

SCOMM

99:3



February 9, 1995

Governor Tony Knowles
P.O. Box 110001
Juneau, Alaska 99811

Honorable Governor Knowles,

On behalf of ONC we would like to support the following of the
appointment to the Board of Fisheries.

☒ Trifon
☒ Hanson
☒ Umphenour

Thank You.

ORUTSARARMUTT NATIVE COUNCIL

Henry Hunter
Henry Hunter, Chairman

cc: Senate Resource Committee
House Resource Committee

RESUME
VIRGIL L. UMPHENDOUR
2400 Davis Road
Fairbanks, Alaska 99701
(907) 456-3885
FAX 456-3889

OBJECTIVE

Appointment to the Alaska Board of Fish

QUALIFYING EXPERIENCE

Have been involved in all aspects of the fishing industry: commercial, sport, subsistence

COMMERCIAL

Have fished commercially on the Tanana River in Fairbanks since 1984. In 1985 became a commercial fish processor, processing both fish and roe from my fish and buying from commercial fishermen in Fairbanks, Nenana, Norton Sound and villages along the Yukon River. Have expanded this business so that now my company operates year round doing smoked fish and value added salmon products. Company does approximately 50,000 lbs of value added salmon products a year. Upwards of 250,000 lbs of salmon and roe can be processed during the summer months pending availability of fish.

SPORT

Have been an avid sport fisherman all my life. I have sport fished from the Kenai Peninsula to the Seward Peninsula and am well aware of the importance of the sport fishing industry to both the Alaskan sport fisherman and the tourism industry. My company processes in excess of 40,000 lbs/yr. of sport caught fish.

SUBSISTANCE

Have subsisted fished for two seasons while living in Nome. As a commercial fish processor, have dealt extensively with the commercial/subsistence fishermen of the Yukon River Drainage and Norton Sound. For the most part, fishermen in these areas commercial fish to obtain cash to support their subsistence lifestyle. I have seen first hand the devastating effects of the failed fish runs on these people.

HUMAN RELATIONS

Past and present positions have required a wide range of interpersonal skills, public information management techniques and political awareness. As a commercial fisherman/processor and former military officer, have learned to deal with a wide range of individuals and be cognizant of their special interests and concerns. Am able to work with others to strike a consensus on critical issues. Was co-organizer of the Yukon River Drainage Fishermen's Association (YRDFA). Prior to the formation of this organization, it was a common belief that fishermen on the Yukon would never work together. YRDFA has since become a model of cooperation, by showing that when it comes to protecting the common resource, fishermen will set aside their differences and work together.

COMMUNICATION

Certified military instructor. Am completely at ease when speaking to large groups of people.

EMPLOYMENT HISTORY

CEO, Interior Alaska Fish Processors, Inc.
Registered Alaskan hunting guide
Officer, US Army Reserve, retired

MEMBERSHIP

Delegate, US Canada Yukon River Salmon Treaty
Negotiating Committee since 1988

Co-Chairman, Yukon River Drainage Fishermen's
Association since Dec 1990

Tanana Valley Sportmen's Association, life member

REFERENCES

Lt. Governor Jack Coghill
State Senator Georgianna Lincoln
State Representative Richard Foster
State Representative Irene Nicholia
State Representative Allen Vezey
Charles Meehan, Deputy Commissioner, ADF&G
Roger Huntington, BOG

878 Lynwood Way
North Pole, AK 99705
January 5, 1994

Honorable Walter J. Hickel
Governor, State of Alaska
PO Box 110001
Juneau, Alaska 99811-0001

Dear Sir

I herein present myself as a candidate to fill the upcoming vacancy on the Board of Fish. I am a commercial fisherman/processor, sport fisherman, and in the past, have been a subsistence fisherman. Hence, I have had actual experience in the three areas where the BDF must try to reach an equitable balance in allocating the fisheries resource. Trying to achieve a balance between these various interests is almost an impossible task.

Currently there are a certain number of sport fisherman on the Board and a certain number of commercial fisherman. These people are from coastal communities. The vast interior region has no representation even though fish is one of their main sources of food. The dollar value of the fish resource on the commercial market exerts a strong influence on the BDF decisions. It is crucial that we get past looking at the fishing industry as how much we can sell the resource for. We must look at the resource with an eye toward conservation and as food and recreation for the people who live here. Unless we insure that enough fish return to the spawning grounds, there will be no fishing for anybody. Our tourist industry will suffer through the collapse of the sport fishery and our cherished Alaskan lifestyle of living off the land will be diminished when we are no longer able to subsistence and sport fish to feed our families. For the Alaskan living in the bush, the traditional lifestyle will be destroyed. I believe that it is time to appoint Board members who care about the state's common fisheries resources and who have a balanced view of the needs of all of the user groups.

I am a commercail fishermen, but my company (Interior Alaska Fish Processors in Fairbanks) yearly processes thousands of pounds of sport caught fish. For the past several years there has been virtually no sport fishing in the Fairbanks area. Visitors have asked us where they can fish. We tell them they must go elsewhere. The Fairbanks Visitor and Convention Bureau has expressed great concern about the impact of the failed fishery both on local businesses and residents who fish for personal use.

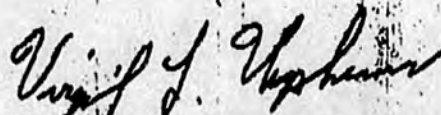
As a fish processor, I buy fish from fishermen on the Yukon and Tanana Rivers and at Norton Sound. For the most part, commercial fishermen in the Interior and Norton Sound are also subsistence fisherman. The money they get from selling their catch is used to buy fuel, etc for their subsistence fishing and hunting. The 1993 failure of the summer and fall chum runs was devastating to the people who rely on these fish to feed their families. The people in Elim, on Norton Sound, have also experienced closures of their subsistence fisheries. This past year, many commercial/subsistence fishermen had there electricity cut off in August. They have had to rely on welfare and government subsidies. The economic impact of the salmon failures on the state is immense...yet there is no subsistence fishery representation on the BOF.

Since 1988 I have been a representative on the US/Canadian Yukon River Salmon Treaty Negotiating Committee. Through this position and as a commercial/sport/subsistence fisherman, I have gained a degree of expertise in both in river and terminal fisheries management. There is currently no one on the BOF with this qualification.

I feel I would be as asset to the BOF. Request your favorable consideration. Resume enclosed.

