

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7479 SENATE JUDICIARY

adversely affected by that standard or criteria. The legislature can enhance the ability of the state to defend SB 443 against such challenges by developing a record of careful consideration of each element of the bill to demonstrate that the element was adopted for specific reasons and not arbitrarily, and by paying particular attention to the goal that the legislature is seeking to achieve in each element of the bill and to the means that it chooses to achieve the goal.

Four, the title of SB 443 fails to fully express the contents of the bill and should be amended accordingly.

DISCUSSION

This memorandum addresses the constitutional issues raised by SB 443.^{1/} SB 443 relates to the subsistence use and allocation of fish and game resources. The bill establishes an intricate system for controlling entry into subsistence user groups and distributing the activities of those user groups throughout the state. The bill provides that persons with a history of dependence on and use of fish and game resources will be able to continue their subsistence activities while leaving an opportunity for new persons to qualify for subsistence activities. Minimizing the administrative burden on the individual subsistence user and the Department of Fish and Game is also an important element of the bill.

The bill provides for subsistence use of fish and game resources under the legislature's authority to provide for the utilization, development, and conservation of natural resources.^{2/} Subsistence is not a constitutionally mandated or protected use of fish and game resources. As a statutorily created use of fish and game resources, any system for management of subsistence use and allocation of fish and game for subsistence use must be consistent with the Alaska Constitution. Of particular relevance to the subsistence use of fish and game are the "open access" provisions of the Alaska Constitution: common use section^{3/}, no exclusive right of

^{1/} This memorandum does not address issues of statutory construction or legislative draftsmanship that do not implicate the Alaska Constitution. Those issues can be addressed later, if you wish.

^{2/} Article VIII, sec. 2:

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

^{3/} Article VIII, sec. 3:

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

fishery clause^{4/}, and uniform application section^{5/}. Although the ramifications of these provisions are varied, they share at least one meaning: exclusive or special privileges to take fish and game are prohibited. The no exclusive right of fishery clause states this explicitly with regard to fisheries. The proceedings of the Alaska Constitutional Convention show that this same meaning was intended with respect to fish and game under the common use section and the uniform application section. McDowell v. State, 785 P.2d 1 (Alaska 1989).

The bill avoids creating an obviously closed class of subsistence users like the rural resident preference that the Alaska Supreme Court struck down in McDowell. Instead, the bill establishes a system in which any person, ostensibly, may engage in subsistence use of fish and game provided that the person satisfies the prescribed eligibility criteria.

ELIGIBILITY CRITERIA FOR SUBSISTENCE

SB 443 proposes seven fundamental considerations for determining who is eligible to engage in subsistence hunting and fishing. SB 443, Sec. 2. Sec. 16.05.268(i); page 7, line 3 - page 8, line 1. The Board of Fisheries and the Board of Game are to jointly establish the actual criteria and a concomitant point system for determining eligibility based on the fundamental considerations. Though the boards jointly develop the actual eligibility criteria, four of the fundamental considerations in SB 443 are in fact specific mandatory minimum standards that a person must satisfy in order to qualify for subsistence hunting and fishing:

- (1) the quantity of fish and game consumed by the person in the preceding 12 months, with a mandatory minimum of 25 pounds consumed in that period;
- (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 12 months, with a mandatory minimum number of species, or groups of species, as determined jointly by the boards by regulation; the mandatory minimum number, and any grouping of species, may

^{4/} Article VIII, sec. 15, in relevant part:

No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

^{5/} Article VIII, sec. 17:

Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

vary by geographical region of the state, based on the diversity of species in a region;

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

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

SB 443, Sec. 2, Sec. 16.05.268(i)(1) - (4); page 7, lines 12 - 24.

Notably three of the four mandatory standards (Sec. 16.05.268(i)(2) - (4)) set specific minimum requirements on the number of species of fish and game consumed and the number of days and months engaged in hunting and fishing activities (at least a total of 30 days during any four months) and requires that each of the three standards be satisfied in a single subsistence use area during the preceding 12 months.^{6/} Once an applicant for subsistence privileges satisfies these mandatory minimum standards in a subsistence use area and the other criteria adopted by the boards, the applicant is then eligible to participate in subsistence hunting and fishing in that subsistence use area. If an applicant wants to engage in subsistence hunting and fishing in an additional subsistence use area or to move subsistence activities to a new subsistence use area, the applicant must then satisfy the three mandatory standards in the new area as well as the other criteria established by the boards. The applicant can satisfy the three mandatory standards in the new subsistence use area by engaging in sport or personal use fishing or sport hunting in the area, taking the prescribed number of species in the area, spending the required amount of time fishing and hunting in the area or processing fish and game taken in the area.

By combining standards for eligibility to engage in subsistence hunting and fishing with a requirement that the standards be satisfied in the subsistence use area in which the applicant wishes to use for subsistence hunting and fishing, the three mandatory standards establish each subsistence use area as a separate subsistence hunting and fishing area open only to certain persons and closed to all others. In fact the standards establish separate user groups for each subsistence use area and then limits admission to the user group to those persons who have a history of recent and

^{6/} A subsistence use area is the subunit of a game management unit together with the contiguous game management subunits, unless a board describes a different subsistence use area for a particular fish stock or game population. SB 443, Sec. 2, Sec. 16.05.268(d) and (e). There are currently 69 game management subunits in the state and thus a possible 69 different subsistence use areas. The actual number of subsistence use areas will probably be less because certain areas (urban areas) are closed to subsistence use of fish and game and subsistence use areas may not be established for those areas. See, SB 443, Sec. 2, Sec. 16.05.268(a).

extensive use in the area. An otherwise qualified subsistence user does not have the freedom to choose which subsistence use area the person will hunt or fish in. The person is confined to that subsistence use area in which he has established the requisite history of use.^{7/} All other persons are barred from using the area for subsistence hunting and fishing. Each subsistence use area becomes an exclusive use area open to use by only a few eligible persons and as such confers a "special privilege" to use the fish and game in the area on those persons.

A system for determining eligibility for engaging in subsistence hunting and fishing which opens participation for some and closes participation for others "will necessarily create tension with article VIII." McDowell, 785 P.2d at 9. Limits on admission to user groups are subject to scrutiny under the article VIII equal access provisions (State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v. State, 763 P.2d 488, 492 (Alaska 1988)), because the provisions of article VIII were intended to guarantee the broadest possible access to and use of fish and game (Owsichek, 763 P.2d at 492 - 93) and to prohibit exclusive or special privileges to take fish and game (McDowell, 785 P.2d at 6). "The history of the common use clauses, . . . , reveals anti-monopoly intent to prevent 'exclusive grants' and 'special privilege[s],' wholly apart from the limits imposed by other constitutional provisions." Owsichek, 763 P.2d at 496.

In Owsichek, the Alaska Supreme Court struck down exclusive guide areas and joint use areas, because these areas were grants of monopolies or special privileges based on a guides previous use, occupancy, and investment in the area. "To grant such a special privilege based on seniority runs counter to the notion of 'common use'." Owsichek, 763 P.2d at 496. In McDowell, the Alaska Supreme Court struck down the rural residency requirement for subsistence because it amounted to an exclusive or special privilege prohibited by the open access provisions of the Alaska Constitution. McDowell, 785 P.2d at 9. In lieu of the rural residency requirement for determining eligibility for subsistence use of fish and game, SB 443 uses the three mandatory minimum requirements to require recent and extensive use in the subsistence use area as a precondition for eligibility. Just as the rural residency requirement precluded nonrural residents from engaging in subsistence activities, the

^{7/} For example, a subsistence user in Kotzebue who moves to Tok must continue to return to Kotzebue to engage in subsistence hunting and fishing, until the user establishes the prerequisite history of use in the Tok area. (This assumes that the state does not deny the person's right to continue to engage in subsistence hunting and fishing in the Kotzebue area, because travelling from Tok to Kotzebue no longer satisfies the economical and efficient requirement for subsistence activities.)

