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*adapted as
work draft 9/26*

CS FOR HOUSE JOINT RESOLUTION NO. 202(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SPECIAL SESSION

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST

A RESOLUTION

1 Proposing amendments to the Constitution of the State of Alaska relating to use
2 of indigenous subsistence resources by residents and relating to litigation on behalf
3 of the state.

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * Section 1. Article VIII, sec. 4, Constitution of the State of Alaska, is amended to read:

6 Section 4. Sustained Yield. (a) Fish, forests, wildlife, grasslands, and all
7 other replenishable resources belonging to the State shall be utilized, developed, and
8 maintained on the sustained yield principle, subject to preferences among beneficial
9 uses.

10 (b) The legislature may provide a preference to and among residents for a
11 reasonable opportunity to take an indigenous subsistence resource on the basis of
12 customary and traditional use, direct dependence, proximity to the resource, or the
13 availability of alternative resources. The preference may be granted only when the
14 harvestable surplus of the resource, consistent with the sustained yield principle
15 and sound resource management practices, is not sufficient to allow a reasonable
16 opportunity for all beneficial uses.

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1 * Sec. 2. Article XV, Constitution of the State of Alaska, is amended by adding new
2 sections to read:

3 **Section 30. Effective Date and Repeal of Subsistence Amendment.** (a) If
4 Section 4 of Article VIII, as amended, regarding indigenous subsistence resources, is
5 adopted at the 2000 general election, the amendment takes effect immediately on
6 certification of the election returns by the lieutenant governor.

7 (b) Subsection (b) of Section 4 of Article VIII, regarding use of indigenous
8 subsistence resources, is repealed on the day after the date of a final, nonappealable
9 judgment or order by a federal court deciding that the rural subsistence priority in
10 Section 804, Alaska National Interest Lands Conservation Act (P.L. 96-487), as
11 amended, violates the Constitution of the United States. In this subsection, "final,
12 nonappealable judgment or order" means a judgment or order that cannot be appealed
13 because all possible appeals, including a petition for certiorari to the United States
14 Supreme Court, have been taken or the time for taking an appeal has expired without
15 appeal.

16 (c) Subsection (b) of Section 4 of Article VIII, regarding use of indigenous
17 subsistence resources, is repealed on the day following the date on which the governor
18 determines that State management of fish and wildlife on State land, including
19 navigable waters to which the State holds title, has been preempted by the federal
20 government under Title VIII, Alaska National Interest Lands Conservation Act (P.L.
21 96 - 487).

22 **Section 31. Litigation on Behalf of the State.** The legislature may bring an
23 action in the name of and on behalf of the State in an appropriate federal court to
24 challenge the constitutionality of the rural subsistence priority of Title VIII, Alaska
25 National Interest Lands Conservation Act (P.L. 96-487) under the Constitution of the
26 United States on grounds as the legislature may determine appropriate.

27 * Sec. 3. PURPOSE. The purpose of the amendments proposed by this resolution is to
28 provide for a preference for subsistence uses of fish, wildlife, and other renewable natural
29 resources; to ensure state management of fish and wildlife throughout the state; and to bring
30 the state into compliance with Title VIII, Alaska National Interest Lands Conservation Act
31 (P.L. 96-487).

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- 1 * Sec. 4. The amendments proposed by this resolution shall be placed before the voters of
- 2 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
- 3 State of Alaska, and the election laws of the state.

Subject: House Judiciary Amendments

Date: Tue, 28 Sep 1999 13:46:02 -0800

From: Crystalline Jones <Crystalline_Jones@legis.state.ak.us>

Organization: Alaska State Legislature

To: Mindy Rowland <Mindy_Rowland@legis.state.ak.us>,
Crystalline Jones <Crystalline_Jones@legis.state.ak.us>

Mindy,
Hope this is helpful.

Amendment 4:

Page 1, Delete lines 10-16

Insert

1 "(b) The Legislature may, consistent with the sustained yield principle and sound
2 resource management practices, provide a preference to and among residents for a
3 reasonable opportunity to take an indigenous subsistence fish or wildlife resource on the
4 basis of customary and traditional use, direct dependence, the availability of alternative
5 resources, the place of residence and proximity to the resource. The preference may be
6 granted only when the harvestable surplus of the resource is not sufficient to provide for
7 the customary and traditional level of subsistence use."

Amendment to Amendment 4:

(was not adopted)

Delete text, after "granted only"

Insert:

"in times of shortage as defined by statute."