1 incl
as

Sincerely


Virgil L. Umphenour

878 Lynwood Way
North Pole, AK 99705
January 19, 1995

Honorable Tony Knowles
Governor, State of Alaska
PO Box 110001
Juneau, Alaska 99811-0001

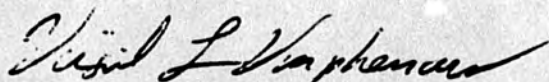
Dear Sir

My name is Virgil Umphenour and am currently a member of the Board Fish and I want to remain on the Board until the expiration of the term to which I was appointed. The Interior has not had a representative on the Fish Board for 2 years. Since that time the fish resources in the northwestern and interior regions have been in serious decline.

Governor, have never met, but I would welcome the opportunity to meet with you before you make your final decision. For your information I have enclosed a copy of my resume and the letter of interest which I submitted in January 1994.

2 incl
as

Sincerely


Virgil L. Umphenour

Box 1
Alakanuk, AK 99554
January 19, 1995

Honorable, Tony Knowles
Governor, State of Alaska
PO Box 110001
Juneau, Alaska 99811-0001

Dear Sir

My name is John Hanson and am a sitting member of the Board of Fish. My current term will be up at the end of January. I would like to be considered for another term. My long term Fish Board experience and knowledge of the State's fishing issues make me a valuable asset to the board process.

Sincerely

John Hanson

Alaska State Legislature

REPRESENTATIVE
JEANNETTE JAMES

P.O. Box 56622
North Pole, Alaska 99705
(907) 488-1546
FAX (907) 488-9006



While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-3743
FAX (907) 465-2381

House of Representatives

House District 34

January 26, 1995

The Honorable Tony Knowles
Third Floor Capitol Building
Juneau, AK 99801

Re: Virgil Umpenhour - Board of Fish

Dear Governor Knowles,

We are very concerned about the prospect of your replacing Virgil Umpenhour as a Board of Fish member before his term ends a little over a year from now.

Mr. Umpenhour is extremely well qualified to act as a member of the Board of Fish and represents the interest of the Interior fisheries, which has had very little representation in the past. These fisheries interests include, but are not limited to, subsistence, personal use, sports and commercial processing.

Historically the Board of Fish has been heavily weighted in favor of the Southern Alaska Commercial Fish industry. We do not quarrel with the notion that commercial fishing interests in this state are important for our state's economy and the interests of our residents; however, we are not willing to have this interest overwhelm the interest of the Interior residents and the recovery of our fish stocks.

Mr. Umpenhour is a long time resident of this state and enjoys a lot of support for his knowledge and ability. His activities on the U.S./Canada/Yukon River negotiation team over the past six years are

indicative of his respect by the industry. He also helped form the Yukon River Drainage Group and contributed to their success in solving problems for the fishery.

As a small commercial fish processor, he gives hope and support for the subsistence fishermen along the Yukon River by buying their fish. He understands the needs of the village participants.

The next meeting of the Board of Fish will be addressing the peninsula fisheries. Mr. Umpenhour has the most extensive information and knowledge regarding the historical and biological information about Area M fishery and needs to be a part of that Board of Fish meeting as it relates to the interest of the Interior fishing concerns. Any attempt to remove him before that meeting will indicate to us that your interest is more political than realistic for the benefit of Alaska as a whole.

Please submit Mr. Umpenhour's name to the legislature for the Board of Fish and allow him to complete his term.

Sincerely,

Representative Jeannette James

JJ/bc

RECEIVED JAN 14 2 5 1995

Keep Umphenour

Jan. 19, 1995

To the editor:

I am disappointed in Gov. Knowles. Bob King, the governor's press secretary, is quoted as saying that, "We're looking at putting our own people on all boards and commissions." The new administration is politicizing positions that were established to administer and allocate the state's resources and assets for the people. They were never intended to be used to pay off political debts or campaign promises to the big guys.

In the case of the Board of Fisheries currently held by Virgil Umphenour, it took the Interior eight long years to get it back. It was not traditionally held by Southeast. The Interior and Northwestern Alaska have had virtually no fish in their streams and rivers for the last four years. With Umphenour, we had a voice on the Board of Fisheries to

speaking for us against the big intercept fishermen on the coast.

Tony "The Boss" Knowles conned the Interior to get elected then

sold us out!
Eric Alexander
Fairbanks

RECEIVED JAN 25 1995

RECEIVED JAN 27 1995

Fish politics

Jan. 23, 1996

To the editor:

Tony Knowles is setting up Tammany Hall in Juneau. He is removing people from commissions and jobs that aren't supposed to be used to pay off political debts. We lost Ralph Seekins from the Permanent Fund Board and now we might lose Virgil Umphenour from the Board of Fish.

Gov. Hickel appointed Umphenour to the fish board because the Interior and northwestern Alaska need a voice on the board. There are no more fish coming into our rivers . . . no fish for the sportsman, no fish for the people in the villages to put up for their winter food. The big guys from False Pass and Southeast control the fish board. I guess they put a lot of money in Tony's "grab" pot!

Marvin Londere
Fairbanks

Lawyer says Knowles cannot dump Umphenour

Governor wants to choose another

By KATE RIPLEY

Staff Writer

JUNEAU—A legislative attorney says Gov. Tony Knowles cannot kick a local fish processor off the state Board of Fisheries and replace him with his own appointee.

The Knowles administration, however, stands by its plan to replace Virgil Umphenour, owner of Interior Alaska Fish Processors Inc., of Fairbanks, with someone hand-picked by the governor.

Umphenour was appointed to the fish panel last July by former Gov. Walter J. Hickel to fill a vacancy. He has 1½ years

left to serve.

The Legislature has not yet confirmed nor denied the appointment, so Knowles wants to put in his own nominee—most likely someone from Southeast Alaska.

But it's not that easy, according to a 12-page memo by Gerald Luckhaupt, an attorney for the Legislature. In a memo dated Friday, Luckhaupt told Nome Rep. Richard Foster that Knowles may not remove Umphenour on a political whim.

A Board of Fisheries member may be removed from office only for inefficiency, neglect of duty, misconduct in office, or for fish and game violations, Luckhaupt said.

Therefore, Umphenour's appointment is binding on Knowles—absent the Legislature's failure to confirm him.

