

HB

256

STATE OF ALASKA

SARAH PALIN, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 115526
JUNEAU, AK 99811-5526
PHONE: (907) 485-4100
FAX: (907) 485-2332

MEMORANDUM

TO: Senator Hollis French
Chairmen, Senate Judiciary Committee

FROM: Denby S. Lloyd, Commissioner
Alaska Department of Fish and Game

DATE: February 20, 2008

SUBJECT: Hearing Request, Senate Bill 176

I am writing to request that, at your earliest convenience, you schedule a hearing in the Judiciary Committee of Senate Bill 176, "Active Game Management/Airborne Shooting". I enclose the following:

- A copy of the current version of Senate Bill 176
- The Governor's Transmittal Letter for the bill
- A copy of ADF&G's zero fiscal note for the bill
- The current statutes that would be amended by passage of SB 176
- A "Draft Transmittal Letter", which amounts to a sectional analysis by Senior Assistant Attorney General Kevin Saxby
- "Answers to Commonly Asked Questions about HB 256/SB 176" by Mr. Saxby and Division of Wildlife Conservation Director Doug Larsen
- A packet of materials explaining the Division's active management and predator control programs

When a hearing has been scheduled, we can provide you with a list of witnesses to testify on behalf of the legislation.

Please feel free to contact my legislative liaison, Tim Barry, with questions or for more information. Thank you for your attention to this matter.

* * *

Cindy Smith

From: Lorraine Murray [lfm@alaska.net]
Sent: Sunday, March 09, 2008 1:53 PM
To: Cindy Smith
Subject: Cindy - here is a CORRECTED VERSION , please use this one - Thankyou! Lorraine

Cindy- This is my corrected version of my email testimony. Please distribute this as my Email testimony on SB 176 to all the members.

Dear Senate Judiciary Committee members:

I urge you not to pass SB 176:

SB 176. This bill puts the welfare of Alaskans Wildlife into the hands of only a few. These few represent only a small percentage of Alaska's population and this is not equal representation. I also strongly believe it is in the best interest of Alaska's Wildlife to have a broad group of Alaskans develop and give input to the wildlife management policies of Alaska and not just a few people. I think the move to make the Wildlife "assets" of the state and therefore closed to public debate was not the intent of the Constitution of the State of Alaska. The citizens of this state must be allowed to continue to bring forth initiatives regarding predator control and the management of our wildlife. The management of Alaska's Wildlife should not be in the hands of the Board of Game, these people are not the best qualified people to make these policies. Our wildlife management policies and predator control program must be based on sound science and we must absolutely require scientific data to support any management decision or policy effecting Alaska's wildlife. To do otherwise is unprofessional, short sighted and not in Alaska's best interest. Alaska deserves the very best and the most qualified professionals to develop and monitor our wildlife management policies. How can the Board of Game monitor and report or even make recommendations for predator control with unsubstantiated, unproven, unscientific, speculative, tenuous data at best? In addition the citizens of this state must be allowed to continue to bring forth initiatives regarding predator control and the management of our wildlife. The initiative process has and always will, serve the greater good, bring forth the better way, because it is the democratic way.

Article 8 - Natural Resources

§ 1. Statement of Policy

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

I urge you not to support SB 176.

Sincerely,

Lorraine Murray
Box 210192
Auke Bay, Ak 99821

Cindy Smith

From: Nina Faust [fausbail@horizonsatellite.com]
Sent: Tuesday, March 11, 2008 7:48 PM
To: Cindy Smith
Subject: SB 176

P.O. Box 2994
Homer AK 99603

March 11, 2008

Senate Judiciary Committee
Alaska State Senate
Juneau AK 99811

Dear Judiciary Committee Member:

We are strongly opposed to SB 176 which would remove the requirement to base the need for local aerial predator control programs on thorough surveys and research. Alaska has generally managed its game with a scientific basis for management decisions. To do otherwise is to manage our wildlife politically or simply based on biased opinions of the Board of Game, a very dangerous precedent indeed if wildlife is to be managed wisely. Managing game solely for the objectives of human harvest means that decisions will not necessarily be based on information of game populations or other important scientific studies. A mandate to manage just for human consumption will leave Alaska with such a lopsided decision making process that many predator populations will be at risk. Predators are important for a healthy wildlife system and are a major attraction for wildlife oriented tourism which significantly boosts our economy.

The current system of scientific wildlife management is not broken. Certainly there are some that would like to see more intensive predator control, but if objective science does not support it, it should not occur. Without scientific management, there is the danger that predator control decisions will get further out of balance placing habitat and predator populations at greater risk. Consider the overabundance of deer and other ungulates and consequent habitat damage in some other states where predators have been excessively reduced in numbers or extirpated.

Please support the balance and prudent method of wildlife management by opposing SB 176 and continuing to require science based management decisions.

Sincerely,

Nina Faust Edgar Bailey

Cindy Smith

From: Alaskan Alpine Treks [carl@alaskanalpinetreks.com]
Sent: Wednesday, March 12, 2008 12:48 AM
To: Rep. Berta Gardner
Cc: Sen. Johnny Ellis; Cindy Smith
Subject: Legislation SB 176

Hello

I am writing you with great concern, regarding the current proposed legislation, specifically SB176. The proposal, as we all know, is simply an attempt by the Alaska State Board of Game to avoid a repetition of the rather unfortunately necessary embarrassment of being sued for failing to comply with their own mandates and laws.

The Board of Game's wish to impose and allow airborne and same day airborne aerial predator exterminating runs contrary to long-standing and respected Alaskan hunting traditions. The Board of Game's wish to make decisions without due and careful study, without consideration of the best available sound science is, at best, narcissistic, more probably negligence and gross malfeasance. Any decisions of environmental management must consider and value the best available sound science over the whims of a few people granted political postings.

Of equal importance here is the issue of accountability. The Board of Game's intent to remove the potential for any further litigation against them is unacceptable.

Political decisions must, like all choices we make, come with responsibility and accountability. The Board of Game are flagrantly der'ring basic principles of a democracy. Proposing that their own opinion of the time is reason enough to make decisions that flout the opinions of their state constituents is not a basis for any reasonable system of government, and certainly does not belong in the institution of American Politics. Governor Palin touts transparency as a critical structure of her government. Well, this is as transparent as it gets - I m certain the Alaskan voting population, as well as the hundreds of thousands of tourists who spend their vacation dollars in this state every year can see right through this farcical and completely unacceptable proposal.

Government officials must be accountable to the will of the populace they represent. The Board of Game MUST be required to show any and all factors affecting their decisions, they must be required to reflect conclusions of examined and peer-reviewed sound science that informs their decisions. Policy must be supported by, and reflect, best available objective information, not the egos and outdated Neaderthallic ideologies of a few. Constituents must have opportunity for input, es well as full legal recourse for failing and unreasonable policies. In the interest of Alaskan tourism, of Alaskan community, human and non-human alike, SB176 must not be adopted.

Thank you.

Best Regards

Carl

- Carl Donohue
Alaskan Alpine Treks
Visit our website: <http://www.AlaskanAlpineTreks.com>
mailto:Carl@AlaskanAlpineTreks.com
Phone: (770) 952 4549

Carl Donohue
4701 Kupreanof St,
Anchorage, AK, 99507.

Cindy Smith

From: robert jackson [bobdphoto@gmail.com]
Sent: Tuesday, March 11, 2008 10:36 AM
To: Cindy Smith
Subject: Oppose bill SB 176

To Whom it may concern,

I strongly appose bill SB 176. Aerial predator control of brown bears and wolverines is completely unnecessary and would add to the already dwindling numbers of these species. Game animals are quite simply being over hunted by subsistence hunters and sport hunters. This is neither right or wrong it's just a fact. Yes, predators do take game animals, but that's been the natural progression of life and death for these animals for thousands of years. Only man has caused the depletion of wildlife in your forests not brown bears and wolverines.

passing bill SB 176 would be a tremendous mistake that would have catastrophic consequences.

Sincerely,
Bob Jackson
4318 Holt St.
Bellaire, Texas 77401
713 661-8569

Cindy Smith

From: Dianne Jackson [diannejxn@hotmail.com]
Sent: Tuesday, March 11, 2008 10:45 AM
To: Cindy Smith
Subject: oppose bill SB 176

To Whom it may concern,

I strongly appose bill SB 176. Aerial predator control of brown bears and wolverines is completely unnecessary and would add to the already dwindling numbers of these species. Game animals are quite simply being over hunted by subsistence hunters and sport hunters. This is neither right or wrong it's just a fact. Yes, predators do take game animals, but that's been the natural evolution of life and death for these animals for thousands of years. Only man has caused the depletion of wildlife in your forests not brown bears and wolverines.

passing bill SB 176 would be a tremendous mistake that would have catastrophic consequences.

Sincerely,
Dianne Jackson
4318 Holt St.
Bellaire, Texas 77401
713 661-8569

Climb to the top of the charts! Play the word scramble challenge with star power. [Play now!](#)

Cindy Smith

From: John Swanson [allaboard@hctc.com]

Sent: Monday, March 10, 2008 2:32 PM

To: Cindy Smith

Subject: HB 348 & HB 176

As a long time eco tour operator in Southeast, Alaska and the president of SAWTA.ORG (Southeast Alaska Wilderness Tours Association) we are in strong opposition to both of these pieces of legislation. Wilderness tourism is such a strong part of Alaska's economy and aerial hunting of predators as seen by tourists in the lower 48 and abroad has a huge impact on that industry.

A couple of years ago when there was publicity on aerial hunting of wolves in Alaska it actually had a significant impact on our business. Several of our customers voiced real opposition to the proposed aerial wolf hunts. Many things have changed the dynamics of tourism in the last 25 years. One of the big draws throughout Alaska is Bear Viewing why don't you let these outside tourist no you plan to make it easy to hunt them by air and see how many tourists you loose. A few months back there was an incident at McNeil River and I know the Anchorage daily news had a reference to it, where a bear was shot at close range. I heard about it from about 50 different people around the world who were all extremely upset. I know they are not Alaska residents but they represent a vital part of Alaska's economy.

Thank you,

Sincerely,

John Swanson

www.sawta.org

3/10/2008

Cindy Smith

From: awareck@ak.net on behalf of April Warwick [awareck@ak.net]
Sent: Monday, March 10, 2008 9:30 AM
To: Cindy Smith
Subject: My opposition to SB 176

Hello Cindy Smith:

Please pass my comments on the the members and staff of the Judiciary Committee.

I oppose SB 176 because it removes my ability to petition predator control programs in the courts.

I'm totally against predator control programs that do not use science or sound reason for their actions. I find killing wolves from the air to be sick, mean, cruel, and not right. By killing Alpha wolves you only leave a pack with no leader or rules to work with. Soon this pack is doing things all wrong, like killing dogs, as a means to survive without the Alpha and their rules.

The people voted twice, why do you not listen to their voting? It's clear we don't want our wolves killed this way. The Board of Game is a joke, made of only hunters with no one understanding the value of wildlife.

Where is our new and improved "transparent" state Government? Listen to voters, don't kill wolves so hunters can get moose easier. Respect the balance between predators and prey and recognize that humans are the biggest predators and we more than get our share of the moose. That includes all legal hunts, car & train moose killings, poacher killings, etc.

We won't go away, we love wildlife and won't watch it be abused this way. No more silly laws, no more shooting wolves from the sky.

April Warwick
5716 Kennyhill Drive
Anchorage, AK 99504
(907) 338-7777



P.O. Box 20791
Juneau, AK 99802

March 17, 2008

Senator Hollis French, Chair
Senate Judiciary Committee
State Capitol, Room 417
Juneau, AK 99801

E-mail: Sen.Hollis.French@legis.state.ak.us

Subject: Opposition to SB176 & HB256

Dear Chairman French and Judiciary Committee Members:

Friends of Admiralty Island (FOAI) is a non-profit, public interest, volunteer organization which was formed in 1987. Our primary mission is to advocate for the protection of Admiralty Island and its ecological, cultural, and historical values and more generally we advocate for environmental protection in the region. We have over 300 registered members and supporters.