For example, if a tier I subsistence user is closed out of his/her area because of a resource shortage that user may not move his/her subsistence activities to another subsistence use area, even though the person has a continuing need to engage in subsistence hunting and fishing.

recent and substantial use requirement of SB 443 precludes all other persons who are similarly situated but who do not have a recent and substantial history of use in the area from engaging in subsistence hunting and fishing in the subsistence use area. The fact that any nonrural resident could move to a rural area and thus qualify for subsistence was ineffective in saving the former rural residency requirement from invalidity. McDowell, 785 P.2d at 7. Likewise the ability of an otherwise qualified person to establish a recent and substantial history of use, of a new or an additional subsistence use area does not prevent the requirement for such a history of use as a condition precedent to use of the new area, from being an excessive infringement on open access provisions of the Alaska Constitution.

Review of the three mandatory standards according to equal protection analysis under the uniform application section requires the following procedure. First, the three mandatory standards must have a legitimate purpose. The purposes of SB 443 that seem relevant to the mandatory standards are protection of healthy fish stocks and game populations and allowing participation in the subsistence taking of fish and game by those who actually and substantially depend on subsistence use of fish and game. SB 443, Section 1(b). These purposes are legitimate purposes. Owsichek, 763 P.2d at 496 - 97; McDowell, 785 P.2d at 13 (concurring opinion). Second, the importance of the individual interest involved must be determined. The individual interest in equal access to fish and game is a highly important interest running to each person within the state. McDowell, 785 P.2d at 10; Owsichek, 763 P.2d at 492 n. 10. Third, the importance of the state's purpose must be balanced against the individual interest involved. McDowell, 785 P.2d at 10. The state's purpose must be at least important to overcome the highly important individual interest at stake. Fourth, the means to further the important state purpose must be carefully drawn and designed for the "least possible infringement on article VIII's open access values." McDowell, 785 P.2d at 10.

Assuming that the state's purpose underlying the three mandatory standards is sufficiently important to countervail the highly important individual interest at stake, it would appear that the means chosen to achieve the state's purpose is not the least possible infringement on open access to fish and game resources. The three mandatory standards allow otherwise qualified individuals to engage in subsistence hunting and fishing in only those subsistence use areas where the individual has a recent and extensive history of use. The remaining dozens of subsistence use areas are closed to this individual.^{8/}

^{8/} This result is intentional. The Section-By-Section Description of the Governor's Subsistence Bill, dated February 21, 1992, states at page 11:

The statute does not provide for qualification on a statewide basis; hunting and fishing in one subsistence area will not qualify the user to subsistence hunt and fish in another area. While
(continued...)

In my opinion, there is a substantial and unnecessary risk that the three mandatory standards contained in SB 443 are an impermissible infringement on open access to fish and game resources and thus would violate the open access provisions of the Alaska Constitution.

It is the creation of dozens of separate, albeit slightly overlapping, subsistence use areas that are each subject to distinct area specific criteria for access that infringes upon the open access provisions of article VIII. Those persons who ultimately qualify for subsistence hunting and fishing privileges in a subsistence use area receive a "special privilege" that is denied to all other persons. Those persons who are not qualified for subsistence hunting and fishing in the area are denied access to the user group for that subsistence use area because they have not established the requisite history of use.

The utilization of past use or activities in an area, as criteria for granting or denying access to fish and game resources has been rejected by the Alaska courts in Owsichek (guide exclusive use and joint use areas) and in Bozanich v. Noerenberg, (Alaska Superior Court, First Judicial District, Juneau, Case No. 70-389, March 15, 1971; state may not bar entry into a salmon net fishery by requiring prior experience in that fishery).

The primary shortcoming of the three mandatory standards is that they combine determinations on access to a user group with determinations on allocation of the fish and game resource. The Alaska Supreme Court is supportive of the state's power to allocate fish and game resources under the sustained yield section of the Alaska Constitution^{2/} (Gilbert v. State Department of Fish and Game, 803 P.2d 391 (Alaska 1990); Meier v. State, Board of Fisheries, 739 P.2d 172 (Alaska 1987)), provided that the allocations are not arbitrary and unreasonable and are consistent with and reasonably necessary to the conservation and development of fish and game resources (Gilbert, 803 P.2d at 399; Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 903 (Alaska 1981)). However, the authority to make

^{8/}(...continued)

it may be technically possible for a person to qualify in more than one subsistence use area under this subsection [SB 443, Sec. 2, Sec. 16.05.268(i)], it is generally contemplated that the vast majority of users will qualify for only one area.

^{2/} Article VIII, sec. 4:

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

allocation decisions does not imply a power to limit admission to a user group. State v. Hebert, 803 P.2d 863, 866; (Alaska 1990) McDowell, 785 P.2d at 7 - 8;^{10/}

The two determinations could be separated by eliminating the requirement that the three mandatory standards be satisfied in a single subsistence use area. If the two determinations were separated a fundamental weakness of SB 443 would be avoided and SB 443 would better withstand challenges under article VIII of the Alaska Constitution. SB 443 can be amended to include criteria for determining where qualified subsistence users may engage in subsistence hunting and fishing or for establishing procedures for allocating fish and game resources among subsistence users. Prior use of a subsistence use area for the taking of fish and wildlife could be among the factors used to determine where a person may engage in subsistence fishing and hunting.

PROOF OF ELIGIBILITY

Though the criteria for establishing eligibility to engage in subsistence activities are relatively uniform, SB 443 provides that the proof necessary satisfy the criteria varies significantly depending on where a person lives.

A person who lives in a category 1 area^{11/} is presumed to satisfy all eligibility criteria without having to establish more than the person's place of residence. The person may engage in subsistence activities until it is proven by clear and convincing evidence that the person is not qualified to engage in subsistence. SB 443, Sec. 2, Sec. 16.05.268(h)(1); page 6, lines 17 - 22.

^{10/} The requirement that a person must engage in subsistence activities in a specific subsistence use area is somewhat analogous to the superexclusive fishing districts established by the Board of Fisheries for the Bering Sea herring sac roe fisheries. The board established two superexclusive herring sac roe fishing districts. If a fisherman chose to fish in either of these fisheries, the fisherman could not fish in any other herring sac roe fishing districts. The Alaska Supreme Court upheld the use of the superexclusive use fisheries for the purpose of allocating the harvest of herring between competing groups of commercial fisherman. State v. Hebert, 803 P.2d 863 (Alaska 1990). The court found that superexclusive fishing districts were consistent with the Alaska Constitution because it did not limit admission to a user group, because the fisherman was free to choose which fishing district to fish in. Hebert, 803 P.2d at 866.

^{11/} A category 1 area is an area where the human population of each community in the area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area. SB 443, Sec. 2, Sec. 16.05.268(f)(1); page 5, lines 9 - 11.

A person who resides in a category 2 area^{12/} is presumed to satisfy all eligibility criteria and need only sign a document affirming that the person does indeed qualify. SB 443, Sec. 2, Sec. 16.05.268(h)(2); page 6, lines 23 - 29. The person may engage in subsistence activities until it is proven by a preponderance of the evidence that the person is not qualified to engage in subsistence.^{13/}

A person who resides in a category 3 area^{14/} may engage in subsistence activities only after the person has convinced the commissioner of fish and game that the person satisfies the eligibility criteria adopted by the joint boards. SB 443, Sec. 2, Sec. 16.05.268(h)(3), page 6, line 30 through page 7, line 2.

Under SB 443, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into the class of subsistence users, they may inhibit equal and open access to subsistence resources and, thus, are at least constitutionally suspect under the open access provisions of the Alaska Constitution.