Foster said he requested the legal opin-

ion because he views the seat as a statewide seat—not one reserved for any particular region. Umphenour has done a good job on the board, Foster said.

"I know him to be fair and impartial on all matters of fishing," he said.

Rep. Jeannette James, R-North Pole, said the memo is encouraging.

"My read on it is the governor doesn't have the legal option to take Umphenour away," she said.

Umphenour, who was in Dillingham for a fish board meeting, could not be reached Monday for comment.

Knowles should simply allow Umphenour to serve out his term, James said.

That's not acceptable, said Knowles' press secretary Bob King.

"We feel we are on firm legal footing in

putting a different name other than Umphenour's up for confirmation," King said. "We're aware of the different legal opinions."

Indeed, controversy over appointments by outgoing governors is nothing new. In 1982, former Gov. Jay Hammond appointed Michael Whitehead to the Alaska Commercial Fisheries Entry Commission. Then Bill Sheffield took office and appointed his own choice to the panel.

Like Knowles, Sheffield contended he had the authority to withdraw Hammond's nominee because the Legislature had not yet voted on the confirmation. But Whitehead sued to keep his job.

The state eventually settled the lawsuit by paying Whitehead his salary and benefits as a commission member through

June 1983, as well as an additional \$75,000.

Luckhaupt said the Umphenour case seems identical.

Past court cases from other states imply the Legislature could ignore Knowles and vote on Umphenour's appointment, even without Knowles' stamp of approval. Or the Legislature could ignore Umphenour and simply vote on Knowles' new nominee.

Whatever happens, it's likely not to be anytime soon.

The Legislature will not vote on confirmations until the end of the 120-day session in May.

King said Knowles may have an announcement about fish board appointments later this week. Two other seats on the panel expire at the end of the month.

STATE OF ALASKA - OFFICE OF THE GOVERNOR

Boards and Commissions Office

Applicant Endorsement List

Virgil Umphenour of Fairbanks
has been endorsed for the following board(s):

Board	Position	Endorser	Date
037		Abel Saccheus	06/27/94
037		Albert Jackson	01/20/94
037		Alice Fagerstrom	01/20/94
037		Alvin Owletuck	01/10/94
037		Annie Conger	01/25/94
037		Bert Sharp	02/01/94
037		Bill Fliris	01/07/94
037		Bosco Olson	01/12/94
037		Byron Haley	01/28/94
037		Carl Morgan Jr.	01/07/94
037		Carol Oliver	01/20/94
037		Daniel Nelson	01/12/94
037		Dean Paddock	06/01/94
037		Dorothy Barr	01/07/94
037		Edgar Jackson, Sr.	01/20/94
037		Fred Sagoonick	01/07/94
037		Fritz Willie	01/10/94
037		Gene Therriault	02/01/94
037		George Berry	01/14/94
037		George Yaska	01/27/94
096		Georgianna Lincoln	07/28/93
037		Georgianna Lincoln	01/28/94
037		Gilbert Gutierrez	01/21/94
037		Harry Wilde	02/01/94
037		Irene Nicholia	02/01/94
037		Jack Carpenter	01/07/94
037		Jack Coghill	02/20/91
096		Jack Coghill	02/20/91
037		Jack Coghill	01/10/94
037		Jeannette James	01/19/94
037		Joe Sitton	01/12/94
037		Joel Kawahara	02/03/94
037		John Davies	01/27/94
037		Joseph Peter	01/21/94
037		Kenneth Kingeekuk	01/11/94
037		Loretta Bullard	01/07/94
037		Luci Eningowuk	01/07/94
037		Lucy Olick	01/24/94
037		Lyman Hoffman	01/24/94
037		Martina Azean	01/11/94
037		Mike Dalton	01/24/94
037		Mike Miller	01/21/94
037		Myron Naneng	01/07/94
037		Myron Naneng	06/08/94
037		Nina Nanouk	01/27/94

STATE OF ALASKA - OFFICE OF THE GOVERNOR
Boards and Commissions Office

Applicant Endorsement List

Virgil Umphenour of Fairbanks
has been endorsed for the following board(s):

Board	Position	Endorser	Date
037		Nina Patkotak	01/20/94
037		Oliver "Bud" Burris	01/18/94
037		Ralph Seekins	01/17/94
037		Richard Foster	01/11/94
037	retain	Richard Foster	01/10/95
037		Steve Frank	02/01/94
037		Tom Brice	01/12/94
037		Will Mayo	01/05/94
037		William Topsekok	01/12/94

Total Endorsements: 54

1-17-95

Applicants to the Board of Fisheries

Trefon Angasan - Anchorage ✓

Dr. John R. White, Bethel

sp? - George Yasca, Fairbanks

Louis H. Green, Jr.- Nome

Mike Heimbuch - Homer

Oliver N. Holm - Kodiak

Richard Thummel - Kodiak

Bruce F. Stanford - Anchorage

Paul Swetzof - Anchorage

Ralph E. Lohse, Cordova

Gregory T. Williams - Cordova

Robert Piorkowski, Fairbanks

Dr. Patricia A. Crandell, Juneau

Charles Haley, Sitka

Dennis Hicks, Sitka

Jeff Meucci, Petersburg

Mim Robinson, Port Alexander

Ronald K. Sparks, Sitka

1/12

1/18 (Noon)

Board needs Interior member

Interior Alaska may not have the vast fishing industry that coastal areas enjoy, but decisions about fish management still have a significant effect on life here. The Interior needs a voice in those decisions.

Gov. Tony Knowles has told Virgil Umphenour, the only member of the state Board of Fisheries from the Interior, that his name likely will not be on the list submitted to the Legislature for confirmation in the next few weeks.

Maybe Knowles isn't comfortable with Umphenour's style. That's his choice. But he should recognize the importance of having an Interior voice on the board.

Salmon allocations and limits have created great controversy along Interior rivers for the past several years. The board needs someone who carries the background and perspective of people from this area.

Umphenour, the owner of Interior Alaska Fish Processors in Fairbanks, has supplied that. However, he sits in an awkward spot. He was nominated last spring for a three-year term by former Gov. Walter Hickel. He replaced Kay Andrew of Ketchikan, an earlier nominee who the Legislature rejected. But the Legislature never confirmed Umphenour's appointment. He has participated in board meetings, as is accepted practice, but the appointment process was not complete.