FOAI opposes SB176 and its identical companion bill HB256. The primary reason for our opposition is that these bills would eliminate the requirement that any Board of Game (BOG) decision regarding predator control must be predicated on a Game Management Plan that is based upon sound science.

These bills would authorize the BOG, under Section 4 of AS 16.05.252, to "adopt regulations it considers advisable to restore the population's productivity and increase human harvest including active management measures and programs." We oppose this section because it would give the BOG full discretion to institute predator control programs. We believe that sound science must be the basis for such programs and that they should be implemented only during biological emergencies. These bills would allow the BOG to approve predator control programs without considering biological information from the Alaska Department of Fish and Game.

The will of Alaska voters will once again be ignored if either of these bills passes. As you recall, airborne hunting programs were voted down in both 1996 and 2000. SB176 and HB 256 would allow even more permissive airborne hunting programs than in the past. We strongly oppose still another attempt to override the will of Alaskan voters.

We appreciate your considering our position on these bills and urge you to oppose them as well.

Sincerely,

A handwritten signature in black ink, appearing to read "K.J. Metcalf". The signature is written in a cursive style with a large, looping "M" and "C".

K.J. Metcalf, President

**CC: Sen. Kim Elton
Sen. Bill Wielechowski
Sen. Albert Kookesh
Rep. Beth Kerttula
Rep. Andrea Doll**

1 of 1 DOCUMENT

Caution

As of: Apr 11, 2008

**HARVEY PULLEN and UNITED FISHERMEN OF ALASKA, INC., Appellants, v.
FRAN ULMER, Lieutenant Governor of the State of Alaska, FAIRNESS IN
SALMON HARVEST, INC., Appellees.**

No. 4394, Supreme Court No. S-7642

SUPREME COURT OF ALASKA

923 P.2d 54; 1996 Alas. LEXIS 96

August 26, 1996, Decided

SUBSEQUENT HISTORY: [**1] As Corrected
September 5, 1996.

PRIOR HISTORY: Appeal from the Superior Court
of the State of Alaska, First Judicial District, Juneau.
Larry Weeks, Judge. Superior Court No. 1JU-95-2385
CI.

DISPOSITION: REVERSED and REMANDED

COUNSEL: Arthur S. Robinson, Robinson, Beiswenger
& Ehrhardt, Soldotna, for Appellants.

Avrum M. Gross and Susan A. Burke, Gross & Burke,
Juneau, for Appellee Fairness in Salmon Harvest, Inc.,
Sarah J. Felix, Assistant Attorney General, and Bruce N.
Botelho, Attorney General, Juneau, for Appellee Fran
Ulmer.

JUDGES: Before: Compton, Chief Justice, Rabinowitz,
Mathews, Eastaugh, and Fabe, Justices. COMPTON,
Chief Justice, concurring.

OPINION BY: RABINOWITZ

OPINION

[*55] *OPINION*

RABINOWITZ, Justice.

I. INTRODUCTION

Pullen and United Fishermen of Alaska, Inc. chal-
lenge an initiative designed to set priorities among dif-
ferent salmon harvest users.

II. FACTS AND PROCEEDINGS

In August of 1995, Appellee Fairness in Salmon
[**2] Harvest, Inc. (F.I.S.H.) submitted an initiative
application to the state. ¹ The proposed initiative pro-
vided that subsistence, personal use, and sport fisheries
would receive a preference to take a portion of the
salmon harvest before the remaining harvestable salmon
are allocated to other harvest users. The proposed initia-
tive also sets a limit on the amount to be allocated to
personal use and sport fisheries of five percent of the
total projected statewide salmon harvest, though this
limit may be exceeded for any particular species or re-
gion.

¹ Pullen notes that "the application was filed by
Alaskans who believed that the Alaska Board of
Fisheries was, in some circumstances, allocating
an unreasonable portion of salmon to commercial
fisheries at the expense of personal consumptive
uses."

The F.I.S.H. initiative, entitled "An Act Relating to
the Management of Salmon" reads in full:

**BE IT ENACTED BY THE PEOPLE
OF THE STATE OF ALASKA**

"An Act relating to the management
of salmon"

Sec. 1 [**3] PURPOSE (a) This act provides that, after maintenance of salmon stocks at sustained yield levels is assured, subsistence, personal use, and sport fisheries shall receive a preference to take a portion of the harvestable surplus of salmon stocks. Subsistence, personal use, and sport fisheries must be ensured of a reasonable opportunity to take enough salmon necessary to satisfy the harvest needs of those fisheries before other fisheries may be allocated the remaining portion of the harvestable surplus.

(b) This Act does not alter existing or establish new allocations or preferences among subsistence, personal use, and sport fisheries.

(c) This Act does not give additional authority to the Board of Fisheries or the Department of Fish and Game, but relies upon the existence of their respective authorities to implement this Act.

Sec. 2. AS 16.05 is amended by adding a new section to article 5 to read:

Sec. 16.05.735 MANAGEMENT OF ALASKA SALMON STOCKS. (a) After providing for biological escapement needs of Alaska salmon stocks, the Board of Fisheries and the department shall exercise their respective authorities under this title to reserve a priority for the harvest [**4] needs of common consumptive uses for each salmon stock, to the extent that is technically possible, prior to allocating a portion of the harvestable surplus to non-priority uses along the entire migratory [*56] path of a stock. The total number of salmon, without regard to the species of salmon, reserved to satisfy the harvest needs of personal use and sport fisheries may not exceed five percent of the total projected statewide harvest of all species of salmon. Personal use and sport fisheries may harvest in excess of five percent of a particular species or stock and or in excess of five percent of the total harvest in a given geographic region of the state. However, the harvest priority for personal use and sport fisheries may not exceed five percent of the total projected statewide harvest.

(b) All harvests shall be made in a habitat responsible manner. The Board

shall adopt regulations establishing methods and means of taking salmon that protects salmon spawning and rearing habitat from damage that will, individually or cumulatively, result in significant reduction in the productivity of salmon stocks.

(c) In this section,

(1) "common consumptive use" means the use of [**5] salmon harvested under subsistence, personal use, or sport fishing regulations or statutes;

(2) "harvest needs" means the harvest capability, using bag limits as established by the Board and the department of all common consumptive uses based upon projected participation, and assuming a harvestable surplus of salmon exists after ensuring an adequate biological escapement;

(3) "salmon" means Coho, Chinook, Sockeye, Pink, and Chum salmon that originate in or will return to spawn in Alaskan waters; salmon does not include Steelhead or other anadromous fish;

(4) "stock" means a population or aggregation of a particular species that typically possess common characteristics such as area of origin, migration patterns, run timing, habitat, and share in a common gene pool;

(5) "statewide salmon harvest" means the total projected annual harvest, in numbers of fish caught, of all combined species of salmon.

Lieutenant Governor Fran Ulmer certified the proposed initiative.² The initiative sponsors then circulated the petition among voters and obtained enough signatures to place the proposed initiative on the 1996 general election ballot.³ Thereafter, the Division of [**6] Elections verified that the petition had the required number of signatures, and directed that the Department of Law prepare the ballot accordingly.

2 The Lieutenant Governor is charged with reviewing initiative applications for compliance with AS 15.45.010-.080. Upon request from the Lieutenant Governor, the Attorney General's Office reviewed the proposed initiative as to whether it was in proper form under applicable state constitutional provisions and statutes. The

Attorney General's Office concluded that it was a close question as to whether the proposed initiative is in proper form, but recommended that it be certified even though there is some doubt as to its validity.

A determination by the Lieutenant Governor that a proposed initiative is in the proper form includes a determination that it does not cover a subject that is restricted for enactment by the Alaska Constitution. *AS 15.45.010-080*. See also *Boucher v. Engstrom*, 528 P.2d 456, 460-61 (Alaska 1974) (overruled on other grounds, *McAlpine v. University of Alaska*, 762 P.2d 81, 84 (Alaska 1988)). This determination is put in issue by Pullen's appeal.

[**7]

3 In accordance with *AS 15.45.090(2)*, the Lieutenant Governor prepared a petition containing the proposed bill as well as a summary of the proposed initiative.

On November 7, 1995, appellants Harvey Pullen and United Fishermen of Alaska (Pullen) filed suit for declaratory and injunctive relief challenging, on several grounds, the Lieutenant Governor's certification of the initiative. More particularly, Pullen asserted that (1) the proposed bill is not a proper subject of an initiative because it would make an appropriation of the State of Alaska's salmon resources, (2) the allocation of salmon resources of the state among common users is exclusively the responsibility of the legislature, (3) the Lieutenant Governor's impartial summary explaining the proposed bill is misleading as to its terms and effects, and (4) the proposed classification of common users of the state's salmon resource is underinclusive and unfair because the initiative denies commercial fishers equal treatment and protection, a violation of the Uniform Application [*57] clause in *article VIII, section 17 of the Alaska Constitution*. [**8] By way of relief, Pullen sought a declaration of unconstitutionality and an injunction prohibiting the Lieutenant Governor from placing the initiative on the November 1996 general election ballot.

4 Grounds numbered three and four are not at issue in this appeal.

Thereafter, Pullen moved for summary judgment, with all parties agreeing that no genuine issues of material fact existed. Pullen grounded his summary judgment motion on the contention that the proposed initiative is not a proper subject for an initiative and is in violation of articles VIII, XI, and XII of the Alaska Constitution as well as *AS 15.45.010*.

In opposition, the Lieutenant Governor argued that the proposed bill is a proper subject for an initiative because it merely creates a new priority system for the allocation of salmon resources among groups of fishers, that the allocation of salmon is not within the exclusive law-making power of the legislature, and that it does not make an appropriation by the state. F.I.S.H. in turn contended [**9] that salmon in their natural state are not property subject to appropriation. F.I.S.H. further argued, in the alternative, that if salmon are considered state property subject to appropriation, the initiative does not make an appropriation of salmon.

The superior court denied Pullen's motion for summary judgment, and entered final judgment, for Lieutenant Governor Ulmer and F.I.S.H. In granting summary judgment, the superior court ruled that salmon are public assets of the state which may not be appropriated by initiative; ⁷ that neither the Alaska Constitutional Convention Minutes nor *article XII, section 11 of the Alaska Constitution* support Pullen's assertion that the Public Trust doctrine prohibits establishing a new priority of the state's natural resources directly through the initiative process; ⁶ and that the initiative does not make an appropriation of state assets. ⁷

5 In its Memorandum and Order, the superior court stated:

The court believes that while the state does not literally own salmon resources, salmon are public assets which may not be appropriated by initiative. The Alaska Constitution contains explicit provisions which state that the natural resources of the state belong to the state, which controls them as trustee for the people of the state. The state takes in significant revenues from fish taxes. The right to participate in the statewide harvest of salmon is valuable to all user groups. Fish have long been an important part of the economy and the desire to control fish resources was an important motivation for Statehood. Permits granted by the state to take fish sell for significant sums. The state devotes substantial financial resources for the protection and management of fish and other wildlife. These factors taken together provide a basis for concluding that the state has sufficient interest in salmon as public assets

so as to characterize them as state property which may not be appropriated by initiative.

(Footnote omitted.)

