

H B

467

(7)
Date Referred: March 13, 1992

HOUSE COMMITTEE REPORT
FURTHER REFERRALS:

Date of Committee Action: 5/5/92

The JUDICIARY Committee considered:

HB 467

HOUSE BILL NO. 467

"ECONOMIC BENEFIT" IN SUBSISTENCE ECONOMY

"An Act amending the definition of 'economic benefit' in relation to a subsistence economy; and providing for an effective date."

- RECOMMENDATIONS: the same title
 be replaced with _____ a new title
- have attached amendments(s)
 do pass
 do not pass
 no recommendations
 individual recommendations
 additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) _____

fiscal impact _____

zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date) _____

fiscal note(s) _____

zero fiscal note(s) Law 3-13-92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	<input checked="" type="checkbox"/>	<i>[Signature]</i>		<input checked="" type="checkbox"/>	
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[Signature]
 CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

No. 1
Bill Version: HB 467
(H) Publish Date: 3-13-92

Revision Date: _____
Title: "...the definition of 'economic benefit' in relation to a subsistence economy..."
Sponsor: Representative Kubina
Requestor: Representative Kubina

Department Affected: Department of Law
BRU: Exxon Valdez Litigation
Component: Exxon Valdez Litigation

COMPONENT SERIAL

1	1	7	5
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Phone: 465-3672
Date: February 28, 1992
Date: February 28, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 467

This bill amends AS 46.03.826(a), retroactive to March 24, 1989, to include within the meaning of "economic benefit," the value of a subsistence economy to the physical, economic, traditional, and cultural existence of persons participating in the subsistence economy. As it is used under current law in AS 46.03.822 - 46.03.828, "economic benefit" is defined to mean a benefit measurable in economic terms, including but not limited to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost.

It is our view that the bill clarifies existing law by defining the term subsistence economy as it is used in the current statute. Consequently, the bill should not impact the Department of Law.

Alaska State Legislature



Representative Eugene Kubina

Chairman
State Affairs
Committee

Legislative Council

Transportation
Committee

During Session:
State Capitol
P.O. Box V
Juneau, Alaska 99811
(907) 465-4859

During Interim:
P.O. Box 2463
Valdez, Alaska 99686
(907) 835-2111

SPONSOR STATEMENT

Sponsor: Representative Gene Kubina

Subject: House Bill 467; An Act amending the definition of 'economic benefit' in relation to a subsistence economy; and providing for an effective date."

Date: 26 February 1992

Subject: compensability of Native subsistence claims within the context of the Exxon Valdez claims of the Trans-Alaska Pipeline Liability Fund.

The Alaska Environmental Conservation Act of 1972 represents a broad effort by the Alaska Legislature to require polluters, including oil spillers, to compensate victims of spill for their full measure of "damages," including all damages measurable in terms of an economic loss. The term "damages" is broadly defined in AS 46.03.824, and refers to "the loss of an economic benefit." The term "economic benefit" is in turn defined in AS 46.03.826(2) to mean any "benefit measurable in economic terms." Included within the scope of such damages are damages to "a subsistence economy," and that term is also defined in the statute at AS 46.03.826. The Legislature's purpose in enacting these provisions was to assure that oil spillers would have to pay all of the economic damages caused by their actions.

In the wake of the Exxon Valdez Oil Spill the subsistence-dependent villages of Prince William Sound and elsewhere have been pressing claims under the Alaska Environmental Conservation Act against Exxon to recover the full measure of economic damages brought about as a result of the immediate and continuing severe impact of the spill on their subsistence way of life. Because the value of subsistence involves considerably more than the bare dollar value of a duck not taken or a fish not caught, computing the damages requires extensive

— DISTRICT SIX —

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and sophisticated economic analyses which in many ways are similar to the analyses applied in determining the dollar value of natural resource damages.