The rural preference of the former subsistence law was struck down in part because it was an "extremely crude" method to provide for the need to engage in subsistence activities. McDowell, 785 P.2d at 10. The classification scheme inherent in the category 1, 2, and 3 areas is subject to similar criticism. Residents in category 1 areas are presumed to qualify for subsistence activities regardless of their individual characteristics. Even those unqualified residents of a category 1 area who engage in subsistence are not penalized or sanctioned for their activities. An unqualified resident of a category 2 area is at least potentially subject to criminal prosecution for falsely alleging their qualifications. It is only the residents of a category 3 area that are evaluated on their individual qualifications. The category 1, 2, and 3 area concept is not the "classification scheme employing individual characteristics" which

^{12/} A category 2 area is an area that consists of a single community that has a human population of 2,500 to 6,999, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community. SB 443, Sec. 2, Sec. 16.05.268(f)(2); page 5, lines 12 - 15.

^{13/} If it is proven that the person is not qualified for subsistence and that the person was aware of the lack of qualifications, the person is potentially subject to criminal prosecution for unsworn falsification under AS 11.56.210.

^{14/} A category 3 area is an area that is
(A) an urban area or a single community where the human population is 7,000 or greater; or
(B) an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. SB 443, Sec. 2, Sec. 16.05.268(f)(3); page 5, lines 16 - 21.

the McDowell court proposed as being "less invasive of Article VIII open access values." McDowell, 785 P.2d at 11. The category 1, 2, and 3 area concept classifies persons as a group based on where they live in the state.

The purpose for this burden on equal access to fish and game resources under article VIII must be, at the minimum, an important purpose. McDowell, 785 P.2d at 10.

According to the Section-By-Section Description of the Governor's Subsistence Bill,^{15/} the primary purpose of the category 1, 2, and 3 areas is to simplify the task of determining who is eligible to engage in subsistence activities. This purpose amounts to promoting administrative convenience. Administrative convenience is generally accepted as legitimate purpose for legislation and regulations but is not necessarily an important purpose. See, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980); Deubelbeiss v. Commercial Fisheries Entry Commission, 689 P.2d 487, 489 (Alaska 1984). Administrative convenience may not be sufficient to justify the burdens imposed by the category 1, 2, and 3 area classification system.

Assuming that the court does find administrative convenience or some other purpose behind the category 1, 2, and 3 area classification system to be important, it is then necessary to establish that the classification system is "designed for the least possible infringement on article VIII's open access values." McDowell 785 P.2d at 10. Though the classification system may be better than the rural-urban distinction made by the former law, it is not the system based on individual characteristics that the Alaska Supreme Court was looking for. In light of the purpose of the uniform application clause "to exclude an especially privileged status for any person in the use of natural resources subject to disposition by the state"^{16/} it is possible that the courts will require less disparity among residents of the state based on their place of residence than provided in SB 443.

A challenge to the category 1, 2, and 3 areas classification system on equal protection grounds under the uniform application section may result in an adverse decision from the courts because the system places different burdens on residents of the state based on where they live and not on their individual qualifications to engage in subsistence hunting and fishing. A system that required all residents to establish their eligibility to engage in subsistence in the same manner or that gave all residents the benefit of the same presumptions would provide fewer grounds for judicial challenge and be less susceptible to unanticipated judicial constructions.

^{15/} Page 10 - 11.

^{16/} Owsichuk, 763 P.2d at 498 n. 17; quoting 6 Proceedings of the Alaska Constitutional Convention, app. V, at 99 (Commentary); emphasis added by court.

OTHER ISSUES

In addition to the specific issues discussed above, several provisions of SB 443 may generate challenges on equal protection grounds. Any provision of the bill that establishes a fixed standard or criteria to determine whether a person is eligible to engage in subsistence hunting and fishing or establishes the conditions under which the person may apply for subsistence privileges or may engage in subsistence hunting and fishing is potentially subject to challenge by a person who is adversely affected by that standard or criteria. For the most part, these challenges will be based on either the state equal protection clause (article I, sec. 1) or the state uniform application section (article VIII, sec. 17).

In order to survive such challenges, the state must be able to show that the standard or criteria is reasonable and not arbitrary, bears an appropriate relationship to a sufficiently important state purpose, and bears an appropriate nexus to the state purpose. The ability of the state to make such showings is dependent in large part upon the extent of review and consideration that the legislature accords to each of the standards and criteria. A record of careful consideration of each element of SB 443 will provide the evidence necessary to establish that an element was adopted for specific reasons and not arbitrarily. It is also important that the legislature pay particular attention to the goals that it is seeking to achieve in each element of the bill and the means that it chooses to achieve the goal. The closer the relationship between the goal and the means chosen to achieve it, the greater is the likelihood that element of the bill will survive scrutiny under the equal protection clause or the uniform application section.

TITLE OF SB 443

According to the title of SB 443, the bill relates "to the taking of fish and game for subsistence." However two provisions of the bill define the terms "game management unit" and "sustained yield". SB 443, Sec. 6, Sec. 16.05.940(38) and (39), page 10, lines 17 - 23. These newly defined terms are intended to apply to subsistence and sport hunting and to subsistence, commercial, sport, and personal use fishing. To the extent that these newly defined terms apply to more than subsistence, the terms are outside of the title of the bill. Article II, section 13 of the Alaska Constitution requires that the subject of each bill be expressed in its title. The purpose of this provision is to give the legislature and the people fair notice as to the contents of the bill. Without mentioning in the bill title that the bill is defining "sustained yield" and "game management unit", the legislature and the people are not aware that those terms are being defined for purposes not related to subsistence. It is unlikely that a court would declare the entire bill unconstitutional for the failure to express the entire contents of the bill in the title. A court is more likely to find the bill

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March 23, 1992
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constitutional, but to limit the application of the terms "game management unit" and "sustained yield" to the subsistence context.

The title problem is easily corrected by adding the phrase "defining 'sustained yield' and 'game management unit:'" to the title.

* * *

You also asked that I speak with Attorney General Cole regarding the perspective of the Department of Law on the constitutional issues raised in this memorandum. I have spoken with Attorney General Cole and Lance Nelson of the Department of Law and have discussed with them the issues raised in this memorandum. It is the opinion of the Department of Law that SB 443 is defensible against challenges based on issues raised in this memorandum and that SB 443 is constitutional.

If I may be of further assistance, please advise.

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Alaska State Legislature



Official Business

Senator Al Adams

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TO: Senator Rick Hulford, Chair, and members of the
Senate Judiciary Committee

FROM: Senator Al Adams *AA*

RE: Senate Bill 443, Subsistence legislation

DATE: April 7, 1992

I am circulating the attached memorandum from our legal counsel in consideration of the subsistence bill in committee today.

Thank you.

cc: Committee members

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MEMORANDUM

March 16, 1992

SUBJECT: Constitutional issues raised by the Governor's Subsistence Bill.
(SB 443)

TO: Senator Lyman Hoffman

FROM: George Utermohle 
Legislative Counsel

You have asked whether SB 443, the Governor's subsistence bill, is consistent with the Alaska Constitution?

SHORT ANSWER

One, SB 443 provides for the establishment of dozens of subsistence use areas. The mandatory minimum eligibility standards for subsistence proposed by SB 443 establish each subsistence use area as a separate use area and limit admission to the user group for that area to only those persons who have an extensive history of use in the area. The mandatory minimum eligibility standards pose a significant infringement on the open access values of the Alaska Constitution. There is a substantial risk that the mandatory minimum eligibility standards are unconstitutional.

Two, under SB 443, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into fish and game user groups, they may inhibit equal and open access to fish and game resources and, thus, are at least constitutionally suspect under the open access provisions of the Alaska Constitution.

Three, the title of SB 443 fails to fully express the contents of the bill and should be amended accordingly.

