from a large number of participants exceeds it. So I have to look at their interest too. Do we take and find that the Glenallen does not fit the traditional and customary, that's not an issue here, but it goes in my mind because some of the participants have been short timers and adult rely on this thing and so the majority do. And these large populations, there are a number of people, small percentage perhaps, but the total numbers exceeds some of the rural areas that we find easily. Speaking of rural that is another issue here, a lot of these comparisons that we are having are rural residence versus urban residences and that's valid but I still have to recognize that all

Alaskan's have access to this resource. So this is some of the things that I have been mulling in my mind and I'll give more details, we go into the eight criteria, but I am going to try and be consistent in looking at this information as I have elsewhere around the state and my understanding of the subsistence law and has it, as it, the various courts provided additional guidance on that, Mr. Chairman. So that's, some of my general concepts at this point, I'll get more specific as I apply some of that general background to the various criteria. I would think that one of the important things again, repeating myself, is that when we look at people's reliance, the sheer numbers of people that are utilizing this within that group, a small percentage may be a very large, compared to the rural people that are using the same resource. You have to respect both users, I think, Mr. Chairman.

MR. CHAIRMAN: I completely agree with you Mr. Engel, the first time I saw the results of the study I felt that the comparison of the two, a possible trap for board members in formulating a decision, and then I was glad to see Mr. Nelson from Law bring it out in committee work, early in committee work if I remember right that that should not be used as standard to decide, to make a decision on customary and traditional in the Chitna subdistrict. And I agree with all your other comments, I can't quite hold up to your moose record, but, I don't, but I know your moose record, you see, I don't hunt moose every year, a lot of years I hunt caribou cause I find them easier to pack, but anyway I have the similar background that you do and I understand what you are saying and I have only spent six years going around the state as you have spent nine, caring about these things, from just about every angle that subsistence could be looked at and,

but I think that we both have seen how this debate is to an extent, tearing the state apart over the issues and definition of what is subsistence, and like I have said before, this three years ago, is the toughest, I think in my six years on the Board, probably the toughest decision I've had to deal with, to make that decision, so I can concur with remarks, and I am mulling over the same things. I am looking at this information from the Chitna subdistrict versus the definition of subsistence that I have developed over six years in relation to the eight criteria, not how it compares to the Glenallen subdistrict, and I hope others are as well so. Other board members.

MR. ANDREWS: Mr. Chairman

MR. CHAIRMAN: Mr. Andrews

MR. ANDREWS: There is four of us here that have been on the Board either 16 or 17 days, and if this is the toughest decision you've faced in six years, think what it means to us. This is extremely tough decision. I certainly agree with everything Mr. Engels has said and I wish that I was eloquent as he has been in explaining the situation. I came here in '59 and was a subsistence person myself down in Palmer. We gill-netted for red salmon and silver salmon in Knik Arm and I even fished Chitna in 1960 and '61 myself. Everything we did was to use the resources around us just like all Alaskans, and I think that's why we are here because we can choose a unique lifestyle which is support by fish and wildlife and all the other wild things we have. I have taken the remarks of Law very closely and I have looked at these criteria based on the comments of Mr. Nelson, and that is what I am going to do is vote on these criteria on that bases. Thank you.

MR. CHAIRMAN: Other board members. Alright, let's move it along. Alright, we'll take a ten minute break.

MR. CHAIRMAN: We're back on the record, 3:55pm, Wednesday, February 5, Alaska Board of Fisheries, Prince William Sound, Copper River Upper-Susitna Finfish Meeting, seven of seven seated board members are present. We are in deliberations on Proposal 42. It's time for us to move along towards final action, board members, we need to build a record. It's time for people to talk about where their at, whether it's yes, no or in between, and you can talk about all eight criteria at once or you can address only the criteria that you find important here, or if you are one of the three board members that were here three years ago you can talk about where you were three years ago and how you feel differently or the same now. Let's move along. Mr. R. Nelson.