While the villages have been pursuing their claims under the Alaska Environmental Conservation Act in state court, they have simultaneously been required under a Federal court order to present their claims to a federally created body known as the Trans-Alaska Pipeline Liability Fund. The Fund is a more limited avenue of relief for oil spill victims than the Alaska Environmental Conservation Act, because it only contains \$86 million for all of the victims of any one spill, while the Alaska Environmental Conservation Act carries no dollar limit. Recently, the Fund rejected the bulk of the subsistence claims on the ground that governing federal law did not authorize the Fund to pay any economic damages suffered by subsistence-dependent people other than the bare dollar value of subsistence foods not consumed. The decision was made by retired Federal Judge John Gibbons, who was hired by the Fund to dispose of all claims.

The decisions by Judge Gibbons, while unfortunate, would be of little consequence to the Alaska Legislature were it not for the fact that, in the course of a lengthy November 12, 1992 memorandum, Judge Gibbons expresses his view that the subsistence damage claims presented to and rejected by the Fund would similarly not be compensable under the Alaska Environmental Conservation Act.

Retired Federal Judge Gibbons is simply wrong in his assessment of our State's laws and of the Legislature's broad intent in making special provision to assure that polluters will pay the full measure of damage to our subsistence-dependent people. My view of the scope of the current law is shared by the Attorney General's office, which, I am informed, agrees that the Alaska Environmental Conservation Act authorizes the application of contingent valuation methodologies and other economic damage assessment models to compute the full measure of damages required to be paid under the Act. Nonetheless, Judge Gibbons' remarks are disturbing, and if they are accepted by the courts, would represent a severe undermining of the Legislature's intent.

For this reason, I have introduced House Bill 467 to remove any possible doubt regarding the Legislature's intent in 1972, and as reinforced by more recent amendments in 1986 and 1991. If the oil companies can hold their liability for the devastation caused to the village citizens of this State down to the mere food dollar value of their subsistence catches, a grave injustice will have been done to our citizens. I believe the Legislature has a duty to assure that this does not occur, and to remove even the most remote doubts that may have been raised as a result of the unfortunate rulings by the Trans-Alaska Pipeline Liability Fund.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 20, 1992

VIA FACSIMILE

The Honorable Gene Kubina
Alaska House of Representatives
Room 102, Capitol
P.O. Box V
Juneau, Alaska 99811

Re: HB 467

MAR 23 1992

Dear Representative Kubina:

You have requested the Department of Law's views on HB 467. In particular I understand that you are concerned as to whether the proposed legislation merely clarifies existing law or whether it would operate to expand that law. In short, it is the Department's position that the proposed amendment does not expand existing law. I would note that there has been no legal interpretation of existing law and the legislative history for that law is virtually nonexistent. For that reason I will briefly explain our views as to the operation of existing law and, hence the operation of the proposed amendment.

AS 46.03.822(a) provides in relevant part that:

the following persons are strictly liable, jointly and severally, for damages to persons and property ... resulting from an unpermitted release of a hazardous substance:

... (2) the owner and the operator of a vessel or facility, from which there is a release

The term "damages" is defined in both AS 46.03.822(k) and AS 46.03.824. In section .824, the term is defined as follows:

Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of

WALTER J. HICKEL, GOVERNOR

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ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

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JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
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the means of producing income, or the loss of an economic benefit.

"Economic benefit" is defined in AS 46.03.826(2):

"[E]conomic benefit" means a benefit measurable in economic terms, including but not limited to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost.

"Subsistence economy" is defined in AS 46.03.826(12):

"[S]ubsistence economy" means an economy which utilizes on a regular basis an item which is owned in common by the people of the state, or the United States, including but not limited to fish, game, fur bearing animals, birds, timber or any part of the natural habitat for noncommercial purposes.

