

Finding of the Alaska Board of Fisheries  
Deferred Southeast Alaska/Yakutat Subsistence Proposals  
(Previously Finding #: 93-08-FB)

Background:

At its regularly scheduled meeting in Sitka, Alaska on November 9, 1993 the Board of Fisheries convened to take action on Southeast Alaska/Yakutat fisheries proposals concerning subsistence and other uses. Because of the invalidation of portions of the 1992 subsistence law on October 16, 1993, by the Alaska superior court in Kenaitze v. State, Case No. 3AN-91-4569 civil, and the resulting uncertainty of the subsistence law, the board found it necessary to defer the subsistence proposals to its January 1994 meeting in Ketchikan, when some of the uncertainties in the subsistence law may have been resolved by the courts.

Certain of the subsistence proposals had been submitted under the call for proposals for the Sitka meeting, while others had been deferred from the Board's previous meeting in Southeast Alaska in February of 1992. At the February 1992 meeting because of court decisions partially invalidating the 1986 subsistence law, conflicting superior court orders concerning application of the law, and pending appeals of those court decisions to the Alaska Supreme Court, the board lacked clear direction under the subsistence law and found it necessary to defer subsistence proposals. The board found that action on subsistence proposals at that time would have had a negative and disruptive impact on established subsistence fisheries, and that it was impossible to address subsistence uses until the legal uncertainties in the law were resolved and the board had clear direction.

In 1992 the Alaska legislature adopted a new subsistence law. The board convened special meetings in the winter of 1992-93, during which it reconsidered and readopted hundreds of subsistence regulations throughout the state, including Southeast Alaska/Yakutat. On October 16, 1993, the superior court issued a decision in Kenaitze v. State invalidating the nonsubsistence area provisions of the 1992 subsistence law. The Judge did not specifically invalidate the entire subsistence law, but asked for briefing on whether the nonsubsistence area provisions could be severed, and the rest of the law remain in effect, or if the entire law must be invalidated because of the invalid provisions. The superior court has not yet decided whether the nonsubsistence area provisions will be severed leaving the subsistence portions of the 1992 law intact. The Department of Law anticipates a decision on the severability of the law and whether the superior court's decision will be stayed pending appeal by the date of the January board meeting. The state will appeal the superior court's invalidation of the nonsubsistence area provisions to the Alaska Supreme Court, but does not expect a final decision before the board completes its meeting cycle in March 1994.

Findings:

1) Until the superior court decides whether the nonsubsistence areas can be severed from the 1992 law, the board does not have clear direction on what subsistence law, if any, governs its subsistence determinations. Under the superior court decision, the subsistence provisions of the

1992 law may or may not be valid, depending on whether they are severable. If they are found to be unseverable, and the entire law is invalidated, the board is advised that the 1986 subsistence law may reemerge to govern the board's subsistence determinations. If they are found to be severable, then the subsistence provisions of the 1992 law will remain in effect.

2) In order to deal fairly with subsistence proposals, and to avoid disruption to established subsistence fisheries, the board finds it essential to have clear statutory standards for addressing subsistence uses. Due to the uncertainty in the subsistence law as a result of the Kenaitze decision, the board finds it impossible to act on subsistence proposals at its meeting in Sitka. In order to fairly and reasonably address subsistence proposals, the board finds it necessary to defer them at least until the superior court decides on the severability of the invalid nonsubsistence area provisions, and whether to grant a stay.

3) The board has deferred the Southeast Alaska subsistence proposals to the board meeting in Ketchikan in January of 1994. At the meeting in Ketchikan, the board will be advised of the status of the state's subsistence law and determine a course of action on the subsistence proposals.

4) Southeast Alaska subsistence proposals will be deferred until the board meets in January unless the department advises the board that a proposal presents: 1) a conservation concern that must be addressed, 2) a subsistence nutritional need that is not being met, or 3) a court order requires consideration. These are the same criteria used by the Joint Board's in February of 1993 to determine whether to consider or defer subsistence proposals.



Tom Elias, Chair  
Alaska Board of Fisheries

11-13-93

Date

Approved: Sitka, AK

Vote: (5/0) (Yes/No) (Absent: Jacobsen, Angasan)