MR. R. NELSON: Thanks Mr. Chair. I'm not going to be speaking to the eight criteria because I can't find an error in that 1999 findings and the new information hasn't changed my mind on how I voted three years ago, so I will just be voting against this proposal, Mr. Chair on those grounds.

MR. CHAIRMAN: Alright, other board members. Mr. A. Nelson

MR. A. NELSON: Thank you Mr. Chair. I'll start with criteria one and again it's still difficult to deal with use versus users on this issue and particularly reliance is one that sticks out and I know it was a topic of discussion in '99 that came up several times because, reliance occurred, the word reliance occurs in several of these criteria as well. But, you know I'll, I will note that from page 21 of RC 139 less than half or only

44% of the fishers at the Chitna subdistrict fish there every year and I gotta question whether that is a reliance or not. And reliance ties to eight in a big way as well and there is some other interesting data on that, but maybe just in the frame of criteria one, I'll toss out that question and see if other board members have a response to it. But only 44% fishing there every year seems a little low. Thank you.

MR. CHAIRMAN: Other board members. Mr. Engel.

MR. ENGEL: In response to Mr. Nelson, you've gotta be careful, I think, or at least I try to be when you look at these percentages. Because the sheer numbers of people in the dipnet fishery for example, maybe 10,000, just take 10,000. Just take that one graph where we looked at the number of years of participation, you know number of years that need to qualify for one generation, 20 years. Well, over, roughly 20% of the people had 20 years or more that seems low. That means 80% has less, but of those 20% that had more that's some 10,000 permit holders, that's 2,000 people that qualified, perhaps under standards of intergenerational or had some dependency depending on what level of dependency, but they have come year in and year out to gather that years of participation, 2,000. That's way more than participate in the Glenallen subdistrict which is not of question as far as C and T findings. The number of permits there, if you look at, it's way more, lot more, so I am looking at the concerns for those people versus the newcomer too, and how do I weigh that and I am coming to the same difficulties that Mr. Nelson did, but when I look at those kinds of things I think percentages are difficult, it's like you look at the big town of Anchorage, or Palmer, it's a non-subsistence area, I know people that are very strong customary and traditional and

have a reliance. It's a big population so that's a lot of people, but percentage wise it may be 20%, so that's the difficult thing looking at a 20%, 40%. In major population it may be a lot of people that we would be excluding because we are looking at a percentile rather than total numbers. Mr. Chairman. It's probably not helpful but it is a thought.

MR. CHAIRMAN: Mr. A. Nelson.

MR. A. NELSON: Thank you Mr. Engel. I certainly understand you're points there and you know there is other criteria that I certainly agree that this fishery meets, there's some that in my opinion that I am a little more hard over on, that I have concerns that it doesn't meet. And one criteria, criteria one is one of those that I am unsure of where I am at. Given some of your arguments, you know, I would probably be tempted to say that it does meet criteria one, but again, still have those same concerns. Thank you Mr. Chair.

MR. CHAIRMAN: Other board members. Mr. Jensen.

MR. JENSEN: I have the same concerns that Art does probably. Based, for number one, based on just use of the fish, I have a hard time with some of the definitions, like one, long-term use. I think that there is a pattern of long-term use and if, of the product, in the Chitna district.

MR. CHAIRMAN: Other board members. Mr. Engel.

MR. ENGEL: Maybe it is a question that has always been somewhat bothersome to me, and maybe there is not an answer, but I'll ask it to Mr. Nelson, for quite awhile. We get hung up on this word reliance and that is going to mean something to different people, your background will probably determine ultimately how you come

down on that, but then when we look at another word that happens when you really get a shortage, it's called, direct dependence. That would be seem to be something much stronger than reliance and I don't, is there any from a legal stand point. What's the difference between any court decisions or anything like that, what does reliance mean versus direct dependence. Because according to the joint Boards standards, direct dependence really separates out people from this process. You got any help in that regard Mr. Nelson? Thank you Mr. Chairman.