[**10]

6 In regard to this holding the superior court stated:

The court believes that neither the Alaska Constitutional Convention Minutes nor *Article XII, section 11 of the Alaska Constitution* support the plaintiffs' assertion that the public trust doctrine prohibits establishing a new priority of the state's natural resources directly through the initiative process. The delegates to the constitutional convention after considerable debate regarding the impact of the authority of Alaskans to enact legislation directly through initiative, decided not to distinguish between matters in the hands of the legislature and matters subject to the initiative process. The court finds nothing in Article XI, Article XII, or the Minutes of the Alaska Constitutional Convention which (aside from an appropriation argument) would prohibit the subject matter of the F.I.S.H. Initiative from being enacted by the people of Alaska directly through the initiative process.

The plaintiffs' public trust doctrine argument may pose a separate, post ballot-box issue. At the current stage of the enactment process, the only issue for the court is whether by creating a new priority among beneficial users of the state's fishery resources, the F.I.S.H. Initiative makes an appropriation under the *McAlpine* test.

[**11]

7 As to this last holding, the superior court in its Memorandum and Order wrote:

The court finds that the F.I.S.H. initiative does not constitute an appropriation as defined by the Alaska Supreme Court in *McAlpine*. The substantive portion of the F.I.S.H. Initiative creates a new system of preference among beneficial users of the statewide salmon harvest. The F.I.S.H. initiative requires that after escapement decisions are made, the Board of Fisheries must then determine what percentage, if any, will be allocated to personal use and sport fisheries up to a maximum of five percent. The initiative does not alter or establish new allocations or preferences among subsistence, personal use, and sport fisheries. By itself, the initiative does not convey or allocate any part or definite amount of the salmon harvest to a specific user group. Further action by the Board of Fisheries is required before fish resources are allocated to competing user groups.

The Board has broad discretion under the initiative to make allocations to consumptive and non-consumptive users based on the amount of fish available and escapement needs. There are no definite or calculable amounts to which any user group is automatically entitled. The directive that up to five percent of the statewide harvest must be reserved for consumptive users provides a maximum "preference" that is within the Board's discretion to implement. The initiative does not guarantee that personal use and sport fisheries will be allocated any fish. Despite the preference scheme, the Board has considerable discretion to determine the amount of fish each group is entitled to and may still allocate based on what it sees as the best interests of the whole.

This pre-election review of an initiative is limited to a determination of whether the contents of the initiative include subjects which

the people may not enact directly through initiative. The F.I.S.H. Initiative establishes a preference, but retains allocation decisions in the Board of Fisheries. As such, the initiative is not executable, mandatory, or reasonably definite without further legislative action. The initiative does not make an appropriation of state assets as defined by the Alaska Supreme Court in *McAlpine*.

Article XI, section 7 of the Alaska Constitution provides in part that "the initiative shall not be used to . . . make or repeal appropriations . . ." In *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977), we endorsed the following definition of "appropriations":

the setting aside from the public revenue of a certain sum of money for specific objects in such a manner that the executive officers of the government are authorized to use that money, and no more for that object, and no other.

[**12] [*58] III. STANDARD OF REVIEW

The parties agree that there are no genuine issues of material fact in dispute. The appeal primarily concerns only questions of the constitutionality of the proposed initiative. These are questions of law. In regard to questions of law, we apply our independent judgment. *Craft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991). Regarding questions of law, this court adopts the rule of law that is most persuasive in light of precedent, reason and policy. *Guin v. Hu*, 591 P.2d 1201, 1284 n.6 (Alaska 1979).

Concerning the applicable standard of review in matters involving initiatives, we have said that the usual rule is "to construe voter initiatives broadly so as to preserve them whenever possible. However, initiatives touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution." *Fairbanks v. Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991) (citation omitted).

IV. DISCUSSION

Pullen's appeal from the superior court's decision on summary judgment raises two issues. First, Pullen argues [**13] that management of Alaska's salmon resources falls exclusively within the power of the state legislature as trustee of Alaska's wildlife, and therefore is not a proper subject of an initiative. Second, Pullen contends that the proposed initiative makes an appropriation of state property, in violation of *article XI, section 7 of the Alaska Constitution*. We address this latter contention first.

A. The Initiative as an Appropriation

1. Can wildlife be characterized as state property subject to appropriation?

Two subsequent decisions of this court have held that the term "appropriations" as used in *article XI, section 7* embraces not only appropriations of money but initiatives [**14] that propose to "give away" any public asset, including land. In *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979), we held that an appropriation of state land to the general public was just as much an appropriation as a disposition of money from the treasury. Specifically, we said, "The stated purpose and effect of the Initiative on the state treasury is still an expenditure of state assets in the form of public lands." *Id.* at 9. Subsequently, in regard to an initiative that would have required [**59] the Municipality of Anchorage to sell a utility to a private non-profit organization for one dollar, we said:

We noted [in *Thomas v. Bailey*] that the constitutional convention delegates "wanted to prohibit the initiative process from being used to enact give-away programs, which would have inherent popular appeal, that would endanger the state treasury." . . . We conclude that the logic of *Bailey* also applies in the instant appeal. The prohibition against appropriation by initiative applies to all state and municipal assets.

Alaska Conservative Political Action Committee v. Municipality of Anchorage, 745 P.2d 936, 938 (Alaska 1987) (citation and footnote omitted).

[**15] It is against this decisional background that F.I.S.H. argues that wildlife is not truly an asset of the state. F.I.S.H. argues that state ownership of wildlife is merely a legal fiction, and should not be applied in the context of deciding whether wildlife is an asset of the state which is subject to appropriation. F.I.S.H. cites several United States Supreme Court cases in support of its position that a state does not literally own the wildlife found within its borders. More particularly, F.I.S.H. concludes that "as a matter of simple common sense, it should be obvious that whatever the Constitution says

about fish and game 'belonging to the state,' salmon or moose or other wild creatures are not state assets in the same way that money or buildings are assets." (Footnote omitted.)

8 According to F.I.S.H., "the United States Supreme Court itself has been careful in its decisions since [*Geer v. Connecticut*, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896)] to clarify the fact that state 'ownership' of fish and game is simply a shorthand way of describing the state's significant interest in preserving and regulating fish and wildlife within its borders." In addition to *Geer*, F. S.H. cited *Hughes v. Oklahoma*, 441 U.S. 322, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979) (overruling *Geer*); *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 384-86, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978); *Toomer v. Witsell*, 334 U.S. 385, 402, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948); and *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 52 L. Ed. 2d 304, 97 S. Ct. 1740 (1977) ("The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th century legal fiction expressing 'the importance . . . that a state have power to preserve and regulate the exploitation of an important resource.'").

[**16] We agree that this facet of F.I.S.H.'s argument is well established -- the state does not own wildlife in precisely the same way that it owns ordinary property. However, this does not answer the question of whether the state's interest in wildlife is such that it can be appropriately characterized as state property subject to appropriation.

F.I.S.H. asks, "If the moose population plunges due to a sudden increase in the wolf population, does the state have an obligation to notify Moody's so that its bond rating may be adjusted?" F.I.S.H. assumes that the answer is "No," reasoning that these kinds of harms cannot affect the financial health of the state. We think this assumed answer is wrong.

In fact, a precipitous decline in the moose population may not, on its own, be enough to greatly affect the state's bond rating, but the effect on the state would be as significant as the loss of any other asset. Moose are valuable assets to Alaska, helping in attracting tourists, for example. Furthermore, if other wildlife populations also plummeted, the state's finances would obviously be affected as one of the primary tourism attractors disappeared. Finally, if the state's salmon population [**17] precipitously declines, the fishing industry would be devastated, causing even more harm to Alaska's economy and revenue base. The state benefits from the harvest of salmon through the collection of taxes imposed

on business enterprises engaged in the fishery and license fees imposed on sport, personal use, and commercial fisheries.

Insofar as loss, use, or exploitation of wildlife directly affects Alaska's fish, it is a state "asset." The fact that other aspects of ownership may not be present in the state's legal relationship to its wildlife does not change this conclusion. We reach this holding for the following additional reasons.

First, examination of the relevant provisions of the Natural Resources Article of the Alaska Constitution clearly indicates the importance of the state's interest in fish.

[*60] *Article VIII, section 2 of the Alaska Constitution* provides:

General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for maximum benefit of its people.

Article VIII, section 3 provides:

Common Use. Wherever occurring in their natural [**18] state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII, section 4 provides:

Sustained Yield Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

In *Owsichek v. State, Guide Licensing*, 763 P.2d 488 (Alaska 1988), we had occasion to analyze the common use clause found in *article VIII, section 3 of Alaska's Constitution*. After noting that the framers of our constitution apparently intended to constitutionalize historic common law principles governing the sovereign's authority over management of fish, wildlife, and water resources, we said:

Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people. We have twice recognized this duty in our prior decisions. In *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961) *aff'd* 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962), we stated: [**19]

These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.

(Emphasis added.) Similarly, in *Herscher v. State, Department of Commerce*, 568 P.2d 996, 1003 (Alaska 1977), we noted that the state acts "as trustee of the natural resources for the benefit of its citizens."

763 P.2d at 495.

In a footnote to this text, we stated:

The Court overruled Geer's state ownership doctrine in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). That case involved facts almost identical to *Geer*: the Oklahoma statute at issue forbade the export of minnows taken from the waters of the state. *See id.* at 323, 99 S. Ct. at 1729, 60 L. Ed. 2d at 254. The Court struck down the statute as violative of the commerce clause. *Id.* at 338, 99 S. Ct. at 1737, 60 L. Ed. 2d at 263. The Court found the state ownership doctrine to be a legal fiction that created anomalies and did not conform to "practical realities." *Id.* at 335, 99 S. Ct. at 1735, [**20] 60 L. Ed. 2d at 261. Nothing in the opinion, however, indicated any retreat from the state's public trust duty discussed in *Geer*. Indeed, the Court stated, "The general rule we adopt in this case

makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." *Id.* at 335-36, 99 S. Ct. at 1735-36, 60 L. Ed. 2d at 261.

After *Hughes*, the statements in the Alaska Constitutional Convention regarding sovereign ownership, quoted *supra*, are technically incorrect. Nevertheless, the trust responsibility that accompanied state ownership remains.

763 P.2d at 495 n.12.

These important themes have been consistently reaffirmed. *See Gilbert v. State, Dep't of Fish and Game*, 803 P.2d 391, 399 (Alaska 1990); *Shepherd v. State, Dep't of Fish and Game*, 897 P.2d 33, 40 (Alaska 1995).

Given the above, we think there is merit in Pullen's contention that the public trust responsibilities imposed on the state by the provisions of article VIII of our constitution compel the conclusion that fish occurring [**21] in their natural state are property of the state for purposes of carrying out its trust responsibilities. [*61] In short, we are in agreement with Pullen's position that

it is the authority to control naturally occurring fish which gives the state property-like interests in these resources. For that reason, naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people.

We hold that the state's interest in salmon migrating in state and inland waters is sufficiently strong to warrant characterizing such salmon as assets of the state which may not be appropriated by initiative. Thus we conclude that the superior court correctly reasoned that salmon are public assets of the state which may not be appropriated by initiative.

2. *Does the initiative constitute an appropriation?*

9 As we explained above,

the usual rule applied by this court is to construe voter initiatives broadly so as to preserve them whenever possible. *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979). However, initiatives touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution.

Fairbanks v. Convention & Visitors Bureau, 818 P.2d 1153, 1155 (Alaska 1991).

[**22]

Article XI, section 7 of the Alaska Constitution states in part:

The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts or prescribe their rules, or enact local or special legislation.¹⁰

¹⁰ AS 15.45 010 provides:

The law making powers assigned to the legislature may be exercised by the people through the initiative. However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

On four previous occasions we have construed the appropriations limitation on the initiative power.