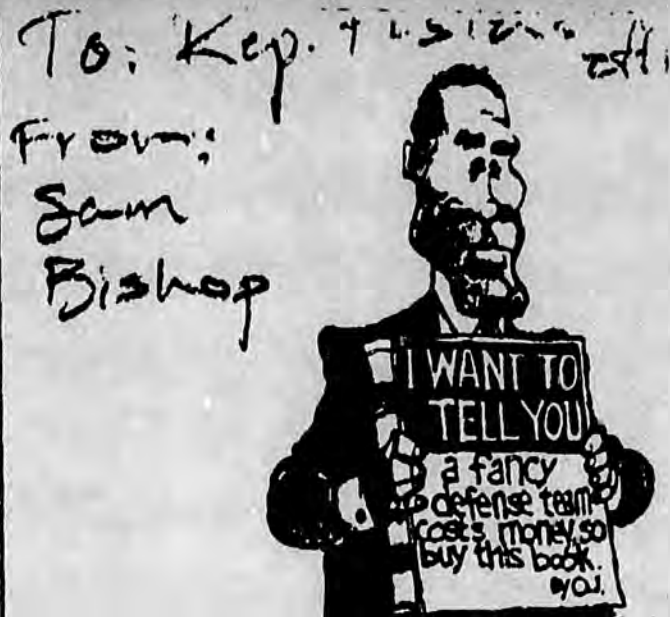
Now Knowles will submit a new list of nominees, for two seats that are scheduled to open, as well as for Umphenour's seat.

Fish issues are not easy to understand or resolve. Interior residents deserve to have someone studying the questions from their perspective.

For example, argument has raged for years over whether chum salmon catches off the Alaska Peninsula have hit Interior salmon stocks too hard. It appeared that the shrinking chum salmon runs in Interior and western Alaska rivers could be blamed in part on "by-catch" at False Pass off the Alaska Peninsula. Boats there pick up large numbers of chum salmon while looking for other salmon species.

The board each year has set a limit on the number of chum caught, but it refused to drop the by-catch limit below 700,000 fish even when chum stocks continued to decline. A majority of board members concluded that there wasn't enough evidence to show that the by-catch was causing a problem. Genetic studies are due next month that should shed more light on the subject.

We need a fish board member to take a close look at these studies and other issues from an Interior viewpoint. People here may not catch as many fish as coastal residents, but what fish we do have are critical for maintaining both subsistence lifestyles and sportfishing opportunities.



Aeronautic four to feature lead

Let's not miss this one, Friday evening, Jan. 27, at the Westmark Gold Room. This is the 12th banquet for the Interior and Arctic Alaska Aeronautical Foundation, and what a series it has been!

The annual dinner occasion since 1984 has featured:

- Sen. Ted Stevens recalling his World War II experience as a fighter pilot flying the India-Burma-China "Over the Hump Route."

- Gregory "Pappy" Boyington, the famed and flamboyant U.S. Marine fighter pilot credited with 28 "kills," who commanded the somewhat unruly, unpredictable but highly successful "Black Sheep Squadron" during the dark days of ferocious fighting in the South Pacific.

- Adm. James Russell who flew the PB-1s in the Aleutians as bombers, fighters, and reconnaissance craft out of Kodiak—every flight an improbable mission.

- The memorable Donald "Deke" Slayton, one of the original nine astronauts of the Apollo space project; and, Masajiro "Mike" Kawato, a Japanese Zero pilot who at age 18 had shot down "Pappy" Boyington. Both survived combat to write books about their daring exploits—one for Japan, one for America.

Here was a great beginning for the IAAAF's annual fund-raiser. Recognition and support followed for the efforts of Randy Acord, a handful of dedicated founding members, and a few others.

Their hard work and persistence made possible the Pioneer Air

The IAAAF
Stevens, Al
Bush pilot, co
and Delta air
"Alaska Avia
tailed and re
and machine



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area, who flew 237 cc
against Japanese ar
was shot down twice
to write about his
"China Through th
ger." After World
came a test pilot, a
air racer, and hos
radio talk show in S
nia, "Aviation Show
mic speaker.

In the early '90s,
land, civilian test
heed, who holds a
and speed records,
Fairbanks audienc
sonic Age. And G
well-known U.S.
media talk show
actor, and humor



Alaska State Legislature

Official Business

State Capitol
Juneau, AK 99801-1182

January 17, 1995

Governor Tony Knowles
PO Box 110001
Juneau, Alaska 99811-0001

Dear Governor Knowles:

For quite some time the Interior delegation has worked to place on the Board of Fisheries an individual who is knowledgeable of Alaska's inland fisheries.

The recent Yukon River chum salmon collapse may have been more effectively mitigated had someone with experience and understanding of Interior fisheries been in place on the Board at that time. The 1994 appointment of Virgil Umphenour succeeded in shaping the make-up of the Board of Fisheries in such a manner.

We find it disconcerting that in less than a year Mr. Umphenour faces being removed from the Board of Fisheries and replaced by an individual from another area of Alaska. Before Mr. Umphenour's appointment, the Interior was not represented. The prospect of our region now being returned to that condition is unacceptable in our view.

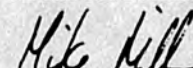
Alaska's Interior fisheries are an important resource to large Native populations, to small commercial fish processing concerns, as well as to the sportfishing public. The issues are significant enough to warrant representation on the Board of Fisheries. We urge you to consider these constituencies with respect to Mr. Umphenour's tenure on the Board. He can meet and understand these needs. His appointment was and is appropriate.

Sincerely,


Senator Steve Frank


Rep. Tom Brice

Rep. Pete Kelly


Senator Mike Miller

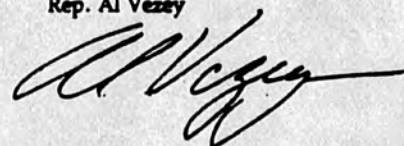
Rep. John Davies

Rep. Gene Theriault


Senator Bert Sharp

Rep. Jeanette James

Rep. Al Vezey



**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 20, 1995

SUBJECT: Removal of Board of Fisheries Member (Work Order No. 9-LS0468)

TO: Representative Richard Foster
Attn: Bryce Edgmon

FROM: Gerald P. Luckhaupt *GL*
Legislative Counsel

QUESTIONS PRESENTED:

I. May Governor Knowles remove Virgil Umphenour as a member of the Board of Fisheries, effective January 6, 1995, without cause, and appoint someone else to Mr. Umphenour's position?