MR. CHAIRMAN: Mr. Nelson from Law.

MR. NELSON: Mr. Chairman. Mr. Engel. I'll take a stab at it. When you talk about direct dependence you're talking about that situation where you are in a Tier II situation, you have to distinguish among subsistence users. In that case, you've already established that the stock or population has been subject to customary and traditional uses. And direct dependence probably connotes a higher standard than reliance because it is presumed I think that subsistence users or a lot of them at least would have a lot of reliance on that, on the subsistence stock that is in question. So, unfortunately reliance is something that you need to satisfy yourselves as been evidenced in the information in front of you, but it's still a fairly ambiguous term that leaves you as a board member a lot of discretion in how to look at that, and what you're, remember what you're looking for is long-term consistent pattern of reliance. So, but I, others might have different thoughts, but I would think that direct dependence is probably going to be a higher standard, because in that situation you're looking specifically at reliance on that stock, that you make that would give you preference over other reliant people.

MR. CHAIRMAN: Mr. Engel

MR. ENGEL: I have nothing further, I kind of concur with the same thing, it's still, one seems to be more powerful. When I am relying on something, Mr. Chairman, it may be just that I rely on something that I choose to enjoy or do whatever, the opportunity, the access, to whatever it may be. The convenience of a town, rely on that or dependent seems to be something that's affects my more than my reliance on whatever that may be. So that's no help.

MR. CHAIRMAN: Other board members. I don't want to go into my reasons yet, I'll save that for later, but I don't want to be trying to get, act like there is any question about how I am going to vote. I am going to vote the same way I did three years ago. I'm going to vote 'yes' which means that we would revert to a personal use fishery and just briefly I'll say that it is because I haven't seen anything to change my decision from where I was three years when we agonized over this. If anything, I'm slightly stronger in my position, but I don't want to go into this. You know, we've got four new board members here and you're taking a fresh look at this, I think that's a good thing and so I will let you guys talk some more first. Mr. A Nelson.

MR. A. NELSON: Well let me then just run through some of my thoughts then on all of these criteria. Number one, that I have kind of labored over many times and heard comments from other board members. I tend to think that the fishery probably fits that criteria. Number two the pattern of taking or use, recurring in specific seasons of each year, you know there may be some differences between the two districts, but again you fall into that pit of comparing the two and using one as a measuring stick, but again

as I also mentioned earlier, when you are dealing with salmon runs, back to rivers, you obviously have a seasonal time constraint for that because the fish are only there for a short period of time and it is probably different with it's application to game populations and critters that are around all of the time. So, the fishery, in my opinion meets criteria two. Criteria three is basically comes down to efficiency within the means of harvest, economy of effort and cost. We've had some discussion earlier about, you know there is probably a wide range of how much it costs people that participate in this fishery and whether; you know what that food would cost otherwise to go get is actually worth it. And I always love hearing from my wife when I come back from a not so successful fishing trip, with one small halibut or something, and her reminding me how much that halibut cost per pound. And so, again there is a wide range there, certainly I think the costs, the average costs to participate are probably higher than what was represented in Figure 15. So I guess I'm still [indiscernible] criteria three. Criteria four, the area in which the [indiscernible]

(tape 5)

There was some interesting information presented by the subsistence division on this, showing that very few of the Chitna users considered the place where they take their harvest, to be their own, either allotment, or private land that they own. And I am not sure if that is really applicable in this case or whether we are just dealing with there's established areas in the Chitna district where a lot of this harvest is occurring. So I am still looking for a little guidance on that one as well. The means of handling under criteria five preparing, preserving and storing fish, we had some guidance