DISCUSSION

This memorandum addresses the constitutional issues raised by SB 443.^{1/} SB 443 relates to the subsistence use and allocation of fish and game resources. The bill establishes an intricate system for controlling entry into subsistence user groups and distributing the activities of those user groups throughout the state. The bill provides that persons with a history of dependence on and use of fish and game resources will be able to continue their subsistence activities while leaving an opportunity for new persons to qualify for subsistence activities. Minimizing the administrative burden on the individual subsistence user and the Department of Fish and Game is also an important element of the bill.

The bill provides for subsistence use of fish and game resources under the legislature's authority to provide for the utilization, development, and conservation of natural resources.^{2/} Subsistence is not a constitutionally mandated or protected use of fish and game resources. As a statutorily created use of fish and game resources, any system for management of subsistence use and allocation of fish and game for subsistence use must be consistent with the Alaska Constitution. Of particular relevance to the subsistence use of fish and game are the "open access" provisions of the Alaska Constitution: common use section^{3/}, no exclusive right of fishery clause^{4/}, and uniform application section^{5/}. Although the ramifications of

^{1/} This memorandum does not address issues of statutory construction or legislative draftsmanship that do not implicate the Alaska Constitution. Those issues can be addressed later, if you wish.

^{2/} Article VIII, sec. 2:

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

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

^{4/} Article VIII, sec. 15, in relevant part:

No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

these provisions are varied, they share at least one meaning: exclusive or special privileges to take fish and game are prohibited. The no exclusive right of fishery clause states this explicitly with regard to fisheries. The proceedings of the Alaska Constitutional Convention show that this same meaning was intended with respect to fish and game under the common use section and the uniform application section. McDowell v. State, 785 P.2d 1 (Alaska 1989).

The bill avoids creating an obviously closed class of subsistence users like the rural resident preference that the Alaska Supreme Court struck down in McDowell. Instead, the bill establishes a system in which any person, ostensibly, may engage in subsistence use of fish and game provided that the person satisfies the prescribed eligibility criteria.

ELIGIBILITY CRITERIA FOR SUBSISTENCE

SB 443 proposes seven fundamental considerations for determining who is eligible to engage in subsistence hunting and fishing. SB 443, Sec. 2, Sec. 16.05.268(i); page 7, line 3 - page 8, line 1. The Board of Fisheries and the Board of Game are to jointly establish the actual criteria and a concomitant point system for determining eligibility based on the fundamental considerations. Though the boards jointly develop the actual eligibility criteria, four of the fundamental considerations in SB 443 are in fact specific mandatory minimum standards that a person must satisfy in order to qualify for subsistence hunting and fishing:

- (1) the quantity of fish and game consumed by the person in the preceding 12 months, with a mandatory minimum of 125 pounds consumed in that period;
- (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 12 months, with a mandatory minimum number of species, or groups of species, as determined jointly by the boards by regulation; the mandatory minimum number, and any grouping of species, may vary by geographical region of the state, based on the diversity of species in a region;
- (3) the number of days in the preceding 12 months that the person engaged in the taking of fish or game in the subsistence use

S/(...continued)

S/ Article VIII, sec. 17:

Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

area, or the processing of that fish or game, with a mandatory minimum of 30 days in that period;

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

SB 443, Sec. 2, Sec. 16.05.268(i)(1) - (4); page 7, lines 12 - 24.

Notably three of the four mandatory standards (Sec. 16.05.268(i)(2) - (4)) set specific minimum requirements on the number of species of fish and game consumed and the number of days and months engaged in hunting and fishing activities (at least a total of 30 days during any four months) and requires that each of the three standards be satisfied in a single subsistence use area during the preceding 12 months.^{6/} Once an applicant for subsistence privileges satisfies these mandatory minimum standards in a subsistence use area and the other criteria adopted by the boards, the applicant is then eligible to participate in subsistence hunting and fishing in that subsistence use area. If an applicant wants to engage in subsistence hunting and fishing in an additional subsistence use area or to move subsistence activities to a new subsistence use area, the applicant must then satisfy the three mandatory standards in the new area as well as the other criteria established by the boards. The applicant can satisfy the three mandatory standards in the new subsistence use area by engaging in sport or personal use fishing or sport hunting in the area, taking the prescribed number of species in the area, spending the required amount of time fishing and hunting in the area or processing fish and game taken in the area.

By combining standards for eligibility to engage in subsistence hunting and fishing with a requirement that the standards be satisfied in the subsistence use area in which the applicant wishes to use for subsistence hunting and fishing, the three mandatory standards establish each subsistence use area as a separate subsistence hunting and fishing area open only to certain persons and closed to all others. In fact the standards establish separate user groups for each subsistence use area and then limits admission to the user group to those persons who have a history of recent and extensive use in the area. An otherwise qualified subsistence user does not have the freedom to choose which subsistence use area the person will hunt or fish in. The

^{6/} A subsistence use area is the subunit of a game management unit together with the contiguous game management subunits, unless a board describes a different subsistence use area for a particular fish stock or game population. SB 443, Sec. 2, Sec. 16.05.268(d) and (e). There are currently 69 game management subunits in the state and thus a possible 69 different subsistence use areas. The actual number of subsistence use areas will probably be less because certain areas (urban areas) are closed to subsistence use of fish and game and subsistence use areas may not be established for those areas. See, SB 443, Sec. 2, Sec. 16.05.268(a).

person is confined to that subsistence use area in which he has established the requisite history of use.⁷ All other persons are barred from using the area for subsistence hunting and fishing. Each subsistence use area becomes an exclusive use area open to use by only a few eligible persons and as such confers a "special privilege" to use the fish and game in the area on those persons.

A system for determining eligibility for engaging in subsistence hunting and fishing which opens participation for some and closes participation for others "will necessarily create tension with article VIII." McDowell, 785 P.2d at 9. Limits on admission to user groups are subject to scrutiny under the article VIII equal access provisions (State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v. State, 763 P.2d 488, 492 (Alaska 1988)), because the provisions of article VIII were intended to guarantee the broadest possible access to and use of fish and game (Owsichek, 763 P.2d at 492 - 93) and to prohibit exclusive or special privileges to take fish and game (McDowell, 785 P.2d at 6). "The history of the common use clauses, . . . , reveals anti-monopoly intent to prevent 'exclusive grants' and 'special privilege[s],' wholly apart from the limits imposed by other constitutional provisions." Owsichek, 763 P.2d at 496.

In Owsichek, the Alaska Supreme Court struck down exclusive guide areas and joint use areas, because these areas were grants of monopolies or special privileges based on a guides previous use, occupancy, and investment in the area. "To grant such a special privilege based on seniority runs counter to the notion of 'common use'." Owsichek, 763 P.2d at 496. In McDowell, the Alaska Supreme Court struck down the rural residency requirement for subsistence because it amounted to an exclusive or special privilege prohibited by the open access provisions of the Alaska Constitution. McDowell, 785 P.2d at 9. In lieu of the rural residency requirement for determining eligibility for subsistence use of fish and game, SB 443 uses the three mandatory minimum requirements to require recent and extensive use in the subsistence use area as a precondition for eligibility. Just as the rural residency requirement precluded nonrural residents from engaging in subsistence activities, the

⁷ For example, a subsistence user in Kotzebue who moves to Tok must continue to return to Kotzebue to engage in subsistence hunting and fishing, until the user establishes the prerequisite history of use in the Tok area. (This assumes that the state does not deny the person's right to continue to engage in subsistence hunting and fishing in the Kotzebue area, because travelling from Tok to Kotzebue no longer satisfies the economical and efficient requirement for subsistence activities.)

