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SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 2/12/92

FURTHER: Judiciary

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

Resources Committee considered SB 398

Amending the definition of 'economic benefit' in relation to a subsistence economy; efd.

and recommends:

replace with _____ CS _____ (_____)

attaches amendment(s)

adopts _____ Letter of Intent

further referral to the _____

same title
 new title
 technical
title change
(HB only)

do pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES: Dept/Date

zero fiscal notes _____

fiscal notes _____

appropriation--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

Governor's bill with fiscal notes:

zero fiscal notes _____

fiscal notes _____

DO PASS:

OTHER RECOMMENDATIONS:

Chair: Signature and Recommendation

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

REPLY TO:

1031 W 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3597

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4673
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K · STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

March 20, 1992

VIA FACSIMILE

The Honorable Curt Menard
Alaska State Senate
Room 9, Capitol
P.O. Box V
Juneau, Alaska 99811

Re: SB 398

Dear Senator Menard:

You have requested the Department of Law's views on SB 398. 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

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 Curt Menard
Alaska State Senate
RE: SB 398

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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 Curt Menard
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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



Resource Development Council

for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035

Phone 907/276-0700 Fax 276-3887

TELECOPIER TRANSMITTAL COVER SHEET

DATE: March 13 1992 4:00 AM/PM

TO: Lloyd Jones - Chairman, Senate Resource Committee

FAX#: 465-2864

PHONE #: 561-7007

FROM: REINWAND BORTMAN HENDRICKSON DUKE DAVIS

RE: HB 467 / SB 398

SUBJECT/MESSAGE: RDC Position Paper

TOTAL NUMBER OF PAGES SENT 2 INCLUDING COVER SHEET

IF YOU DO NOT RECEIVE ALL PAGES SENT CALL (907) 276-0700

RDC'S TELECOPIER (FAX) NUMBER IS: (907) 276-3887



Resource Development Council

for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035

Phone 907/276-0700 Fax 276-3887

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 Congressman Don Young

Position Paper - HB 467/SB398 March 10, 1992

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.

KONIAG, INC.

• 4300 B Street, Suite 407, Anchorage, AK 99503

(907) 561-2668 • FAX (907) 562-5258 •

March 3, 1992

Representative Jim Zawacki
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Zawacki:

We are writing you regarding H.B. 467. This proposed legislation purports to create a special class of citizens with special rights to damages totally unrelated to economic damages. Furthermore, we can't help but think, when noticing the retroactive date (to 1989) provision, that the bill is lawyer generated and driven in order to help them and others profit unjustly from the Exxon Valdez oil spill incident.


We are convinced that once recognized by the State, these special rights may not be confined to the oil industry alone, but would be claimed for other development projects i.e. mining, logging, railroad and road building, port and airport construction and so on.

This bill, in our opinion, would clear the way to almost any conceivable claim for damage with no clear standard of measurement. This is a dangerous, precedent setting piece of legislation that cannot be allowed to see the light of day. We seek your support to defeat this bill.

By copy of this letter to Governor Walter J. Hickel, we are asking him to veto the bill should it by chance made it through the legislature.

Sincerely,

KONIAG, INC.


Frank Pagano
President

KONIAG, INC.


Uwe L. Gross
Chief Executive Officer

cc: Walter J. Hickel, Governor



ALASKA OUTDOOR COUNCIL, INC.

*Senator Jones: This letter
reflects our position on SB396.*

P O Box 34097
Juneau, AK 99803
463-3830

Richard Bishop

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

Richard H. Bishop
Legislative Affairs

Major Problems With House Bill No. 467

SB 398

°The bill changes the rules of litigation pending for three years in mid-stream, at the behest of litigants in the case, raising serious questions not only of fairness but of constitutionality.

°The bill creates new, special recovery rights under Alaska law for "cultural" damages in the volatile area of subsistence, with significant possible impacts on other subsistence and Native rights issues.

°The bill is anti development because it creates a risk of new "cultural damage" lawsuits in other areas over claimed impacts of business activity in Alaska.

°The bill undermines tort reform principles by creating the risk of runaway jury awards for unsubstantiated, non-economic damage to "traditional and cultural existence".

°The bill will increase State government exposure for land, resource management, and other activities on grounds of claimed cultural impacts.