from Law on that and I believe that was the *Peyton* decision, is that correct? Mr. Nelson, thank you. That we need to be cautious of, but, you know, it is put up in a variety of ways and I am sure that freezing and other technological advances have narrowed the uses and we can't preclude it because of that. Number six, this is one that I kind of pick on a little bit. According to the survey, a large majority, in fact I believe it was almost half of the users in the Chitna district taught themselves how to fish. And then the other large majority 40, 50% learned from a friend. And, some of that is intergenerational, to what extent, I don't know. Probably a lower proportion of that but I certainly don't want to fall into a trap of trying to guess at what that proportion might be. But, when looking at the intergenerational transfer, I think that is a pretty low proportion of the Chitna subdistrict of users that have learned their ability to harvest the fish from a different generation. And then number seven, deals with sharing, including customary trade, barter and gift giving. I don't really have quite the problem with this, I think that there could be, there was interesting data from Subsistence Division, they showed some differences between the subdistricts, although I believe that a lot of the Chitna fishers indicated that they do share their catch. They may not share as much or as widely, because they don't take as much perhaps as the folks in the Glenallen district do. And eight is kind of the whole enchilada, in a lot of ways, it takes bits and pieces from other criteria but a lot of what it boils down to is the reliance for subsistence purposes upon a wide diversity of fish and game resources. Reliance also ties back to criterion one as well and what jumped out at me was, pardon me for a second while I find it. Dr. Fall, perhaps you could help me out on the, where that figure was that indicated when folks were asked

'how much fish would they like to take?' bingo, page 34 of RC 139. Now again trying to avoid the pit of comparing the two subdistricts, I do see the differences rather striking and without trying to use the Glenallen subdistrict as the bar that these, that the Chitna has to get over, it's quite a striking difference there. Also relating to reliance, there was some reliance in the wide diversity of fish and game resources, it was some information in RC 90, Dr. Fall, I think, kind of summarized it earlier, about, one moment please Mr. Chair. About just how much other wild game resources that people who fish in Chitna use and I have some concern about applying the wider census type numbers that were located on page 58 of the C and T worksheet. Showing, I believe, across the whole average, residence from Anchorage consume 18 pounds wild foods, Fairbanks 21 pounds, and Mat-Su 25 pounds. But it is tough, but that's the population as a whole to apply it, and there is some other thoughts that I have on criteria eight. Maybe I'll let some other members speak for awhile and I'll gather my thoughts again and jump back in again at some point. Thank you Mr. Chair.

MR. CHAIRMAN: Mr. Nelson from Law.

MR. L. NELSON: Mr. Chairman, just a point of clarification for the record, on the chart on page 34 RC 139, just, it looks a little ambiguous and maybe Dr. Fall could clear it up for us with, what was that question if the regulations could be changed how many salmon would you like to be able to harvest or was that just as written, how many salmon would you like to be able to harvest?

MR. CHAIRMAN: Dr. Fall

DR. FALL: Mr. Chair. Mr. Nelson. The question is exactly as in the title. The question was "how many salmon would you like to be able to harvest?"

MR. L. NELSON: Thank you, thank you Dr. Fall. And Mr. Chairman, I think it could be misconstrued to by some or people looking at this that maybe if it meant that if the regulations could be changed, how many would you like to be able to harvest, though it doesn't indicate that, you might not want to harvest more if they thought could harvest more. I just want to clarify that.

MR. CHAIRMAN: Other board members. Well, the next thing I am going to do is start calling on you individually and ask for you to build your record. So if somebody wants to volunteer before I do that. Mr. Morris, how do you feel?