For example, if a tier I subsistence user is closed out of his/her area because of a resource shortage that user may not move his/her subsistence activities to another subsistence use area, even though the person has a continuing need to engage in subsistence hunting and fishing.

recent and substantial use requirement of SB 443 precludes all other persons who are similarly situated but who do not have a recent and substantial history of use in the area from engaging in subsistence hunting and fishing in the subsistence use area. The fact that any nonrural resident could move to a rural area and thus qualify for subsistence was ineffective in saving the former rural residency requirement from invalidity. McDowell, 785 P.2d at 7. Likewise the ability of an otherwise qualified person to establish a recent and substantial history of use, of a new or an additional subsistence use area does not prevent the requirement for such a history of use as a condition precedent to use of the new area, from being an excessive infringement on open access provisions of the Alaska Constitution.

Review of the three mandatory standards according to equal protection analysis under the uniform application section requires the following procedure. First, the three mandatory standards must have a legitimate purpose. The purposes of SB 443 that seem relevant to the mandatory standards are protection of healthy fish stocks and game populations and allowing participation in the subsistence taking of fish and game by those who actually and substantially depend on subsistence use of fish and game. SB 443, Section 1(b). These purposes are legitimate purposes. Owsichek, 763 P.2d at 496 - 97; McDowell, 785 P.2d at 13 (concurring opinion). Second, the importance of the individual interest involved must be determined. The individual interest in equal access to fish and game is a highly important interest running to each person within the state. McDowell, 785 P.2d at 10; Owsichek, 763 P.2d at 492 n. 10. Third, the importance of the state's purpose must be balanced against the individual interest involved. McDowell, 785 P.2d at 10. The state's purpose must be at least important to overcome the highly important individual interest at stake. Fourth, the means to further the important state purpose must be carefully drawn and designed for the "least possible infringement on article VIII's open access values." McDowell, 785 P.2d at 10.

Assuming that the state's purpose underlying the three mandatory standards is sufficiently important to countervail the highly important individual interest at stake, it would appear that the means chosen to achieve the state's purpose is not the least possible infringement on open access to fish and game resources. The three mandatory standards allow otherwise qualified individuals to engage in subsistence hunting and fishing in only those subsistence use areas where the individual has a recent and extensive history of use. The remaining dozens of subsistence use areas are closed to this individual.^{8/}

^{8/} This result is intentional. The Section-By-Section Description of the Governor's Subsistence Bill, dated February 21, 1992, states at page 11:

(continued...)

In my opinion, there is a substantial and unnecessary risk that the three mandatory standards contained in SB 443 are an impermissible infringement on open access to fish and game resources and thus would violate the open access provisions of the Alaska Constitution.

It is the creation of dozens of separate, albeit slightly overlapping, subsistence use areas that are each subject to distinct area specific criteria for access that infringes upon the open access provisions of article VIII. Those persons who ultimately qualify for subsistence hunting and fishing privileges in a subsistence use area receive a "special privilege" that is denied to all other persons. Those persons who are not qualified for subsistence hunting and fishing in the area are denied access to the user group for that subsistence use area because they have not established the requisite history of use.

The utilization of past use or activities in an area, as criteria for granting or denying access to fish and game resources has been rejected by the Alaska courts in Owsichek (guide exclusive use and joint use areas) and in Bozanich v. Noerenberg, (Alaska Superior Court, First Judicial District, Juneau, Case No. 70-389, March 15, 1971; state may not bar entry into a salmon net fishery by requiring prior experience in that fishery).

The primary shortcoming of the three mandatory standards is that they combine determinations on access to a user group with determinations on allocation of the fish and game resource. The Alaska Supreme Court is supportive of the state's power to allocate fish and game resources under the sustained yield section of the Alaska Constitution^{8/} (Gilbert v. State Department of Fish and Game, 803 P.2d 391 (Alaska 1990); Meier v. State Board of Fisheries, 739 P.2d 172 (Alaska 1987)), provided that the allocations are not arbitrary and unreasonable and are consistent with and reasonably necessary to the conservation and development of fish and game resources (Gilbert, 303 P.2d at 399; Kenai Peninsula Fisherman's Cooperative Association, Inc.

^{8/}(...continued)

The statute does not provide for qualification on a statewide basis; hunting and fishing in one subsistence area will not qualify the user to subsistence hunt and fish in another area. While it may be technically possible for a person to qualify in more than one subsistence use area under this subsection [SB 443, Sec. 2, Sec. 16.05.268(i)], it is generally contemplated that the vast majority of users will qualify for only one area.

^{9/} Article VIII, sec. 4:

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

v. State, 628 P.2d 897, 903 (Alaska 1981)). However, the authority to make allocation decisions does not imply a power to limit admission to a user group. State v. Hebert, 803 P.2d 863, 866; (Alaska 1990) McDowell, 785 P.2d at 7 - 8;^{10/}

The two determinations could be separated by eliminating the requirement that the three mandatory standards be satisfied in a single subsistence use area. If the two determinations were separated a fundamental weakness of SB 443 would be avoided and SB 443 would better withstand challenges under article VIII of the Alaska Constitution. SB 443 can be amended to include criteria for determining where qualified subsistence users may engage in subsistence hunting and fishing or for establishing procedures for allocating fish and game resources among subsistence users. Prior use of a subsistence use area for the taking of fish and wildlife could be among the factors used to determine where a person may engage in subsistence fishing and hunting.

PROOF OF ELIGIBILITY

Though the criteria for establishing eligibility to engage in subsistence activities are relatively uniform, SB 443 provides that the proof necessary satisfy the criteria varies significantly depending on where a person lives.

A person who lives in a category 1 area^{11/} is presumed to satisfy all eligibility criteria without having to establish more than the person's place of residence. The person may engage in subsistence activities until it is proven by clear and convincing evidence that the person is not qualified to engage in subsistence. SB 443, Sec. 2, Sec. 16.05.268(h)(1); page 6, lines 17 - 22.

^{10/} The requirement that a person must engage in subsistence activities in a specific subsistence use area is somewhat analogous to the superexclusive fishing districts established by the Board of Fisheries for the Bering Sea herring sac roe fisheries. The board established two superexclusive herring sac roe fishing districts. If a fisherman chose to fish in either of these fisheries, the fisherman could not fish in any other herring sac roe fishing districts. The Alaska Supreme Court upheld the use of the superexclusive use fisheries for the purpose of allocating the harvest of herring between competing groups of commercial fisherman. State v. Hebert, 803 P.2d 863 (Alaska 1990). The court found that superexclusive fishing districts were consistent with the Alaska Constitution because it did not limit admission to a user group, because the fisherman was free to choose which fishing district to fish in. Hebert, 803 P.2d at 866.

^{11/} A category 1 area is an area where the human population of each community in the area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area. SB 443, Sec. 2, Sec. 16.05.268(f)(1); page 5, lines 9 - 11.

A person who resides in a category 2 area^{12/} is presumed to satisfy all eligibility criteria and need only sign a document affirming that the person does indeed qualify. SB 443, Sec. 2, Sec. 16.05.268(h)(2); page 6, lines 23 - 29. The person may engage in subsistence activities until it is proven by a preponderance of the evidence that the person is not qualified to engage in subsistence.^{13/}

A person who resides in a category 3 area^{14/} may engage in subsistence activities only after the person has convinced the commissioner of fish and game that the person satisfies the eligibility criteria adopted by the joint boards. SB 443, Sec. 2, Sec. 16.05.268(h)(3), page 6, line 30 through page 7, line 2.

Under SB 443, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into the class of subsistence users, they may inhibit equal and open access to subsistence resources and, thus, are at least constitutionally suspect under the open access provisions of the Alaska Constitution.