°The bill radically expands emotional distress type recoveries, creating the anomaly that an Alaska Native living in California could claim recovery for emotional distress for oil spill damage to his "cultural existence" but the relatives of a woman crushed to death in an elevator in Anchorage cannot.

°The bill opens the door to new claims by environmentalists and other special interest groups on similar theories of recovery for damages beyond any actual physical injury, property damage, or economic loss.

°Change in the existing strict liability statute is wholly unwarranted because it already provides recovery for actual damages from oil spills, without regard to fault, to the extent legally cognizable.

Specific Issues

° New and unprecedented damages authorized by this bill would go far beyond actual damages into claims for loss of the "cultural" value of subsistence.

° This will create the risk of precisely the kind of unjustifiable jury damage awards which reformers have been trying to correct through tort reform, imposing further litigation costs upon business.

° The damages the bill would create are not for tangible losses but for what the Trans-Alaska Liability Fund described as alleged "cultural, psychic, or emotional damage to the native subsistence way of life."¹ The bill represents a radical expansion of established legal limits to liability for such claims of emotional distress.

° Recovery for such emotional distress type damages is carefully limited in the law and is usually available only in cases of personal injury or intentional acts. Even recovery for pain and suffering in wrongful death cases is limited by statute.

° This bill also appears to be an attempt to vastly expand emotional distress damages from individual claims to essentially collective claims for alleged damage to culture.

° The beneficiaries of this act are asking the legislature to intervene in pending litigation when they have themselves deliberately failed to provide information on actual subsistence damages to the Trans-Alaska Pipeline Liability Fund, despite repeated requests and opportunities to do so, and thus have failed to utilize remedies already available.²

° The Natives subsistence claimants similarly failed to submit individual subsistence claims to the Exxon Claims program,

¹Memorandum of the Trans-Alaska Pipeline Liability Fund Explaining Its Preliminary Disposition Of Native Subsistence Claims, January 23, 1992 at 2.

² Specifically, the Trans-Alaska Pipeline Liability Fund decisions on claimed subsistence losses (to which Lloyd Miller has called this bill a response) made clear the necessity of "individualized substantiation of claimed damage." Memorandum Of The Trans-Alaska Pipeline Liability Fund Explaining Its Preliminary Disposition of Native Subsistence Claims, January 23, 1992 at p. 1. The Fund, with the assistance of the Subsistence Division of ADF&G, prepared questionnaires for individual subsistence claimants seeking "essential" information on topics including subsistence harvests, mitigation income from oil spill cleanup work, and substitute provisions received from other sources including Exxon. *Id.* at 4. Despite repeated warnings from the Fund, only 14 individual responses were received. *Id.* at 5. Others were apparently completed but withheld by claimants' counsel. *Id.* The Fund had no choice but to deny the claims. *Id.* at 7.

which paid over \$300 million dollars to claimants for oil spill losses.

° Given the failure of these claimants to even attempt to document actual individual damages when given the opportunity, it must be concluded that this act is an attempt to avoid the burden of proof of doing so in court by changing the nature of the subsistence claims from actual individual losses to a vaguely defined and general "cultural" loss.

° The legislature should not become a backdoor means for special interest groups thus to receive the benefit of preferential legal standards and to avoid their burden of proof in pending litigation in court.

° It is particularly inappropriate to radically expand damages as proposed in this bill in a strict liability statute, where a plaintiff does not have to prove fault to recover actual damages.

° There are no established legal standards to determine these putative damages. The bill will invite an emotional appeal to the standardless discretion of a jury to award unjustified damages.

° Enactment of the bill will open the door to other claims for special treatment on related subsistence or native rights issues.

° The bill will create a dangerous precedent. If an oil spill can allegedly damage "cultural" aspects of subsistence, so can many other actions by individuals, private businesses, or the government. If successful here, the beneficiaries of this legislation will certainly assert entitlement to these types of damages in other cases, citing this act as recognition and approval of such claims.

° Other groups including environmentalists will also try to seek such "cultural" damages, in addition to actual losses, in litigation involving the particular activities they may be engaged in.