Thomas v. Bailey, 595 P.2d 1 (Alaska 1979), presented in the context of a land give-away initiative, the issue of whether the prohibition on making appropriations included initiatives which required the outflow of land, or was limited to the outflow of money. *Bailey* established that not only money, [**23] but also other state assets could be the subject of appropriations, and therefore that the initiative was prohibited. In reaching this holding we observed that "though most state consti-

tutions with referendum and initiative provisions have some limitation relating to appropriation, Alaska's appropriation limitation is worded more generally than that of most other states." *Id.* at 4. ¹¹ Of particular significance is the emphasis given in *Bailey* on the dangers associated with direct legislation relating to appropriations.

The restrictions on permissible subjects for direct legislation represent "a recognition . . . that certain particularly sensitive or sophisticated areas of legislation should not be exposed to emotional electoral dialogue and impulsive enactment by the general public." Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 N. Engd. L. Rev. 455, 461 (1977) (footnote omitted). The danger with direct legislation relating to appropriations is that it "tempt[s] the voter to [prefer] . . . his immediate financial welfare at the expense of vital government activities." Note, *Referendum: The Appropriations Exception in Nebraska*, 54 Neb. [**24] L. Rev. 393, 394 (1975). Cf. *Brown v. Ward*, 593 P.2d 247 (Alaska 1979). The lure of an immediate grant of land poses the same temptation as an immediate grant of money. Both decisions are the kind that require the reasoned deliberation characteristic of legislative actions.

595 P.2d at 8. [*62] ¹²

¹¹ In this regard we further stated:

Even if the initiative provision referred to appropriations "of public funds," the issue would still be whether public funds refers generally to the state's assets or only those assets in the form of money. We have concluded that by the term "appropriations." Article XI, section 7 prohibits an initiative whose primary objective is to require the outflow of state assets in the form of land as well as money.

Bailey, 595 P.2d at 6, 7.

¹² We further elaborated:

Initiatives for the purpose of requiring appropriations were thought to pose a special danger of "rash, discriminatory, and irresponsible acts." The delegates [to Alaska's Constitutional Convention] were influenced by the experience of other states whose constitutions placed no restrictions on the subject matter of initiatives. They adopted the appropriations restriction to avoid the bad experiences of those states.

The delegates wanted to prohibit the initiative process from being used to enact give-away programs. They have a strong popular appeal, that would endanger the state treasury. A rather lengthy statement by Delegate Taylor explains the delegates' concerns:

Now in practically all the states that have initiative and referendum there are certain limitations put upon the matters that can be acted upon by those measures. Now appropriations are not subject to the initiative or the referendum. Some states made a great mistake by not restricting the initiative measures and allowed pressure groups to gather great numbers of signatures to a petition and that petition would require the expenditure of large amounts of money, perhaps a great deal more than the state could possibly afford and sometimes they would also initiate

some legislation to raise money, a revenue measure and then directed that the proceeds of that measure would be utilized for a particular purpose. In other words, it took the making of revenue measure and expenditure of the funds from the legislature in some instances the governmental functions and governmental institutions suffered a great deal. And it was necessary within as short a time as possible to undo the damage that has been done.

595 P.2d at 7, 8 (footnotes omitted).

[**25] The prohibition against using an initiative to make an appropriation next arose in *Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936 (Alaska 1987). There we concluded that the logic of *Bailey* controlled and that "the prohibition against appropriations by initiative applies to all state and municipal assets." *Id.* at 938. We further stated:

A utility with \$ 32.7 million equity is a significant municipal asset. The initiative would require the Municipality to transfer it for the nominal sum of one dollar. This is precisely the kind of "rash, discriminatory, and irresponsible act[]" against which the state and its subdivisions are protected under Article XI, section 7.

Id.

The issue arose again in *McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988). In *McAlpine*, an initiative was proposed reestablishing the community college system in the state. This part of the initiative was not held to violate the prohibition on appropriations.

However, the initiative also provided for the transfer of certain property of the University of Alaska to the Community College System:

The University of [**26] Alaska shall transfer to the Community College system of Alaska such real and personal property as is necessary to the independent operation and maintenance of the Community College System. The amount of property transferred shall be commensurate with that occupied and operated by the Community Colleges on November 1, 1989.

Id. at 83. Again drawing on *Bailey*, we said in *McAlpine*:

Parallel reasoning applies in the present case. Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose. The reason for prohibiting appropriations by initiative is to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative [**27] could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

Id. at 88, 89 (first emphasis in original, second emphasis added, footnote omitted). We [*63] then went on to hold that the second sentence of the initiative constituted an impermissible appropriation.

Most recently, we upheld a challenged initiative in *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153 (Alaska 1991). In that case, the initiative in question repealed a city code section which

designated bed tax revenues for purposes of tourist and entertainment facilities and other economic development. The initiative also set aside the bed tax revenues for deposit in the city council discretionary fund. We held that the placing of revenues in the discretionary fund was not an appropriation. The test we applied was "whether the initiative would set aside a certain specified amount of money or property for a specific [**28] purpose or object in such a manner that it is executable, mandatory, and reasonably definite with no further legislative action." *Id.* at 1157. " In concluding that the initiative was not violative of the prohibition against making appropriations, we observed:

A reference to the dual purposes behind the prohibition of initiatives which make appropriations is instructive. First, the initiative is not a give-away program. No particular group or person or entity is targeted to receive state money or property, nor is there any indication that by passing this initiative, the voters would be voting themselves money. Second, this initiative does not reduce the council's control over the appropriations process. Instead, the initiative allows the council greater discretion in appropriating funds than does the current law. It is axiomatic that if FGCO 5.402 does not make an appropriation, then the initiative, which affords greater legislative discretion and is not a give-away program, cannot make an appropriation.

Id. at 1157.

13 The test we applied in *City of Fairbanks* derives from *McAlpine*.

[**29] From these decisions two core objectives of the constitutional prohibition on the use of initiatives to make appropriations can be distilled. First, the prohibition was meant to prevent an electoral majority from bestowing state assets on itself. Second, the prohibition was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets. In light of these objectives, we now address the question of whether the proposed initiative violates *article XI, section 7 of the Alaska Constitution* as well as *AS 15.45.010*. We answer this question in the affirmative.

Our interpretation of the proposed initiative leads us to the conclusion that the initiative, if enacted, would violate the basic purposes underlying Alaska's constitutional restriction against making appropriations by initia-

tive. First, it is clear that the proposed initiative is designed to appeal to the self-interests of sport, personal and subsistence fishers, in that these groups are specifically targeted to receive state assets in the circumstance of harvestable shortages. ¹⁴ In short, it "tempt[s] the voter to [prefer] . . . his immediate financial welfare at the expense of [**30] vital government activities." *Bailey*, 595 P.2d at 8. Second, the initiative significantly reduces the legislature's and Board of Fisheries' control of and discretion over allocation decisions, particularly in the event of stock-specific or region-specific shortages of salmon between the competing needs of users. See *McAlpine*, 762 P.2d at 88-89. ("The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money.")

14 It should be noted that subsistence fisheries are already accorded a preference which is not affected by our determination that the proposed initiative is violative of *article XI, section 7 of the Alaska Constitution* as well as *AS 15.45.010*.

The overriding purpose of the proposed initiative is to require the Board of Fisheries, after providing for [**31] the biological escapement needs of Alaska's salmon stocks, to reserve a priority for the harvest needs for each particular salmon stock of personal use, sport, and subsistence fisheries prior to allocating any portion of the harvestable surplus to commercial [*64] fisheries. ¹⁵ The State comes close to conceding that if the proposed initiative is approved by the electorate it could result in the closure of some commercial fisheries. In this regard, the State notes:

Pink salmon, and to some respects sockeye salmon, are the largest producers in numbers of fish. . . . However, most of the sport fishermen in Southeast and the A-Y-K regions target kings and cohos. . . . *Since the priority is stock directed and allocation is not, one could argue that the initiative requires allocations of kings and cohos to sport and personal users in these regions. If so, this arguably requires closing some commercial fisheries also targeting kings and cohos.* ¹⁶

(Emphasis added, citations omitted.)

15 We need not disavow the *McAlpine* "whether the initiative would set aside a certain specific amount of money or property for a specific pur-

pose or object in such a manner that is executable, mandatory, and reasonably definitive with no further legislative action" language in concluding that the current initiative makes an appropriation. The initiative, if passed, would suffice without further action of the legislature to direct the Board of Fisheries to allocate salmon in accordance with its terms. Further, the point of the quoted language is that where the legislature retains a broad range of freedom to make allocation decisions, an appropriation will not be found. Under the current initiative, in cases of shortage - which is when the initiative operates -- such freedom is not retained.

[**32]

16 In regard to potential conflicts between different users, F.I.S.H. states:

There are no conflicts at all over pink salmon, the most numerous of all salmon in Alaska. In most areas, chum salmon and red salmon are only exploited for commercial purposes. There are real conflicts on the Kenai Peninsula over king salmon and to a much lesser extent red salmon; there are conflicts in Southeastern Alaska over king and silver salmon, and there are some conflicts between subsistence users and commercial fishermen on the river systems in western Alaska.

We cannot interpret the proposed initiative as simply amending "a series of general legislative criteria to add more specific ones to guide the Board of Fisheries in its future allocation decisions" as F.I.S.H. contends. We think it is clear that the proposed initiative calls for an actual allocation, in the event of a shortage of a given salmon species in a given geographical region, to sport, personal use, and subsistence fisheries. ¹⁷ In such circumstances there exists the very real possibility that the commercial fishers will be excluded [**33] from such fisheries. Thus, the initiative cannot be viewed as merely protecting the relative positions of sport, personal use, and subsistence fisheries as against commercial fisheries. Nor can this initiative be construed as not impinging upon the legislature's and Board of Fisheries' discretion to make allocation decisions among the competing needs of users. See *McAlpine*, 762 P.2d at 89, 91. The proposed initiative does not purport to maintain the existing relative positions between sport, personal use, and commercial fisheries. Further, the proposed initiative does re-

move the Board of Fisheries' discretion to make allocation decisions in times of shortages, and there is a very realistic danger that such shortages will occur.

17 The Fish and Game statutes define "subsistence use" as the "noncommercial, customary and traditional uses of wild, renewable resources . . . for direct personal or family consumption . . ." AS 16.05.940(32). "Personal use fishing means the taking, fishing for, or possession of fin fish . . . by Alaska residents for personal use and not for sale or barter with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries." AS 16.05.940(24). "Sport fishing means the taking of or attempting to take for personal use, and not for sale or barter, any . . . anadromous fish by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries." AS 16.05.940(29).

[**34] For these reasons, we hold that the F.I.S.H. initiative violates *article XI, section 7 of the Alaska Constitution*, as well as AS 15.45.010. "

18 Our holding makes it unnecessary to address Pullen's argument that the management of Alaska's salmon resources falls exclusively within the power of the state legislature as trustee of Alaska's wildlife, and therefore is not a proper subject of an initiative.

IV. CONCLUSION

The judgment of the superior court is REVERSED insofar as it holds that the proposed F.I.S.H. initiative does not make an appropriation of state assets in violation of the provisions of *article XI, section 7 of the Alaska Constitution*. The case is REMANDED to the superior court with directions to amend its judgment to provide that the Lieutenant Governor is permanently enjoined from placing the proposed F.I.S.H. initiative on the 1996 general election ballot.

CONCUR BY: COMPTON

CONCUR

COMPTON, Chief Justice, concurring.

I concur with the court in holding that the judgment of the superior court should be amended to provide that the Lieutenant Governor be permanently enjoined from placing the F.I.S.H. initiative on the 1996 general election ballot. However, I do not agree that the initiative violates *article XI, section 7 of the Alaska Constitution*. Rather, I conclude that the initiative violates

article XII, section 11 of the Alaska Constitution, and for this reason it cannot be placed on the ballot.