ANSWER: No. A member of the Board of Fisheries may only be removed from office by the governor for "inefficiency, neglect of duty, or misconduct in office, or because the member while serving on the board is convicted of a misdemeanor for violating a statute or regulation related to fish and game or of a felony. An interim appointee, as is Mr. Umphenour, may only be removed by the governor for the "cause" cited or, if the legislature should fail to confirm Mr. Umphenour, Mr. Umphenour would be removed from his position by operation of law - by the failure of the legislature to confirm. See discussion I.

II. What can the legislature do concerning the appointment of Mr. Umphenour to the Board of Fisheries if the governor does not forward Mr. Umphenour's name to the legislature or forwards someone else's name to the legislature for confirmation?

ANSWER: The legislature can confirm or reject Mr. Umphenour's appointment or do nothing concerning Mr. Umphenour's appointment. If the legislature fails to take any action regarding Mr. Umphenour's appointment then by operation of law, AS 39.05.080(3), Mr. Umphenour would be removed from his membership on the Board of Fisheries as of the last day of the legislative session. If the legislature rejects Mr. Umphenour's appointment by affirmatively voting in joint session not to confirm him, then by operation of law (AS 39.05.080(3)), Mr. Umphenour will be removed from his membership on the Board of Fisheries as of that day and the governor will be free to appoint someone else at that time. If the governor attempts to appoint someone else to Mr. Umphenour's position and forwards that new name to the legislature for confirmation and that person is confirmed without Mr.

Umphenour being rejected, a court could rule that Mr. Umphenour is entitled to the office until the last day of the session (as Mr. Umphenour was not confirmed by the legislature) or could decide that the new appointee's confirmation was an implicit rejection of Mr. Umphenour, thereby entitling the new appointee to the office. See Discussion II.

FACTUAL BACKGROUND

The facts as presented to me by Bryce Edgmon of your office are that Governor Hickel appointed Virgil Umphenour to the Board of Fisheries on July 22, 1994 to the position on the board that became vacant when Kay Andrew's appointment to the position was rejected by the legislature when the legislature failed to confirm Ms. Andrew. See 18th Alaska Legislature, Senate Journal, at 4662; House Journal, at 4324. On January 6, 1995, Mr. Umphenour was informed by a phone call from Jim Ayers, Chief of Staff for Governor Knowles, that Mr. Umphenour was being removed from position on the Board of Fisheries. To date Mr. Umphenour has not received any written notification that he has been removed from his position on the Board of Fisheries.

DISCUSSION

I

In answer to your first question, it is my opinion that Governor Hickel's appointment of Virgil Umphenour to the Board of Fisheries is valid and binding on Governor Knowles and Mr. Umphenour cannot be removed from office by the Governor absent a finding by the Governor that there is cause for Mr. Umphenour's removal from office as provided in AS 16.05.280.

Article III, § 26 of the Alaska Constitution provides:

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor. [Emphasis supplied].

This provision clearly delineates the respective powers of the governor and the legislature regarding the appointment of members of boards and commissions. The governor has the

exclusive power to appoint and the legislature has the exclusive power to confirm and to provide how a member of a board or commission may be removed from office."

AS 16.05.221(b) provides that the Board of Game is "composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session."² AS 16.05.280 provides:

The governor may only remove a board member for inefficiency, neglect of duty, or misconduct in office, or because the member while serving on the board is convicted of a misdemeanor for violating a statute or regulation related to fish or game or of a felony, and shall do so by delivering to the member a written copy of the charges and giving the member an opportunity to be heard in person or through counsel at a public hearing before the governor or a designee upon at least 10 days' notice by registered mail. The member may confront and cross-examine adverse witnesses. Upon removal, the governor or a designee shall file in the proper state office the findings and a complete statement of all charges made against the member.³

The governor may appoint members of boards and commission, such as the Board of Fisheries, to fill vacancies that occur while the legislature is not in session pursuant to art. III, § 27 of the Alaska Constitution.

Further, AS 39.05.080(4) provides that

Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership.

Based upon the facts as presented there was a vacancy on the Board of Fisheries and Governor Hickel, pursuant to statutory and constitutional authority appointed Mr. Umphenour to that vacant position. Mr Umphenour entered upon and was vested with all the duties of his office at that time. But is this interim appointment binding on Governor Knowles or may Governor Knowles withdraw Mr. Umphenour's appointment because he has not been confirmed by the legislature or otherwise remove Mr. Umphenour from office? It

¹ Article III, § 26 of the Alaska Constitution only applies to boards and commissions that are "at the head of a principal department or a regulatory or quasi-judicial agency." The Board of Game is, I believe, clearly a regulatory board subject to art. III, § 26.

² AS 16.05.221 was amended by the legislature in section 1, chapter 121, SLA 1992. The quoted language was not affected.

³ This section, as amended by section 3, chapter 121, SLA 1992, took effect September 20, 1992. The entire section is made applicable to all members of the Board as of September 20, 1992, by section 6, chapter 121, SLA 1992.

is my opinion that Mr. Umphenour's appointment is binding on Governor Knowles and that Mr. Umphenour may not be removed from office absent the legislature's failure to confirm Mr. Umphenour or Governor Knowles' compliance with the procedure provided in AS 16.05.280 by removing Mr. Umphenour for cause.

Support for this conclusion is found in the plain language of the Constitution and in the court decisions. The Constitution recites in art. III, sec. 26 that the members of those boards or commissions shall be "appointed" by the governor. To determine the meaning of "appointed" we can look to other provisions of the Constitution for assistance. Article II, sec. 5 of the Constitution refers to the terms "nominated," "elected," or "appointed" as exclusive alternatives which are "clearly intended to catalogue the routes by which one may attain an office or position of profit." Begich v. Jefferson, 441 P.2d 27, 32 (Alaska 1968). In Alaska, "appointed" clearly does not mean "nominated."

That "nominated" and "appointed" are not synonymous terms in this state is further supported by the proceedings of the framers of our constitution. Art. III, § 26 of our constitution, as originally proposed in Committee Proposal No. 10a, by the Executive Branch Committee of the Alaska Constitutional Convention stated:

Whenever a board or commission is at the head of a principal department or of a regulatory or quasi-judicial body, the members thereof shall be **nominated and appointed** by the governor, with the advice and consent of the senate. . . . [Emphasis supplied].

