

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6989 HOUSE JUDICIARY

038

Senator Shirley Craft
February 18, 1992
Page 2

Administrative Procedure Act (AS 47.45.160), this general principal still applies. Otherwise, the regulatory authority exercised by the agency will be found by a court to constitute an improper delegation of legislative power.

AS 47.45.010 clearly provides for a monthly bonus payment of \$250. There is no authority in statute for the department to make two payments for the same month. I believe that the department acted outside its authority in doing so.

TBC:pl
92-111.plm

Audit Report



STATE OF ALASKA

SINGLE AUDIT

For the Fiscal Year Ended
June 30, 1990



Audit Control Number:

02-6100-91

Division of Legislative Audit
P.O. Box W, Juneau, Alaska 99811-3300

As discussed above, in our opinion, the Alaska Permanent Fund Corporation should not have transferred \$80 million of interest income to the principal of the fund in FY 88 without legislative appropriation.

As discussed in Recommendation No. 13, we believe that the calculations used for the FY 87 lapse of the newly reconstituted National Petroleum Reserve - Alaska Special Revenue Fund were incorrect. As a result the Alaska Permanent Fund received too much of the FY 87 lapse. The corporation staff disagree and have declined to return \$2.7 million to the NPRA fund and \$4.7 million to the General Fund. We acknowledge that there are differing legal opinions on the issue.

- o Significant Fiscal Policy Decisions Without Legislative Involvement ✓
Recommendation No. 11 reports that the Division of Pioneers' Benefits made a change in the manner in which they pay out longevity bonuses. The effect of the change was to duplicate payments for two months, roughly estimated at a total value of \$9.75 million. The division believes that they will simply recover the \$500 duplicate payments from each recipient upon their disqualification or termination from the program.

More recently, the administration began highway reconstruction work on the Copper River Highway utilizing a questionable funding source. According to reports, \$250,000 of an FY 91 appropriation to the Department of Transportation and Public Facilities for Northern Region Deferred Maintenance were used to begin the Copper River Highway work. This work plan was not presented to the legislature for consideration.

While some of the above items may not be significant by themselves, and may at first glance appear to be disjointed, the common thread among them is that they all occurred without proper legislative involvement in the decision process. ✓

In our opinion, this trend has been developing over the years and is not attributable to any one administration. However, we do believe that it merits close attention by the legislature to ensure that proper legislative powers are not eroded.

DEPARTMENT OF ADMINISTRATION
DIVISION OF PIONEERS' BENEFITS
Longevity Bonus Program

P.O. BOX CL
JUNEAU, ALASKA 99811-0211
PHONE: (907) 465-4416
TOLL FREE: 1-800-478-2160
FAX: (907) 465-4108

February 7, 1992

Senator Shirley Craft
Alaska State Legislature
State Capitol
Juneau, Alaska 99801 - 1182

RE: "Duplicate" Payments - Longevity Bonus Program

Dear Senator Craft:

Thank you for meeting with me to discuss the issue of "duplicate" payments for the Longevity Bonus Program. In December 1990, the administrative regulations were revised to change the Longevity Bonus Program payment system from being prospective in nature to retrospective in nature. Rather than delay payments for two months during the transition, "duplicate" payments were issued for the months of January and February, 1991. The actual switch occurred during the first four months of 1991 as shown below:

<u>Payment Mailing Date</u>	<u>For the Month of</u>
January 1, 1991	January 1991
February 1, 1991	February 1991
March 1, 1991	January 1991
April 1, 1991	February 1991
May 1, 1991	March 1991
etc.	etc.

The administrative regulation is being scrutinized with the assistance of the Department of Law. Also, enforcement of the collection efforts have been suspended during the review process.

According to accounting officials, the change results in a debt to the Longevity Bonus system for those receiving "duplicate" payments for January and/or February 1991 in the amount of \$250 for each "duplicate" payment. Most recipients received both "duplicate" payments for those months and therefore have a debt coded in the computer in the amount of \$500 (about \$10,000,000 for all recipients).

Per current administrative regulations (see 2 AAC 40.175), the debt is collected at the time a recipient becomes disqualified (e.g. enters a nursing home) or terminates from the program (death, moves from Alaska). You can well imagine the feelings recipients

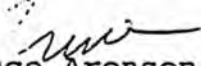
RE: "Duplicate" Payments - Longevity Bonus Program

and their families experience when this regulation is applied. As mentioned during our meeting, this particular administrative regulation is under active review by the department.

Thank you for the opportunity to discuss the Longevity Bonus Program, and if you have further questions or comments, please contact us.

A handwritten signature in cursive script, appearing to read "Thanks!".

Sincerely,



Bruce Aronson
Administrator

Longevity Bonus Program 1991 Payment Schedule



Bonuses paid after February 1, 1991, are for the second prior month rather than for the month in advance. This means that many of you received duplicate bonuses for January (one payment about January 1 and a second about March 1) and for February (one payment about February 1 and a second about April 1). These duplicate payments were necessary to avoid interruption of bonuses during the transition to the new payment system. We will not attempt to collect duplicate payments unless and until you are disqualified or terminated from the program. Bonuses are mailed as follows.

<u>Mailing Date</u>	<u>For the Month of</u>
January 1, 1991	January 1991
February 1, 1991	February 1991
March 1, 1991	January 1991
April 1, 1991	February 1991
May 1, 1991	March 1991
June 1, 1991	April 1991
July 1, 1991	May 1991
August 1, 1991	June 1991
September 1, 1991	July 1991
October 1, 1991	August 1991
November 1, 1991	September 1991
December 1, 1991	October 1991

*} Paid
2 times
for months
of
January
and
February*

The form attached to the bonus payment asks questions which will confirm that you qualify for a bonus payment. After answering all the questions on the form and returning it by the 15th of the month, if you are qualified you will receive your bonus payment and a new validation form, which is mailed the first day of the following month. The process is repeated each month.

If you have questions about the payment system, you may call or write to us.

Longevity Bonus Program
P.O. Box 110211
Juneau, AK 99811-0211
Telephone: 465-4416



Bringing lifetimes of experience and leadership to serve all generations.

February 20, 1992

Honorable Ben Grussendorf
Speaker of the House of Representatives
P.O. Box V (MS3100)
Juneau, Alaska 99811

Dear Speaker Grussendorf:

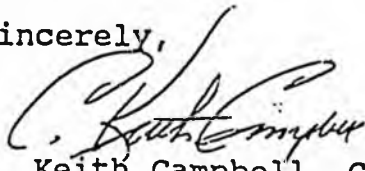
The Alaska State Legislative Committee of the American Association of Retired Persons respectfully requests that the Administration and Legislature solve the problems created by the duplicate payments to recipients of the longevity bonus program.

These payments were made in January and February 1991, during the implementation of regulations changing the payments under this program from a prospective basis to a retrospective basis.

The State Legislative Committee urges the resolution of this problem be both uniform and equitable. This request is stimulated by complaints of recoupment being activated only at the death of a recipient and the resulting shock of an unforeseen debt levied against the estate. The unexpectedness of this action causes undue stress during a grieving period. A more sensitive handling of the problem is requested by the State Legislative Committee.

Thank you for your attention to this matter. Our Committee would welcome the opportunity to comment upon future regulations in regard to this issue.

Sincerely,


C. Keith Campbell, Chair
Alaska State Legislative Committee

cc: Members of Alaska House of Representatives
Jean H. Nalibow, Area 10 Director
Myriam Marquez, Area 10
Legislative Representative

longbp.ltr

ALASKA STATE LEGISLATIVE COMMITTEE

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Mr. Joe Alter
Box 20304
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3/6/92

LONGEVITY BONUS PROGRAM

Proposed Emergency Regulation Change

PURPOSE

Resolve the confusion surrounding the transition from prospective payment and retrospective payment systems by eliminating the erroneous assumption of "duplicate payments."

DISCUSSION

When the program changed from paying prospectively to paying retrospectively a transition was necessary to ensure that payments to current recipients would not be interrupted. This should have been handled as a transition issue for the program, not as a debt to recipients.

The current regulation, 2 AAC 40.175 (f), establishes a debt for "duplicate payments" under the Longevity Bonus. Duplicate payments, however, were not made to any recipient. The program dated two checks for January 1991 and February 1991. The checks were delivered to recipients during a four month period from January through April of 1991. This was done for accounting and payment processing purposes and in an attempt to make program administration changes transparent to current recipients.

The result has been confusion on the part of most recipients and the creation and posting of a debt due from recipients for "duplicate payments" pursuant to 2 AAC 40.175 (f). The fact is that no recipient received more than one payment in any one month. Thus there is no reality to a notion of duplicate payment nor should there be a debt.

The solution to the problem is to terminate payments to those eligible before December 1, 1990 (old recipients) at the time of disqualification. Those who became eligible on or after December 1, 1990 (new recipients) would continue to be eligible through the last full month of eligibility as provided in the current

regulations. The practical effect of this approach is that old recipients will not be eligible to keep any bonus payments issued after they lose eligibility.

Examples for recipients eligible before December 1 , 1990

1. A person dies on January 10. The person would keep the payment received in January. We would turn off the payment scheduled for February. No collection efforts would be required.

2. A person dies on January 29. A payment is issued in the month of February. We will ask that the payment be returned. We would not attempt to collect the January payment.

The proposed emergency regulations will not affect recipients who became eligible for the Longevity Bonus Program on or after December 1, 1992.

The attached proposed emergency regulations accomplish this objective.

b:\proemreg

NOTICE OF ADOPTION OF EMERGENCY REGULATIONS

Notice is given that, under the authority of AS 47.45.100(1) the Department of Administration adopted, amended and repealed, as emergency regulations, provisions in 2 AAC 40.075 and 2 AAC 40.175 relating to Longevity Bonus payments.

The amendments change the regulations by:

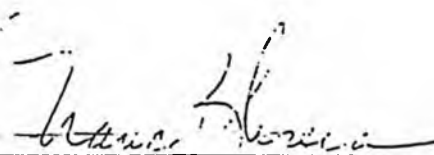
Eliminating transition language which require the administrator to recover certain payments and clarifying eligibility to receive bonus payments at the time of disqualification.

The emergency regulations took effect March 6, 1992.

Copies of the regulations may be obtained by writing to the Division of Pioneers' Benefits, P.O. Box 110211, Juneau, Alaska 99811.

Notice is also given that the Department of Administration intends to make the regulations permanent, and any person interested may send written statements relevant to the action proposed to Division of Pioneers' Benefits, P.O. Box 110211, Juneau, Alaska 99811, to be received no later than April 15, 1992.

Date: 3-9-92



Nancy Bear Usera
Commissioner of Administration

FINDING OF EMERGENCY

The Department of Administration finds that an emergency exists and that the attached regulations adopting, amending and repealing provisions in 2 AAC 40.075 and 2 AAC 40.175 are necessary for the immediate preservation of the public peace, health, safety, or general welfare. The facts constituting the emergency are as follows:

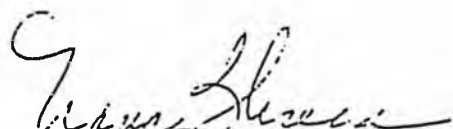
1. The current regulations are confusing to Longevity Bonus program recipients.
2. The current regulations were promulgated with an erroneous interpretation of accounting principles.
3. The regulations have created a current debt against approximately 20,000 Alaskans who have not received any overpayment from the State of Alaska.
4. The inappropriate debt recorded against Longevity Bonus recipients can adversely affect their credit rating.
5. Adoption of these regulations will allow the Longevity Bonus Program to remove the debt that has been posted against Longevity bonus recipients and clear any concern with credit ratings.
6. Delay in adoption will cause initiation of collection procedures for a debt which should not exist.

ADOPTION ORDER

Under authority of AS 47.45.100(1), the amendments to the regulations are therefore adopted as emergency regulations and are effective March 6, 1992.

This action is not expected to require an increased appropriation.

Date: 3/1/92
Juneau, Alaska



Nancy Bear Usera, Commissioner

FILING CERTIFICATION

I _____, Lieutenant Governor for the State of Alaska, certify that on _____, 1992, at _____ .m., I filed the attached regulations, which were voluntarily submitted to me for publication.

Lieutenant Governor

Effective _____.
Register _____.

2 AAC 40.075 (b)(2) and (c) are amended to read:

(2) the recipient has notified the administrator that he or she has discontinued residency in Alaska and the payment is for a month for which a [THE] recipient is qualified to receive [FOR] a bonus payment.

(c) Unless other reimbursement is received by the administrator, bonus payments will be withheld as repayment for bonuses that were issued to a recipient for a period in which the recipient was not entitled to receive a bonus payment. (Eff. 12/1/90, Register 117; am / / , Register).

Authority: AS 47.45.100(1)

2 AAC 40.175(f) is repealed and reenacted to read:

(f) A recipient who was eligible for and received a bonus before December 1, 1990 is not eligible to receive bonus payments after the month of disqualification under 2 AAC 40.110 or termination under 2 AAC 40.140 (a), (b), (c)(2), and (c)(3), regardless of the month for which the payment is being made.

2 AAC 40.175 is amended by adding new subsections (g) and (h) to read:

(g) A recipient who was eligible under 2 AAC 40.010(b) before December 1, 1990 who terminates eligibility under 2 AAC 40.140(c)(1) will continue to receive payments without interruption.