The court holds that "insofar as loss, use, or exploitation of wildlife directly affects Alaska's fish, it is a state 'asset.'" Op. at 14. The state's interest in migrating salmon is sufficiently strong "to warrant characterizing such salmon in their natural state as *assets of the state* which may not be appropriated by initiative." Op. at 17 (emphasis added). I cannot accept the conclusion that fish, or other wildlife, are "assets of the state."

It is correct to observe, as does the court, that wildlife is of significant value to the state. Unquestionably a "precipitous decline" in wildlife population would affect the state's finances for reasons identified by the court. Yet fish and wildlife occurring in their natural state are not remotely like the forests found [**36] on state owned lands, or hydrocarbons and minerals found on or under state owned lands. These are assets of the state in a sense of the term that readily can be understood. However, it is counter-intuitive to suggest that migratory wildlife is "an asset of the state." It is an asset to the State, not of the State.

In addition to the court's conclusion being counter-intuitive, there is virtually no case support for the proposition. The court quotes from *Owsichek v State, Guide Licensing and Control Board*, 763 P.2d 488, 495 (Alaska 1988), which cited to and quoted from *Mellakatla Indian Community; Annette Island Reserve v. Egan* 362 P.2d 901 (Alaska 1961), *aff'd* 369 U.S. 45, 7 L. Ed. 2d 562, 82 S. Ct. 552 (1962). In *Mellakatla*, the court stated that "these migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the state. . . ." 362 P.2d at 915 (emphasis added). The court notes candidly that the state ownership doctrine, given the blessing of the United States Supreme Court in *Geer v. Connecticut*, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896), was overruled by the Court in *Hughes v. Oklahoma*, [**37] 441 U.S. 322, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979). The Court termed the state ownership doctrine a legal fiction that did not conform to practical realities.

The court also correctly notes that *Hughes* did not dictate a retreat from the trust doctrine advanced in *Geer*. It is this trust relationship, repeatedly articulated and embraced by this court, that lies at the core of the present dispute. This relationship between migratory fish and game, the State of Alaska, and the people of the State of Alaska is not an "asset of the state" in any sense of the term.

The trust relationship derives generally from article VIII of the Alaska Constitution, and in this case specifically from article VIII, section 3, which provides that "wherever occurring in their natural state, fish, wildlife,

and waters are reserved to the people for common use." This section, generally referred to as the "common use clause," can be amended by the people of the State, for that right is guaranteed them by *article XIII, section 1 of the Alaska Constitution*. However, it cannot be amended by the legislature, only implemented within the narrow confines of the limitations of the common use clause, which [**38] has created the trust relationship between the State and its people.

Article XII, section 11 of the Alaska Constitution provides in part that "unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI." Since *article VIII, section 2 of the Alaska Constitution* grants the legislature law-making powers [**66] over natural resources, the question becomes whether law-making powers through initiative are "clearly inapplicable" to implementation of the trust relationship established by *article VIII, section 3*. In my view, it is precisely because of the trust relationship that law-making powers through initiative are "clearly inapplicable."

Although the constitutional debate is not particularly informative, what does become clear from Delegate V. Fischer's and Delegate McLaughlin's remarks, *see 4 Proceedings of the Alaska Constitutional Convention*, at 2828 and 2847-51 (1955), is that "unless clearly inapplicable" does not mean "unless specifically excluded." The term "unless clearly inapplicable" became part of the constitution, the term "unless specifically excluded" did [**39] not. Undefined, "unless clearly inapplicable" thus becomes subject to interpretation.

In my view an initiated law is "clearly inapplicable" to the allocation of a resource reserved to the people for their common use. This is particularly so when the State holds the resource in trust for all the people of the State. The people, as beneficiaries of this trust, cannot dictate to the trustee the manner in which the trust is to be administered.

The uniqueness of this trust relationship in our government distinguishes it from most other relationships created by the Alaska Constitution. Additionally, the

structure of the Department of Fish and Game belies the notion that fish and game management decisions may be left to initiated laws. The Commissioner of Fish and Game serves a specific term of five years, *AS 16 05.010*, unlike other commissioners. Also unlike other commissioners, who simply are appointed by the governor, subject to legislative approval, the Boards of Fisheries and Game present to the governor a list of qualified nominees for the office of Commissioner of Fish and Game. The governor makes the appointment from the list, or a supplemental list if he or she requests one. The [**40] appointment is subject to legislative approval. *AS 44.39.030*. Unlike other commissioners, specific professional qualifications for Commissioner of Fish and Game are required by statute, including "knowledge of the requirements for the protection, management, conservation, and restoration of the fish and game resources of the state." *AS 16 05.010*. Also unlike other commissioners, who serve at the pleasure of the governor, a proceeding for removal of the Commissioner must be initiated by a resolution by either the Board of Fisheries or Board of Game, who request the Commissioner's removal. Only then can the governor make a final decision to remove the Commissioner. *AS 44.39.050*.

The trust relationship, the structure of the Department of Fish and Game, the agency responsible for implementing the State's trust responsibilities for the benefit of all the people of the State, and the detailed professional requirements that must be possessed by the Commissioner of Fish and Game, the executive who directs that agency, persuasively demonstrate the clear inapplicability of initiated laws which dictate policies regarding the "protection, management, conservation, and restoration of the fish [**41] and game resources of the state."

Long ago we set upon a course that defined the State's responsibility under the common use clause as that of a trustee for its people, the beneficiaries of that trust. I am persuaded that the characterization of that relationship was, and is, correct. I am persuaded similarly that the constitutional grant of the right of initiative is clearly inapplicable to alter such a relationship.

Stealth bills take aim at your right to vote on game issues

COMPASS: Other points of view

By NICK JANS

(03/24/08 04:01:40)

HB 348 seems an innocuous little bill -- several lines that merely redefine Alaska's wildlife as an "asset." The Department of Law has argued that it and related bills, SB 176/HB 256, simply clarify existing statutes governing wildlife management.

However, the intent of these bills is far-ranging, and hardly innocuous. These pieces of stealth legislation are designed to subvert the right of Alaska's people to vote in this August election on the issue of shooting wolves and bears from private aircraft, and to prevent all future ballot initiatives regarding wildlife management. All three bills are backed by well-connected special interest groups, notably the Alaska Outdoor Council -- which receives heavy financial backing from Outside organizations such as the Safari Club International and the National Rifle Association.

It is not the viewpoint behind these bills you should resent -- it's the disingenuous attempt to slip them past the people without openly acknowledging the clear intent: to silence Alaska's voters.

In the case of HB 348, the designation of Alaska's wildlife as an "asset" is meant to put decisions regarding wildlife management solely in the hands of a Legislature that has routinely flouted the wishes of its constituents. In a 1996 ballot initiative, 36 of Alaska's 40 districts rejected aerial predator control. In 2000, 29 of 40 districts did the same. Yet both times, the Legislature overturned that mandate.

In 2000, 63 percent of Alaskans rejected a referendum that would have made unconstitutional all wildlife ballot initiatives. Now, 56,000 Alaska voters are once again demanding that their voices be heard on the issue of aerial predator control, in a ballot measure that has already been certified.

These were and are Alaskans speaking out, not Outsiders. And contrary to Alaska Outdoor Council rhetoric, thousands of rural Alaskans voted against it -- people who truly do depend on subsistence. Shishmaref, Klawock, Sleetmute, Kivalina, Pedro Bay, Shageluk, Buckland, Anaktuvuk Pass, White Mountain, Koyuk, Chignik Lagoon, New Stuyahok, Kotzebue, and more -- many Native Bush communities voted against aerial predator control in 2000. To say that these people don't understand the nature of subsistence or wolves is an insult to Native traditions and cultures.

Likewise, thousands of active non-Native hunters, including myself, feel insulted when we're told by the Board of Game or the Alaska Outdoor Council that we just don't understand the issue. Many of us have far more experience and knowledge regarding wolves than those who claim we know so little.

In any case, the opposition's rhetoric distorts the issue. Aerial predator control is not a matter of science, but of ballot-box policy, directed by political appointees. It is the constitutional right of Alaska's people to decide how this management tool will be wielded. The wildlife of Alaska belongs to us all, not to just a well-connected few who exert influence behind closed doors, contrary to the democratic process.

The Alaska Outdoor Council proudly claims roughly 3,000 paying members. Since when do the desires of 3,000 trump those of 56,000-plus?

The answer's simple: when a special interest group (which includes Gov. Palin, who requested the introduction of SB 176/HB 256, and is herself an Alaska Outdoor Council member) attempts to exert its will, and the majority stand by and allow their rights to be stolen.

You don't have to agree with me on the issue of airborne predator control to agree that we do indeed live in a democratic society, where the majority rules. Alaska's citizens have a constitutional right to vote on matters of wildlife management policy, and to raise a ballot initiative when our collective will is ignored by those sworn to represent us.

The issue of aerial wolf and bear shooting pales in comparison to the real issue at stake: the democratic process. We must insist that the Legislature and Gov. Palin protect and nurture that process.

Alaskans, raise your voices and call for the striking down of HB 348 and SB 176/HB 256, not because of your convictions regarding aerial predator control, but because of your convictions in a government of the people, by the people, and for the people.

Nick Jans is with Alaskans for Wildlife and is the author of several books about Alaska.

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Ruth McHenry
HC60 Box 306T
Copper Center, Alaska 99573
Phone & Fax 907-822-3644
cca@coppervalleyak.net

March 21, 2008

Senate Judiciary Committee
Senator Hollis French, Chair

by fax to 907-465-6595

Re: SB 176

Dear Committee Members:

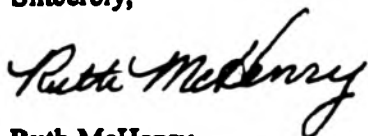
I am a long-time (62-year) resident of Alaska, and I am writing to ask you to remove from SB 176 language relating to airborne shooting or same day airborne shooting of wolverine.

The Alaska Department of Fish and Game has done some research on wolverines in Alaska. I will cite some of that work as I make some key points about why airborne taking of wolverine does not belong in SB 176:

- **Wolverines are not a threat to big game populations in Alaska.** ADFG's Ken Taylor stated, "Snowshoe hares and carrion are the principal foods for wolverines....Wolverines are capable of bringing down some of Alaska's hoofed mammals," but he concludes, "Wolverine predation on large mammals, however, is presently considered to be an uncommon occurrence in Alaska."¹
- **Wolverines do not exist in large numbers in Alaska.** "They are generally not present at high densities anywhere within their range," according to ADFG's Howard Golden.²
- **It's difficult to know when we have removed or displaced too many wolverine for the continued survival of a population.** Two quotes on this topic:
 - The wolverine occupies remote areas, is solitary and secretive, and occurs at relatively low densities, which makes field study difficult and expensive.³
 - Wolverines require more attentive management because they occur at naturally low densities, have low reproduction rates, are sensitive to human development and harvest, and have been eliminated from vast areas of their former range.⁴

Given that information, I hope you will decide that it is unnecessary to include the wolverine in a predator management program.

Sincerely,



Ruth McHenry

¹ Taylor, Ken, "Wolverine (*Gulo gulo*)", *Wildlife Notebook Series*, ADFG, 1989.

² Golden, Howard, *Wolverine Survey Plan for Upper Turnagin Arm and Kenai Mountains, Alaska, Interagency Collaborative Project Progress Report*, ADFG, May 2004.

³ Magoun, Audrey J. (ADFG) and Copeland, Jeffrey P. (Idaho DFG), "Characteristics of Wolverine Reproductive Den Sites", *Journal of Wildlife Management* 62 (4):1313-1320.

⁴ Golden, Howard N., Routs, William T., and Becker, Earl F., *Wolverine Demography and Ecology in Southcentral Alaska: Project Outline and Phase I Project Report*, February 1993, ADFG, USF&WS, NPS, USFS.