The rural preference of the former subsistence law was struck down in part because it was an "extremely crude" method to provide for the need to engage in subsistence activities. McDowell, 785 P.2d at 10. The classification scheme inherent in the category 1, 2, and 3 areas is subject to similar criticism. Residents in category 1 areas are presumed to qualify for subsistence activities regardless of their individual characteristics. Even those unqualified residents of a category 1 area who engage in subsistence are not penalized or sanctioned for their activities. An unqualified resident of a category 2 area is at least potentially subject to criminal prosecution for falsely alleging their qualifications. It is only the residents of a category 3 area that

^{12/} A category 2 area is an area that consists of a single community that has a human population of 2,500 to 6,999, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community. SB 443, Sec. 2, Sec. 16.05.268(f)(2); page 5, lines 12 - 15.

^{13/} If it is proven that the person is not qualified for subsistence and that the person was aware of the lack of qualifications, the person is potentially subject to criminal prosecution for unsworn falsification under AS 11.56.210.

^{14/} A category 3 area is an area that is
(A) an urban area or a single community where the human population is 7,000 or greater; or
(B) an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. SB 443, Sec. 2, Sec. 16.05.268(f)(3); page 5, lines 16 - 21.

are evaluated on their individual qualifications. The category 1, 2, and 3 area concept is not the "classification scheme employing individual characteristics" which the McDowell court proposed as being "less invasive of Article VIII open access values." McDowell, 785 P.2d at 11. The category 1, 2, and 3 area concept classifies persons as a group based on where they live in the state.

The purpose for this burden on equal access to fish and game resources under article VIII must be, at the minimum, an important purpose. McDowell, 785 P.2d at 10.

According to the Section-By-Section Description of the Governor's Subsistence Bill,^{15/} the primary purpose of the category 1, 2, and 3 areas is to simplify the task of determining who is eligible to engage in subsistence activities. This purpose amounts to promoting administrative convenience. Administrative convenience is generally accepted as legitimate purpose for legislation and regulations but is not necessarily an important purpose. See, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980); Deubelbeiss v. Commercial Fisheries Entry Commission, 689 P.2d 487, 489 (Alaska 1984). Administrative convenience may not be sufficient to justify the burdens imposed by the category 1, 2, and 3 area classification system.

Assuming that the court does find administrative convenience or some other purpose behind the category 1, 2, and 3 area classification system to be important, it is then necessary to establish that the classification system is "designed for the least possible infringement on article VIII's open access values." McDowell 785 P.2d at 10. Though the classification system may be better than the rural-urban distinction made by the former law, it is not the system based on individual characteristics that the Alaska Supreme Court was looking for. In light of the purpose of the uniform application clause "to exclude an especially privileged status for any person in the use of natural resources subject to disposition by the state"^{16/} it is possible that the courts will require less disparity among residents of the state based on their place of residence than provided in SB 443.

A challenge to the category 1, 2, and 3 areas classification system on equal protection grounds under the uniform application section may result in an adverse decision from the courts because the system places different burdens on residents of the state based on where they live and not on their individual qualifications to engage in subsistence

^{15/} Page 10 - 11.

^{16/} Owsichek, 763 P.2d at 498 n. 17; quoting 6 Proceedings of the Alaska Constitutional Convention, app. V, at 99 (Commentary); emphasis added by court.

Senator Lyman Hoffman

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hunting and fishing. A system that required all residents to establish their eligibility to engage in subsistence in the same manner or that gave all residents the benefit of the same presumptions would provide fewer grounds for judicial challenge and be less susceptible to unanticipated judicial constructions.

TITLE OF SB 443

According to the title of SB 443, the bill relates "to the taking of fish and game for subsistence." However two provisions of the bill define the terms "game management unit" and "sustained yield". SB 443, Sec. 6, Sec. 16.05.940(38) and (39), page 10, lines 17 - 23. These newly defined terms are intended to apply to sport hunting and to commercial, sport, and personal use fishing. To the extent that these newly defined terms apply to more than subsistence, the terms are outside of the title of the bill. Article II, section 13 of the Alaska Constitution requires that the subject of each bill be expressed in its title. The purpose of this provision is to give the legislature and the people fair notice as to the contents of the bill. Without mentioning in the bill title that the bill is defining "sustained yield" and "game management unit", the legislature and the people are not aware that those terms are being defined for purposes not related to subsistence. It is unlikely that a court would declare the entire bill unconstitutional for the failure to express the entire contents of the bill in the title. A court is more likely to find the bill constitutional, but to limit the application of the terms "game management unit" and "sustained yield" to the subsistence context.

The title problem is easily corrected by adding the phrase "defining 'sustained yield' and 'game management unit;'" to the title.

If I may be of further assistance, please advise.

GU:pl

92-176.plm

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 27, 1992

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The Honorable Lyman F. Hoffman
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The Honorable Georgianna Lincoln
House Bush Caucus Chair
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Re: Subsistence Legislation, Senate Bill 443, House
Bill 552

Dear Senator Hoffman and Representative Lincoln:

In your letter of March 16, 1992 to Attorney General Cole, you raised several concerns about the constitutionality of the provisions of the subsistence legislation drafted by the Governor's Subsistence Advisory Council and introduced by Governor Hickel as Senate Bill 443 and House Bill 552. Attorney General Cole asked me to respond to your letter.

Our department has reviewed the fish and game subsistence bill and it is our opinion that the bill is consistent with the constitutions of the United States and the State of Alaska. We do not believe that a constitutional amendment will be necessary to implement the provisions of this bill. The bill does raise several possible constitutional issues that have not been fully resolved by the courts, but we are prepared to fully defend the bill and expect favorable results. We have briefly analyzed below what are likely to be the most controversial issues, including those raised in your letter.

Community-Based Presumptions

One potential issue is whether the presumptions based on where a user lives, as outlined in the proposed AS 16.05.268(h), are consistent with the Alaska Constitution's provisions for equal access to fish and game. We believe that they are.

In subsections (f), (g), and (h), the new subsistence statute establishes presumptions based on community characteristics.

Under subsection (f), every area and community in the state will be classified into one of three categories.¹ Small communities that are subsistence dependent will be in category 1. Medium sized communities that are subsistence dependent will be in category 2. All other communities, large cities and suburbs or smaller and medium sized communities that are not subsistence dependent, will be in category 3. Subsection (g) lists factors the boards will use to determine subsistence dependence.²

¹ Subsection (f) states:

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

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

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

(3) category 3, an area that

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

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

² Subsection (g) states:

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

(1) the social and economic structure;

(2) the stability of the economy;

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

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

Subsection (h) establishes administrative presumptions about the qualifications of individuals living in the communities in the categories.³ Only those who qualify under the individual

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

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

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

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

(7) the seasonal cycle of economic activity;

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

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

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

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

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

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

³ Subsection (h) states:

(h) Participation in a subsistence harvest in a subsistence use area is limited to persons whose taking and use of fish and game in that subsistence use area meets the requirements for qualification under (i) of this section, with the following presumptions and requirements:

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

(2) a person who is domiciled in the subsistence

requirements in (i) are authorized to subsistence hunt and fish, but (h) establishes presumptions about individual users based on where they live. Those who live in category 1 areas are presumed to individually qualify for subsistence hunting and fishing for the subsistence use area in which they live, but not for any other subsistence use area. They will not be required to submit any application or signed statement before hunting or fishing. The presumption is not conclusive and can be challenged by the state, but they will be allowed to subsistence hunt and fish in the subsistence area in which they live unless and until the state demonstrates, by clear and convincing evidence, that they are not qualified.

Those persons living in category 2 communities who choose to subsistence hunt and fish must first sign a statement in a form to be supplied by the department averring that they meet the individual qualifications standards of (i). Once they sign such a statement they are rebuttably presumed to qualify to subsistence hunt and fish in the subsistence use area in which they live, but not any other subsistence use area. Signing a false statement subjects the signer to prosecution for unsworn falsification. This presumption can be rebutted by the normal civil evidentiary standard: proof by a preponderance of the evidence.