MR. MORRIS: Mr. Chairman, I'm stilling listening. I do have some questions about number six, handing down of knowledge. I heard that it can be done by a younger and older person, but I see that 84% of the Chitna dipnetters have been taught by themselves or by friends, how to do it, how to. You know, I don't know whether they were older or younger or whatever. I understand that it doesn't particularly matter if it's intergenerational. I am having a little problem with the long-term consistent pattern, in understanding how 42% can be under five years in the fishery and only 20% can be, you know, or between 10 and 20 years and don't know what exactly long-term means again. Whether that actually tells me, five years certainly doesn't sound like a long-term to me, but then again there is nothing that tells me what is long-term or what isn't. Having a little problem with number eight and I haven't heard the social aspect of the subsistence way of life spoken to yet. What is social? I read in the transcripts of the 1999 meeting

that social consisted of a lot of people, families that went down to the Chitna river and could be mother, father, grandmother, and what not, had get togethers, and this was considered, this was considered social, but I am not sure that it relates to a subsistence way of life. I think you can get together in your barbecue and that would be social and it wouldn't, because you've go your whole family together or other people together that it necessarily was a social outing or social bonding or whatever it would be called, that related to subsistence way of life. And again, you know, it's sort of an ambiguous thing that requires me to decide on those issues not with any definitive information but how does it play out in what I have heard. And I have heard that 20% is still 2,000 people. I have a hard time relating to the number of people, I think what we are talking about isn't so much how many people we're impacting because if that was were the, were what our concern was about we could have stopped a long time ago. I don't think that the fact that 2,000 people would be impacted by this is anymore meaningful than the fact that 150 people in the Ahtna group would be impacted. I think that we have to, and I think that Law would advise us, that we have to look at it that way. So at this point and time, I want to listen a little more and if that's alright with you Mr. Chairman, I'll rest my case.

MR. CHAIRMAN: Other board members. Mr. Engel.

MR. ENGEL: Mr. Chairman, I just think that several board members have spoken to criteria number six a pattern of taking use includes the handing down of knowledge of fishing and hunting skills and values or from generation to generation.

That was the one that I was hung up, when I first dealt with the *Peyton* issue in Skwentna.

That's an area where I often spent time hunting and fishing, and there was without

court feels that way. I think that generation to generation could be as much as new a wife learning how to cook. See the mother didn't teach her but she reads a cookbook and that generation or who ever provided that information provides the guidance to continue on. I don't think that it has to be word to mouth, I don't think it has to be family, but I think that it could be something that was the old recipes could have been from 20 or 30 years ago. Or the fact that you learn how to use a certain gill net or something by reading about it or hearing about it or talking to somebody, so I don't get to hung up on how people learn that in terms of passing on from generation to generation. I think that can be transferred in many, many different ways. And obviously the one we always think about is family, family which we know that the courts don't necessarily require. I guess that there is a lower standard if it gets passed on by a friend and gets even lower if you acquired it through the, some other means such as reading about it, Mr. Chairman. So that's my take on that generation to generation.

MR. CHAIRMAN: Thank you Mr. Engel. That's the answer Mr. Morris. I certainly don't want to rush anybody and I have been trying to move this along and I want everybody's questions and, to be answered the best we, to everybody's ability before we take final action on this so. If you got anymore questions or you want to tell us something that's hanging you up, then ask for other board members to give you their opinion of that specific thing, don't hesitate.

MR. MORRIS: Mr. Chairman, I am ready to vote. If that's what you are asking?

question a long-term customary use of the fish resources in Skwentna by the original inhabitants of the area, and then somewhat later arrival of the trappers and those sort of people they used nets and they used fishwheels to harvest fish in that area. It's my understanding because a variety of reasons, from epidemics, fur trapping industry wasn't as prosperous it once was, and people largely moved, most of those people moved out of there. And there was also to a certain extent the state when it become a territory, precluded the use of gill nets and fishwheels shortly after statehood in that area for the few people that remained there. Then there was many years where the only harvest technique that was legal was rod and reel. Then the state of Alaska provided for large acreage of land for people that wanted to move into that area and settled, like 200,000 acres a year they were giving away and many people took advantage of that and moved into the area in the early mid-70's and then shortly there after, they requested subsistence customary and traditional use findings. There was this gap in there of generation to generation like some board members thought, and I did at the time too that had been passed on by family relationships. There was a large space when there wasn't some of the consistent use but that was done by regulations on some of these things. But, the courts cleared up that you didn't have to pass down by generation to generation and mostly people have moved in there never did use a fishwheel, they learned from other generation by reading or seeing or whatever. Much as the people at the Copper River didn't use a fishwheel, they, it was brought up by somebody from the Columbia River and then they, then it took off. This was passed on by generation from someplace else. I don't think that you necessarily you have to have those direct ties, I don't think that the

MR. CHAIRMAN: Well, yeah, that's one, well yeah, that's fine but we're still gonna build some more record, but that's good to know Mr. Morris.