(h) A recipient who was eligible for the program before December 1, 1990 whose eligibility for bonus payments is discontinued under 2 AAC 40.110(b) or (c), or who is terminated under 2 AAC 40.140 may be reinstated under 2 AAC 40.130 but will be treated as a new recipient who was not eligible for the program before December 1, 1990. Bonus payments will commence pursuant to 2 AAC 40.065. (Eff. 12/1/90, Register 117; am / / , Register).

Authority: AS 47.45.020(1)



Alaska State Legislature

SENATOR JIM DUNCAN

P. O. Box V JUNEAU, ALASKA 99811-3100
(907) 465-4766

COMMITTEES:
VICE CHAIR —
FINANCE
VICE CHAIR —
STATE AFFAIRS
RULES
BUDGET & AUDIT
ETHICS REFORM

February 3, 1992

Ms. Nina Brown
Box 020981
Juneau, Alaska 99802

Dear Ms. Brown:


Joe Alter provided me with a copy of your letter to the Department of Administration concerning their request for reimbursement of \$500 on your husband's Longevity Bonus.

I agree with you totally that the state should not be attempting to collect funds from the estates of deceased Longevity Bonus recipients because of a Pioneers' Benefits internal accounting problem. I have been in contact with them about this matter and will work with them in the Senate Finance subcommittee, which I chair, to see if the repayment requirement can be eliminated.

I extend my sincere condolences on the death of your husband, and will do all I can to alleviate the Longevity Bonus as an additional burden to you at this time.

Sincerely,

cc: Dennis Dewitt, Director
Pioneers Benefits


Jim Duncan
Senator

January 15, 1992

Alaska Department of Administration
Division of Pioneers' Benefits
P.O. Box CL
Juneau, Alaska 99802

Attention: Mr. Bruce Aronson

Dear Mr. Aronson:

My husband died in Swedish Hospital in Seattle on October 26, 1991, after being medivaced from Bartlett Memorial Hospital on September 21, 1991. He was on life support, and the transfer to Swedish Hospital was the only option.

When I called the Longevity Bonus Office to tell them of Mr. Brown's death, I was informed that I would be required to reimburse the program \$500 for the September and October bonus payments he had received. I asked that the request for reimbursement be confirmed in writing, and a copy of your letter is enclosed.

Changes from prepayment to retroactive payment of the bonuses by the Department of Administration was the reason for overpayment made in the first part of 1991 to avoid interruption of bonuses during the transition to the new payment system. The September check was to be repaid due to these changes.

The October repayment of \$250 has been requested by you because Mr. Brown, prior to his death, was in Swedish Hospital in Seattle receiving medical services not available at Bartlett Memorial Hospital in Juneau.

My expenses after my husband's death for hospital, funeral and the expenses of living in Seattle for five weeks are approximately \$150,000. I do not know at this time how much of the medical expenses will be paid by health insurance. Apparently financial hardships for the family at time of the death of a recipient was not considered with the Longevity Bonus Program payment system was written to require these repayments.

I question the ability of the state to collect all overpayment; any effort to randomly collect is unfair.

My suggestion to recover your overpayments would be to reduce payments by \$25 per month until the overpayment amount has been collected, and not at the time of the death of a recipient.

I support the initial concept of HB 122, to continue the Longevity Bonus for recipients who are out of state for medical care not available in their Alaskan communities.

I will be working with members of the Legislature, and will be advising them of my predicament to enable the necessary policy changes.

Sincerely,

Nina Brown

Nina Brown
Box 020981
Juneau, Alaska 99802
586-1248

ALASKA LONGEVITY BONUS PROGRAM

Recipients and Cost by Fiscal Year--1973-2000

Fiscal Year	Recipients at Year-end	Annual Increase		Annual Cost	Annual Increase	
		Number	Percent		Amount	Percent
73	4,753			346,100		
74	5,250	497	10.5%	967,500	621,400	179.5%
75	5,463	213	4.1%	3,689,700	2,722,200	281.4%
76	5,553	90	1.6%	6,470,700	2,781,000	75.4%
77	6,228	675	12.2%	8,689,375	2,218,675	34.3%
78	6,671	443	7.1%	9,486,375	797,000	9.2%
79	7,207	536	8.0%	11,814,900	2,328,525	24.5%
80	7,897	690	9.6%	12,804,600	989,700	8.4%
81	8,527	630	8.0%	18,778,600	5,974,000	46.7%
82	9,101	574	6.7%	26,074,500	7,295,900	38.9%
83	9,731	630	6.9%	27,586,750	1,512,250	5.8%
84	10,769	1,038	10.7%	29,254,500	1,667,750	6.0%
85	15,135	4,366	40.5%	43,199,000	13,944,500	47.7%
86	15,763	628	4.1%	44,105,500	906,500	2.1%
87	16,834	1,071	6.8%	47,095,500	2,990,000	6.8%
88	17,675	841	5.0%	50,152,500	3,057,000	6.5%
89	18,439	764	4.3%	53,472,250	3,319,750	6.6%
90	19,490	1,051	5.7%	57,172,700	3,700,450	6.9%
91	20,298	808	4.1%	60,209,600	3,036,900	5.3%
92	21,645	1,347	6.6%	63,571,000	3,361,400	5.6%
93	22,879	1,234	5.7%	67,194,500	3,623,500	5.7%
94	24,137	1,258	5.5%	70,890,250	3,695,750	5.5%
95	25,392	1,255	5.2%	74,576,500	3,686,250	5.2%
96	26,535	1,143	4.5%	77,932,500	3,356,000	4.5%
97	27,570	1,035	3.9%	80,971,750	3,039,250	3.9%
98	28,645	1,075	3.9%	84,129,750	3,158,000	3.9%
99	29,705	1,060	3.7%	87,242,500	3,112,750	3.7%
2000	30,834	1,129	3.8%	90,557,750	3,315,250	3.8%

Rec 11/6/91 As you can see, the cost of providing the longevity bonus program has grown by leaps and bounds, since 1973. The expense to the state to operate the program for this year alone, is approximately \$63 million dollars.

In 1972, this program was exempted from the Administrative Procedures Act (APA). With such a large budget, you would think it appropriate for the program to adhere to the same hearing and review procedures that the majority of programs are required to use.

H B

5 8 8

HOUSE COMMITTEE REPORT

(7)
Date Referred: May 6, 1992

FURTHER REFERRALS:

Date of Committee Action: 5/9/92

The JUDICIARY Committee considered:

HB 588

HOUSE BILL NO. 588

PROTECT MERIT PRINCIPLE OF EMPLOYMENT

"An Act establishing a procedure for the review of the reorganization of agencies in the executive branch of state government for violations of the merit principle of employment and providing remedies for violations of the merit principle."

RECOMMENDATIONS:

be replaced with CSAB 588 (JUD) the same title a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

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

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal impact _____

fiscal note(s) in accordance

zero fiscal note _____

zero fiscal note(s) Admin 5/16/92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<u>David Douley</u>	✓	<u>Kevin Pat Farrell -</u>		✓	
<u>John Ebbert</u>	α	<u>Terrell Masten</u>		✓	
<u>Mark Stuenkel</u>	-	<u>Mark Stanley</u>		Y	

David Douley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 588

Revision Date: _____

Department Affected: Administration

Title: Review reorganizations for violation of merit principles.

BRU: Personnel/OEEO

Component: Personnel/OEEO

Sponsor: House Finance Committee

Requestor: House State Affairs

COMPONENT SERIAL NO.

0	0	5	6
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Expenditures/Revenues: (Thousands of Dollars)

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

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

GENERAL FUND	*	*	*	*	*	*
FEDERAL FUNDS	*	*	*	*	*	*
OTHER FUND SOURCE:	*	*	*	*	*	*
TOTAL	*	*	*	*	*	*

POSITIONS:

FULL-TIME	*	*	*	*	*	*
PART-TIME	*	*	*	*	*	*
TEMPORARY	*	*	*	*	*	*

Estimate of current year impact: \$0

ANALYSIS: (Attach a separate page if necessary.)
The fiscal impact of HB 588 is indeterminate. See attached.

Prepared by: R. H. King
Division: Personnel/OEEO

Phone: 465-4430
Date: _____

Approved by Commissioner: Nancy Bear Usura
Agency: Administration

Date: 5/5/92

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

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 588

HB 588 would allow employees or former employees to complain to the Personnel Board that a reorganization in the Executive Branch violates the merit principle. This bill is based on the recent Investigative Report of the Ombudsman of the recent reorganization of the Division of Family and Youth Services. This bill would require investigations by the Personnel Board very similar to the one conducted by the Ombudsman. It is apparent from reading the Investigative Report that considerable time and resources of at least two people were involved.

This recent investigation is the only model for estimating the costs for the Personnel Board should this bill become law. However, there are considerable unknowns. To our knowledge, this reorganization is the only one in which a violation of the merit principle was a nontrivial charge. What volume of complaints can be expected? Will more complaints be filed with the Personnel Board than have been raised by employees' collective bargaining representative, or to the Ombudsman, or to the Attorney General (violation of the Personnel Act is a misdemeanor under Alaska Statute 39.25.)? Will complaints increase with the inevitable downsizing that will be required by falling revenue? Or was this a unique occurrence that will not be repeated for another 30 years? Will this Ombudsman's Investigative Report be a sufficient deterrent for five or ten years?

While the above questions make it impossible to estimate a cost for this bill, the department does not want to fall into the trap of having no appropriation committed to the costs and thus having the Personnel Board turn down complaints because "the resources of the board are insufficient for adequate investigation" (proposed AS 39.25.310, page 2, line 14 of the bill). We look forward discussions during the hearing process of an appropriate way to project and fund the costs.

HB 588 - Violations of the Merit Principle of Employment

Sectional Analysis

Section 1.

Sec. 39.25.300. Jurisdiction of the Personnel Board: Establishes the jurisdiction of the Personnel Board to investigate whether the merit principle has been violated by a state agency reorganization.

Sec. 39.25.310. Investigation of Complaints: Requires a complaint to be filed within one year of a reorganization or knowledge of a violation; requires a hearing officer to conduct an investigation unless

- a) complaint is outside the jurisdiction of AS 39.25.300-500;
- b) complainant does not have sufficient personal interest;
- c) complainant has not alleged sufficient facts to proceed;
- d) complaint is trivial or made in bad faith;
- e) board does not have adequate resources to investigate.

Sec. 39.35.320. Notice to Complainant: Hearing officer shall inform the complainant whether the board will investigate the complaint.

Sec. 39.25.330. Notice to Others: With some exceptions, if an investigation is undertaken, the hearing officer shall notify the agency and other employees affected by the reorganization.

Sec. 39.25.340. Investigation Procedures: The hearing officer shall investigate the complaint informally and, if the allegations are supported by substantial evidence, try to eliminate the merit principle violation by conference, conciliation and persuasion. Authorizes a hearing officer to make inquiries, inspect the premises of an agency, hold closed hearings, and have access to agency records, including confidential records. The hearing officer and the board shall maintain confidentiality regarding all matters and identities of complainants or witnesses.

Sec. 39.25.350. Stay of Personnel Actions: After a complaint is accepted for investigation, the board may issue a 30-day stay of implementation of all or part of the reorganization. The board may issue additional stays; an agency may petition the board for amendments to a stay.

Sec. 39.25.360. Subpoena Powers: The board may subpoena witnesses and records. The board may not subpoena records of active criminal investigations that reveal the identity of confidential police informants. If a person refuses to comply with a subpoena, the court may compel obedience.

Sec. 39.25.370. Procedure After Investigation: After the investigation, the hearing officer shall make a preliminary report as to whether the reorganization violated the merit principle of employment. If the principle has been violated, the report must include recommendations for correction of the violation. The board may adopt, amend or reject the findings of fact and the recommendations of the report. The report and recommendations become final 30 days after the report is issued unless the board acts on the report, or the complainant or the agency requests a hearing. The board shall hold the hearing at a place where the violation allegedly occurred; testimony shall be taken under oath. If the board determines that a violation

occurred, the board shall order appropriate corrective action. The board may order reinstatement of an employee, or may order the discipline of a state employee other than an elected official or a public officer subject to legislative confirmation. The preliminary report is confidential; a final order may be disclosed only after providing notice to the agency and complainant.

Sec. 39.25.380. Judicial Review and Enforcement: A complainant or agency may obtain judicial review of the order. The board may obtain a court order for the enforcement of its orders by filing a complaint with superior court.

Sec. 39.25.390. Referral to Attorney General: The board may refer a matter to the attorney general at any time in an investigation or hearing.

Sec. 39.25.500: Definitions.

HOUSE COMMITTEE REPORT

5-6-92
Judiciary

(7)
Date Referred: April 29, 1992

FURTHER REFERRALS:

Date of Committee Action: 5/6/92

The STATE AFFAIRS Committee considered:

HB 588

HOUSE BILL NO. 588

PROTECT MERIT PRINCIPLE OF EMPLOYMENT

"An Act establishing a procedure for the review of the reorganization of agencies in the executive branch of state government for violations of the merit principle of employment and providing remedies for violations of the merit principle."