The proposed legislation would modify the definition of "economic benefit" to provide a second example of the type of economic benefit that is included under the statute. In his testimony before the House Resources Committee, Lloyd Miller stated that the legislation is necessary because of a footnote in a November 11, 1991, memorandum by Trans-Alaska Pipeline Liability Fund Administrator John Gibbons. In that footnote, Administrator Gibbons stated that AS 46.03.822-.826 had "no room in [its definition of damages] for cultural, psychic or emotional distress claims of the Villages." Memorandum at 12-13 n. 23. In the text for that footnote, Gibbons essentially limited subsistence claims to the value of subsistence foods not consumed as a result of the spill, minus offsetting food supplied by the defendants. In fact the state statute was irrelevant to Gibbons' ruling, which relied on the definition of damages in the Fund regulations, 43 C.F.R. § 29.1(e), which is worded differently from state statutes and may be more limited than the existing state statute.

The definition of "economic benefit" dates from 1972. Virtually no usable legislative history exists for it. Nor does any prior judicial construction of the statute exist. General rules of statutory construction would then apply. Such an analysis should lead to a broad reading of the original statute, in order to effectuate the statute's general purpose of protecting the economic and social well-being of its natural resource users. The common

Letter to The Honorable Gene Kubina
Alaska House of Representatives
RE: HB 467

March 20, 1992
Page 3

meaning of the terms used in the statute should apply, unless they are technical words that have acquired a peculiar meaning.

The definition of "economic benefit" is couched in "including but not limited to" terms. The proposed new language, subsection (B), arguably merely restates the first part of the prior subsection. The value ("economic benefit") of "the gathering, catching, or killing of food or other items utilized in a subsistence economy" (existing AS 46.03.826(2)) should be synonymous with "the value of a subsistence economy to the physical, economic, traditional, and cultural existence of persons participating in the subsistence economy" (proposed new AS 46.03.826(2)(B)). An interpretation of the existing statute, such as that proposed by the TAPL Fund, that values subsistence resources only at replacement cost ignores the "and" immediately before "their replacement cost." Such a reading is plainly at odds with the existing structure of the statute.

In our view the existing statute provides for the recovery of "use values" for participants in a subsistence economy. Those use values include not merely the replacement cost of the subsistence catch, but also may include a "premium" based on the value of the subsistence activity to the user. In other words, the law recognizes that participation in a subsistence economy has value to the user that may go beyond the nominal value of the catch. That value may be reflective of the physical, economic, traditional and cultural background and values of the individual. I would emphasize that in most cases, such use values will not be easy for the user to prove. As specifically required by the statute, the value must be susceptible to being measured in economic terms. Thus it must be proven with reference to generally accepted scientific methods. While what is acceptable will necessarily differ with each situation, the types of analysis that claimants may attempt to utilize include travel cost, contingent valuation and the hedonic wage approach. Whether these or other types of analysis will be acceptable will be an issue that will be determined by the court hearing the particular case.

In order to provide you with a complete understanding of the damages for loss of economic benefit that, in our view, are recoverable under AS 46.03.826(2), it is useful to briefly discuss those damages that are not permitted by the existing statute, and thus would not be permitted under the amended version. Specifically, the definition of economic benefit does not allow for damages for emotional distress, pain and suffering and other types of damages that are not susceptible to measurement in economic terms.

Letter to The Honorable Gene Kubina
Alaska House of Representatives
RE: HB 467

March 20, 1992
Page 4

Finally, even though a particular item of damage may be recoverable as a loss of an economic benefit by someone or some entity, that damage may not be recoverable by all persons or entities. For example, individuals cannot recover for existence values for injuries to the resource itself. Existence values for injured resources, which may be very great for certain resources, may only be recovered by the government acting as trustee for those resources.

CHARLES E. COLE
ATTORNEY GENERAL

By: *Craig J. Tillery*
Craig J. Tillery
Assistant Attorney General

CJT:bkn

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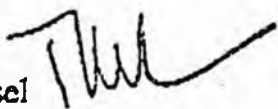
MEMORANDUM

March 25, 1992

SUBJECT: Subsistence (SB 398)

TO: Senator Curt Menard

FROM: Terri Lauterbach
Legislative Counsel



You have asked whether the amendment made to "economic benefit" in SB 398 would have any effect on the state's efforts to establish a system for the regulation and management of subsistence and subsistence uses, particularly the Governor's proposed system under SB 443.