DR. FALL: Mr. Chair-

MR. CHAIRMAN: Ah, Mr. Fall

DR. FALL: Mr. Chair, I just wanted to provide some more information on the *Peyton* case for the Board. First of all, as I think all of you know it's our job with the Division of Subsistence by statute to advise the Board on which uses should be deemed customary and traditional. People have asked me about other subsistence fisheries and how they compare to the Chitna fishery and review of the *Peyton* case stimulated my memory a little bit. I guess I don't know of any subsistence fishery in the state that has had a substantial break in a direct transmission of knowledge about the traditions in that fishery. As I think you know, the evidence that was used in the *Peyton* decision, the original Board finding the case and the subsequent positive finding by the Board was all collected by the Division of Subsistence. It was the Division of Subsistence that advised the Board that intergenerational transmission of knowledge should not necessarily have to pass between kinship ties. In fact, in the Skwentna situation, we had documentation that there was direct knowledge about fishing in fishwheels that had been passed on not only through the long-term homesteading families which went back to the teens and twenties and thirties there, but even before that the native people that had used that area. So I think the record on *Peyton* and the Skwentna situation did have a thread of tradition linking it back in time that was direct. I don't think that that was entirely a matter of getting out a book and learning about it.

There might very well have been some that, but I do think that in the context of the subsistence fisheries that we described and we understand, in that Alaskan context, the passing on of traditions, is one that is direct that takes place in a social context between people. Thank you Mr. Chair.

MR. CHAIRMAN: As I consider these criteria, now that we've you know had the vote about new information and if gotten this back before us it is deja vu all over again, because I feel like we are right where we were three years ago, pretty much. That new information as I mention, as I look at how it relates to criteria one, those two pieces of information are, they are interesting, they are slightly surprising to me. Neither one of them by themselves could be explained, and have been, no possible explanations for why they would come out that way have been given by Mr. Engel, I believe. Criteria six, information there strikes me as a little different than I would have expected and comes down to what do you with that percentage that's says friend, how much of that is intergenerational. I don't know, but I suspect that at least some of it, fair amount of it isn't, so when I add that to the self-taught, that's an interesting fact for me to consider. So when I look at one and six, when I looked at one and six three years ago, I was kind of right on the point of a knife, couldn't decide which way to go, based on those two. And am I a little more on one side of the knife, yeah, I'm a little more leaning towards no on those two, but I'd still hate to make this decision based on those two alone. With criteria eight, that was the deciding factor for me, three years ago I felt that criteria best defined for me what the whole question of subsistence and is this subsistence. And I just want to refer, except I've lost it, I want to refer back, briefly to the final comments I made three