This "nomination" language and reasoning was specifically rejected by the framers of our constitution as it was finally enacted.

The distinction between "nominated" and "appointed" is significant. In the federal system, the president "nominates" persons to the senate for confirmation. A federal "nominee" does not take office pending confirmation. In that situation:

There is no appointment within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

Munson v. Territory of Alaska, 16 Alaska 580 (1956). But, an "appointee" takes office and is vested with all the duties, powers, and responsibilities of the office subject only to the legislature's authority to fail to confirm the appointment. When a person is "appointed" and takes office and exercises the powers of the office, the governor has performed the "last act" necessary to vest the person with the powers of the office. The governor may not later withdraw or revoke the appointment except that he may remove the appointee as provided by law.

In Division of Elections v. Johnstone, 669 P.2d 537, 539-540 (Alaska 1983) the supreme court held that the term appointment as used in the Constitution means "to designate for office." The court also found that the appointment of a superior court judge was effective on the completion of the "last act" of the appointing authority, in that case, the letter of appointment issued to the judge by the governor.

The Alaska Supreme Court, in Johnstone, cited McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930) in support of this proposition. McChesney is strikingly similar to the present case. In McChesney, the Kentucky Supreme Court was confronted with a situation where the governor, having the authority to appoint members of a board subject to confirmation by the Senate, appointed in the interim (between sessions of the legislature), McChesney who entered upon and performed the functions of the office. Several months later, before the legislature had again convened, the governor removed McChesney without cause and appointed another person. McChesney sued to retain his office. The court held that the governor's purported removal of McChesney was illegal. The court stated that the governor by naming and appointing McChesney had exhausted his power to appoint and performed the "last act" necessary to vest McChesney with his office, subject only to the state senate's authority to confirm or fail to confirm and to the governor's authority to remove McChesney for cause as provided by law. The court further contrasted the situation where an officer is "appointed" subject to confirmation by the legislature (as exists in Alaska by art. III, sec. 26 of the Constitution) with the situation where an officer is "nominated" subject to confirmation (as exists for federal appointments) and said:

Furthermore, in cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall . . . What, then, constitutes an appointment insofar as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office. [Citation.] It is completed when the appointing authority has performed the acts incumbent upon him to accomplish the purpose. [Citations.] The fact that the title to the office, and the tenure of the officer, are yet subject to the

action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power. [Emphasis supplied].

McChesney, *supra*, at 587.

The court concluded by stating: "Such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld." See also Barrett v. Duff, 114 Kan. 244, 217 P. 918 (1923).

The rule discussed in McChesney v. Sampson has been variously stated by courts and commentators to be the "majority rule," the "general rule," and to be "universally held." See e.g., Barrett v. Duff, *supra*; State v. Essling, 128 N.W. 2d 307, 311 (Minn. 1964) ("well settled"); State v. Brewster, *supra*; 89 ALR 135 ("general rule").

McChesney and the rule discussed in it are based upon Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 159-60, 2 L.Ed 60, 68-69 (1803) in which Justice Marshall stated:

[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him.

While the principle of a strong executive is embraced by our Constitution and recognized by our courts, Bradner v. Hammond, 553 P.2d 1, 3, n.3 (Alaska 1976), that principle does not mandate a different conclusion than that reached by the United States Supreme Court, the McChesney court and their progeny. To state that a subsequent governor has the authority to recall the appointments of a previous governor, absent constitutional or statutory authority, would render appointments to office personal to the particular governor and his term. This is contrary to our Constitution which establishes an office of governor and provides for succession to that office. Under our Constitution there is a governor and a governor there will always be, though the individuals occupying that office may come and go. See e.g., People v. Shawver, 30 Wyo. 366, 222 P. 11 (1924); Barrett v. Duff, *supra*; State v. Brewster, 84 S.E.2d 231, 246 (W. Va. 1954); Tappy v. State, 82 So.2d 161, 169 (1955).

When Governor Hickel appointed Mr. Umphenour, that is, named him to the office in the letter of appointment, there was a present vacancy on the Board of Fisheries due to the legislature's failure to confirm Ms. Andrew. Under the rationale of the Alaska Supreme Court in Johnstone, *supra*, Mr. Umphenour was appointed at that time. If there is a present vacancy

in office and when the governor performs that "last act," in this case the letter of appointment, then the appointment is effective and binding upon the executive branch, subject only to the legislature's power to confirm or not to confirm and the statutory authority of the governor to remove the appointee "as provided by law." If Governor Hickel had attempted to appoint Mr. Umphenour to a position where a vacancy did not then exist, but for which a vacancy was anticipated in the future (for example, a seat on the board that was currently occupied but the occupant's term was due to expire, say on January 1, 1995), then I would conclude that a purported appointment by Governor Hickel to take effect in the future, after Governor Hickel had left office, would not be binding on the subsequent administration."

This distinction was recognized in an Alaska Attorney General's opinion from Rodger Pegues to Vicki Clayman on December 10, 1979. (Copy attached). In that opinion the attorney general opined that appointments by an outgoing governor to take effect beyond the governor's term are not binding upon and may be withdrawn by the new administration. That opinion, though, recognizes that if "the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense." Presumably, if they make some sense, then they are also effective and binding upon the new administration. If there is a present vacancy in an office when the governor performs that "last act," in this case the letter of appointment of Mr. Umphenour in July of 1994, then the appointment is effective and binding on the new administration, subject only to the legislature's power to confirm or not to confirm and the statutory authority of the new governor to remove the appointee "as provided by law."

Support for this conclusion is found in the settlement of a lawsuit brought by a former member of the Alaska Commercial Fisheries Entry Commission, Michael Whitehead against the state. Mr. Whitehead was appointed to a position on the commission on October 16, 1982, by then Governor Hammond. Governor Sheffield took office in December, 1982, and on February 28, 1983, Governor Sheffield appointed another person to fill the position occupied by Mr. Whitehead. AS 16.43.030(a) provided that the members of the commission could only be removed for cause. Governor Sheffield contended that he had the authority to withdraw Mr. Whitehead's appointment as Mr. Whitehead had not as yet been confirmed by the legislature.* Mr. Whitehead then sued to retain his position on the commission. The state settled the lawsuit by paying Mr. Whitehead his salary and benefits as a member of the commission up to June 16, 1983, and an additional \$75,000.