GREATER FAIRBANKS BOARD OF REALTORS®

The Voice for Real Estate™ in FAIRBANKS

1449 Gillam Way
Fairbanks, Alaska 99701
(907) 452-7743

RESOLUTION

by the Greater Fairbanks Board of REALTORS opposing House Bill 467, an act amending the definition of "economic benefit" in relation to a subsistence economy, and providing for an effective date

WHEREAS House Bill 467, an act amending the definition of "economic benefit" in relation to a subsistence economy, and providing for an effective date of March 24, 1989, is under consideration by the Alaska State Legislature; and,

WHEREAS the act creates special recovery rights under Alaska law for "cultural" damages in the volatile area of subsistence, with significant possible impact on other subsistence and Native rights issues; and,

WHEREAS the act is anti-development in that it creates a risk of new "cultural damage" lawsuits in other areas based on claimed impacts of business activities in Alaska; and,

WHEREAS the act undermines tort reform principles by creating the risk of excessive jury awards for unsubstantiated, non-economic damage to "traditional and cultural existence"; and,

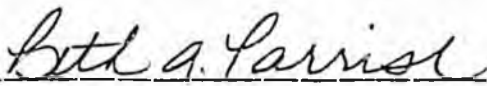
WHEREAS the act opens the door to new claims by environmental and other special interest groups on similar theories of liability for damages beyond any actual personal injury, property damage or economic loss; and,

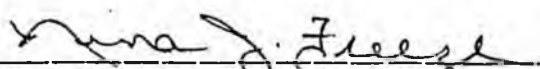
WHEREAS such a change in the existing strict liability statute is unwarranted, because it already provides for recovery of actual damages from oil spills, without regard to fault, to the extent legally cognizable;

NOW, THEREFORE, BE IT RESOLVED that the Greater Fairbanks Board of REALTORS strongly urges the Alaska State Legislature to defeat House Bill 467.

Adopted this 3rd day of April, 1992.

BY: GREATER FAIRBANKS BOARD OF REALTORS


Beth Parrish, President


Nina J. Freeze, Executive Officer



GREATER FAIRBANKS BOARD OF REALTORS®

The Voice for Real Estate™ in FAIRBANKS

1449 Gillam Way
Fairbanks, Alaska 99701
(907) 452-7743

A RESOLUTION OPPOSING HOUSE BILL 29, AN ACT AUTHORIZING SUITS TO ENFORCE ENVIRONMENTAL LAWS

WHEREAS House Bill 29, an act authorizing suits to enforce environmental laws, is under consideration by the Alaska State Legislature; and,

WHEREAS the act would allow persons affected by an alleged violation of the environmental law, regulation, permit, plan, or order to file a civil action against the alleged violator; and,

WHEREAS the act mandates that proceeds from a settlement of such a civil action may only be used for restoration costs, environmental education, donations to 501(c)(3) organizations, or for reimbursement of legal fees and costs; and,

WHEREAS the act is modeled after similar federal law; and,

WHEREAS the federal law in purpose and effect is an off budget entitlement program for environmental advocacy groups; and,

WHEREAS the vast majority of private enforcement actions under the federal law have been brought by environmental advocacy groups; and,

WHEREAS the federal law has not measurably increased the detection and cessation of pollution; rather, the violations easiest to prove and, therefore, those that attract the attention of private enforcers, most often turn out to be paperwork violations; and,

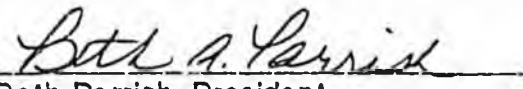
WHEREAS the vast majority of notices of intent to sue under the federal law have led, not to litigation, but to negotiations, settlements, and consent decrees; and,

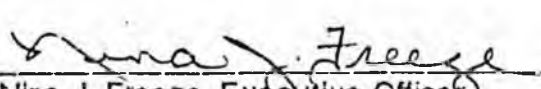
WHEREAS the compulsory philanthropy to environmental advocacy groups required by federal law and contemplated by House Bill 29 is a hidden tax on consumers;

NOW, THEREFORE, BE IT RESOLVED that the Greater Fairbanks Board of REALTORS strongly urges the Alaska State Legislature to defeat House Bill 29.

Adopted this 3rd day of April, 1992.