RECOMMENDATIONS:

be replaced with _____ the same title

have attached amendments(s) a new title

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

indeterminate
 fiscal impact Admin

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) _____

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>		<i>Eugene H. Kibuna</i>		<input checked="" type="checkbox"/>	
<i>[Signature]</i>		<i>David McCicchie Choquette</i>			<input checked="" type="checkbox"/>
<i>[Signature]</i>		<i>[Signature]</i>			

Eugene H. Kibuna
CHAIRMAN'S SIGNATURE
Eugene H. Kibuna

Alaska State Legislature

HOUSE OF REPRESENTATIVES



REPRESENTATIVE FRAN ULMER

MEMORANDUM

May 4, 1992

TO: Rep. Gene Kubina, Chair
House State Affairs Committee

FROM: Rep. Fran Ulmer

RE: HB 588, Violations of the merit principle in public employment

HB 588, relating to violations of the merit principle of employment, was introduced as a result of an audit performed by the State Ombudsman of the Division of Family and Youth Services. The audit concluded that a recent reorganization of DFYS was a politically motivated maneuver designed to subvert the merit system and to remove certain classified employees from their positions. The audit documents the manner in which plans were carefully laid to fire specified employees without regard to the merit of their performance on the job. In the pursuit of this goal, agency personnel deliberately misled the legislature regarding the purpose of the reorganization, the benefits to be derived, and the cost.

The stated purpose of the DFYS reorganization was to reduce unnecessary mid-management positions, save \$600,000, and use the savings to fund additional line workers who would deliver direct services to clients. The net result was purported to be an increased ability of the state to protect at-risk children and adults. In reality, the result of the reorganization was an annual increase in costs of \$361,343, a decrease in line workers, and 1100 fewer child abuse investigations performed each year.

HB 588 establishes the authority of the Personnel Board to investigate whether the merit principle has been violated by reorganization of a state agency. If a preliminary investigation indicates that a violation has probably occurred, the Board is authorized to try to eliminate the violation by conciliation. The preliminary report must include recommendations for correction of the violation. The Board may order appropriate corrective action. During an investigation, the Board may also issue a stay of implementation of the reorganization.

The merit principle of employment serves two purposes: (1) it ensures that public employment is based on effective performance of approved responsibilities; and (2) encourages the agency to evaluate agency/employee performance based on merit alone. It is impossible to separate the effective functioning of the agency from the employment of qualified, experienced personnel. The reorganization of DFYS resulted in the intentional elimination of competent

employees. The result is a serious loss of service in an agency providing some of the most critical public protection services in the state.

It is doubly onerous that the agency persisted in the reorganization despite the many inquiries and criticisms leveled at agency management by professionals and other knowledgeable persons in the field, including legislators, prior to its implementation. HB 588 will help prevent the same abuses from occurring in the future by providing the Personnel Board with the power to order corrective action and to implement a stay of implementation. If these powers had been in place last year, the reorganization of DFYS could have been required to meet closer scrutiny prior to implementation.



State of Alaska
ombudsman

Duncan C. Fowler

Reply to:

- P.O. Box 102636
Anchorage, AK 99510-2636
(907) 277-8848
(800) 478-2624
- P.O. Box WO
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970
- P.O. Box 74358
Fairbanks, AK 99707-4358
(907) 452-4001
(800) 478-3257

May 7, 1992

Representative Dave Donley, Chairman
House Judiciary Committee
State Capitol
Juneau, Alaska 99801-1182

RE: HB 588

Dear Representative Donley:

This bill was sent to your committee yesterday by the House State Affairs committee. It had support from the state's two largest unions. The administration stated they had no position as yet on the measure.

The genesis of this bill was a recently completed ombudsman investigation of the reorganization of the Division of Family and Youth Services (DFYS). I appreciate the support of the House Finance Committee representative Ulmer by introducing this measure. I know we are in the last weeks of this legislature. But, I believe HB 588 speaks to an important aspect of our responsibility to provide nonpartisan government services to all Alaskans.

My investigation of DFYS looked at the allegation that the agency had based its reorganization on incorrect information. Part of that review found the agency director had circumvented the principles of the merit system during the restructuring. This proposal provides an appeal mechanism for covered state employees when reorganizations are undertaken in contravention of our constitutionally mandated merit system.

This measure *does not prohibit nor constrain an agency from reorganizing* to improve its internal efficiency or to meet budget constraints. That ability is defined in AS 44.17.070 "Reorganization by Department Heads". HB 588 does require that personnel decisions made during a reorganization effort be made in compliance with our state merit principals as required in Article XII, Section 6 of the Alaska Constitution and defined in AS 39.25.010. It specifically does not deal with employees in the exempt or partially exempt service. New administrations must have the freedom to appoint individuals with certain skills and philosophies to form and implement its new policy directions and agendas.

All of us expect to see the number of state employees dramatically shrink over the next few years. This measure helps ensure future personnel reductions occur in concert with the merit principles. Our investigation showed how easy it is to use a reorganization effort to target specific merit employees and cause their positions to be removed. Unfortunately reasons for removal can well be for non-merit reasons as there is no standard appeal or review available to those affected. Political, personal and religious affiliations and associations could be the criteria for an administrator with a hidden agenda. This measure provides an appeal and

review to occur by the state personnel board. It gives the board the ability to take corrective action if necessary.

A quote from our DFYS investigation illustrates this concern clearly:

One of the basic tenets of the merit system is that classified employees shall be hired, evaluated, retained or promoted on the basis of their competency and job performance rather than their political associations or personal connections. Perceived manipulation of merit system principals for political ends has a chilling effect on the functioning of government agencies wherever and whenever it occurs. In an agency such as DFYS the potential harmful effects are simply too great for prudent managers to allow political considerations to become preeminent.

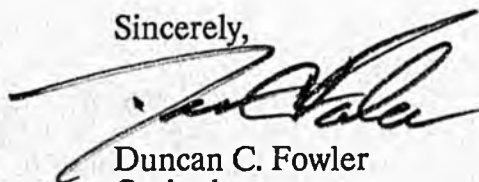
DFYS staff are required to make complex decisions in emotionally charged circumstances on a daily basis. If staff must be concerned that their decisions and actions can cause them to become targets of political reprisal the effect can be paralyzing. When classified managers are affected, subordinate staff may become afraid to act or may base critical casework decisions on an evaluation of political expediency rather than on the risk to a vulnerable client or the community.

In the DFYS reorganization effort, merit principals were not simply ignored but actively circumvented and subverted. The "targeted down-sizing" which occurred in DFYS has been highly visible and demoralizing within that agency and has been carefully watched by others.

As reduced revenues necessitate legitimate "down-sizing" in this agency or others, adequate mechanisms must be developed to ensure this reduction process is not used as a means of political restructuring. Protections are needed to ensure the "down-sizing" process does not become a means of eliminating divergent political perspectives to achieve political uniformity among government employees. If unchecked, such actions can be demoralizing to government employees and seriously compromise government services to citizens.

I have had the enclosed amendment drafted which resolves a concern brought by the Department of Law. I would urge the committee's favorable consideration of the amendment and this measure. There is no fiscal impact on my office. Copies of the Division of Family and Youth Services investigation were sent to each legislator's office. I was pleased that the agency in this case has agreed to implement my recommendation to review personnel actions that were taken during their last reorganization. If additional copies of this investigation are needed please let me know. I would be happy to answer any questions about this measure or the Office of the Ombudsman.

Sincerely,



Duncan C. Fowler
Ombudsman

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 588

Page 3, after line 19:

Insert a new subsection to read:

"(b) A stay of implementation may be granted only if it appears that

(1) the complainant or others affected by the reorganization are faced with irreparable harm;

(2) the harm to the agency by the granting of the stay does not outweigh the harm to the complainant or the others; and

(3) the complainant raises serious and substantial questions going to the merits of the case."

Reletter the remaining subsections accordingly.

Page 6, line 7, after "Alaska":

Insert ", including the description in AS 39.25.010(b)"

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 588

Page 5, lines 8 - 9:

Delete "an elected public officer or a public officer confirmed by the legislature"

Insert "a public officer"

Page 5, line 12, after ".":

Insert "If the board finds that a public officer has violated the merit principle of employment, the board may recommend to the governor that the public officer be disciplined, including a recommendation of suspension or dismissal."

Page 6, line 10, after "(5)":

Insert new material to read:

""public officer" includes

- (A) an elected public officer;
- (B) a public officer confirmed by the legislature;
- (C) a person hired or appointed as the head or deputy head of a department in the executive branch or as a director of a division or independent agency within a department in the executive branch, an assistant to the governor, and the chair or member of a state commission or board;

(6)"



State of Alaska
ombudsman

Duncan C. Fowler

May 4, 1992

Representative Gene Kubina, Chairman
House State Affairs Committee
State Capitol
Juneau, Alaska 99801-1182

RE: HB 588

Dear Representative Kubina,

The genesis of this bill was a recently completed ombudsman investigation of a reorganization of the Division of Family and Youth Services (DFYS). I appreciate the support of the House Finance Committee and Representative Ulmer by introducing this measure. I know we are in the last few weeks of this legislature. But, I believe HB 588 speaks to an important aspect of our responsibility to provide nonpartisan government services to all Alaskans.

My investigation of DFYS looked at an allegation that the agency had based its reorganization on incorrect information. Part of that review found the agency director had circumvented the principles of the merit system during the restructuring. This proposal provides an appeal mechanism for covered state employees when reorganizations are undertaken in contravention of our constitutionally mandated merit system.

This measure *does not prohibit nor constrain an agency from reorganizing* to improve its internal efficiency or to meet budget constraints. That ability is defined in AS 44.17.070 "Reorganization by Department Heads". HB 588 does require that personnel decisions made during a reorganization effort be made in compliance with our state merit principals as established in Article XII, Section 6 of the Alaska Constitution. It specifically does not deal with employees in the exempt or partially exempt service. New administrations must have the freedom to appoint individuals with certain skills and philosophies to form and implement its new policy directions and agendas.

All of us expect to see the number of state employees dramatically shrink over the next few years. This measure helps insure future personnel reductions occur in concert with the merit principles as stated in our constitution and defined in AS 39.25.010. Our investigation showed how easy it is to use a reorganization effort to target specific merit employees and cause their positions to be removed. Unfortunately reasons for removal can well be for non-merit reasons as there is no standard appeal or review available to those affected. Racial, political, sexual and religious biases could be the criteria for an administrator with a hidden agenda. This measure provides an appeal and review to occur by the state personnel board. It gives the board the ability to take corrective action if necessary.

Reply to:

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A quote from our DFYS investigation illustrates this concern clearly:

One of the basic tenets of the merit system is that classified employees shall be hired, evaluated, retained or promoted on the basis of their competency and job performance rather than their political associations or personal connections. Perceived manipulation of merit system principals for political ends has a chilling effect on the functioning of government agencies wherever and whenever it occurs. In an agency such as DFYS the potential harmful effects are simply too great for prudent managers to allow political considerations to become preeminent.

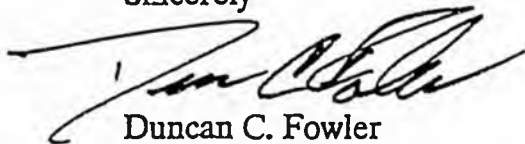
DFYS staff are required to make complex decisions in emotionally charged circumstances on a daily basis. If staff must be concerned that their decisions and actions can cause them to become targets of political reprisal the effect can be paralyzing. When classified managers are affected, subordinate staff may become afraid to act or may base critical casework decisions on an evaluation of political expediency rather than on the risk to a vulnerable client or the community.

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As reduced revenues necessitate legitimate "down-sizing" in this agency or others, adequate mechanisms must be developed to ensure this reduction process is not used as a means of political restructuring. Protections are needed to ensure the "down-sizing" process does not become a means of eliminating divergent political perspectives to achieve political uniformity among government employees. If unchecked, such actions can be demoralizing to government employees and seriously compromise government services to citizens.

I would urge the committees favorable consideration of this measure. There is no fiscal impact on my office. Copies of the Division of Family and Youth Services investigation were sent to each legislators' office. I was pleased that the agency in this case has agreed to implement my recommendation to review personnel actions that were taken during their last reorganization. If additional copies of this investigation are needed please let me know. I would be happy to answer any questions about this measure or the Office of the Ombudsman.

Sincerely



Duncan C. Fowler
Ombudsman

H B

5 9 9

(7)
Date Referred: 6/17/92

HOUSE COMMITTEE REPORT

FURTHER REFERRALS:

6/17
Rules

Date of Committee Action: 6/17

The JUDICIARY Committee considered:

HB 599

HOUSE BILL NO. 599

SUBSISTENCE TAKING OF FISH AND GAME

"An Act relating to the taking of fish and game; and providing for an effective date."

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

ADOPTS: _____ letter of Intent

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

APPROVES PREVIOUS: 6/17 (Dept/Date)

fiscal impact _____

(4) 1 fiscal note(s) Court LAW, FBG (2) - 6/15

zero fiscal note _____

zero fiscal note(s) DPS 6/15

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Mike Miller	X	Al Ellis		X	
Terry Masters	X	Therion Pad Parnell			✓
Mark Hanley	X	McKervey			✓
		Danah Ouley		✓	
		(steel concerns on the record)			


 CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 4
 Bill Version: HB 599
 (H) Publish Date: 6/15/92

**STATE OF ALASKA
 1992 LEGISLATIVE SESSION**

Revision Date: _____ Department Affected: Public Safety
 Title: "An Act relating to the taking of BRU: Fish & Wildlife Protection
fish and game for subsistence." Component: Enforcement & ISU
 Sponsor: Rules
 Requestor: Governor COMPONENT SERIAL NO.