The answer to your question is no. SB 398 will not affect SB 443. The changes made in SB 398 neither expand nor contract, nor even describe, who is a subsistence user or what a subsistence use is. SB 398 only refers to the "value" of whatever a subsistence economy is as being a value that will have to be recognized when determining damages from a release of a hazardous substance. Subsistence laws will determine what that economy is and who is in it, not SB 398.

The relationship between SB 398 and the Governor's subsistence bill runs the direction opposite to that implied in your question. That is, SB 443 (or whatever subsistence scheme is worked out) will have a great effect on what a "subsistence economy" is (and who participates in it) for purposes of oil spill damages, but not vice versa. Changes made by SB 398 in the definition of "economic benefit" for purposes of oil spill damages will have no effect on the subsistence system proposed in SB 443 or any other subsistence proposals.

Please let me know if you have further questions about this matter.

TML:pl
92-206.plm



Resource Development Council

for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone 907/276-0700 Fax 276-3887

EXECUTIVE DIRECTOR
Becky L. Gay

Position Paper - HB 467/SB398
March 10, 1992

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Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young

HB 467/SB 398 would create special recovery rights under Alaska law for "cultural" damages in the volatile area of subsistence. The damages the bill would recognize are not for tangible losses, but for alleged cultural psychological or emotional damage to the Native subsistence way of life.

RDC recognizes the importance of preserving the cultural heritage of Alaskan Natives and their subsistence lifestyle. Subsistence remains an absolute necessity for many rural Alaskan residents. However, RDC cannot ignore the potential ramifications of this bill:

- As currently written, the bill creates a risk of new "cultural damage" lawsuits over impacts of business activity in Alaska that allegedly result in the release of hazardous substances. If an oil spill can allegedly damage cultural aspects of subsistence, so can activities or accidents within the logging, mining, construction and commercial fishing industries.

- Since the bill sets no standard for measurement of cultural damages, there is a risk of runaway jury awards for unsubstantiated claims, undermining tort reform principles. There are no established legal standards to determine these damages. The bill will invite an emotional appeal in awarding damages.

- HB 467/SB398 could potentially open the door to new claims by non-development groups for damages beyond any physical injury, property damage or economic loss.

- As currently drafted, this bill represents an attempt to avoid burden of proof of documenting actual individual damages by changing the nature of the subsistence claims from actual individual losses to a vaguely defined and general "cultural" loss.

- Recovery for emotional distress type damages is carefully limited in the law and is usually available only in cases of personal injury or intentional acts. This bill, however, could vastly expand emotional distress damages from individual claims to perhaps collective claims for alleged damage to culture.

RDC has no choice but to oppose this bill in its current form. It opens Pandora's Box to almost any conceivable claim for damages. Specific language and modifications are needed to define its application and remove potential ramifications.



ALASKA OUTDOOR COUNCIL, INC.

P O Box 34097
Juneau, AK 99803
463-3830

March 13, 1992

The Honorable Dave Donley, Chair
House Judiciary Committee
Alaska State Legislature
Juneau, AK 99811

Dear Representative Donley:

I am writing to express the opposition of the Alaska Outdoor Council to HB467, which amends the definition of economic benefit in relation to a subsistence economy.

Contrary to comments made on public radio, this bill does not clarify the law regarding the meaning of economic benefit. Rather, it introduces a whole host of intangibles and unknowns and invites creative, sweeping claims of economic benefits and damages that are not susceptible to objective evaluation.

We do not question the importance of cultural and traditional values including those related to subsistence uses. As the Alaska Outdoor Council's representative on the Governor's Subsistence Advisory Council, I advocated recognition and enunciation of those values. However, as a group the Governor's Council found that such values were not amenable to use as criteria by meeting which people might qualify for a subsistence priority. Unmeasurable values do not make good or acceptable standards. So we recognized the intangible values in our proposed findings, but used objective standards as qualifying criteria.