Those persons living in category 3 communities, which will be larger cities or urban areas, smaller communities that do not have a demonstrated dependence on subsistence, or communities outside the subsistence use area, will qualify to subsistence hunt and fish under an individual application procedure outlined in subsection (i). They may not subsistence hunt or fish until their application is approved by the department.

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

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

This system of differing presumptions amounts to an administrative scheme to focus the state's efforts to weed out unqualified users onto those areas where most of the unqualified reside. Based on the information presented to the legislature, use of the three sets of standards will result in identifying, under (f)(1), communities or areas with a large majority of residents that would individually qualify as subsistence users in the subsistence use area in which they live; under (f)(2), communities with a majority of qualified subsistence users; and under (f)(3), communities with a very a small minority of qualifying individuals. Communities outside the subsistence use area are also expected to have very few people who would qualify. It is expected that the legislature will make statutory findings based upon this information.

The presumptions in this statute are reasonable and have a strong factual basis. The presumptions will not exclude any qualified subsistence user from access to fish and game. Residence in a particular community or state does not determine a person's qualification to subsistence hunt and fish; it does, however, determine the amount of administrative paperwork the person will be required to submit. It will impose a higher administrative burden on those users who are domiciled in areas that have been determined to have no significant dependence on subsistence; but the status of the community will not be determinative of whether an individual finally qualifies as a subsistence user.

While there is some difference in treatment of the individual based on community standards, the actual access to fish and game for subsistence is equal. No qualified user will be excluded. All those who actually and substantially rely on subsistence uses of fish and game in a particular area will receive the subsistence preference. All those who are similarly situated with respect to the fish and game resources in an area are given equal opportunity to take that fish and game.

The legislation generally requires that qualifying dependence be current. This will mean that some people that have had reliance in the past, but have not recently relied on fish and game in a subsistence use area, will not qualify for the preference. This does not present a constitutional problem. The situations of these people with respect to the fish and game are not similar to the situation of those who have a current reliance. See Article VIII, section 17 of the Alaska Constitution. Of course, once the past user demonstrates a current reliance, he qualifies for the preference.

We believe that this statutory scheme satisfies the concerns expressed in McDowell v. State, 785 P.2d 1 (Alaska 1989). In that case, the supreme court of Alaska held that qualification for a subsistence preference based conclusively and solely on an individual's residence in a rural area violated the provisions of the

Alaska Constitution requiring equal access to natural resources. In Part A of the decision, three justices of the Alaska Supreme Court ruled that sections 3, 15, and 17 of article VIII of the Alaska Constitution⁴ prohibited the grant of exclusive or special privileges based on the characteristics of the community in which a user resides. Id. at 9.

We think that the new subsistence legislation is consistent with the principles laid out in the McDowell decision. The critical right in McDowell was the "equal right to participate in [hunts and] fisheries, regardless of where one resides." Id. Under the new subsistence legislation, the right to participate in subsistence hunts and fisheries is the same for all people who actually and substantially rely on fish and game for subsistence purposes. The differentiation in treatment based on residence does not involve the right to hunt or fish; no qualified person will be excluded. The only difference in treatment comes in the extent of paperwork required of residents in different kinds of communities.

The McDowell decision also found fault in the old law because it limited admission to a user group based on residence. 785

⁴ Section 3 of article VIII of the Alaska Constitution provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

P.2d at 8. With the new legislation, admission to the subsistence user group is not limited by residence.

Section 17 of article VIII of the Alaska constitution requires equal treatment of "all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Under the new legislation, all those who actually and substantially rely on the fish and game in an area will qualify for the subsistence preference. In McDowell, that was not the case. Urban users were excluded even though their reliance on fish and game may have been as substantial as that of rural users.

The difference in paperwork requirements for residents of different kinds of communities does not violate the equal access provisions. First of all, the paperwork requirements are not determinative of access to fish and game. Nor are any of the requirements so burdensome as to be an effective obstacle to access. The right affected by the discrimination under the new law is not the right of access to fish and game as was the case in McDowell and Owsichek v. State, 763 P.2d 488 (Alaska 1988), but only the right to equal treatment under the law common to all equal protection issues. An individual's right to equal paperwork requirements is certainly not as important as the equal right to take fish and game, and is probably not an "important" interest in the context of equal protection analysis.

The Alaska courts use a "uniform-balancing" test for reviewing equal protection challenges under the state constitution. The "uniform balancing" test places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984). The minimum burden that the state must meet is the substantial relationship test: the state must show that the classification is reasonable and not arbitrary and is based on some ground of difference having a fair and substantial relation to the object of the legislation. State v. Ensearch Alaska Construction, Inc., 787 P.2d 624, 632 n.12 (Alaska 1990). In this case the right to equal paperwork, unlike the right to access to fish and game, is probably not an important individual right. A classification would, therefore, only have to meet the substantial relationship test.

The classification for purposes of paperwork requirements based on residence meets the substantial relationship test. The requirements are more burdensome for category 2 residents than category 1 residents and more burdensome for category 3 residents than the other two categories. But this graduated burden is fairly and substantially related to the purpose of the requirements: to direct the state's enforcement resources to those areas representing the biggest threat to the goal of preferring only actual and

substantial reliance. The lighter burden on category 1 residents is based on the fact that a large majority will qualify. The heavier burden on category 2 residents is based on the fact that a high percentage of category 2 residents are not qualified. The even heavier burden on category 3 residents and residents of communities outside the subsistence use area is directly related to the fact that an extremely high percentage of category 3 residents are certainly not qualified. A tougher standard for category 2 and 3 residents will result in preventing the highest number of unqualified persons from subsistence hunting and fishing. The discrimination in the paperwork requirements bears a fair and substantial relationship to the object of the requirements: preventing subsistence hunting and fishing by the most clearly unqualified users. We, therefore, believe that these provisions would pass constitutional muster should the bill become law.

Limitations to Subsistence Use Areas

Under the provisions of the bill, the entire state would be divided up into subsistence use areas. Every fish stock and game population would be within a subsistence use area. There is no danger that someone would be precluded from subsistence use of fish or game because it was not within a subsistence use area. It is true that fish and game within a category 3 community located in a particular subsistence use area would not be subject to the subsistence preference. Section 2, Line 11, SB 443. That was also the case with the 1986 subsistence law. AS 16.05.258(a) states:

The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

(Emphasis added). The McDowell court did not strike down this provision; it struck down the priority to rural users, not the limitation of the subsistence preference to rural animals.⁵ The

⁵ Upon remand of the McDowell case, superior court judge Beverly Cutler, in ruling on the question of severability, did state, in an unfortunate diversion from the issues:

The parties do not address whether the boards now should identify any such stocks or populations anywhere in the state, not merely in rural areas. That the boards should make these determinations anywhere in the state appears to be a logical result of the supreme court's holding in McDowell

Alaska Supreme Court has never required that regulation of seasons, bag limits, methods and means, etc., be uniform for every species throughout the state. There is no constitutional requirement that if a particular kind of use is allowed in one area of the state, the same kind of use must be allowed in all other areas. This point was later clarified by the court in Gilbert v. State, Dep't of Fish and Game, 803 P.2d 391, 398-99 (Alaska 1990).

What the constitution does require is that if a use is allowed, all persons that are similarly situated with respect to the resource and the purpose of the law be treated equally. Article VIII, section 17 of the Alaska Constitution. Gilbert, 803 P.2d at 399. There is no requirement of equal treatment of resources, rather than users of those resources.

There is also no constitutional requirement that once a person qualifies for a subsistence use in one area, she be entitled to a subsistence preference in another area. A person reliant on fish and game in Area A must be treated the same as all others similarly reliant on Area A fish and game; but that person need not be treated the same with respect to fish and game in Area B. Only those who have similar reliance on Area B fish and game must receive equal treatment. The new bill is not significantly different from the 1986 subsistence bill in this respect. Under that law, only residents of communities that had demonstrated customary and traditional uses of a particular fish stock or game population were granted a subsistence preference. See former 5 AAC 99.010 and 5 AAC 99.025. There was no statewide subsistence preference. Nor is there a statewide preference under the federal ANILCA regulations. Temporary Subsistence Management Regulations For Federal Public Lands In Alaska (1991-92). A statewide subsistence preference in state law would, itself, create a conflict between state law and ANILCA.