years ago, because they are pretty much the same now about that one issue. The last thing I said before we voted on this was 'Mr. Chairman, I just want to flush out my own personal record on this issue a little more. I agree with all the issues that Mr. Miller and Mr. Engel stated in their reasoning, they are the exact same issues that I've been mulling over and over. This is a very tough issue and I've spent a lot of time. I am sure the all the other board members have too. It's kept me awake at night thinking about it. I mentioned earlier that a majority of my reliance was on answering the question of criteria number eight, specifically where it talks about reliance and the phrase it provides substantial economic culture, social and nutritional elements of the subsistence way of life. And once you make sure in your own mind that it is meeting the tests of and following the statute and policy that guides us in this decision. I think the question comes down to your personal definition of what is a subsistence way of life. I certainly respect Mr. Umphenor's reasoning in his decision, but I am going to stick to my guns and vote no, Mr. Chairman.' I'm still in that same position. Do I think that the dipnet fishery at Chitna is not important? No, I don't think that, I think it is a very important fishery. I believe it has cultural aspects, social aspects, just like I think that sport fishing does. I think that sport fishing is a very important cultural and social activity. And I think that there are definitely cultural aspects of commercial fishing, I don't think that there wouldn't be as many people still doing it in this state if there weren't. But I don't think that commercial fishing or sport fishing meets the test of customary and traditional and I do not believe based on the use patterns that I see in the dipnet fishery in Chitna, that

which requires me to look at the group of people who create that use pattern over time. I just don't think it meets the test and that's where I am. Other board members. Mr. Engel

MR. ENGEL: Mr. Chairman, I just referenced my previous comments, relative to this and I just have a couple final comments of why I am have come to the point of looking at continuing the subsistence use. Again, it goes back, there are many people perhaps that are taking advantage of this fishery that would not fit the eight criteria, but there are a small percentage which means a lot of people that probably in my experience do and have lived a life at whatever subsistence lifestyle is. We all know it, we see it, and it looks different to each of us just like defining beauty. And my background suggests in my dealings with people that live in non-subsistence areas and want to continue that pattern of reliance. One of the concerns that I have is there was no question probably at one point and time, a great majority of these people the Ahtna's when they first were there, they relied heavily on and had to continuing customary and traditional use of these fish stocks in Chitna, and they've left for all the reasons we've heard about and they were replace by others, that were in many cases not as dependent and didn't have the customary and traditional use pattern, although we didn't talk about those things in the '60's and '70's. I see the same pattern happening, that happened Chitna perhaps, it's occurring in the Glenallen subdistrict. A few years ago 98% of the fishwheels in that district were local residents that had long ties to traditional and customary use of that resource. Almost a 100%, as recently as 1988, the information from Dr. Fall's report. And looking at the dipnet fishers in that Glenallen subdistrict, in the last, since 1988 they were up to 99% of those were local people both classes

contained of these were almost totally dominated by local users, were Ahtna people. Now, what's happened today? Something we haven't really talked about, we touched on it, the great majority of people that dipnet in there now are the great, great majority figures are non-local people. The majority of the fishwheel permits, in the Glenallen subdistrict are now out-of-area people. If that continues to grow, which it probably will if the state statutes remain as they are, all Alaskan's are have access to subsistence, then we might see the same trend there over a period of ten years, we see something go from 99% local to it's now 71% of the permits issued in the Glenallen district go to non-local people, 71 and just 10 or 12 years ago that was the reverse, 91% went. So what is going to happen in the next decade? We're gonna have the same situation so therefore we say that the people that are most dependent because they were a small percentage are denied that because of the majority of the newcomers, because of state law is going to dictate that some future Board or something will say 'well, 70% of the people now don't fit that pattern, these are people from outside of the area are not dependent, don't have traditional, didn't have intergenerational transmissions, so on and so forth. So these people are limited.- That bothers me. So for those reasons, I'm gonna stick with my original, those and the other reasons I mentioned, with my original position on this, to retain the C and T, and I would do the same thing if I was dealing with 90% non-residence, out of area residence in the Glenallen district, to protect access to those by local people who have long depended upon that, because they are a very important consideration until we sort out this subsistence problem in the state of Alaska. Mr.

Chairman.

MR. CHAIRMAN: Other board members? Mr. A. Nelson.