We are concerned that defining "economic benefit" to include "traditional" and "cultural" sets a dangerous, open-ended precedent that may be spuriously applied not only to damage claims related to oil spills. It would suggest claims based on "culture" or "tradition" in relation to any other perceived conflict between subsistence and other uses. The potential for conflicts between resource users is staggering.

This bill would essentially create a special class of people with rights arbitrarily denied to others. That is the sort of discriminatory treatment that we worked very hard to eliminate from the Governor's proposed subsistence bill. It would be unfortunate to have it surface elsewhere in law.

Please do not pass HB467.

Sincerely,

Richard H. Bishop
Legislative Affairs

Native Village of Port Graham

PORT GRAHAM VILLAGE COUNCIL
P.O. BOX PGM • PORT GRAHAM • ALASKA 99603
907-284-2227 FAX 907-284-2222

April 7, 1992

Representative Gene Kubina
Alaska State Legislature
P.O. Box V (MS3100)
Juneau, Alaska 99811

Dear Representative Kubina:

I write to express my strong support for House Bill 467 and Senate Bill 398, amending the oil spill laws to explain more fully that all subsistence damages must be paid in tragedies like the Exxon Valdez Oil Spill.

Please do everything in your power to get this bill to the Governor.

Sincerely,

Elenore McMullen

Elenore McMullen, First Chief



MT. MARATHON NATIVE ASSOCIATION

March 24, 1992
MAR 24 1992

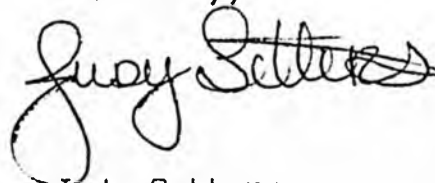
Representative Kubina
Alaska State Legislature
Box V (MS 3100)
Juneau, AK 99811

Dear Representative:

I am writing in regards of the recent House Bill 467; which will make it clearer that the impact on subsistence cannot be measured by putting a dollar value on our subsistence foods.

The Mt. Marathon Native Association represents 500 Native members of the community of Seward. We would like to express our support of this bill as well as best wishes on the outcome.

Sincerely,



Judy Setters,
Administrative Officer
Mt. Marathon Native Association

cc: Lloyd Miller of Sononsky,
Chambers, Sachse, Miller and Munson

**Kodiak
Area
Native
Association**



402 Center Avenue
Kodiak, Alaska 99615
Phone (907) 486-5725

MAR 24 1992

March 24, 1992

Representative Gene Kubina
Alaska State Legislature
PO Box V (MS 3100)
Juneau AK 99811

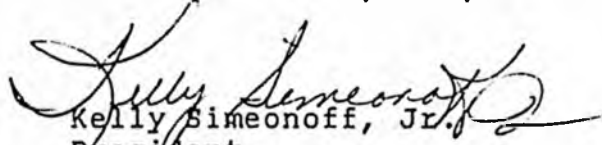
Dear Representative Kubina

The Kodiak Area Native Association (KANA) is in strong support of House Bill 467 and Senate Bill 398, amending the oil spill laws to explain more fully that all subsistence damages must be paid in tragedies like the Exxon Valdez oil spill.

Please do everything in your power to get this bill to the Governor.

Sincerely

KODIAK AREA NATIVE ASSOCIATION
KELLY SIMEONOFF, JR., PRESIDENT


Kelly Simeonoff, Jr.
President

KS:kc

file copy

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ANNE D. NOTO

OF COUNSEL
TASSIE M.K. HANNA
ROGER W. DUBROCK
RAY E. MAASSEN GOEWENS

*ALASKA BAR

WEDDIE L. BARDAOLIO
LEGISLATIVE SPECIALIST

April 8, 1992

Honorable Gene Kubina
House of Representatives
State of Alaska
Room 102, Capitol
P.O. Box V
Juneau, AK 99811

Re: House Bill 467 (Our File No.
1904.24(d)(60))

Dear Representative Kubina:

Thank you for sending me a copy of the Koniag letter expressing opposition to H.B. 467. It is unfortunate, but surprising, that Koniag has chosen to take a position radically different from the Kodiak villages themselves, as well as from all the other affected villages.