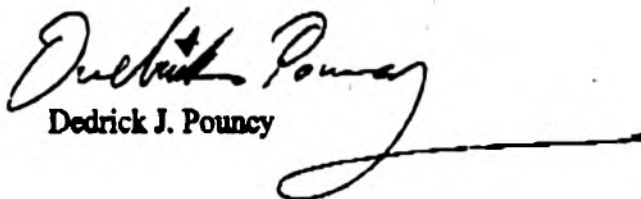
Dedrick J. Pouncy
635 W45th Ave. #1
Anchorage, AK 99503

March 22nd 2008

To: Representative Mike Doogan, Senator Hollis French

My name is Dedrick J. Pouncy.

I stayed at the Safe Harbor Inn located at 1905 E 4th Ave. Anchorage, AK 99501. Safe Harbor is purchasing the Ramada Inn on Muldoon St. As a former resident I support them in this because they supported my family and I in our time of need with shelter, transportation, supplies and many other valuable resources. Currently I am employed and they continue to support me on our way to self-sufficiency.


Dedrick J. Pouncy

Cindy Smith

From: Peter and Sarah Carter [luckyenterprizes@gmail.com]

Sent: Tuesday, March 18, 2008 4:21 PM

To: Cindy Smith; Sen. Hollis French; Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski; Sen. Gene Therriault

Subject: Please oppose SB 176

Dear Senators and those concerned for the welfare of our state's wildlife and natural resources:

I oppose SB 176 on aerial predator control.

SB 176 is attempting to remove all the language requiring the Board of Game to develop aerial predator control programs based on science. The bill removes the words "based on science" and replaces science with the following language:

" the Board of Game may authorize a predator control program that involves airborne or same day airborne shooting of wolves, wolverines, or brown bears if the board determines that the program would be conducive to achieving the objectives established for human harvest"

What does " conducive to achieving the objectives" mean? Nothing more than the "**opinion**" of the Board of Game. The board will no longer be required to show what factors may be keeping big game populations at low numbers. Is it predators or other environmental factors such as lack of food? No longer will the board be required to use science to determine which predator may be contributing to low big game populations. Is it wolf, brown bear or wolverine? The board can choose which ever predator they "think" is responsible. No longer will the board be responsible for showing whether intensive predator control programs are even effective!

If SB 176 is adopted the board can simply have an opinion, based on anything they want, that a particular predator needs to be included in an aerial predator control program – including brown bears! For the first time the board could simply shrug its shoulders at any concerns about intensive predator control programs and state they are mandated to initiate these programs, it is not up to them, the legislature has told them to do it! With no other mandates in statute other than the opinion of the Board of Game, **the citizens would have no recourse in the courts to oppose predator control.**

I strongly urge you to listen to the will of your constituents. Please oppose Senate Bill 176.

Sincerely,
Sarah Carter
Valdez, Alaska
907.835.4488

3/18/2008

STATE OF ALASKA

SARAH PALIN, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 115526
JUNEAU, AK 99811-5526
PHONE: (907) 485-4100
FAX: (907) 485-2332

MEMORANDUM

TO: Senator Hollis French
Chairman, Senate Judiciary Committee

FROM: Denby S. Lloyd, Commissioner
Alaska Department of Fish and Game

DATE: April 6, 2008

SUBJECT: Hearing Request, House Bill 256

I am writing to request that, at your earliest convenience, you schedule a hearing in the Judiciary Committee of House Bill 256, "Active Game Management/Airborne Shooting". I have earlier provided you with the following:

- A copy of the current version of Committee Substitute for House Bill 256(JUD)
- The two previous versions of the bill: CSHB 256(RES) and HB 256
- The Governor's Transmittal Letter for the bill
- A copy of ADF&G's zero fiscal note for the bill
- A "Draft Transmittal Letter", which amounts to a sectional analysis by Senior Assistant Attorney General Kevin Saxby
- "Answers to Commonly Asked Questions about HB 256/SB 176" by Mr. Saxby and Division of Wildlife Conservation Director Doug Larsen
- "Talking Points on HB 256" prepared by Mr. Saxby and Mr. Larsen
- The current statutes that would be amended by passage of HB 256

When a hearing has been scheduled, we can provide you with a list of witnesses to testify on behalf of the legislation.

Please feel free to contact my legislative liaison, Tim Barry, with questions or for more information. Thank you for your attention to this matter.

* * *

STATE OF ALASKA

**SARAH PALM,
GOVERNOR**

DEPARTMENT OF FISH AND GAME

P.O. BOX 115528
JUNEAU, AK 99811-5528
PHONE: (907) 465-4110
FAX: (907) 465-8004

BOARD of GAME

March 10, 2008

Senator Hollis French, Chairman
Senate Judiciary Committee
State Capitol, Room 417
Juneau, AK 99801

Dear Senator French:

The Alaska Board of Game (Board) supports Senate Bill 176 and House Bill 256 ("An Act relating to active game management and to the airborne or same day airborne taking of certain game animals...") and urges your positive action on these measures. These bills will harmonize existing law, reduce confusion, and minimize litigation.

State predator control programs have been subjected to continuous and repetitive lawsuits, alleging that the Board failed to follow the intensive management law (AS 16.05.255(e)-(j)) and the same-day airborne law (AS 16.05.783). No court has yet held that the Board has violated either, and plans adopted by the Board as prescribed by 5 AAC 92.125 are based on scientific information currently available. We will continue to follow this practice. Critics suggest that predator control programs be curtailed until more field data can be gathered. The Board and the Alaska Department of Fish and Game (Department) welcome review of these programs and constantly strive to improve their efficacy, but suspending them will not help meet the statutory and constitutional requirements we are compelled to follow in working to meet the needs of Alaskans.

Opponents argue that the bills abandon science while conversely claiming that the Board ignores scientific input it receives from various organizations in adopting predation control plans. The Board demands and receives high quality information and applies appropriate wildlife science to its decisions. The Department acts as staff and primary science advisor to the Board, and nearly always has the best available scientific data. The bills' deletion of AS 16.05.783's unnecessary, superfluous requirement that predation control programs be "based on information provided by the department" will not change the Board's continued reliance on the Department's expertise.

The Board always considers information presented by other individuals or groups, even though critics sometimes claim otherwise. Department wildlife biologists are members of professional societies, regularly attend scientific conferences, publish information in peer-reviewed professional journals, and are participating in a Wildlife Society review of North

American predator control programs. Department participation follows up on criticism that Alaska has not implemented the recommendations put forth in the 1997 National Academy of Science – National Research Council review of Alaska’s predator control programs. These scientific activities are critical to our decision-making process, just as legislative funding for intensive management studies is necessary both to Board deliberations and to continue and expand the solid scientific basis for managing complex predator-prey-human-ecological systems.

SB 176/HB 256 will clarify existing laws without changing the Board’s longstanding reliance on science. We strongly recommend they be enacted.

Sincerely,



**Cliff Judkins, Chairman
Alaska Board of Game**

**cc: Original letters sent to all members of the Alaska State Legislature
Commissioner Denby Lloyd, Alaska Department of Fish and Game
Mike Nizich, Deputy Chief of Staff to Governor Palin**

STATE OF ALASKA

SARAH PALIN, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 115526
JUNEAU, AK 99811-5526
PHONE: (907) 465-4100
FAX: (907) 465-2332

MEMORANDUM

TO: Senator Hollis French
Chairman, Senate Judiciary Committee

FROM: Denby S. Lloyd, Commissioner
Alaska Department of Fish and Game

DATE: March 27, 2008

SUBJECT: Hearing Request, House Bill 256

I am writing to request that, at your earliest convenience, you schedule a hearing in the Judiciary Committee of House Bill 256, "Active Game Management/Airborne Shooting". I enclose the following:

- A copy of the current version of Committee Substitute for House Bill 256(JUD)
- The two previous versions of the bill: CSHB 256(RES) and HB 256
- The Governor's Transmittal Letter for the bill
- A copy of ADF&G's zero fiscal note for the bill
- A "Draft Transmittal Letter", which amounts to a sectional analysis by Senior Assistant Attorney General Kevin Saxby
- "Answers to Commonly Asked Questions about HB 256/SB 176" by Mr. Saxby and Division of Wildlife Conservation Director Doug Larsen
- "Talking Points on HB 256" prepared by Mr. Saxby and Mr. Larsen
- The current statutes that would be amended by passage of HB 256

When a hearing has been scheduled, we can provide you with a list of witnesses to testify on behalf of the legislation.

Please feel free to contact my legislative liaison, Tim Barry, with questions or for more information. Thank you for your attention to this matter.

* * *

Answers to Commonly Asked Questions about HB 256/SB 176

Submitted by:

**Douglas Larsen, Director
Division of Wildlife Conservation
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK 99811-5526**

**Kevin Saxby
Sr. Assistant Attorney General
Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501**

1. Isn't the bill just a response to current litigation challenging Alaska's predator control programs?

No, the bill was in draft well before any of the current lawsuits were filed. It was done in response to requests from several legislators to the Murkowski Administration that ADF&G and the Dept. of Law be tasked to suggest improvements to the Intensive Management law and the Same-day Airborne law. When the bill was completed, early in the Palin Administration, she agreed that it included improvements that she also supported, and ordered that it be introduced.

2. Doesn't the bill remove all requirements for science-based decision-making on predator control decisions?

No, the Department's role as the Board's science advisor, among other things, is not affected in any way by this bill. There is no need to have individual directives to use science in specific statutes or for any particular Board decisional process because, under its general statutory authorities, the Department always produces all scientific data within its control that is relevant to any Board decision. The Department does not envision its role before the Board changing in any way as a result of this bill, nor does it envision any diminution of the Board's reliance on science.

3. Doesn't the bill remove requirements for a careful planning process before predator control is initiated?

This question is frequently asked, but it is deceptive. Much depends on what the questioner considers to be an adequate plan. Currently, the Department does prepare for the Board a detailed predation control implementation plan before predator control is begun, and a great deal of effort, data and public input goes into the creation of these plans. However, opponents argue that such plans are still not detailed enough, and a multi-year, much more expensive planning process involving lengthier public debate should be completed before any predator control may begin. The bill preserves what the state has always understood to be the legislative intent for predator control by requiring timely action to respond to prey population declines, supported by the same excellent planning efforts that are currently developed to support the Board's decisions.

4. Doesn't the bill weaken the Same-day Airborne law?

In several ways, the Same-day Airborne law is strengthened. For example, for the first time brown bears are added to the species protected under that law. Also, necessary changes are made so that ADF&G personnel will not run afoul of the law if they are required to dispatch nuisance or threatening wolves, wolverines or brown bears on the same day they have been in an aircraft. The use of tranquilizer guns and other non-lethal forms of "shooting" is also authorized for the first time. What some see as a weakened standard for same-day airborne predator control, the requirement that it be determined to be "conducive" to meeting population and harvest objectives, is important because it harmonizes the Same-day Airborne law with the Intensive Management law where, currently, they are essentially contradictory.

5. Doesn't the bill make it less likely that intensive (or active) management measures will be adopted? That is, doesn't it weaken the Intensive Management law?

No, the bill simplifies the Intensive Management law down to its core principles and states those principles more clearly and forcefully. The Board will be required to identify moose, caribou and deer populations that are important to manage for high levels of human consumptive use and to set population and harvest objectives for those populations. For such populations, the Board will then have an affirmative duty to always manage that population to meet those objectives, including both times of abundance and times of depletion. If objectives are not being met, the Board will also have the obligation to adopt active management measures, including predator control, designed to meet those objectives. Problematic definitions and complicated requirements about what steps must be taken when have been eliminated, leaving the simple statutory duty to manage these important populations for abundance.