MR. A. NELSON: Thank you, Mr. Chair. You know I have appreciated all the comments that have been made so far, but I gotta say that I most agree with your assessment, Mr. Chair on eight. Particularly looking at that last part of it dealing with the economic, cultural, social, and nutritional elements of this subsistence way of life. And in many of those aspects, you know, economic, cultural, social, nutritional relate back to several of these other criteria, in different manners. But it comes down to that final part, the subsistence way of life and, and it does depend on your perspective with that. You know I still have some concerns with some of the other criteria as well, but it really does boil down to eight. And I don't feel the fishery meets under eight and I have concerns over the other criteria and with that I will be voting, make sure I get it right, yes on the motion. Thank you.

MR. CHAIRMAN: Other board members? Mr. Andrews.

MR. ANDREWS: Mr. Chairman, very quickly on criteria eight. The word cultural is included in that definition and to me that means living an Alaskan lifestyle, but it can mean just about anything to anybody else, but that's the way I'm going to interpret it. In looking over the eight criteria and the directions from Law. I don't really find new information, and I don't see where there is a legal error, and I am not qualified in legal error, but we have been assured there hasn't been. I also have a concern that over turning a C and T finding may have long-term impacts and precedence and I am concerned about that. My last statement, Mr. Chairman, is that I do believe that

he dipnet fishery in Chitna is very important to a lot of Alaskans and we should take that into consideration, I'm going to vote no against this, Mr. Chairman.

MR. CHAIRMAN: Other board members? Mr. A. Nelson.

MR. A. NELSON: I'd just, would like to reply and put some of my other thoughts on the record as far as this, and I agree with what Mr. Andrews just said, that the fishery at Chitna is important to a lot of Alaskans and I don't argue that one point. But I, just in my gut opinion and looking at a lot of these other criteria, again it comes back down to eight because it has some many different aspects. I don't feel it qualifies as a subsistence fishery. There's other avenues where we can still meet people's needs for food and their lifestyles, their recreation, but again I don't think this fishery qualifies for subsistence. Thank you.

MR. CHAIRMAN: Other board members? Mr. Jensen.

MR. JENSEN: My feelings are pretty much the same with what Art just said, especially on number eight. I am going to vote yes on this proposal. Thank you, Mr. Chairman.

MR. CHAIRMAN: Other board members we still have to cover cost. Mr. Morris.

MR. MORRIS: You mean whether this will impact any other person? Is that what you [indiscernible]

MR. CHAIRMAN: Cost of the private person to participate, Mr. Morris.

MR. MORRIS: I believe that should this proposal be adopted no additional costs will be incurred by any person wishing to participate in this fishery.

MR. CHAIRMAN: Other board members?

UNKNOWN: Question?

MR. CHAIRMAN: Errors or omissions Captain Cain

CAPTAIN CAIN: No, Mr. Chairman

MR. CHAIRMAN: Mr. Nelson from Law?

MR. NELSON: No, Mr. Chairman

MR. CHAIRMAN: Staff?

UNKNOWN: No, Mr. Chair

UNKNOWN: Questions heard Mr. Cody [indiscernible – laughing]

MR. CHAIRMAN: Mr. A. Nelson's got his hand up anyway.

MR. A. NELSON: Just again for clarification. A yes vote would over turn the C and T determination, and a no vote would uphold it and keep it as subsistence. Is that my understanding?

MR. CHAIRMAN: Yes sir

MR. A. NELSON: Thank you.

MR. CHAIRMAN: Mr. Marcotte

MR. MARCOTTE: On adopting Proposal 42. Jensen?

MR. JENSEN: Yes

MR. MARCOTTE: Engel?

MR. ENGEL: No

MR. MARCOTTE: Art Nelson?

MR. A. NELSON: Yes

MR. MARCOTTE: Mr. Dersham?

MR. DERSHAM: Yes

MR. MARCOTTE: Mr. Andrews?

MR. ANDREWS: No

MR. MARCOTTE: Mr. Morris?

MR. MORRIS: Yes

MR. MARCOTTE: Russell Nelson?

MR. R. NELSON: No

MR. MARCOTTE: Motion carries four in favor, three opposed. Mr.

Chair.