	4	9	0
--	---	---	---

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

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

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

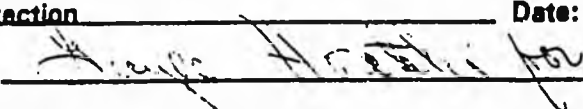
GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)
 No fiscal impact is anticipated.

Prepared By: Captain Conrad G. Seibal Phone: 269-5509
 Division: Fish & Wildlife Protection Date: 6/08/92
 Approved by Commissioner:  Richard L. Burton
 Agency: Department of Public Safety Date: 6/08/92

FISCAL NOTE

No. 3

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: HR 599
(H) Publish Date: 6/15/92

Revision Date: June 8, 1992
Title: "An Act relating to the taking of fish and game for subsistence..."
Sponsor: Request of the Governor
Requestor: Governor's Office

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL

		9	3
--	--	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	85.0	85.0	85.0	85.0	85.0	
TRAVEL	5.0	5.0	5.0	5.0	5.0	
CONTRACTUAL	17.6	17.6	17.6	17.6	17.6	
SUPPLIES	2.4	2.4	2.4	2.4	2.4	
EQUIPMENT	6.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	116.5	110.0	110.0	110.0	110.0	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	116.5	110.0	110.0	110.0	110.0	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	1.0	1.0	1.0	1.0	1.0	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director Phone: 465-3672
 Division: Administrative Services Date: June 8, 1992
 Approved by Commissioner: Richard I. Peques / FOR /
 Agency: Department of Law Date: June 8, 1992
 Approved by Commissioner: Charles E. Cole, Attorney General

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. _____

This bill provides a broad statutory framework that gives subsistence use of fish and game a preference over other consumptive uses of the state's fish and game resources. The bill establishes subsistence dependence standards, defines several terms that have been subject to litigation, and provides a rational scheme for determining those Alaskans whose reliance upon fish and game for subsistence purposes is actual and substantial. The bill also directs the Department of Fish and Game and the Boards of Fish and Game to take affirmative action in situations where a stock or population is not sufficient to provide for both subsistence and nonsubsistence uses, and to formulate plans for recovery of the resource sufficient to provide for all users, if possible.

The bill uses individual eligibility requirements to determine qualification for the subsistence preference. While the bill uses community characteristics to determine the paperwork requirements for qualification, an individual's demonstrated actual and substantial reliance on fish and game in the last twelve months is what determines ultimate qualification as a preferred subsistence user. Urban residents who meet the requirements will also be preferred users. This is an abrupt departure from the state's previous (rural versus urban) attempts to provide a subsistence preference. Furthermore, the bill represents a fair and manageable way of complying with the spirit of ANILCA, without violating special provisions in Alaska's constitution requiring equal access to fish and game and management according to the sustained yield principle.

Because of the controversies that have surrounded and continue to surround subsistence, this bill will be vigorously challenged in court if it is enacted. Although the bill will eliminate many uncertainties that currently involve subsistence, the bill will have a significant, ongoing fiscal impact on the Department of Law over the first four of five years of implementation. That is because the department must defend the bill against court challenges, assist the Boards of Fisheries and Game in drafting, and then reviewing, a substantial body of evolving regulations, and also advise and defend the Department of Fish and Game in disputes resulting from adverse preference qualification determinations. Consequently, the Department of Law will require the additional services of an attorney.

It is important to note that the department has handled 47 litigation matters involving subsistence preference, since the state passed its first subsistence law in 1980. During the past two years, the department has devoted approximately 1,500+ attorney hours each year to handle these matters, many of which are still

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. _____

ongoing. Budget reductions in the coming fiscal year will cause the loss of three of the twelve general fund attorney positions that handle natural resources matters, including subsistence. Thus, it is imperative that a new attorney position be approved to help insure the success of the subsistence plan provided in this bill.

**STATE OF ALASKA
1992 LEGISLATIVE SESSION**

FISCAL NOTE

No. 2
Bill Version: HB 599
(H) Publish Date: 6/15/92

Revision Date: _____

Department Affected: Fish and Game

Title: An Act relating to the taking
of fish and game

BRU: Subsistence

Component: Subsistence

Sponsor: Rules Committee

Requestor: GOVERNOR

COMPONENT SERIAL NO.

4	8	3
---	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	229.9	222.4	218.4	193.8	200.3	206.8
TRAVEL	8.5	7.5	6.5	5.5	5.5	5.5
CONTRACTUAL	27.5	25.5	23.5	22.0	22.0	22.0
SUPPLIES	2.5	2.5	2.5	2.5	2.5	2.5
EQUIPMENT	17.0	3.0	3.0	2.5	2.5	2.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	285.4	260.9	253.9	226.3	232.8	239.3

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	285.4	260.9	253.9	226.3	232.8	239.3
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	285.4	260.9	253.9	226.3	232.8	239.3

POSITIONS:

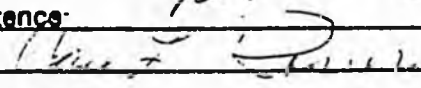
FULL-TIME	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME	3.0	3.0	2.0	1.0	1.0	1.0
TEMPORARY						

Estimate of current year impact: No impact in FY 92

ANALYSIS: (Attach a separate page if necessary.) See attached analysis.

Prepared By: Robert Bosworth, Director  Phone: 465-4147

Division: Division of Subsistence Date: 6/8/92

Approved by Commissioner:  Date: 6/8/92

Agency: Department of Fish and Game

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

FISCAL NOTE ANALYSIS: Division of Subsistence

Development of a Subsistence Permitting Program:

OVERVIEW:

The Governor's subsistence bill creates a new system by which subsistence qualification criteria are applied to individual applicants in the urbanized areas of Alaska, and in some smaller communities where the economy is not based on subsistence. This individual application system is expected to draw in excess of 10,000 applicants in the first year or two, and a lesser number of applicants thereafter. Implementation of the proposed subsistence permitting program is anticipated to have a cost of \$285,378 for the first year, FY 93. By FY 98, the cost is expected to have dropped to \$239,342 as the permitting system assumes a normal regulatory presence and acceptance. A subsistence application program staff, with initial support from other Division of Subsistence staff, will have responsibility for the preparation, distribution, scoring, and issuing of subsistence permits. In addition, the staff will review applications for completeness and accuracy, evaluate responses, and hold findings of fact in disagreements involving issuance of permits.

PROCESS:

The unit charged with issuing subsistence permits will consist of a core of four individuals: a hearing officer, an analyst/programmer, a data processing clerk, and a clerk typist. Duties of the staff relate to two primary functions, (1) the mechanics of issuing permits and (2) the rectification of disagreements. The issuance of permits requires the design and printing of applications, a distribution system to provide the public with ready access to the applications, a means to rapidly evaluate applications, and issue permits to qualified applicants. The rectification of disagreements over the issuance of permits requires a systematic process in which applicants have adequate recourse to resolving disputes prior to seeking judicial relief.

To provide the applicant with the greatest opportunity of receiving the benefits to which they are entitled, the permitting system provides a series of safe guards. The oversight process begins with receipt of the application and its initial review. Applications lacking vital information or incomplete responses will be returned with letters of explanation. Applicants who do not receive a permit as confirmation of meeting the subsistence criteria will receive notification of their rejection and the opportunity to provide additional support to their claim of subsistence priority. If the unsuccessful applicant provides additional support, the application will be re-evaluated and the applicant informed of the results. Should the applicant still be rejected, they may seek an appearance before the hearing officer in order to determine the facts of the case. If the hearing officer still decides against the applicant, the applicant can appeal to the Commissioner of Fish and Game. In the event the Commissioner affirms the original denial, the decision would be final for the Department and the applicant could appeal to the state Superior Court.

CORE STAFFING:

Hearing Officer: The hearing officer (HO) is a range 21 employee with responsibilities for determining findings of facts. This position will design and implement the necessary procedures to see that the intent of the legislation is met and that applicants who are denied a subsistence permit are assured of due process. The position receives clerical support from the clerk typist position and investigative support from the analyst programmer position.

Analyst Programmer III: The analyst programmer (A/P III) is a range 17 with responsibilities for the design of the application, creation of the necessary data management procedures and programs, and the

collection of administrative information relevant to the applicant. Using hunting license and permit information within the Department of Fish and Game, the programmer will provide the hearing officer with data relevant to applications in dispute. The position will also undertake a random review of successful awardee to ensure that the system is meeting its objective of providing a subsistence priority to qualified applicants. The analyst/programmer will have co-responsibility with the hearing officer for preparation of documentation on applicant cases. The position will provide immediate supervision of the data processing clerk and those functions of clerk exclusive of the hearing process.

Data Processing Clerk II: The data processing clerk II (DPC II) is a range 9 with responsibilities for the accurate review and entry of information provided by the applicant. Following data entry, the position will archive all materials in accordance with administrative procedures. As required, the data processing clerk will provide support for the distribution of applications and permits.

Clerk III: The clerk III is a range 9 with responsibilities for maintaining administrative functions of the unit, responding to public inquiries, and facilitating the activities of the hearing officer through the recording and preparation of transcripts of all hearings.

SUPPORT STAFF:

During the initial years of the program, the unit will draw upon some staff resources of the Division of Subsistence. The Division's current research director and AP IV will develop and analyze options for the subsistence application and scoring system for presentation to the Boards of Fisheries and Game, who are authorized in the bill to finalize the application and scoring system. These and other support functions will be subsumed within the Division's current budget. Subsistence Resource Specialist (SRS) IIs and clerical staff will provide regional support in facilitating the public's awareness of the process and responding to inquiries of local residents. In the first year, eight months of SRS support is provided. This drops to four months in the second year, and a single month in the third year. After the third year, the permitting process will involve only the core, four-member staff.

BUDGET—Division of Subsistence:

FY 93

The initial budget provides for three full time employees: the analyst/programmer III, the data processing clerk II, and the clerk III. This group will prepare and distribute the application forms, respond to public inquiries, and score the applications received. The hearing officer will be brought onto staff immediately prior to the receipt of applications. With the subsistence permitting unit based in Anchorage, additional regional support to respond to public inquiries will be provided by subsistence resource specialists (SRS) and clerical staff (C III) in other regions of the state. Funding in the amount of four months each is provided for each of the two employee classes. Total personnel costs are projected at \$229,878.

A travel budget of \$8,500 provides opportunities for program outreach in affected portions of the state, and the appearance of the hearing officer for hearings as required.

Contractual services for the printing and distribution of applications, permits, and other correspondence, and communications totals \$27,500. Total contractual expenses are \$27,500.

Providing for office expendibles will entail \$2,500 per year. The creation of a new organization requires the acquisition of the necessary equipment and furniture to allow the staff to perform their required functions. Seventeen thousand dollars (\$17,000) is designated to meet this one-time need for equipment.

The total budget for the first year of operation is \$300,378.

FY 94:

Staff expenses during the second year decline to \$222,416 as the additional SRS and clerical support is reduced. An additional \$3,000 reduction occurs for lines 200 and 300 (travel and services) as the number of applicants declines. Equipment expenses decline to \$3,000. The total cost of implementing the program in the second year is \$260,916, a reduction of over 8% from the previous year.

FY 95:

Further personnel savings accrue during the third year as outside support is reduced to a single month of SRS time. Travel and services decline by an additional \$3,000. Supplies and equipment expenses are unchanged from the previous year. The total cost of program implementation in the third year is \$253,921, a reduction of 2.5% from the previous year.

FY 96:

The third year is projected to show a decline of nearly \$25,000 in personnel costs from the previous year as outside assistance is eliminated and the hearing officer position reduced to half-time as the need for additional rectification declines. Supplies and services decline by another \$2,500. The total program cost for the year is \$226,315, a 10% reduction from the prior year.

FY 97 and FY 98:

No additional personnel savings are projected as the program is managed by three and a half full time employees. All other expenditures remain stable. In FY 97, the budget is \$232,828, and in FY 98 it is \$239,342. The modest increment is due to personnel longevity charges.

FISCAL NOTE

No. 1
 Bill Version: HB 599
 (H) Publish Date: 6/15/92

STATE OF ALASKA
 1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Fish and Game
 Title: An Act relating to the taking BRU: Boards
of fish and game Component: Board Services
 Sponsor: Rules Committee

Requestor: _____ COMPONENT SERIAL NO.