6. How does this bill fit with the pending initiative on the Same-day airborne law?

As stated above, the bill was drafted and introduced because ADF&G and the Department of Law, with the governor's approval, made commitments to various legislators to submit language that improves the Intensive Management and Same-Day Airborne laws. The bill should stand or fall on that basis. It is a comprehensive effort to rewrite these two laws in a way that makes them both workable, while preserving the important principles which underlie each one. Legislators and possibly voters, will make up their own minds about whether Alaska's predator and prey management is better with the bill or without it.

Senate Bill 176/House Bill 256
Active Game Management/Airborne Shooting

DRAFT TRANSMITTAL LETTER/SECTIONAL ANALYSIS

Kevin Saxby, Senior Assistant Attorney General

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to active game management and to the airborne or same day airborne taking of certain game animals. In general, the bill would simplify and clarify the state's current intensive management law for big game and the state's "same day airborne hunting" law, harmonize these two currently inconsistent laws with each other, and make both laws more workable and consistent with other important game management laws, such as the state's subsistence law.

The intensive management law is clarified and simplified as follows. First, the Board of Game (board) must identify moose, caribou, and deer populations that are important for high levels of harvest by humans. This requirement is similar to the existing requirements in the state's intensive management law, at AS 16.05.255(e) - (g), but focuses on moose, caribou, and deer -- the primary ungulate species in the state that are managed for high levels of harvest by people for food. The language stating this requirement, in sec. 3 of the bill, would be clearer and less subject to misinterpretation than the language in the existing statute.

Next, under sec. 3 of the bill, the board would be required to set population and harvest objectives for the identified populations. This, again, would mirror requirements in the current intensive management law in AS 16.05.255(e) - (g). There has been a great deal of debate, in and out of court, about the current law's meaning in this regard, and whether active, or "intensive," management should be driven by population declines, by harvest declines, or by both. The language in sec. 3 of the bill would help by clarifying that the board is to establish objectives that are both population and harvest-based, so that these important game herds would be managed for both abundant numbers and abundant harvest opportunities.

Section 4 of the bill would require the board to then adopt regulations that implement its identifications and objectives, such as by adopting seasons, bag limits, and other regulations that accommodate and foster high levels of use when population sizes allow, and that will increase the population sizes as necessary to approach or meet harvest objectives, when doing so would be conducive to achieving the objectives. The board would be required to adopt regulations it deems advisable to restore herd numbers and harvest levels when a population is depleted or reduced in productivity, including taking active management measures. These provisions also track a current statutory requirement, but with language that is clearer and would provide the requisite discretion the board needs to be innovative in tailoring its active management

programs to the specific problems and circumstances in each area. It should assist courts and the public in understanding the goals and requirements of active management programs in areas where there is current confusion.

Next, the bill would define the key terms "high level of human harvest" and "active management." The first is relatively unchanged from the current definition, adding only the concept that the term is designed to achieve an ability to allocate a high level of harvest in the future, and does not require that the allocation be based on currently depleted numbers, as some have argued. The second term is new and is used in place of "intensive management." "Active management" is generally viewed as a broader term by wildlife managers, and encompasses strategies that may be useful in the state's varied terrain and conditions but that do not necessarily rise to the level of "intensive" management. Because it is such a broad term, no exhaustive listing of techniques is attempted, but predator control is included as one example so that there is clear legislative direction that this technique is an appropriate tool in the overall tool kit of the state's game managers. The bill also would eliminate several current definitions that have proven to be problematic for both the board and the courts, and that vary from existing legal authorities and common usages within the wildlife management community.

The above changes would tend to make the principles of active management more compatible with the state's subsistence law, AS 16.05.258, and give legislative direction in accordance with the state's constitutional requirements to manage game under the maximum use, maximum benefit, common use, and sustained yield principles in art. VIII, secs. 1 - 4, of the Constitution of the State of Alaska. Thus, managing for high levels of all human consumptive uses would be set out as the overall mandate. However, under the proposed changes, the board would be given more discretion to respond to declines in herd numbers or productivity while considering biological constraints, subsistence needs, and many other factors that it must take into account in regulating uses of these important game herds. Under current language, the board is essentially prohibited from significantly reducing the taking of a herd without adopting a predator control program, unless complex and legally vulnerable findings can be made or equally vulnerable emergency actions are taken. Thus, the board's sustained yield obligations, which must always come first, are significantly hampered by a complex, difficult to follow and defend decisional process. The changes eliminate this unworkable process, allowing reductions to occur while retaining the obligation to always manage for abundance.

The bill would clarify and simplify the current "same day airborne hunting" law, first enacted by an initiative in 1996, in several ways. First, the bill retains the overall prohibition against the airborne or same day airborne shooting of certain large predators, in keeping with the public votes in favor of declaring this practice to be illegal as an ordinary hunting practice, and it adds brown bears to the list of protected

species. Second, the bill also would retain the idea that, in certain situations, game management priorities and biological concerns require that an exception to this general prohibition must be allowed so that important game management programs may proceed. However, the bill would eliminate the current complex, controversial, and problematic decisional process that the board has been required to use to authorize game management programs involving airborne or same day airborne shooting and substitutes a simpler process. Under the new language, the board would need to find that such a program would be conducive to achieving population and harvest objectives set under the active management provisions described in this paragraph, or that it would be conducive to the health of a predator population. In other words, by passing this bill, the Alaska State Legislature will again affirm that predator control is an appropriate tool for the state's game managers to use, so the board can authorize airborne or same day airborne predator control programs when necessary to fulfill active management requirements or to help the predators themselves as, for example, may be the case with the lice problem in Kenai Peninsula wolves. In either case, the program must be limited to the area necessary for the stated purpose. These changes should reduce judicial and public confusion over what standards apply to such decisions and, for the first time, mesh this statute with the active management principles set out in AS 16.05.255. These changes also would give the board more freedom to manage under the state's subsistence law, so that predator control may be used to assist with the recovery of herds necessary for subsistence uses in order that the reasonable opportunity mandate may be met.

The bill also would change a current exception to the "same day airborne hunting" law to clarify that it does not prohibit Department of Fish and Game employees from shooting, wolves, bears, and other designated animals on the same day that the employee has been airborne for public safety, scientific, or other legitimate governmental purposes as outlined in AS 16.05.050. The bill additionally would repeal two current provisions of the statute that are redundant. AS 16.05.783(d), which currently authorizes the board to determine the parameters of any predator management or control program, is unnecessary because such powers are fully encompassed within other existing board authorities. AS 16.05.783(e), which prohibits the use of helicopters and state personnel without the commissioner's approval, is unnecessary because the commissioner already makes all fiscal, budgetary, and administrative decisions about such programs. AS 16.05.050 and 16.05.241. Finally, the bill includes a clarification that the airborne and same day airborne prohibition does not apply to the administration of drugs, often done with "dart guns" from aircraft, and eliminates a problematic and unnecessary definition of "game management program."

Overall, the bill takes two laws that were written to achieve almost exactly opposite purposes and rewrites them so that the state's game managers, the courts, and the public would have less trouble understanding how they may work together and which legal requirements apply in which situation. The important principles of limiting

use of airborne and same day airborne shooting of large predators is retained, while the process for conducting game management programs that are critical to meeting several of the state's constitutional mandates relating to game management is made simpler, more workable, and more legally defensible. In doing so, this bill addresses the same subjects that are currently pending in a ballot measure, designated as 05HUNT, to be placed on the ballot in 2008, in a holistic approach that harmonizes the essential underlying concepts of that measure in keeping with other important principles and processes required under AS 16 (Fish and Game Code).

I urge your prompt and favorable consideration of the measure.

Sincerely,

Sarah Palin
Governor

TALKING POINTS ON HB 256

“An Act relating to active game management and to the airborne or same day airborne taking of certain game animals; making conforming amendments; and providing for an effective date.”

- HB 256 is intended to clarify the intent of the Intensive Management law, passed in 1994. It is not intended to address people’s values or beliefs about predator management in Alaska.
 - HB 256 retains the process for implementing Intensive Management in circumstances where moose, caribou, and deer populations identified for high levels of human harvest fail to meet established population and harvest objectives.
- Because of confusing language in the existing law, the Departments of Law and Fish and Game have struggled in their efforts to effectively implement the Intensive Management law.
- The Department of Fish and Game has developed an administrative process for implementing the law.
 - While the Department’s process clearly follows the intent of the law, individuals and groups repeatedly challenge whether these processes are in keeping with the letter of the law.
- Consequently, the Departments of Law and Fish and Game find themselves repeatedly challenged in court on their predator management programs. These challenges require the departments to invest substantial staff and financial resources in defending the programs.
- Time and money invested in court actions detracts from time and money that can be spent collecting biological data and information about Alaska’s wildlife for use by the Board of Game in its deliberations on the many wildlife issues that come before the Board.
- While the Department of Law has repeatedly done well in court when faced with legal challenges, many of the same allegations are brought forward time and time again, demonstrating that the existing law is not clear.
 - HB 256 is put forward as a way to remove confusion and ambiguity.
- The bill is the first attempt by the people who have to implement the fish and game laws to harmonize two very different statutes, the intensive management law and the same-day airborne law. If we’re going to keep both on the books, we need them to work together.
- The bill does not change the way the Board and Department rely on scientific data for their game management decisions. That process is already well established. The bill simply removes unnecessary language that has led to a great deal of public confusion about how the Board is supposed to make these types of decisions.
- Brown bears are included in the bill not so that aerial control methods may be used, as there are no current plans to use aerial methods even though the Board could have authorized this, but because they should be treated the same as wolverines-subject to the same general prohibition and the same exception from that prohibition.
- The bill authorizes the Board to permit the use of aircraft for predator control when doing so would be conducive to achieving its active management objectives for important deer, caribou, and moose populations. “Conducive” means “tending to cause.” Thus, contrary to assertions made by opponents, the bill retains a causation element for predator control decision making.

Applicability of subsection (c). — Subsection (c) applies to allocation of fish resources between two commercial fisheries. *Pennock Mktg. Ass'n v. State*, 817 P.2d 917 (Alaska 1991)

In adopting a regulation for the allocation of harvestable treaty salmon, the Board of Fisheries had discretion to treat guided and unguided sport fishing as a single category and to make a separate allocation to the commercial trolling fishery. *Rattler v. State, Bd. of Fisheries, Dept of Fish & Game*, 963 P.2d 1137 (Alaska 1998)

If a cooperative fishery and an open fishery use the same type of gear in the same administrative area to take the same fishery resource, an allocation of resources to the cooperative would be impermissible allocation within a single fishery under subsection (c) of this section. *Grunert v. State*, 109 P.3d 174 (Alaska 2006).