Koniag has a different perspective on a number of matters. Of all the village and regional corporations whose lands were substantially oiled as a consequence of the Exxon Valdez oil spill disaster, Koniag is the *only* corporation which never filed suit against any of the responsible parties, never filed a claim against the Trans-Alaska Pipeline Liability Fund, and has shown no interest in recovering compensation as a result of the impact of the spill on Koniag lands. Interestingly, the Koniag Board Chairman was hired by Exxon immediately after the spill to represent Exxon's interests in dealing with all the affected villages, and to my knowledge she continues to work for Exxon to this day.

Turning to the letter (copy enclosed), the Koniag objection has no basis in fact.

Koniag states that the legislation "Proports [sic] to create a special class of citizens with special rights to damages totally unrelated to economic damages." This is precisely what

Honorable Gene Kubina

April 8, 1992

Page 2

the legislation does *not* do. Rather, the legislation explains that subsistence dependent people have the *same* right to recover economic damages as do other people. The legislation thus assures that subsistence users are treated the *same* as others, rather than being disadvantaged.

Koniag next suggests that "the bill is lawyer generated and driven in order to help them and others profit unjustly." This is absurd. As you know, not one penny in compensation has ever been paid to the villagers in connection with the impact of the oil spill on their subsistence way of life. While it may be fine for Koniag to choose not to seek compensation for the oil spill damage cause to its lands and other interests, Koniag has no business suggesting to the people of Prince William Sound, Lower Kenai and Kodiak that they, too, should never be compensated for their losses. As you know, lawyer bashing, although popular, is usually a sign that the author has no sound argument.

Next Koniag argues that somehow the bill will eventually be extended to "mining, logging, railroad and road building, port and airport construction and so on." This statement makes no sense. House Bill 467 is narrowly focused on the Alaska Environmental Conservation Act, and nothing else. This objection is but an exercise in obfuscation.

Finally, Koniag claims that the bill "would clear the way to almost any conceivable claim for damage with no clear standard of measurement." Again, this is simply not the case. As with all other damages which may be claimed under the AECA, subsistence damages must be "measurable in economic terms". AS 46.03.826(2). Whether the issue is the spill's effect on subsistence users, the price of fish sold by commercial fishermen, or other matters, sound economic analysis must support each claim. If such support is lacking, the subsistence damage claim will be thrown out by the courts.

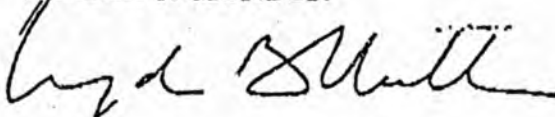
We are saddened that Koniag has seen fit to give voice to these objections. As noted earlier, however, given Koniag's past behavior in connection with the oil spill we are not surprised. That Koniag should seek to deny village people their full right to recover compensation for the severe impact of the oil spill on their way of life is, however, not merely ironic; it is unconscionable.

Thank you again for the opportunity to respond to the comments from Koniag. By copy of this letter I am sharing these thoughts with the other co-sponsors of this important legislation.

Honorable Gene Kubina
April 8, 1992
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Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON



By: Lloyd Benton Miller

Enclosure

LBM/lf

cc: (with enclosure)
Honorable Eileen Panigeo MacLean (Room 507, Capitol)
Honorable Georgianna Lincoln (Room 112, Capitol)
Honorable Ben Grussendorf (Room 208, Capitol)
Honorable Jerry Mackie (Room 110, Capitol)
Honorable Ivan Ivan (Room 405, Capitol)

caz191gu/lbm

bcc w/incl.