BY: GREATER FAIRBANKS BOARD OF REALTORS


Beth Parrish, President


Nina J. Freeze, Executive Officer



GREATER FAIRBANKS BOARD OF REALTORS®

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1449 Gillam Way
Fairbanks, Alaska 99701
(907) 452-7743

A RESOLUTION OPPOSING HOUSE BILL 522, AN ACT IMPOSING A REAL ESTATE CONVEYANCE TAX

WHEREAS House Bill 522, an act imposing a real estate conveyance tax; providing for sharing with municipalities of a portion of the revenue obtained from the tax; authorizing certain municipalities to levy and collect a real estate conveyance tax; amending the formal requisites of recording a conveyance; and providing for an effective date; and,

WHEREAS, in the absence of a State withholding tax or a State sales tax, the property owners are already paying the bulk of the taxes; and,

WHEREAS such act would increase closing costs for the Sellers of real property and **WHEREAS** such costs would be passed on in part to the Purchasers of real property in Alaska, the moderate to low income family would be unable to realize the American dream of property ownership; and,

WHEREAS the real estate industry and the lending institutions are making an effort to provide alternatives for low to moderate income housing loans; and,

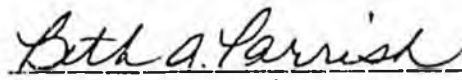
WHEREAS the sale and purchase of real property is essential to a healthy economy as well as a healthy real estate industry; and,

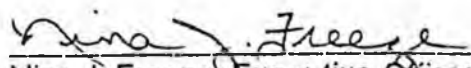
WHEREAS there should be more effort by the Alaska State Legislature to reduce State expenditures;

NOW, THEREFORE, BE IT RESOLVED that the Greater Fairbanks Board of REALTORS strongly urges the Alaska State Legislature to defeat House Bill 522.

Adopted this 20th day of March, 1992.

BY: GREATER FAIRBANKS BOARD OF REALTORS


Beth Parrish, President


Nina J. Freeze, Executive Officer

LAW OFFICES
SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON

SUITE 700

900 WEST FIFTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 258-8377
TELEFAX (907) 272-8332

JUNEAU OFFICE
229 FOURTH STREET
JUNEAU, ALASKA 99801
(907) 586-5880
TELEFAX (907) 586-5883

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*ALASKA BAR

WREXIE L. BARDAGLIO
LEGISLATIVE SPECIALIST

March 18, 1992

D.C. OFFICE
SUITE 1000
1250 EYE STREET, N.W.
WASHINGTON, D.C. 20008
(202) 682-0240
TELEFAX (202) 682-0240

The Honorable Lloyd Jones
Alaska State Senate
State Capitol
Juneau, AK 99801-1182

Re: Senate Bill 398 (Spill Damages to
Subsistence Interests)

Dear Senator Jones:

Thank you so much for taking a few minutes with me and Senator Menard several days ago to discuss the merits of Senate Bill 398. I thought our discussion served as an excellent test of the merits of this fairly innocuous bill, and I was glad to have the opportunity to talk with you directly regarding its importance.

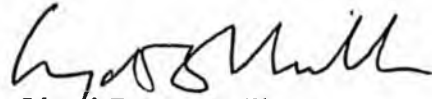
You correctly pointed out what the Attorney General's office has also been saying: A judge correctly interpreting the oil spill law as it is currently written should not limit the damages of subsistence users to a few dollars worth of salmon, duck meat or seal meat. Still, one judge has already misconstrued the law in precisely this way. S.B. 398 will make sure that that sort of retroactive misreading of the law does not occur. Because the bill is short, technical, and when properly interpreted not controversial, I hope you will be able to find a small block of time on your Committee to hear the bill and move it on to Judiciary.

Thank you once again for making the time to discuss this bill.

The Honorable Lloyd Jones
March 18, 1992
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Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

A handwritten signature in black ink, appearing to read "Lloyd Benton Miller". The signature is written in a cursive style with a large initial "L".

By: Lloyd Benton Miller

LBM/lf

cas:142ps:lbm

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**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

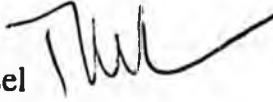
MEMORANDUM

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



Alaska State Legislature

SENATE

Official Business

SENATOR CURT MENARD

P.O. Box V
State Capitol
Juneau, Alaska 99811

SPONSOR STATEMENT

Sponsor: Senator Curt Menard

A handwritten signature in black ink, appearing to read "Curt Menard", written over the printed name.

Subject: Senate Bill 398: An act amending the definition of 'economic benefit' in relation to a subsistence economy

Date: 28 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 spills for their full measure of "damages," including all damages measureable 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 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,

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SB 398 Sponsor Statement

and if they are accepted by the courts, would represent a severe undermining of the Legislature's intent.

For this reason, I have introduced Senate Bill 398 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.

I would appreciate your support of SB 398.