The Whitehead case seems identical to the present case. The settlement by the state seems to support a conclusion that a subsequent administration may not withdraw or revoke the

*A purported "appointment" to take effect at some date in the future is in actuality a "nomination" because the purported "appointee" is not then, at the time of "appointment," vested with all the duties, powers, and responsibilities of the office.

* It was apparently the state's position that Mr. Whitehead was a "nominee" and that the "last act" necessary to make his appointment effective was confirmation by the legislature.

valid, effective appointments of a previous administration, or replace an appointee except "as provided by law," where the appointee has taken office and is exercising the powers, duties, and responsibilities of the office.

Further support for this position is found in Governor Hickel's purported removal of Peter Sokolov as a member of the Alaska Public Utilities Commission in 1991. Mr. Sokolov had been appointment by Governor Cowper in November, 1990, to begin a new term after the expiration of Mr. Sokolov's previous term. In January 1991, Governor Hickel notified Mr. Sokolov that his appointment was being "withdrawn." The legislature that year took up Mr. Sokolov's appointment, even though the governor failed to send Mr. Sokolov's name to the legislature for confirmation. The legislature then failed to confirm Mr. Sokolov's appointment.

Just last session the Alaska Legislature revisited this issue when Governor Hickel appointed Jack Didrickson to the Board of Game after the governor's previous appointment to the position was rejected by the legislature. Mr. Didrickson took office and performed the duties of that office until he was notified by the governor's office that his "nomination" was being withdrawn, he was being removed from office, and the governor was forwarding the name of a different person to the legislature for confirmation to the seat that had been held by Mr. Didrickson. Absent any communication from the governor the legislature took up the confirmation of Mr. Didrickson and rejected his appointment to the Board of Game.

✕ Be advised that the Alaska Attorney General in an opinion from James L. Baldwin to Kevin Bruce, dated February 3, 1983 (copy attached) advised the Sheffield administration that the governor had the authority to withdraw an appointment made by a previous governor. The opinion does not cite any authority for this position other than another Department of Law opinion from Rodger Pegues to Vicki Clayman issued on December 10, 1979, discussed earlier. That opinion also does not cite any authority other than Marbury v. Madison, discussed herein.

II

You have asked what the legislature can do with reference the Umphenour matter. I see the legislature as having two options: (A) hold confirmation proceedings for Mr. Umphenour and treat Governor Knowles' purported removal of Mr. Umphenour as ineffective; and (B) do nothing. I will discuss these options each in turn.

A

If the legislature decides that Governor Knowles's purported removal of Mr. Umphenour is ineffective then I believe the legislature can consider Mr. Umphenour for confirmation in the absence of a communication from the governor requesting the confirmation.

Art. III, sec. 26 provides:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.⁶

This provision provides that the governor has the authority to appoint the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency." These appointees are subject to the legislature's constitutional authority to confirm or reject them.⁷

In Bradner v. Hammond, 553 P.2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency," though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor:

shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or

⁶ Art. III, § 25 provides that the governor may appoint the "head of each principal department" of the state.

⁷ Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §8, members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. . . .

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name? The Alaska Supreme Court has never considered this issue but the courts of several other states have. The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment in the absence of a communication by the governor appears to be People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is actually a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, *supra*, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously provide him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, *supra*, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan. 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor could not remove the state officers involved here except as provided by law, for cause. The court said:

The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the

Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926. The Kentucky Supreme Court in McChesney, supra, discussed in Discussion I also reaches the same conclusion.

In fact, virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only two court decisions that have reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941) and Burke v. Schmidt, 191 N.W. 2d 281 (S.D. 1971)). In Warner, the court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground. In Burke, it appears the court held that the board members involved were not entitled to succeed to their offices and perform the duties thereof until they were confirmed. Burke, Supra, at 285. This is contrary to the procedure that is provided here in Alaska by constitutional provision and statute and is clearly distinguishable on that ground. See Art. I, § 27 of the Alaska Constitution and AS 39.05.080(4).

Therefore, I conclude that the legislature may properly consider the confirmation or rejection of Mr. Umphenour as an art. III, § 26 appointee of the governor. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39 05.080, if the governor fails or refuses to request the confirmation of an appointee (as apparently is the case with Mr. Umphenour), the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in section 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at his whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, I believe, be embraced by our courts.

Cross references. — For appointment of members of Board of Education, see AS 14.07.085; for a description of districts of the state public school system, see AS 14.12.010.

Sec. 39.05.070. Purpose. It is the purpose of AS 39.05.070 — 39.05.200 to provide procedural uniformity in the exercise of appointive powers conferred by the legislature to eliminate, insofar as possible, recess or interim appointments except in the event of death, resignation, inability to act or other removal from office and the exercise, insofar as possible, of appointive powers only when the legislature is in session. (§ 1 ch 64 SLA 1955)

NOTES TO DECISIONS

Section repugnant to tacit confirmation. — The expressed intention of this section is repugnant to tacit confirmation of appointments. *Munson v. Territory of Alaska*, 16 Alaska 580 (1956).

Sec. 39.05.080. Procedure for all appointments. Appointments shall be made in the following manner:

(1) The appointing authority shall, within 30 days of the convening of the legislature in regular session, present to the legislature for confirmation the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution.

(2) When appointments are presented to the legislature for confirmation,

(A) the presiding officer of each house shall assign the name of each appointee to a standing committee of that house for a hearing, report and recommendation; standing committees of the two houses assigned the same person's name for consideration may meet jointly to consider the qualifications of the person appointed and may issue either a separate or a joint report and recommendation concerning that person; then

(B) the legislature shall, before the end of the session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.

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(3) When the legislature declines to confirm an appointment, the legislature shall notify the appointing authority of its action and a vacancy in the position or membership exists which the appointing authority shall fill by making a new appointment. The new appointment shall be presented for confirmation to the legislature within 20 calendar days following receipt by the appointing authority of the legislature's notification of its refusal to confirm the prior appointment. If the name of a person is submitted and is not confirmed, the appointing authority may not, upon resubmission of appointments, submit again the name of the person whose confirmation was refused for the same position or membership during the session of the legislature at which confirmation was refused. The person whose name is refused for appointment by the legislature may not thereafter be appointed to the position or membership during the interim between legislative sessions. Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns.