Amendment to Amendment 4:

(was not adopted)

In the last sentence of Amendment 4,

Delete text after "granted"

Insert:

"when no practical alternative means are available to replace the food supplies and other items gathered from the fish and wildlife which supply residents dependent on subsistence uses."

Amendment to Amendment 4:

(adopted)

In the last sentence of Amendment 4,

Delete "The preference may be granted only"

The last sentence of Amendment 4 would read as follows:

"When the harvestable surplus of the resource is not sufficient to provide for all beneficial uses, other beneficial uses shall be limited to protect subsistence uses."

Amendment to Amendment 4:

(adopted)

Line 3 of Amendment 4; page 1, line 2(conforming title)

Delete "indigenous subsistence fish or wildlife"

Insert "wild renewable"

Page 2, line 4

Delete "indigenous subsistence"

Insert " wild renewable"

Amendment 5(refer to language in Amendment 4):

(was not adopted)
Line 2 of Amendment 4,
Delete "for a reasonable opportunity"

Amendment 6(refer to language in Amendment 4):
(was adopted)
Line 5 of Amendment 4,
Delete "and"
Insert "or"

THEREFORE, AMENDMENT 4 ended up reading as follows:

Page 1, Delete lines 10-16

Insert

1 "(h) The Legislature may, consistent with the sustained yield principle and sound
2 resource management practices, provide a preference to and among residents for a
3 reasonable opportunity to take a wild renewable resource for subsistence uses on the
4 basis of customary and traditional use, direct dependence, the availability of alternative
5 resources, the place of residence or proximity to the resource.
6 When the harvestable surplus of the resource is not sufficient to provide for all
7 beneficial uses, other beneficial uses shall be limited to protect subsistence uses uses."

9-26
}

Amendment

OFFERED IN THE HOUSE JUDICIARY COMMITTEE
TO: HJR 202

BY REPRESENTATIVE

Markowski

1. Page 1, line 11 after "proximity to the resource,"

insert "place of residence,"

adpta.
w/o

ROKBERG

DELETE P 2, L 7-21

#2

1 Page _____ Line _____ add

INSERT :

2

3 Subsection B, of Section 4 of Article VIII, regarding a subsistence priority, is repealed
4 when the governor certifies that;

- 5 1. any federal agency has implemented regulations on the management of fish
6 and or wildlife on State land, including navigable waters to which the State
7 holds title, under Title VIII, Alaska National Interest Lands Conservation Act
8 (P.L. 96-487); or
9 2. a state or federal court has issued a final nonappealable judgment or order
10 deciding that any provision of Title VIII, Alaska National Interest Lands
11 Conservation Act (P.L. 96-487), as amended, violates the constitution of the
12 United States.

13 Any person may bring an action in superior court to enforce this subsection.

14

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Fcd

CROFT

AMENDMENT #3

PAGE 2

DELETE LINES 7-26

Am #4 as an adptd

GREEN

~~#3~~ #4

AMENDMENT

~~by Rep.~~

Page 1, Delete lines 10-16.

Insert:

1 "(b) The Legislature may, consistent with the sustained yield principle and sound
 2 resource management practices, provide a preference to and among residents for a
 3 reasonable opportunity to take an (indigenous) ^{→ MURK} subsistence fish or wildlife resource on the
 4 basis of customary and traditional use, direct dependence, the availability of alternative
 5 resources, the place of residence and proximity to the resource. (The preference may be
 6 granted only when the harvestable surplus of the resource is not sufficient to provide for
 7 the customary and traditional level of subsistence use." >

adptd.
as amended

delete:

AM #5 - KERTT "for a reasonable opp"

↳ Fld

CROFT - AM #6 adptd "OR"

9/26/99

from AOC
Kelleyhouse add.

(b) The legislature may, consistent with the sustained yield principle and sound resource management practices, provide a preference to and among residents for a reasonable opportunity to take an indigenous subsistence fish or wildlife resource on the basis of [CUSTOMARY AND TRADITIONAL USE,] direct dependence, proximity to the resource, [OR] and the availability of alternative food resources in areas where the residents are characteristically dependent upon that resource for personal and family nutrition. The preference may be granted only when [the harvestable surplus of the resource, CONSISTENT WITH THE SUSTAINED YIELD PRINCIPLE AND SOUND RESOURCE MANAGEMENT PRACTICES,] is not sufficient to ^{provide} allow ^a reasonable opportunity ^{for other} [for all beneficial uses.]

for nonwasteful, noncommercial subsistence taking

a historically unusual shortage of a fish stock or wildlife population occurs, until the stock or population of the resource has increased to a level that is consistent with the normal range of historic stock or population levels of the resource in the area and with the habitat limitations for the resource in the area.