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 Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	115.0	120.0	125.0	130.0	130.0	130.0
TRAVEL	192.0	199.5	172.0	97.0	97.0	97.0
CONTRACTUAL	100.0	104.0	100.0	57.0	57.0	57.0
SUPPLIES	5.0	5.0	5.0	2.0	2.0	2.0
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	412.0	428.5	402.0	286.0	286.0	286.0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	412.0	428.5	402.0	286.0	286.0	286.0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	412.0	428.5	402.0	286.0	286.0	286.0

POSITIONS:

FULL-TIME						
PART-TIME	2	2	2	2	2	2
TEMPORARY						

Estimate of current year impact: no FY92 fiscal impact

ANALYSIS: (Attach a separate page if necessary.)
 see attached

Prepared By: Beverly Reaume *Beverly Reaume* Phone: 465-4110
 Division: Division of Boards Date: 6/13/92
 Approved by Commissioner: Carl Z. Rosier
 Agency: Department of Fish and Game Date: 6/14/92

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

DIVISION OF BOARDS

ANALYSIS

The Board of Fisheries and the Board of Game meeting individually and together as the Joint Board would require approximately seventy days of meetings over a three year period to implement the new subsistence bill. In future years, the new bill would add approximately ten days to the overall board schedule. This estimate is based on board consideration of rural designations and customary and traditional use during the 1980s. It is important to note that since 1989 both boards have deferred most proposals dealing with subsistence in anticipation of legislation that would allow for a defensible approach to proposals. Over this same time period there have been reductions in the Division of Boards budget that have reduced the capability of the boards to meet. With the advent of new subsistence legislation, the boards will have to deal with subsistence issues as well as maintaining a full workload in other regulatory areas.

The items in the proposed legislation requiring the greatest effort on the part of the boards, in descending order, are:

- (1) "The boards shall by regulation, jointly identify and delineate areas of the state, utilizing game management unit, portion of game management unit, or community, as follows:
 - (1) areas where the human population of each community is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area, and that are not part of an urban area.
 - (2) communities where the human population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community, and that are not part of an urban area." 20 DAYS
- (2) "Upon receipt of recommendations from the commissioner, the Boards of Fish and Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally used for subsistence in the areas and communities of the state identified by the boards under (e)(1) and (e)(2) of this section." 40 DAYS
- (3) "Upon receipt of a recommendation from the commissioner, the boards shall, by regulation, adopt procedures by which the commissioner shall determine the qualification of subsistence users to subsistence hunt and fish in a specific subsistence use area." 10 DAYS

Other items affecting cost estimates:

(1) With the loss of federal funding, Boards Division has eliminated two regional coordinators in the FY93 budget. The cost estimates include reactivation of these two coordinators. The regional coordinators are essential to provide for increased advisory committee meetings. Implementation will add at least one more meeting for each advisory committee. This increase, plus increased board meeting days, are beyond staff's capability to provide adequate support.

(2) If the bill were to bring the state into compliance with ANILCA, we could anticipate that a portion and perhaps all of the estimated costs could come from the federal government.

COSTS - FY93

<u>Personal Services:</u>	115.0
overtime for existing staff	
two regional coordinators	
<u>Travel:</u>	192.0
travel and per diem for board members,	
Boards staff, and advisory committee	
meetings	
<u>Contractual:</u>	100.0
meeting space, printing and postage for	
proposal books, telephone and legal	
notice of meetings	
<u>Supplies:</u>	5.0
office supplies	
TOTAL	<u>412.0</u>

COSTS - FY94:

Personal Services	120.0
Travel	199.5
Contractual	104.0
Supplies	5.0
TOTAL	<u>428.5</u>

COSTS - FY95:

Personal Services	125.0
Travel	172.0
Contractual	100.0
Supplies	5.0
TOTAL	<u>402.0</u>

COSTS - FUTURE YEARS

Personal Services	130.0
Travel	97.0
Contractual	57.0
Supplies	2.0
TOTAL	<u>286.0</u>

FISCAL NOTE

**STATE OF ALASKA
1992 LEGISLATIVE SESSION**

Bill No. HB 599

Revision Date: _____ Department Affected: Alaska Court System
 Title: An Act relating to the taking of fish BRU: Trial Courts
 and game Components: _____
 Sponsor: Governor
 Requestor: _____ COMPONENT SERIAL NO.

000 000	000 768
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	20.0	15.0	10.0	5.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	20.0	15.0	10.0	5.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	20.0	15.0	10.0	5.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	20.0	15.0	10.0	5.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel  Phone: 264-8228
 Division: Alaska Court System Date: 06/16/92

Approved by: Arthur H. Snowden, II, Administrative Director  Date: 06/16/92
 Agency: Alaska Court System

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Alaska Court SystemHB 599Analysis

ANALYSIS

This legislation provides a statutory priority for subsistence use of fish and game, relative to other consumptive uses of the state's fish and game resources.

Because of the continuing controversies surrounding this issue, it can be anticipated that the bill will face a vigorous legal challenge if it is enacted. It can also be anticipated that regulations adopted to implement this legislation will face legal challenge.

As drafted, the bill limits participation in a subsistence harvest to persons who meet certain qualifications. The Department of Law has indicated that actions by the state to challenge the presumptive qualifications of specific individuals would be by declaratory judgement brought in superior court.

The fiscal note reflects pro tem judge costs that will be incurred in handling these matters expeditiously.

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16 June 1992

The Honorable Dave Donley
Chairman, House Judiciary Committee
State Capitol
Juneau, Alaska 99801

Re: Your letter of 11 June

Dear Representative Donley:

This attempts to respond to the questions posed in your letter of 11 June.

If McKie Campbell represented to your Committee that the Governor's bill "incorporated the concerns raised" by subsistence-plaintiffs' lawyers, rather than just those raised by the defense attorneys in the Department of Law, he misrepresented the facts.

I have had two fairly extensive exchanges with Mr. Campbell during the past year, and several other, less extensive, discussions. Within a month or so after he assumed his current role, Mr. Campbell paid me the courtesy of an extended visit in my office in Fairbanks last July. Then in October, we participated together on a subsistence panel at the Alaska Bar Association's 4th Annual Alaska Native Law Conference. I have no doubt that Mr. Campbell has spent a considerable amount of time with the lawyers in the Department of Law. In my meetings with him, he has been well-versed about the subsistence litigation in which the State is involved, he understood the nature of the controversies, and he was familiar with the litigation positions of both sides to these controversies. It is my assessment, however, that he has *not* used this knowledge, and the additional insight (if any) that he has gained from talking to subsistence-plaintiffs' lawyers such as me, to draft legislative proposals aimed at alleviating the hardships being inflicted upon subsistence users, and thereby eliminating the necessity of litigation in the first instance. Rather, Mr. Campbell has used the process of consulting with the lawyers on both sides to enable him to draft legislative proposals ensuring that one side, and only one side -- the State -- will prevail in all of the pending cases and any repeats of cases the State has already lost. Thus, the Governor's bill contains provisions specifically designed to reject the arguments of subsistence users in virtually all, if not all, of the pending cases, and other provisions would uproot protective rulings subsistence users have already secured in court. If this charade succeeds, the losers, of course, will not be the plaintiffs' lawyers, but rather the people who are vitally dependent upon subsistence uses of our fish and wildlife resources for their cultural, social and economic security and well-being -- the assault upon which by the State regulatory process has forced them to the last resort of seeking judicial relief.

Aside from the particulars of individual cases and individual issues that I and other subsistence-plaintiffs' lawyers have addressed in our meetings with Mr. Campbell, I have persistently advanced three central themes which not only have

failed to be "incorporated" into the Governor's bill, but which in fact have been squarely rejected. First, in my initial meeting with Mr. Campbell, I emphasized my view that the State's best hope of regaining subsistence-management jurisdiction over federal lands and waters was to stick with the basic ANILCA-oriented structure of the 1986 State law (which Mr. Campbell helped craft), except for the rural-preference provisions invalidated by the Supreme Court in the *McDowell* decision. I explained my view, which then had the support of several Superior Court decisions (reinforced since then by several additional decisions), that the "customary and traditional use" standard of State law (as embodied in statute and elaborated in the "eight-criteria regulation" of the Joint Boards of Fisheries and Game (5 AAC 99.010(b))) could and should be applied to afford the subsistence priority to all Alaska residents with respect to the diverse fish and game resources reasonably accessible by efficient and economical methods and means of harvest from their places of residence, and upon which they customarily and traditionally depended pursuant to a long-term, consistent pattern of use that provides substantial economic, cultural, social, and traditional elements of their lives. This approach -- which in my judgment is as valid without the "rural" limitation in the law as it was when the priority was restricted to rural residents -- employs the common-sense notion that "subsistence" uses are those that occur near one's place of residence, be it urban or rural, and involve the harvest of essentially *local* resources. I suggested to Mr. Campbell that a proper and sensitive application of the "customary and traditional" standard likely would demonstrate that the State priority, though not limited to rural residents, was effective in protecting all of those (even if more) that Congress intended to protect in Title VIII of ANILCA -- and that a solid foundation for regaining State management jurisdiction might thereby be laid.

I therefore urged Mr. Campbell, and through him the new Administration, to reject the "all Alaskans" policy dictated by the Department of Law and adopted by the Joint Boards, pursuant to which all residents of the State are automatically deemed eligible, by virtue of State residency alone, to participate in any previously recognized subsistence hunt or fishery anywhere in the State.¹ I argued to Mr. Campbell that the State should accept the rulings of the State's trial courts and begin the process of applying appropriate "customary and traditional use" criteria; or, in the alternative, if the State really believed that the 1986 Legislature was so careless as to enact a law that resulted in the "all Alaskans" policy, that the Administration should devise a simple, straightforward amendment to the law that would displace that policy with a "customary and traditional use" standard. These suggestions, quite obviously, are not included in the Governor's bill. Instead, the State has dug in its heels in defense of the "all Alaskans" policy and insisted that the

¹ If ever there was an example of legal advice designed to advance a political agenda getting out of hand, this is it. The Cowper Administration's Department of Law had imposed the "all Alaskans" policy upon the Joint Boards for the purpose of making the law, without its "rural" limitation, appear unworkable and ludicrous. This was an understandable (if questionable) ploy on the part of an administration whose political goal was to pressure the Legislature into adopting and submitting to the people a constitutional amendment reinstating the rural preference. But why would *this* Administration, whose very platform is opposed to such a constitutional amendment, continue to embrace such a policy? The answer appears to be that the absurdities of the "all Alaskans" policy provide a convenient straw man for the argument that the Legislature must do *something* -- even if that "something" has no prayer of regaining State management, and even if it is profoundly harmful to true subsistence users, as the Governor's bill plainly is.

Alaska Supreme Court uphold its position. The vehicle for this desired result is *Morry and Kwethluk IRA Council v. State*, which was argued to the Supreme Court in December, and which could be decided any day now (although our Court has not revealed any inclination to provide timely, much less helpful, advice on this subject).

Second, I have repeatedly insisted to Mr. Campbell that the fundamental cause of the avalanche of litigation lies neither in the structure nor in the substance of the law, but in the regulatory process by which the law is implemented -- a process that, despite its superficial "democratic" appearance, provides subsistence users with precious little access and no influence. I have argued to him that no change in the law that does not embody a thorough reform of the subsistence regulatory/management regime can possibly bring an end to the lawsuits, for litigation is the inevitable result of a continuous rule-making process that disrupts and threatens the core cultural, economic and life-choice values of large segments our population. Until the State establishes a mechanism enabling subsistence users to have a meaningful role in the decision-making process that so vitally affects the quality of their daily lives, litigation will continue unabated. Sure, under the Governor's bill the State might actually win a case or two, and might pay out less in attorneys' fees, but the level of dissatisfaction and unrest among subsistence users, of which the litigation is but a symptom, will go without remedy. The lawsuits will persist, and the appeals to Congress for more protective action will intensify. People simply will not allow their way of life to be trampled into the ground without resistance. The Governor's bill merely compounds the harm; it "incorporates" nothing in the way of an effective "solution."

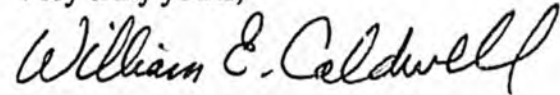
Third, I have also emphasized to Mr. Campbell the need for continued recognition of the subsistence way of life, especially in the Native villages, as a communal enterprise -- as a complex, interrelated socioeconomic/sociocultural system in which people participate as a group and define themselves as members of that group. The Governor's bill rejects this concept altogether, opting instead for an individual-oriented system in which only the individual, not his or her community or group as a whole, qualifies for the subsistence priority. This is a culturally destructive feature of the Governor's bill; it is also unnecessary.

Finally, I should inform you that Mr. Campbell has never attempted to have an in-depth discussion of these matters with Carol Daniel, our Chief Counsel, who has been lead counsel for the Kenaitze Indian Tribe for the past six years. This omission is remarkable in view of the fact that stripping the people of the Kenai Peninsula of their subsistence hunting and fishing rights seems to be the driving (albeit ironic²) force behind the Governor's demand for legislative action.

² The irony is that, while the Governor is maintaining the appearance of opposition to a rural-preference constitutional amendment, he is aggressively pushing a legislative scheme that would largely accomplish the same restrictive result, if not worse, though in a more convoluted, and likely even more unconstitutional, way.

My litigation schedule has prevented me from providing a more comprehensive response to your letter, but I hope this abbreviated reply is helpful. I will attempt to provide any additional information you desire as you thanklessly struggle with this morass.