Allocation criterion addressed in earlier proposal. — Where the Board of Fisheries considered such a new allocation criterion for sockeye salmon with an earlier proposal and incorporated its previous definitions on that proposal into a later proposal, the board properly addressed the allocation criterion for sockeye salmon under subsection (c) *Stepovak-Shumagan v. State Nat. Ass'n v. State, Board of Fisheries*, 886 P.2d 632 (Alaska 1994)

Regulation delaying the commercial salmon fishing season was consistent with and reasonably necessary for purposes of conservation and development, was not arbitrary and was supported by reasonable objectives. *Stepovak-Shumagan Nat. Ass'n v. State, Board of Fisheries*, 886 P.2d 632 (Alaska 1994)

Regulation upheld. — In promulgating a regulation governing commercial herring fishing in Norton Sound, the board pursued a permissible objective (allocation of a fishery resource between resident and nonresident fishermen) and employed means within its powers, and the regulation itself was reasonable and nonarbitrary. *State v. Hebert*, 743 P.2d 392 (Alaska Ct. App. 1987), *aff'd*, 803 P.2d 863 (Alaska 1990)

Where a mixed stock regulation was the product of a four-day meeting in which the fisheries board took a hard look at the issues and justified its decisions through written findings, and where the regulation was not so indefinite or uncertain that it could be overturned as facially vague or devoid of substance, it was a valid exercise of discretion. *Native Village of Elim v. State*, 990 P.2d 1 (Alaska 1999)

Regulation held invalid because inconsistent with statutes. — Regulation developed by the Board of Fisheries to identify customary and traditional uses of Cook Inlet salmon qualifying for subsistence priority and codified as 5 AAC 01.597 was held invalid because it was inconsistent with former subsection (b) and AS 16.05.040 and contrary to the legislature's intent in enacting the 1978 subsistence law. *ch. 161, SLA 1978 Madison v. Alaska Dept of Fish & Game*, 896 P.2d 168 (Alaska 1985)

Applied in *Meier v. State, Bd. of Fisheries*, 739 P.2d 172 (Alaska Ct. App. 1987); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314 (Alaska 1994)

Quoted in *Interior State Airboat Ass'n v. State*, 18 P.3d 686 (Alaska 2001)

Cited in *Roynolds v. State*, 666 P.2d 1313 (Alaska Ct. App. 1982); *Langeester v. State*, 668 P.2d 1369 (Alaska Ct. App. 1983); *State v. Blusaku*, 698 P.2d 174 (Alaska Ct. App. 1985)

Sec. 16.05.253. Operation of stationary fishing gear. (a) The Board of Fisheries may require a person who holds a limited entry permit or an interim-use permit under AS 16.43 to be physically present at a beach or riparian fishing site during the operation of net gear or other stationary fishing gear at the site, except when the permit holder is at or traveling to or from the location of

- (1) a sale of fish caught in the gear; or
- (2) other stationary gear of the permit holder.

(b) In this section, "fishing site" means fishing site as defined by the Board of Fisheries and includes any structure used for providing shelter in support of the operation of the net gear or other stationary fishing gear. (§ 1 ch 94 SLA 1982; am § 1 ch 19 SLA 1983)

Sec. 16.05.255. Regulations of the Board of Game; management requirements. (a) The Board of Game may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

(1) setting apart game reserve areas, refuges, and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of game;

(3) establishing the means and methods employed in the pursuit, capture, taking, and transport of game, including regulations, consistent with resource conservation and development goals, establishing means and methods that may be employed by persons with physical disabilities;

(4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators, or other categories;

(6) methods, means, and harvest levels necessary to control predation and competition among game in the state;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation, and stocking of game;

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(9) establishing the times and dates during which the issuance of game licenses, permits, and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed;

(10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game;

(11) taking game to ensure public safety;

(12) regulating the activities of persons licensed to control nuisance wild birds and nuisance wild small mammals;

(13) promoting hunting and trapping and preserving the heritage of hunting and trapping in the state.

(b) [Repealed, § 12 ch 52 SLA 1986.]

(c) If the Board of Game denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must provide that, consistent with the provisions of AS 16.05.258, the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents.

(a) The Board of Game shall adopt regulations to provide for intensive management programs to restore the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals of the board in an area where the board has determined that

(1) consumptive use of the big game prey population is a preferred use;

(2) depletion of the big game prey population or reduction of the productivity of the big game prey population has occurred and may result in a significant reduction in the allowable human harvest of the population; and

(3) enhancement of abundance or productivity of the big game prey population is feasibly achievable utilizing recognized and prudent active management techniques.

(f) The Board of Game may not significantly reduce the taking of an identified big game prey population by adopting regulations relating to restrictions on harvest or access to the population, or to management of the population by customary adjustments in seasons, bag limits, open and closed areas, methods and means, or by other customary means authorized under (a) of this section, unless the board has adopted regulations, or has scheduled for adoption at the next regularly scheduled meeting of the board regulations, that provide for intensive management to increase the take of the population for human harvest consistent with (e) of this section. This subsection does not apply if the board

(1) determines that intensive management would be

(A) ineffective, based on scientific information;

(B) inappropriate due to land ownership patterns; or

(C) against the best interest of subsistence uses; or

(2) declares that a biological emergency exists and takes immediate action to protect or maintain the big game prey population in conjunction with the scheduling for adoption of those regulations that are necessary to implement (e) of this section.

(g) The Board of Game shall establish population and harvest goals and seasons for intensive management of identified big game prey populations to achieve a high level of human harvest.

(h) [Repealed, 2000 Ballot Measure No. 6.]

(i) For the purpose of encouraging adults to take children hunting, the board shall establish annual hunting seasons in appropriate areas of the state for big game, other than bison and musk ox, that are open before schools start in the fall and before regular hunting seasons begin. Only a resident child accompanied by a resident adult or a child accompanied by the child's resident parent, resident stepparent, or resident legal guardian may take big game in an area where a season established under this subsection is in effect. The adult, parent, stepparent, or legal guardian who accompanies the child may only assist the child in taking big game. A big game

animal taken under this subsection must be counted against the bag limits of both the child and the adult, parent, stepparent, or legal guardian who accompanies the child. In this subsection,

(1) "adult" means an individual who is 21 years of age or older;

(2) "child" means an individual who is not more than 17 years of age and not younger than eight years of age.

(j) In this section,

(1) "harvestable surplus" means the number of animals that is estimated to equal the number of offspring born in a game population during a year less the number of animals required for recruitment for population maintenance and enhancement, when necessary, and the number of animals in the population that die from all causes, other than predation or human harvest, during that year;

(2) "high level of human harvest" means the allocation of a sufficient portion of the harvestable surplus of a game population to achieve a high probability of success for human harvest of the game population based on biological capabilities of the population and considering hunter demand;

(3) "identified big game prey population" means a population of ungulates that is identified by the Board of Game and that is important for providing high levels of harvest for human consumptive use;

(4) "intensive management" means management of an identified big game prey population consistent with sustained yield through active management measures to enhance, extend, and develop the population to maintain high levels or provide for higher levels of human harvest, including control of predation and prescribed or planned use of fire and other habitat improvement techniques.

(5) "sustained yield" means the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game, subject to preferences among beneficial uses, on an annual or periodic basis. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978; am §§ 10, 11 ch 132 SLA 1984; am §§ 4, 5, 12 ch 52 SLA 1986; am § 1 ch 6 SLA 1989; am § 2 ch 13 SLA 1994; am § 2 ch 54 SLA 1996; am §§ 4 — 6 ch 76 SLA 1998; am § 1 ch 20 SLA 2000; am § 1 2000 Ballot Measure No. 6; am § 1 ch 68 SLA 2001; am § 1 ch 132 SLA 2003; am § 4 ch 87 SLA 2005)

Revisor's notes. — Subsection (g) was enacted as (h) and paragraphs (j)(1), (2), and (5) were enacted as (j)(3)-(5), respectively. Renumbered in 1998, at which time former (j)(1) and (2) were renumbered as (h)(3) and (4), and relettered as (i) in 2000 and as (j) in 2001.

Former subsection (h) was enacted as (i), relettered in 2000. Subsection (i) was enacted as (j); relettered in 2001, at which time former subsection (i) was relettered as (j).

Cross references. — For restriction on maximum area of land that may be closed to multiple uses without an act of the state legislature, see AS 38.06.300(a).

For legislative findings in connection with the enactment of (a), (f), and (j)(3) and (4) (formerly (a)-(g)) of this section, see § 1, ch. 13, SLA 1994 in the Temporary and Special Acts. For legislative findings relating to the 1998 amendment to paragraph (j)(4) (formerly (h)(4)) and the enactment of paragraphs (j)(1), (j)(2), and

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(c) It is an affirmative defense to a prosecution under (a) of this section that the person took the bear in defense of life or property if the person who took the bear shows by a preponderance of the evidence that

(1) the necessity for the taking was not brought about by harassment or provocation of the bear by the person who took the bear;

(2) the necessity for the taking was not brought about by the negligent disposal of garbage or the creation of a similar attractive nuisance by the person who took the bear; and

(3) the person exhausted all other practicable means to protect life and property before the bear was taken.

(d) Notwithstanding (a) — (c) of this section, the department may authorize the taking of a problem brown or grizzly bear within one-half mile of a solid waste disposal facility at any time, if the taking of the bear is necessary to protect the public and is consistent with sound game management principles.

(e) In this section

(1) "criminal negligence" has the meaning given in AS 11.81.900(a);

(2) "property" means

(A) a dwelling, permanent or temporary;

(B) an aircraft, boat, automobile, or other conveyance;

(C) a domestic animal;

(D) other property of substantial value necessary for the livelihood or survival of the owner;

(3) "solid waste disposal facility" means a facility for the disposal of solid waste, other than sewage, for which a prior authorization has been issued under AS 46.03.100. (§ 1 ch 64 SLA 1989; am § 1 ch 136 SLA 2004)

Cross references. — For penalties for class A misdemeanors, see AS 12.55.036(b)(5), 12.55.036, and 12.55.136(a).

Effect of amendments. — The 2004 amendment, effective July 1, 2004, substituted "prior authorization" for "permit" in paragraph (e)(3).

Sec. 16.05.783. Same day airborne hunting.

(a) A person may not shoot or assist in shooting a free-ranging wolf or wolverine the same day that a person has been airborne. However, the Board of Game may authorize a predator control program as part of a game management plan that involves airborne or same day airborne shooting if the board has determined based on information provided by the department

(1) in regard to an identified big game prey population under AS 16.05.255(g) that objectives set by the board for the population have not been achieved and that predation is an important cause for the failure to achieve the objectives set by the board, and that a reduction of predation can reasonably be expected to aid in the achievement of the objectives; or

(2) that a disease or parasite of a predator population

(A) is threatening the normal biological condition of the predator population; or

(B) if left untreated, would spread to other populations.

(b) This section does not apply to

(1) a person who was airborne the same day if that person was airborne only on a regularly scheduled commercial flight; or

(2) an employee of the department who, as part of a game management program, is authorized to shoot or to assist in shooting wolf, wolverine, fox, or lynx on the same day that the employee has been airborne.

(c) A person who violates this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$5,000, or by imprisonment for not more than one year, or by both. In addition, the court may order the aircraft and equipment used in or in aid of a violation of this section to be forfeited to the state.

(d) When the Board of Game authorizes a predator control program that includes airborne or same day airborne shooting, the board shall have the prerogative to establish predator reduction objectives and limits, methods and means to be employed, who is authorized to participate in the program, and the conditions for participation of individuals in the program.

(e) The use of state employees or state owned or chartered equipment, including helicopters, in a predator control program is prohibited without the approval of the commissioner.

(f) In this section,

(1) "free-ranging" means that the animal is wild and not caught in a trap or snare; and

(2) "game management program" means a program authorized by the Board of Game or the commissioner to achieve identified game management objectives in a designated geographic area. (§ 1 1996 Ballot Measure No. 3; am §§ 1 — 4 ch 2 SSSLA 1999; am § 2 ch 20 SLA 2000; am § 2 2000 Ballot Measure No. 6; am §§ 1, 2 ch 124 SLA 2003)

Revisor's notes. — Paragraph (f)(2) was enacted as (d)(3) and relettered as (d)(2) in 1999. Subsections (d) and (e) were enacted as (e) and (f) and relettered in 2003, at which time subsection (d) was relettered as (f).

Effect of amendments. — The first 2000 amendment, effective July 20, 2000, inserted "or agent" in two places in paragraph (b)(2).

The second 2000 amendment, effective January 4, 2001, by referendum deleted "or agent" following "employee" in two places in paragraph (b)(2).

The 2003 amendment, effective June 10, 2003, rewrote subsection (a) and added subsections (d) and (e).

Sec. 16.05.785. Effect of failure to remove old markers. If the Board of Fisheries by regulation uses department markers to establish waters closed to commercial fishing and the state fails to remove the old markers when new markers are posted to establish waters closed to commercial fishing, commercial fishing is expressly permitted in the waters between the new markers and the old