↳ would suggest inserting in []

~~Handwritten signature~~
not issued

Amendment

OFFERED IN THE HOUSE JUDICIARY COMMITTEE
TO: HJR 202

BY REPRESENTATIVE

Murkowski

- 1. Page 1, line 10 after "take",
- delete "an indigenous subsistence resource"
- insert "replenishable natural resources"



United States Department of the Interior

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extra
(refers to
Version D)

September 23, 1999

MEMORANDUM

TO: Special Assistant to the Secretary for Alaska
FROM: Regional Solicitor
SUBJECT: Analysis of Proposed Constitutional Amendment

The Speaker of the Alaska State House of Representatives has asked us to review a proposal for a state constitutional amendment which would, among other things, allow the legislature to "establish criteria for determining eligibility for a resident to take a resource for subsistence use. Those criteria may include proximity of residence to the fish or wildlife resource as a primary factor for determining eligibility." The Solicitor's Office has reviewed the proposal, and we have identified some significant legal problems. Several of these are discussed below:

1. The proposed constitutional amendment is insufficiently specific to allow the state legislature to enact a law containing the rural subsistence priority as provided for in the Alaska National Interest Lands Conservation Act (ANILCA). Other provisions of the Alaska State Constitution (*i.e.*, Article VIII, §§ 3, 15 and 17) were interpreted by the Alaska Supreme Court in *McDowell v. State of Alaska*, 785 P.2d 1 (AK 1989), *reh. denied* (March 2, 1990), as prohibiting the enactment of a statutory subsistence priority based on rural residence. Without specific enabling language in a constitutional amendment which would permit a subsistence priority to be based on rural residence, the Speaker's proposed amendment to "establish criteria for determining eligibility" most likely does not state the amendment's purpose clearly and specifically enough to overcome the previous interpretation of the state constitution by the Alaska Supreme Court.

2. The only eligibility criteria which is explicitly mentioned in the Speaker's proposed constitutional amendment is "proximity of residence to the resource," which the proposal states may be applied as a "primary factor for determining eligibility." A proximity-based preference would be inconsistent with ANILCA § 804, which provides the priority for subsistence uses to rural residents. Eligibility based on "proximity," by contrast, is determined by where fish and wildlife are physically located at a time when there is determined to be a shortage. Using proximity to the resource as a primary eligibility criteria would create a preference for whomever encounters the fish and wildlife first in their migrations when the subsistence seasons open, regardless whether the person is an urban or rural resident. Because many fish and wildlife populations in Alaska range over extensive geographical areas, it would mean, for example, that residents of an urban area downstream on a river would be legally entitled to take all the fish

Barnes
Quote

available for subsistence, preventing the fish from swimming upstream to where rural residents are waiting to harvest them. This result is wholly inconsistent with ANILCA's rural priority.

3. Using proximity to the resource as a primary criteria for the subsistence priority also raises other problems. Under ANILCA § 803, a cornerstone of the subsistence priority is its assurance of protection for "customary and traditional uses." Rural Alaskans, particularly Alaska Natives, customarily and traditionally have hunted and fished up and down rivers and over large areas of the state, following the resource populations as they migrate. A preference based primarily on proximity of residence to the fish and wildlife resource may not protect all customary and traditional uses.

4. Other difficulties with the proposed wording of the amendment may also render it inconsistent with ANILCA. As one example, the amendment includes proximity to the resource as a primary factor for eligibility whereas ANILCA has three specific criteria for applying the priority in rural Alaska in times of shortage: (1) customary and direct dependence upon the populations as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources. The amendment also adopts the "reasonable opportunity" approach to providing the subsistence priority which was previously contained in amendments to ANILCA enacted by Congress in 1997, but which expired in 1998 without ever taking effect because the state legislature did not approve a constitutional amendment as the Act containing the amendments required. By focusing on criteria like these which are not in the federal law, the proposal risks creating new conflicts with ANILCA.

5. For these and other reasons, the constitutional amendment proposed by the Speaker does not satisfy the requirements established by Congress (in the FY 1999 Interior Appropriations Act) to prevent federal assumption of subsistence fisheries management on October 1, 1999. That Act requires that any proposed amendment to the state constitution which is placed on the ballot by the legislature must, if approved by the electorate, "enable the implementation of state laws of general applicability which are consistent with, and provide for, the definition, preference, and participation specified in sections 803, 804 and 805" of ANILCA. As explained above, the Speaker's proposed language likely does not meet that test. Even if adopted by the state legislature, it would not stop the Interior Department from assuming subsistence fisheries management on October 1, 1999, as required by law.