Very truly yours,

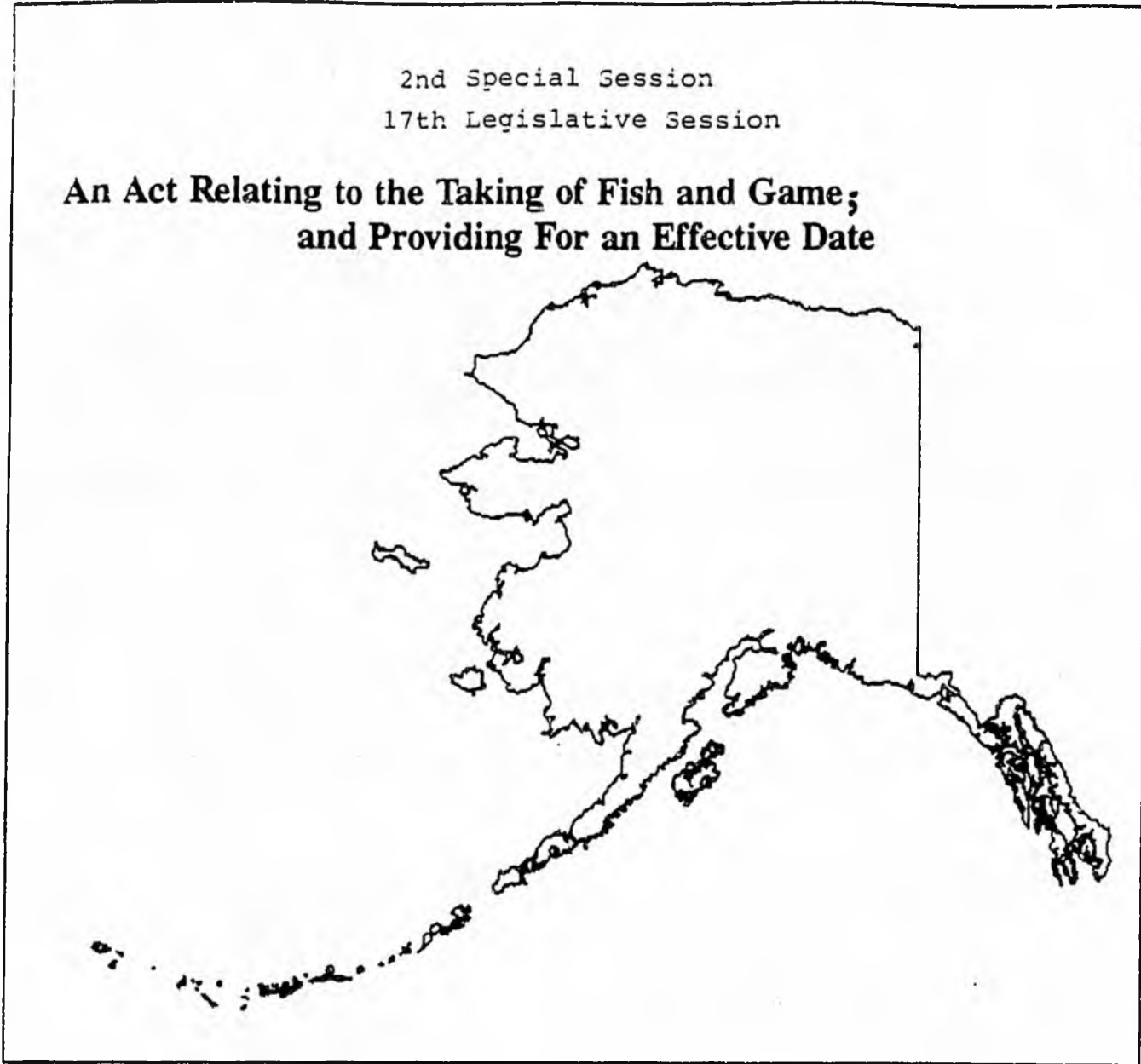
A handwritten signature in cursive script that reads "William E. Caldwell". The signature is written in dark ink and is positioned above the printed name.

William E. Caldwell

cc: Carol H. Daniel

2nd Special Session
17th Legislative Session

**An Act Relating to the Taking of Fish and Game;
and Providing For an Effective Date**



Drafted by:
The Governor's Subsistence Advisory Council

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Documents for the Legislative History of the Governor's Subsistence Advisory Council Bill

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- II. *Questions and Answers on Subsistence*
- III. *Introduction*
- IV. *"An Act Related to the Taking of Fish and Game; and Providing for an Effective Date"*
- V. *Department of Law Sectional Analysis*
- VI. *Letter from the Governor to the Subsistence Advisory Council & Letter from the Subsistence Advisory Council to the Governor*
- VII. *Fiscal Notes*
- VIII. *Sectional Analysis Appendices*
 - A. *Game Management Unit Map*
 - B. *Listing of Alaska Communities by Category*
 - C. *Sample of Subsistence Harvest Certification for Type II Communities*
 - D. *Sample Subsistence Application for Residents of Type III Communities*
 - E. *Case studies of qualification under Individual Criteria Application*
 - F. *Community size, economy, and number of Subsistence Users*
 - G. *Resource diversity of Subsistence Users*
 - H. *Bibliography of Subsistence Studies used by the Subsistence Council*

WALTER J. HICKEL
GOVERNOR

P. O. Box 110001
Juneau, Alaska 99811-0001
'907) 465-3500

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

June 15, 1992

The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the taking of fish and game.

I am introducing this bill to prevent the severe problems we will face with management of all fish and game if we do not resolve our problems with our state subsistence law.

If we fail to fix this problem we will see an ever increasing number of hunts going first into subsistence only status and then into a restricted Tier II mode. In fisheries we will see an elimination or serious erosion of many sport and commercial fishing opportunities. To make matters worse, all of this will happen at the same time we are failing to provide real protection for the true subsistence user.

This bill will not resolve the problems of federal law. No one is more interested than I am in an overall resolution, but it is clear that at this stage there is sharp disagreement on how to do that. I do believe that this bill is a vital first step toward agreement within our state.

The State of Alaska controls almost all of the fish through our ownership of navigable waters, and about half the game. We desperately need to fix, now, what we can for the three-fourths of our fish and game resources that we control. Afterwards, we all need to continue our efforts to solve the rest of the problem.

This bill was drafted by the Governor's Subsistence Advisory Council, in an attempt to reach a consensus approach for Alaska. The members did an outstanding job, spending almost a year in their efforts. This bill is not what any one member of the council, nor I, would have written independently, but I believe it is what I asked the council for: the best possible plan for Alaska.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

QUESTIONS & ANSWERS ON SUBSISTENCE

June 2, 1992

Q - What's the subsistence problem?

A - Unfortunately there is not one subsistence problem, but many. The most commonly known is the conflict between the Alaska's constitution and ANILCA. ANILCA requires a subsistence preference for all "rural" residents. Alaska's Supreme Court ruled that this was both under and over inclusive. That is, there are some urban residents who are subsistence users and not all rural residents are. Federal management of any portion of Alaska is a serious problem, but it is not our most serious problem in managing our fish and game.

Q - So what causes the most problem in managing our fish and game?

A - When the Supreme Court struck "rural" out of our state law, it left us with a law that gives subsistence an absolute priority over all other uses and makes every Alaskan a qualified subsistence user for game on state lands and for almost all fish. This is a lose-lose situation. The priority for true subsistence users is diluted, and the combination of "all Alaskans" plus the absolute priority is soaking up so much of the resource that many commercial and sports fishing and general hunting opportunities will be eliminated or severely restricted. From the standpoint of management of our fish and game this is a greater problem than ANILCA compliance. This can be fixed by a change in state statute.

Q - Are there any other problems?

A - Yes, both ANILCA and our current state law use key terms such as "customary and traditional," "customary trade," and others without any definitions. This has led to a morass of conflicting court decisions that have tied up effective management of fish and game. For example, the lack of definition for customary and traditional has also resulted in almost every fish stock and game population in the state being subject to subsistence, further endangering many commercial and sport uses, and federal courts have blessed large scale sale of fisheries resources through commercial channels under the guise of subsistence "customary trade."

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

WALTER J. HICKEL
GOVERNOR

P. O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500

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I

The Honorable Richard I. Eliason
June 15, 1992
Page 2

The legislation is designed for species protection, to function with a minimum of disruption for users, for ease of administration by the Board of Fisheries and the Board of Game, for management by the Department of Fish and Game, enforceability by the Department of Public Safety, and defensibility in court.

The legislation will reduce the constant barrage of subsistence court cases by making the state's actions more defensible, but much more importantly by laying out clear guidelines for the boards and reducing the problems that caused people to sue.

Unfortunately, some groups have refused any efforts at consensus unless all issues were resolved in a way that met their approval. In a democracy, that cannot work. Painful though it may be, it is now up to the legislature to act.

I realize that the legislature has a constitutional responsibility to consider and, if necessary, amend bills to make them the best possible legislation. Neither I nor the council make any claim that this legislation is perfect, but every word in it has been the subject of hours or days of debate.

A packet of material describing and explaining Senate Bill 443 and House Bill 552, which are fully applicable to this bill, have been provided to the Senate Secretary and Chief Clerk.

Solving subsistence is not an issue of the governor versus the legislature, Republicans against Democrats, or even rural versus urban. This is not an issue where one side will win and the other lose, but rather one where we all act together to solve the problem. If we do not, we have failed Alaska's people.

I ask the legislature to maintain the goal of the advisory council by passing the best possible piece of subsistence legislation, and to act swiftly to solve the subsistence crisis and help heal Alaska.

Sincerely,



Walter J. Hickel
Governor



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

QUESTIONS & ANSWERS ON SUBSISTENCE

June 2, 1992

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A - Unfortunately there is not one subsistence problem, but many. The most commonly known is the conflict between the Alaska's constitution and ANILCA. ANILCA requires a subsistence preference for all "rural" residents. Alaska's Supreme Court ruled that this was both under and over inclusive. That is, there are some urban residents who are subsistence users and not all rural residents are. Federal management of any portion of Alaska is a serious problem, but it is not our most serious problem in managing our fish and game.

Q - So what causes the most problem in managing our fish and game?

A - When the Supreme Court struck "rural" out of our state law, it left us with a law that gives subsistence an absolute priority over all other uses and makes every Alaskan a qualified subsistence user for game on state lands and for almost all fish. This is a lose-lose situation. The priority for true subsistence users is diluted, and the combination of "all Alaskans" plus the absolute priority is soaking up so much of the resource that many commercial and sports fishing and general hunting opportunities will be eliminated or severely restricted. From the standpoint of management of our fish and game this is a greater problem than ANILCA compliance. This can be fixed by a change in state statute.

Q - Are there any other problems?

A - Yes, both ANILCA and our current state law use key terms such as "customary and traditional," "customary trade," and others without any definitions. This has led to a morass of conflicting court decisions that have tied up effective management of fish and game. For example, the lack of definition for customary and traditional has also resulted in almost every fish stock and game population in the state being subject to subsistence, further endangering many commercial and sport uses, and federal courts have blessed large scale sale of fisheries resources through commercial channels under the guise of subsistence "customary trade."

Q - Can't we fix all this by passing a law that complies with ANILCA?

A - While there is a slim chance the Council bill may comply, most feel ANILCA compliance will require either changing ANILCA or amending our constitution.

Q - Can we fix it with a constitutional amendment?

A - No. While a constitutional amendment could allow the state to amend its statute to redefine "rural" in a manner consistent with ANILCA this would not really restore state management, but rather state administration as dictated by federal courts. It would not fix any of the problems caused by lack of definitions mentioned above. ANILCA was not intended to be in violation of Alaska's constitution and Title 16, section 3202(a) of ANILCA states, "Nothing in this Act is intended ... to amend the Alaska constitution."

Q - What will the Subsistence Advisory Council bill fix?

A - The Council bill will amend state law to fix the "all Alaskans" problem and those problems caused by lack of definitions. The bill protects subsistence users and does so in a manner that does not decimate other uses. It will solve these problems for game on state and private lands and fish in navigable waters. The bill by itself is a vital first step towards solving the overall problem. The bill represents "the best solution for Alaska" for which the Governor asked the Council to strive.

Q - What is necessary to fix all the problems?

A - Different people have different overall solutions; some advocate amending ANILCA and our constitution, some want to amend just our Constitution, some just ANILCA, some want to repeal ANILCA outright or try to have it struck down in court. So far there is no consensus in Alaska and we will need to continue to work for an overall solution. What we can do now is fix our state law.

Q - Is it worth fixing just the state law if we can't fix all the problems?

A - Definitely. A new state law can resolve the problems for almost all fish and about half of the game. It will protect subsistence users while preventing commercial and sports uses from being seriously eroded. It will dramatically reduce the number of lawsuits on this issue and provide a model people can live with to see if they would be comfortable extending it to the full state at a later date. Failure to pass a new state law will result in severe damage to commercial and sports fisheries, as well as to general hunting without offering true subsistence users on state lands and waters meaningful protection.

Q - A special session is very expensive, can't this wait until the next regular session?

A - A special session is expensive, the cost for a five day session is estimated at \$140,000. This cost pales beside the cost of not solving this issue. In the last twelve months alone, the Department of Law has paid over \$800,000 just in attorney's fees to plaintiff's attorneys in subsistence cases. This amount does not include the even greater cost of the state attorneys, Fish & Game employees and others on this issue. Even more important, is the potential damage to our state's economy if we needlessly disrupt or damage commercial fishing, Alaska's largest private employer or sport fishing which is a major tourism draw and an economic force in its own right.

Q - What can I do to help?

A - The Governor's Subsistence Advisory Council bill was crafted to be a just consensus among all groups to protect subsistence while not needlessly damaging other uses. Please support the swift passage of the Council bill without substantive amendments. This is not an issue of the Governor vs. the Legislature, not Republicans vs. Democrats, nor even rural vs. urban. Protecting subsistence in a just manner is not an issue to win or lose, but rather a problem for all of us together to solve.