Johanna Munson in
Senator Menard's office

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November 12, 1991

MEMORANDUM OF LAW OF
THE ADMINISTRATOR -- EXXON VALDEZ CLAIMS
OF THE TRANS-ALASKA PIPELINE LIABILITY FUND
REGARDING THE COMPENSABILITY OF NATIVE SUBSISTENCE CLAIMS

INTRODUCTION

Before the Fund are claims by Alaska Natives and the Villages in which they live ["Native Claimants"] seeking compensation for damages to the native subsistence way of life claimed to have been caused by the oil spill of the Exxon Valdez.¹ Broadly read, these Claimants seek damages both for tangible economic loss -- such as diminished food harvests and

¹ Specifically, the Fund received a submission from "Elenore McMullen, Frank Carlson, and the Native Village of Larsen Bay on behalf of themselves, on behalf of the 1,895 Alaska Natives who have filed claims against the Trans Alaska Pipeline Liability Fund . . . and all members of the Alaska Native Class who have not filed claims against the Fund." Submission to the Trans Alaska Pipeline Liability Fund by the Alaska Natives Class Member Claimants 1 (Aug. 23, 1991) [hereinafter "Claimants' Submission"]. In addition to Larsen Bay, the Submission also contains information about the effects of the spill on Tatitlek, Chenega Bay, English Bay, the Native Village of Port Graham, and the Villages of Kodiak Island. It is not clear from the Claimants' Submission whether these other Native Villages, each of which has submitted its own claim against the Fund and is represented by the same counsel, join in this submission. Nevertheless, the claims at issue appear largely to be common to all of the Native Villages represented by counsel making this submission. These claims will be dealt with in this Memorandum.

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- (5) Loss of use of natural resources; or
- (6) Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence, hunting, fishing, and gathering opportunities.²¹

On their face the regulations define damages to include only "economic loss."

Nevertheless, the Native Claimants make two broad arguments. First, they argue that the Department's definition of "economic loss" is not a limitation on recoverable damages but is only illustrative of the meaning Congress intended when it used the term "damages."²² By defining damages as "economic", they

²¹ 43 C.F.R. § 29.1(e) (1989).

²² Claimants do not argue that the damages they seek to recover are in fact for "economic" loss. Any such argument would run contrary to conventional understanding of the term. For example, one leading dictionary defines "economic" as meaning "of, relating to, or concerned with the production, distribution, and consumption of commodities" or "having practical or industrial significance, uses, or application" or "capable of or liable to profitable exploitation." Webster's Third New International Dictionary (Unabridged) 720 (1971). Clearly emotional or psychic matters do not fall within the ambit of the word "economic."

Statutory schemes that authorize recovery of "economic" damages are also illustrative. For example, the State of Alaska's Environmental Conservation Act, which is remedial legislation analogous to TAPAA, has defined "damages" as "includ[ing] but ... not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit." Alaska Stat. § 46.03.824. "Economic benefit" is in turn defined as "a benefit measurable in economic terms, including but not limited

(continued...)

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argue, DOI did not mean to foreclose compensation for non-economic damages, including cultural, emotional or psychic losses -- that when DOI declared that "damages means any economic loss," it meant to say "damages includes, but is not limited to, any economic loss." Second, Claimants argue that, if the language of the regulations cannot be so read, the limitation in the regulations to "economic loss" is ultra vires. The Fund can accept neither contention.

There is no basis for the first argument that the phrase "economic loss" is only illustrative and not a limitation.

23 (...continued)

to the gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement cost." Alaska Stat. § 46.03.826. There appears to be no room in this definition for cultural, psychic or emotional distress damages.

While a state statutory definition is not dispositive of the meaning of a federal statute, it supports the existence of a common understanding in legal usage of the term "damages" in the context of an oil spill. It also suggests that "damages to the subsistence way of life" may be commonly understood in a strictly economic, as opposed to cultural or psychic sense.

Moreover, some state tort laws draw a distinction between economic and non-economic damages that is illustrative. For example, Maryland's Code defines "economic damages" in the tort context as meaning "loss of earnings and medical expenses." Md. Ann. Code § 11-109(a)(1). On the other hand, it defines "noneconomic damages" as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury." *Id.* at § 11-108(a)(1). Other state statutes provide similarly. See, e.g., Alaska Stat. § 09.17.010 "noneconomic damages" means "pain, suffering, disfigurement, loss of Cal. Civ. Code