(4) Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership. (§ 4 ch 64 SLA 1955; am §§ 1 — 3 ch 1 SLA 1964; am § 1 ch 2 SLA 1967; am § 1 ch 65 SLA 1974; am § 2 ch 82 SLA 1975)

NOTES TO DECISIONS

Legislative history of ch. 82, SLA 1975. — See Bradner v. Hammond, Sup. Ct. Op. No. 1297 (File No. 2802), 553 P.2d 1 (1976).

Laws requiring bilateral appointments are mandatory. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

Paragraph (2) of this section imposes a direct mandate upon the legislature to act upon the nominations of the governor. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

The reason for dual consideration of prospective officeholders is the benefit of the considered opinion of the legislators, to avoid the possibility of incompetency and injury to the public which may otherwise be perpetrated. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

Affirmative rejection not required. — Paragraph (2) of this section does not demand affirmative rejection. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

Failure of legislature to act on an

appointment is, in effect, rejection. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

And not tacit confirmation. — In acting upon an appointment, the legislature is not exercising a prerogative granted it in its own interest or that of its members; there can be no waiver of that duty so that inaction would be the equivalent of a tacit approval of an appointment. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

Tacit confirmation negated by paragraph (3). — The language of paragraph (3) of this section tends to negate any argument of tacit confirmation. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

The question of confirmation is determined at the first vote under paragraph (2) of this section. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

The purpose of paragraph (4) of this section is to vest authority in necessary interim appointees. Munson v. Territory of Alaska, 16 Alaska 580 (1956).

MEMORANDUM

State of Alaska

TO: Kevin Bruce, Special Assistant
Office of the Governor

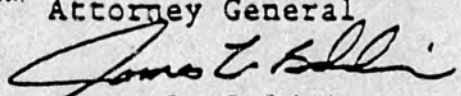
DATE: February 3, 1983

FILE NO: 366-391-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Withdrawal of
appointment


By: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

You have asked if Governor Sheffield may refuse to forward to the legislature the name of a person appointed by the former governor to an office in the executive branch of state government.

We have attached a copy of our earlier memorandum of advice of December 10, 1979. In that memorandum we advised the governor that he may remove a person before confirmation by withdrawing the nomination, or if the name has not been forwarded to the legislature, by informing the person that he or she is no longer under consideration. We reaffirm that advice. However, you should consider the fact that no authority is cited for our earlier advice and that no Alaska case exists to guide us concerning the resolution of this issue.

If our reasoning expressed in the earlier memorandum is rejected by a court, and the appointment is not considered to be a nomination, then an appointee whose name is summarily withdrawn may have a cause of action for denial of a property right without due process of law. See Braeden v. City of Nome, 628 P.2d 924 (Alaska 1981).

JLB/pjg

Enc.

Vicki A. Clayman
Office of the Governor

DATE: December 10, 1979

FILE NO: J-66-334-80

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Reappointments to
boards or commissions

By:

Rodger W. Pegues
Assistant Attorney General

You have asked whether, prior to the expiration of his own term, the Governor can make reappointments of members of boards or commissions whose terms expire thereafter. You also ask whether, if that is the case, the new Governor can revoke the reappointment and appoint someone else.

We believe that the answer to both questions is yes.

When a term for an office is set by law, the term continues until its conclusion, regardless of the actual tenure of any person who may hold the office from time to time. Thus, when an incumbent leaves office prior to the expiration of his term, his successor is appointed for the remainder of that term, and the successor must be reappointed if he is to hold the position beyond the end of that term. Accordingly, no matter what an incumbent may do, his term continues until its prescribed end.

Nothing, however, precludes the Governor, as appointing authority, from anticipating the end of terms of office and making present appointments to fill the offices as those terms expire in the near future. Indeed, he is required to do this during each session of the legislature with respect to offices which have terms which will expire before July 2, and to submit the names of his appointees to the legislature for confirmation. AS 39.05.080(1). Hence, the Governor, even though he may be leaving office in early December, may make appointments for terms which begin the following January.

If the appointments are subject to confirmation, they are not complete until the legislature confirms them. Prior to confirmation, the new Governor may withdraw the nomination. And indeed, he need not even submit it and can merely revoke the nomination outright. If the appointments are not subject to nomination, they take effect when the appointee qualifies and takes office. That cannot happen until the new term for the office begins. Until that time,

S. Vicki A. Clayman
December 10, 1979
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The appointment can, as a general rule, be revoked.

It is probably because each new Governor has the power to countermand any appointive actions taken by each outgoing Governor which remain pending that the latter have not established a history of making midnight appointments to terms of office which begin after they leave office. Where, as in the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense. But where they remain pending, they will have been futile unless the incoming chief executive approves of them as well.

WP/pjg



Alaska Sportfishing Association

We've Moved !

Alaska 99503

Alaska Sportfishing Association

P.O. Box 241847

Anchorage, AK

99524-1847

TO: Members of the Senate and House Resources Committees

Re: Confirmation Hearings for Virgil Umphenour

Ladies and Gentlemen:

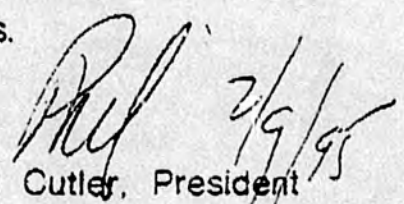
Thank you for holding the hearings for Virgil in such a timely manner. It is important for all of us fishery users to feel comfortable with who is on the Board of Fisheries and in what esteem they are held by their "bosses", you-the Legislature. These hearings will hopefully provide some insight into your feelings on the qualifications and abilities of Mr. Umphenour.

To us, the 'bottom line' is "What does Mr. Umphenour bring to the Board of Fisheries?" First, and most importantly, we feel he provides the Board with knowledge of several of the very important Interior in-river fisheries. Some of these fisheries are unique in that they are fished by all four user groups in Alaska-Subsistence, Commercial, Sport, and Personal Use. Additionally, the Yukon is co-managed with Canada. His knowledge of the international fisheries may be beneficial in managing our other treaty fisheries in Southeast.

As sport fishers, we have appreciated his in-river fishing perspective that he has imparted to the Board of Fisheries over the past year.

We know that you will give him a fair and open hearing and are anxiously awaiting the results of these hearings.

Thank You

 2/9/95
Phil Cutler, President