A Brief Introduction to the Governor's Subsistence Advisory Council Bill

How would the new law work?

Participation would be limited to qualified subsistence users. Qualification is based on use criteria applied across the state with three different levels of presumption. The new system would provide that communities and areas in the state be classified into one of three groups, and apply presumptions as follows:

Group 1 consists of areas where the population of each community in the area is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.

A person who hunts or fishes and lives in an area identified under group 1 is presumed to meet the subsistence eligibility standards. No permit or filing of a statement affirming the person's compliance with the standards is required.

Group 2 consists of communities where the population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.

A person who hunts or fishes and lives in a community identified under group 2 is rebuttably presumed to meet the standards upon signing a statement affirming his or her compliance with the standards.

Group 3 consists of communities or urban areas where the population is 7,000 or greater or communities where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life.

A person who lives in a community or in an area identified under group 3 may qualify by applying to the Department of Fish and Game and demonstrating that he or she meets the qualification standards.

What are the qualification standards?

Qualification will be based on a weighted point system of 7 criteria. The boards will adopt the point system by regulation. Qualification requires more points than just meeting the minimums in the first four criteria, but anyone who fails to meet each of the minimums would be disqualified. The last three criteria do not have minimums. The seven criteria are:

- (1) the quantity of fish and game consumed by the person in the preceding twelve months, with a mandatory minimum of 125 pounds;
- (2) the number of species and groups of species of fish and game from the subsistence use area consumed by the person in the preceding twelve months, with a mandatory minimum set by the boards by region;

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- (3) the number of days in the preceding twelve months that the person engaged in taking fish or game in the subsistence use area or spent processing that fish or game, with a mandatory minimum of 30 days;
 - (4) the number of months in the preceding twelve months in which the applicant engaged in taking fish or game in the subsistence use area, with a mandatory minimum of four months;
 - (5) the number of weeks, in the preceding twelve months, during which the taking or processing of fish and game was the applicant's principal work effort, to a maximum of 26 weeks;
 - (6) the number of households, other than the person's household, with which the person shared or received fish and game in the preceding twelve months, with a maximum of 10 households; and
 - (7) whether the person's taking of fish and game occurred solely in the subsistence use area for which they are qualifying.

As indicated above, in group 3 communities a person must fill out an application and score sufficient points to demonstrate his or her eligibility; in group 2 communities, signature of a statement affirming the person's qualification creates a rebuttable presumption that the person is qualified; and in group 1 areas, no paper work is required and the presumption is that all persons who hunt or fish meet the minimum standards.

Where would people be able to subsistence hunt and fish?

People would normally qualify for the subsistence use area in which they live, but could qualify for another area by application. Subsistence use would be on fish stocks and animal populations that have customarily and traditionally been used for subsistence. This would allow qualified subsistence users to hunt and fish as they have in the past. Group 3 areas would be closed to subsistence hunting and fishing, but Group 3 residents who qualify as subsistence users would be able to subsistence hunt and fish in portions of the subsistence use area in which they live that are not classified in group 3 and thus closed to subsistence taking, or they could qualify for another area of the state such as a village of origin.

What are the advantages of this approach?

It protects the resource. It does not divide villages. It protects residents of regional centers from growing out of subsistence, and it allows the small minority of urban residents who are subsistence users to participate. It complies with our constitution. Most importantly, it will protect subsistence and subsistence users while not wiping out other uses. This will reduce the division and political instability that has plagued this issue.

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SPECIAL SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the taking of fish and game; and providing for an effective date."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. FINDINGS, PURPOSE, AND INTENT. (a) The legislature finds that

4 (1) there are Alaskans, both Native and non-Native, who have a traditional, social, or
5 cultural relationship to and dependence upon the wild renewable resources produced by Alaska's land
6 and water; the harvest and use of fish and game for personal and group consumption is an integral part
7 of those relationships;

8 (2) although customs, traditions, and beliefs vary, these Alaskans share ideals of respect
9 for nature, the importance of using resources wisely, and the value and dignity of a way of life in which
10 they use Alaska's fish and game for a substantial portion of their sustenance; this way of life is
11 recognized as "subsistence";

12 (3) customary and traditional uses of Alaska's fish and game originated with Alaska
13 Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses,
14 among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of

1 identity for many subsistence users:

2 (4) while Alaska's fish and game are generally still plentiful, these resources are not
3 unlimited and cannot provide for every desired use, now or in the future: competition for and the level
4 of effort on these resources have required the legislature and the Board of Fisheries and Board of Game
5 to establish a preference for subsistence among the various beneficial uses of fish and game in the state;

6 (5) in most areas of the state, a preference for subsistence can be provided without an
7 overly burdensome intrusion upon other consumptive uses of fish and game;

8 (6) among persons who take fish and game, a large majority of those living in areas
9 described in AS 16.05.268(f)(1), a majority of those living in areas described in AS 16.05.268(f)(2), and
10 a small minority of those living in areas described in AS 16.05.268(f)(3) depend upon the subsistence
11 taking of fish and game;

12 (7) in determining dependence upon the subsistence taking of fish and game, the
13 application of different levels of presumptions based on categories is logical, does not deny any person
14 the opportunity to demonstrate dependence on subsistence use, focuses on persons who depend on
15 subsistence use, is administratively efficient, and is compatible with existing management measures
16 without needlessly interfering with other uses of fish and game resources; and

17 (8) the application of presumptions, based on areas of domicile, to facilitate
18 determinations of a person's qualifications as a subsistence user will maximize the state's management
19 efforts.

20 (b) It is the purpose of this Act

21 (1) to develop and maintain healthy fish stocks and game populations through
22 management based on the sustained yield principle;

23 (2) to provide for a preference for subsistence use over other consumptive uses of fish
24 and game resources;

25 (3) to provide for the participation in the subsistence taking of fish and game by those
26 Alaskans who actually and substantially depend upon that subsistence taking;

27 (4) to maximize the state's management efforts by applying presumptions based on
28 subsistence characteristics of areas to reduce the need for case-by-case individual determinations of
29 dependence on subsistence in those areas of the state that have a high proportion of subsistence users
30 who meet the qualifications set out in this Act.

31 (c) It is the intent of the legislature

1 (1) that subsistence uses of Alaska's fish and game resources are given the highest
2 preference, in order to accommodate and perpetuate those uses;

3 (2) to clarify the statutory protection for actual, substantial dependence on fish and game
4 for subsistence; and

5 (3) that this Act not result in significant reallocations of fish and game in Alaska.

6 * Sec. 2. AS 16.05 is amended by adding a new section to read:

7 Sec. 16.05.268. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a)

8 The Board of Fisheries and the Board of Game shall identify the fish stocks and game
9 populations, or portions of stocks or populations, that are customarily and traditionally taken for
10 subsistence in the areas of the state identified by the boards under (f)(1) and (2) of this section.
11 The commissioner shall provide recommendations to the boards concerning the stock and
12 population identifications. The boards shall make identifications required under this subsection
13 after receipt of the commissioner's recommendations.

14 (b) The appropriate board shall determine whether a portion of a stock or population
15 identified under (a) of this section can be harvested consistent with sustained yield, and

16 (1) if the harvestable portion of the stock or population is sufficient to provide
17 for all consumptive uses, the appropriate board

18 (A) shall adopt regulations that provide a reasonable opportunity to
19 participate in the subsistence uses of those stocks or populations;

20 (B) shall adopt regulations that provide for other consumptive uses of
21 those stocks or populations, subject to preferences among beneficial uses; and

22 (C) may adopt regulations to differentiate among consumptive uses;

23 (2) if the harvestable portion of the stock or population is sufficient to provide
24 for subsistence uses and some, but not all, other consumptive uses, the appropriate board

25 (A) shall adopt regulations that provide a reasonable opportunity to
26 participate in the subsistence uses of those stocks or populations;

27 (B) may adopt regulations that provide for other consumptive use of those
28 stocks or populations; and

29 (C) shall adopt regulations to differentiate among consumptive uses and
30 provide for a preference for the subsistence uses, if regulations are adopted under (B) of
31 this paragraph;

1 (3) if the harvestable portion of the stock or population is sufficient to provide
2 for subsistence uses, but no other consumptive uses, the appropriate board shall adopt regulations
3 that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence
4 uses; and

5 (4) if the harvestable portion of the stock or population is not sufficient to provide
6 a reasonable opportunity for all subsistence uses, the appropriate board shall

7 (A) adopt regulations eliminating all consumptive uses, other than
8 subsistence uses;

9 (B) distinguish among subsistence users, through limitations based on

10 (i) the customary and direct dependence on the fish stock or game
11 population by the subsistence user for human consumption as a mainstay of life;

12 (ii) the proximity of the domicile of the subsistence user to the
13 stock or population; and

14 (iii) the ability of the subsistence user to obtain food if subsistence
15 use is restricted or eliminated.

16 (c) If the harvestable portion of a stock or population is insufficient to provide both for
17 a reasonable opportunity for subsistence and for all other consumptive uses, the department shall
18 prepare a plan to facilitate the recovery of that stock or population to allow for increased
19 consumptive uses as soon as possible. The department shall provide recommendations to the
20 appropriate board for necessary regulatory changes. If subsistence use of a stock or population
21 has been eliminated to achieve sustained yield, the appropriate board shall adopt regulations to
22 allow subsistence uses when that board determines that the stock or population has recovered
23 sufficiently to allow the taking for any consumptive use, consistent with sustained yield.

24 (d) The subsistence use area for a stock or population is the subunit of a game
25 management unit in which the fish or game may be taken under subsistence regulations adopted
26 under (b) of this section, together with contiguous game management subunits, unless the
27 appropriate board identifies and delineates a subsistence use area with different boundaries for
28 a particular fish stock or game population under (e) of this section.

29 (e) Each board shall consider subsistence use area boundaries described in (d) of this
30 section. Each board shall delineate a different boundary for a particular stock or population if
31 the appropriate board determines that the boundary of a subsistence use area is inconsistent with

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1 established patterns of taking and use of that fish stock or game population for subsistence, or
2 is inconsistent with the efficiency and economy of effort, cost, and transportation inherent in the
3 customary and traditional taking and use of fish and game for subsistence.

4 (f) The boards shall, by regulation, for the state, jointly identify and delineate areas, using
5 game management units, portions of game management units, or communities, into the following
6 categories:

7 (1) category 1, an area where the human population of each community in the
8 area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is
9 a principal characteristic of the economy, culture, and way of life of the area;

10 (2) category 2, an area that consists of a single community that has a human
11 population of 2,500 to 6,999, is not part of an urban area, and where dependence upon
12 subsistence is a principal characteristic of the economy, culture, and way of life of the
13 community;

14 (3) category 3, an area that is

15 (A) an urban area, or a single community, where the human population
16 is 7,000 or greater; or

17 (B) an area or community where dependence upon subsistence is not a
18 principal characteristic of the economy, culture, and way of life of the area or community.

19 (g) In determining whether dependence upon subsistence is a principal characteristic of
20 the economy, culture, and way of life of an area under (f) of this section, the boards shall jointly
21 consider the relative importance of subsistence compared to the totality of the following socio-
22 economic characteristics of the area:

23 (1) the social and economic structure;

24 (2) the stability of the economy;

25 (3) the extent and the kinds of employment for wages, including full-time, part-
26 time, temporary, and seasonal employment;

27 (4) the amount and distribution of cash income among those domiciled in the
28 area;

29 (5) the cost and availability of goods and services to those domiciled in the area;

30 (6) the variety of fish and wildlife species used by those domiciled in the area;

31 (7) the seasonal cycle of economic activity;

1 (8) the percentage of those domiciled in the area participating in hunting and
2 fishing activities or using wild fish and game;

3 (9) the harvest levels of fish and game by those domiciled in the area;

4 (10) the cultural, social, and economic values associated with the taking and use
5 of fish and game;

6 (11) the geographic locations where those domiciled in the area hunt and fish;

7 (12) the extent of sharing and exchange of fish and game by those domiciled in
8 the area;

9 (13) additional similar factors the boards establish in regulation to be relevant to
10 their determinations under this subsection.

11 (h) Participation in a subsistence harvest in a subsistence use area is limited to persons
12 who meet the requirements for qualification under (i) and (j) of this section for that subsistence
13 use area, with the following presumptions and requirements:

14 (1) a person who is domiciled in the subsistence use area in an area identified
15 under (f)(1) of this section, and who intends to take fish or game for subsistence purposes is
16 presumed to meet the requirements for qualification under (i) and (j) of this section for that
17 subsistence use area; this presumption may be rebutted only by the state by clear and convincing
18 evidence, and the boards may not require a permit or filing of a statement affirming that the
19 person meets the requirements for qualification under (i) and (j) of this section;

20 (2) a person who is domiciled in the subsistence use area in an area identified
21 under (f)(2) of this section, and who intends to take fish or game for subsistence purposes is
22 rebuttably presumed to meet the requirements for qualification under (i) and (j) of this section
23 for that subsistence use area upon that person's signing a statement, on a form provided by the
24 department, affirming that the person meets those requirements; the state may rebut this
25 presumption by a preponderance of the evidence that the person does not meet those qualification
26 requirements;

27 (3) a person domiciled in an area identified under (f)(3) of this section or who
28 is domiciled outside of the subsistence use area is qualified to participate in a subsistence fishery
29 or hunt in that subsistence use area only upon certification by the commissioner that the person
30 meets the requirements for qualification under (i) and (j) of this section.

31 (i) The boards shall jointly, by regulation, adopt procedures by which the commissioner

1 shall determine the qualification of a person to subsistence fish or hunt in a specific subsistence
 2 use area. The commissioner shall provide recommendations to the boards on qualification
 3 procedures. The boards shall jointly adopt the regulations required by this subsection after the
 4 receipt of the commissioner's recommendations. The boards shall adopt, by regulation, a
 5 weighted point system to determine a person's eligibility. The boards shall structure the point
 6 system so that the minimum points required for qualification exceed the total points received for
 7 meeting the mandatory minimum requirements in (1) - (4) of this subsection. The point system
 8 shall be based on the following criteria and restrictions:

9 (1) the quantity of fish and game consumed by the person in the preceding 12
 10 months, with a mandatory minimum of 125 pounds consumed in that period;

11 (2) the number of species and groups of species of fish and game from the
 12 subsistence area used by the person in the preceding 12 months, with a mandatory minimum
 13 number of species, or groups of species, as determined jointly by the boards by regulation; the
 14 mandatory minimum number, and any grouping of species, may vary by geographical region of
 15 the state, based on the diversity of species in a region;

16 (3) the number of days in the preceding 12 months that the person engaged in the
 17 taking of fish or game in the subsistence use area, or the processing of that fish or game, with
 18 a mandatory minimum of 30 days in that period:

19 (4) the number of months in the preceding 12 months in which the person
 20 engaged in the taking of fish or game in the subsistence use area, with a mandatory minimum
 21 of four months in that period;

22 (5) the number of weeks in the preceding 12 months during which the taking or
 23 processing of fish or game was the person's principal work effort, with no additional
 24 consideration given beyond a maximum of 26 weeks;

25 (6) the number of households, other than the person's household, with which the
 26 person shared or from which the person received fish and game in the preceding 12 months, with
 27 no additional consideration given beyond a maximum of 10 households; and

28 (7) whether the person's taking of fish and game occurred solely in the
 29 subsistence use area.

30 (j) A person who does not meet the mandatory minimum requirements of each of (i) (1) -
 31 (4) of this section does not meet the requirements for qualification under (i) of this section.

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1 (k) For the purposes of (h) and (i) of this section, the taking, processing, or use of the
 2 fish and game must have been legal, noncommercial, and characterized by efficiency and
 3 economy of effort, cost, and transportation. For the purposes of (i)(1), (2), and (6) of this
 4 section, the fish and game may not have been purchased for money or other monetary
 5 consideration. The boards shall jointly adopt regulations allowing a person who has been unable
 6 to meet the criteria of (h) or (i) of this section because of hospitalization, or military service or
 7 full-term attendance at an educational institution outside the relevant subsistence use area to base
 8 responses on the 12 months immediately preceding the commencement of the circumstance.

9 (l) The commissioner shall provide, by regulation, for an expedited review procedure for
 10 a person who is determined by the department not to meet the qualifications as a subsistence
 11 user.

12 (m) Fish stocks and game populations, or portions of fish stocks and game populations
 13 not identified under (a) of this section may be taken only under nonsubsistence regulations.

14 (n) Taking and use of fish and game authorized under this section are subject to
 15 regulations regarding open and closed areas, seasons, methods and means, marking and
 16 identifications requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations.
 17 Takings and uses of resources authorized under this section are subject to AS 16.05.831 and
 18 AS 16.30.010.

19 (o) For purposes of
 20 (1) subsection (b) of this section, "reasonable opportunity" is an opportunity, as
 21 determined by the appropriate board,

22 (A) allowing a subsistence user to participate in a subsistence hunt or
 23 fishery that provides a normally diligent participant with a reasonable expectation of
 24 success of taking of fish or game, but does not guarantee the taking of fish or game; the
 25 conditions of the hunt or fishery; or the taking of all the fish and game that the participant
 26 wants or needs; and

27 (B) based on the findings of the appropriate board on each of the
 28 following factors:

- 29 (i) resource population and management objectives;
- 30 (ii) estimated harvest per unit of effort by participants in the
- 31 fishery or hunt;

(iii) patterns and levels of customary and traditional taking and use of the fish or game;

(iv) migratory patterns and availability of fish or game;

(v) competition for the fish or game from other subsistence and nonsubsistence uses; and

(vi) other factors that the appropriate board considers relevant.

(2) subsection (i) of this section, "preceding 12 months" means for a person described

(A) in (h)(1) of this section, the 12 months preceding the taking of the fish or game resource;

(B) in (h)(2) of this section, the 12 months preceding the date of signing of the required statement;

(C) in (h)(3) of this section, the 12 months preceding the date of signing the application to the commissioner.

* Sec. 3. AS 16.05.251(d) is amended to read:

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.268 [AS 16.05.258], provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

* Sec. 4. AS 16.05.255(d) is amended to read:

(d) Regulations adopted under (a) of this section shall provide that, consistent with the provisions of AS 16.05.268 [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.

* Sec. 5. AS 16.05.940(29) is amended to read:

(29) "subsistence fishing" means the taking [CF, FISHING FOR,] or possession, by a qualified resident, of fish, shellfish, or other fisheries resources [BY A RESIDENT DOMICILED] in a subsistence use [RURAL] area of the state, in accordance with regulations adopted under AS 16.05.268, for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries, except for rod and reel;

* Sec. 6. AS 16.05.940(30) is amended to read:

(30) "subsistence hunting" means the taking [OF, HUNTING FOR,] or possession, by a qualified resident, of game [BY A RESIDENT DOMICILED] in a subsistence use

1 [RURAL] area of the state, in accordance with regulations adopted under AS 16.05.268, for
2 subsistence uses by means defined by the Board of Game:

3 * Sec. 7. AS 16.05.940(31) is amended to read:

4 (31) "subsistence [USES]" means the noncommercial, customary and traditional
5 taking in a subsistence use area of the state, and the customary and traditional uses, of fish
6 and game [WILD, RENEWABLE RESOURCES] by a resident [DOMICILED IN A RURAL
7 AREA OF THE STATE] for direct, noncommercial, personal or family consumption as food,
8 [SHELTER, FUEL,] clothing, [TOOLS,] or transportation, for the making and selling of
9 handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal
10 or family consumption, for noncommercial sharing, and for barter and [THE] customary trade
11 of a portion of fish or game resources harvested primarily [, BARTER, OR SHARING] for
12 personal or family consumption; in this paragraph, "family" means persons related by blood,
13 marriage, or adoption, and a person living in the same household on a permanent basis;

14 * Sec. 8. AS 16.05.940 is amended by adding new paragraphs to read:

15 (36) "customary and traditional" means the noncommercial, long term, consistent,
16 and ongoing dependence on the taking and use of fish or game in a specific area and the use
17 patterns and harvest levels of that fish or game that have been established over at least one
18 preceding generation of users;

19 (37) "customary trade" means the limited, noncommercial exchange, for minimal
20 amounts of cash, as restricted by the appropriate board, of fish or game resources harvested
21 primarily for personal or family consumption; "customary trade" does not include sales in
22 commercial channels; the terms of this paragraph do not restrict money sales of furs or
23 furbearers;

24 (38) "game management unit" is the same as an area of the state established as
25 a game management unit by the Board of Game under AS 16.05.255;

26 (39) "sustained yield" means the management principle of utilization,
27 development, and maintenance, applied to naturally occurring fish and game resources, that
28 provides beneficial consumptive uses in perpetuity, subject to preferences among such uses, and
29 seeks to provide for desired population increases and prevent undesired declines, for the purpose
30 of maintaining healthy, self-perpetuating stocks or populations.

31 * Sec. 9. AS 16.05.258 and AS 16.05.940(26) are repealed.

1 * Sec. 10. REGULATIONS. Notwithstanding the provisions of AS 16.05.258, the Board of Fisheries,
2 Board of Game, and Department of Fish and Game shall adopt regulations necessary to implement the
3 provisions of this Act.

4 * Sec. 11. TRANSITION. (a) It is the intent of the legislature that the Board of Fisheries and the
5 Board of Game expeditiously adopt regulations necessary to implement this Act.

6 (b) Any regulations adopted by the Board of Fisheries, Board of Game, or Department of Fish
7 and Game after July 1, 1992, may not be inconsistent with the provisions of this Act.

8 (c) Regardless of whether regulations adopted under the authority of AS 16.05.251, 16.05.255,
9 or 16.05.258 and in effect on July 1, 1992 are inconsistent with the provisions of this Act, they may
10 continue to be implemented and enforced until the effective date of sec. 2 of this Act.

11 * Sec. 12. REVIEW. (a) The legislature acknowledges and recognizes that this Act deals with a
12 subject of vital concern and that the subject merits review. Therefore, it is the intent of the legislature
13 that the operation of this Act and the regulations adopted under this Act be fully reviewed by the
14 governor no later than June 1, 1994.

15 (b) This review period is intended to allow for further research and to gain experience in
16 implementing the Act and regulations adopted under it. It is the intent of the legislature that the
17 governor convene a representative group to provide recommendations to the governor before the end of
18 the review period. It is the intent of the legislature that representatives of the legislature and persons
19 with a history in the formulation of subsistence legislation in this state participate in the group.

20 (c) It is the intent of the legislature that the review under this section occur with public input
21 and participation.

22 (d) No later than September 1, 1994, the governor shall provide a report to the legislature on
23 the results of the review and any proposed recommendations for statutory amendments.

24 * Sec. 13. Sections 10 and 11 of this Act take effect immediately under AS 01.10.070(c).

25 * Sec. 14. Sections 1 - 9 and 12 of this Act take effect on the effective date of regulations first
26 adopted under this Act by the Board of Fisheries and the Board of Game, acting jointly.

GOVERNOR'S SUBSISTENCE BILL

SECTION-BY-SECTION DESCRIPTION

February 21, 1992

Section 1

Section 1 of the bill sets out findings for, and the purpose and intent of the proposed new law.

Section 2

Section 2 sets out proposed new AS 16.05.268, which contains the crux of the new subsistence law. An analysis of the proposed new statute, by subsection, follows.

Proposed AS 16.05.268(a):

This subsection is very similar to existing AS 16.05.258(a). Under this new subsection, the Board of Fisheries and the Board of Game are to identify fish stocks and game populations that have been subject to customary and traditional subsistence use. The term "customary and traditional" is defined in proposed AS 16.05.940(36) (sec. 6 of the bill). The commissioner is to make recommendations to the boards concerning the identification of stocks and populations and whether they have been subject to customary and traditional subsistence use.

There are definitions of "fish stock" and "game population" in existing law; those definitions are left unchanged. Existing law also already requires the boards to identify the stocks and population used for subsistence.

The identification of fish stocks and game populations subject to subsistence regulations is a situation where all groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that the subsistence preference is protected.

The identification of subsistence stocks leaves those that are not identified to be harvested by all Alaskans under nonsubsistence regulations. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and recently transplanted (not reestablished) game; and some steelhead and trout stocks and brown bear populations. There are also fish stocks and game populations in areas of the state so remote from any village or community that there is no established use of them. As in existing

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law, whether or not fish or game are or are not subsistence stocks and populations is a factual determination made by the boards.

Fish stocks and game populations in urban areas of the state or in areas where dependence upon subsistence is not a principal part of the economy, culture, and way of life of the area will not be subject to subsistence hunting under the statute. (See the discussion of subsecs. (f) and (g), below.) Fish and game in nonsubsistence areas will continue to be available under general hunting regulations and sport, personal use, and commercial fishing regulations. The subsection does not affect where subsistence users may live. They can live anywhere in the state. Subsistence use areas overlap areas closed to subsistence taking. Qualified subsistence users who live in an area of the state where there is no taking for subsistence in the immediate area would continue to have access to fish and game under subsistence regulations in areas proximate to the closed area and other areas of the state.

Proposed AS 16.05.268(b):

This proposed subsection is very similar to existing AS 16.05.258(b)(1). That existing statute requires the boards to determine "what portion" of the resource can be harvested consistent with sustained yield. Some had interpreted this as a requirement for an exact determination of the number of animals that could be harvested. Such an exact number is normally beyond calculation with the biological information that is available. The language in proposed AS 16.05.268(b) is designed to conform to the actual capabilities of the boards and the ability of the Department of Fish and Game to provide information to the boards, and omits language that could be interpreted to require a determination of exact numbers.

As in existing law, this subsection requires the boards to provide a preference for subsistence uses, although even subsistence use may be curtailed to protect stocks or populations and achieve sustained yield. Subsistence hunting and fishing regulations must provide a reasonable opportunity to participate. "Reasonable opportunity" is defined in proposed AS 16.05.268(o), discussed later.

The subsistence preference does not work like the Endangered Species Act, mandating limitation or closure of any other fishery or hunt that is believed to contain even a single member of the subsistence stock or population. The subsistence preference applies when a stock becomes a stock, in other words, wherever it becomes manageable as a unit. While this point may seem self-evident from the existing definitions of stock and populations, some have argued that the courts should eliminate all downriver and marine fisheries on certain fish stocks that spawn, for example, in