The Governor's Subsistence Advisory Council did not intend to prefer the reliance of a user who, for example, might take red salmon on the Copper River, king salmon on the Kenai River, chum salmon on the Tanana River, moose in the Innoko River area, deer on Kodiak Island, and caribou on the North Slope. In the advisory

McDowell v. State, Memorandum of Decision Severing Unconstitutional Portions of Statute from Remainder of Statute at 8 (Alaska Super. Ct. June 20, 1990). The obvious reason that the parties did not address the issue on remand is because it was not an issue on appeal. We do not believe that the Alaska Supreme Court would agree with Judge Cutler's ruling on this issue. See Gilbert v. State Dep't of Fish and Game, 803 P.2d 391, 398-99 (Alaska 1990).

council's eyes, that kind of reliance was not as deserving of a preference to fish and game in one of those areas as hunting and fishing that is concentrated in that area. It seems obvious that in deciding who should have a preference in a particular area, the user that gets all or most of his fish and game from the area should rank higher than one who gets only a smaller portion from that particular area. We believe the courts would decide that these two users are not similarly situated with respect to the resource and the purpose of the law. See article VIII, section 17 of the Alaska Constitution. We also believe that, as between a person who has demonstrated reliance on fish and game in Area A and one who has such reliance in another area that is suffering from shortages of fish and game, the person with demonstrated reliance in Area A may be properly preferred over the other user because they are not similarly situated with respect to the resource in Area A and the purpose of the bill.⁶

The Twelve Month Qualification Period

Under the proposed AS 16.05.268(i) and (o), qualifying activity must occur within the preceding twelve months. While it may be technically possible to qualify in as little as four months (taking fish or game in four different months is the longest determinative durational minimum requirement, proposed AS 16.04.268(i)(4)), it is generally anticipated that many users will require closer to the full twelve-month period to qualify. This provision does not create constitutional problems.

At first blush, the twelve-month provision might seem to create a durational residency problem. It does not. Several points must be kept very clear. Under this bill, residence in a particular area is never required for qualification. Residence in the subsistence use area is not required. To the extent that the user's presence, as opposed to residence, in the area is required, those requirements meet "durational residency" standards. Hicklin v. Orbeck, 565 P.2d 159, 162-65 (Alaska 1977) rev'd on other grounds, 437 U.S. 518 (1978).

The twelve-month period is closely related to the patterns of use and fish and game in Alaska and is the only reasonable period for the demonstrations of actual and substantial reliance on fish and game. The goal of the legislation is to give a preference to those who currently, actually, and substantially rely on fish and game in particular areas of the state. It is not the goal to give

⁶ This is the situation posed by George Utermohle of the Legislative Legal Affairs Agency in his March 16, 1992 letter to Senator Lyman Hoffman at page 5, note 7.

There must necessarily be some kind of test to identify actual and substantial reliance on that fish and game. To avoid spurious claims of reliance based on very short-term or only sporadic use, some time requirements are necessarily included. In deciding what time period would make the most sense, the advisory council looked at the patterns of fish and game use in Alaska. Most uses are seasonal. For example, salmon are generally only available during a certain time-span during the year. With game, hunting is generally limited to one or two seasons to get the best quality of meat or to avoid interference with species reproduction. In any case, patterns of use are tied to yearly cycles. If the qualifying time was less than the preceding 12 months, persons in certain areas might be disadvantaged because of the seasonal availability of fish and game. If the time period was longer than twelve month you would expect to see duplication of activity which would be less probative of current reliance. The twelve-month period is obviously the most appropriate for this particular test. It is necessary to identify the kind of use of fish and game the bill is intended to prefer. It is the "least drastic means" to achieve the ends of the statute. Hicklin, 565 P.2d at 165. It is a necessary test of bona fide reliance.

Certainly, the twelve-month provisions, as explained above, meet substantive due process standards that legislative enactments be reasonable and not arbitrary. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

Tier II Criteria

In the proposed AS 16.05.268(b)(4)(B), subsistence use of game populations or fish stocks insufficient to provide for all subsistence uses would be authorized by ranking users by applying three criteria. One of the criteria would be "the proximity of the domicile of the subsistence user to the stock or population". Proposed AS 16.05.268(b)(4)(B)(ii); SB 443, Section 2 at page 4, lines 14-15. The question of the constitutionality of this provision was raised at one meeting of the Senate Resources Committee. We believe that the provision is probably constitutional.

First, it should be noted that the current subsistence law contains a very similar provision expressed simply as "local residency". AS 16.05.258(c)(2). This phrase has been interpreted by the Joint Boards of Fish and Game to mean that those who "live closest to the resource" would be given maximum protection. 5 AAC 99.010(f)(1). "Local residency" is also the language used in ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law or from ANILCA, but is intended to more clearly state how "local

The Honorable Lyman F Hoffman
The Honorable Georgianna Lincoln

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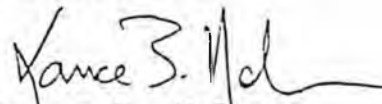
ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law or from ANILCA, but is intended to more clearly state how "local residency" will be measured. If the Tier II provision of the subsistence legislation did not contain a "local residency/proximity to the resource" criterion it would be in conflict with Section 804 of ANILCA, 16 U.S.C. Sec. 3114(2).

While the Alaska Supreme Court ruled in McDowell that the subsistence preference could not be awarded on the basis of the characteristics of the community in which an individual user resided, there is nothing in that opinion to indicate that the location of an individual's residence in relation to the fish or game could not be a constitutional criterion, especially in the times of extreme shortages envisioned under the Tier II provisions. Upon remand of that case to the superior court, Judge Beverly Cutler ruled that the Tier II provisions did not violate the standards in McDowell.⁷ When there is not enough fish or game to satisfy all qualified subsistence users, further ranking of these users becomes mandatory. Assuming that two users are equal as to the two other criteria of dependence and the ability to obtain other food, it would seem that proximity to the resource would not be an unreasonable way to distinguish between the two otherwise similar users.

If you have further questions about issues raised by the subsistence legislation, we would be happy to discuss these matters with you at your convenience.

CHARLES E. COLE
ATTORNEY GENERAL

By:



Lance B. Nelson
Assistant Attorney General

⁷ Judge Cutler ruled that the Tier II "local residency" criterion did not violate the supreme court's holding in McDowell. McDowell v. State, Memorandum of Decision Severing Unconstitutional Portions of Statute from Remainder of Statute at 7 (Alaska Super. Ct. June 20, 1990).

CONFIDENTIAL**DRAFT**

March 23, 1992

Senator Lyman F. Hoffman
Senate Bush Caucus Chair
P.O. Box V
Juneau, Alaska 99811

Representative Georgianna Lincoln
House Bush Caucus Chair
P.O. Box V
Juneau, Alaska 99811

Re: Subsistence Legislation, Senate Bill 443, House
Bill 552

Dear Senator Hoffman and Representative Georgianna Lincoln:

In your letter of March 16, 1992, you raised several concerns about the constitutionality of the provisions of the subsistence legislation drafted by the Governor's Subsistence Advisory Council and introduced by Governor Hickel as Senate Bill 443 and House Bill 552.

My department has reviewed the fish and game subsistence bill and it is our opinion that the bill is consistent with the constitutions of the United States and the State of Alaska. We do not believe that a constitutional amendment will be necessary to implement the provisions of this bill. The bill does raise several possible constitutional issues that have not been fully resolved by the courts, but we are prepared to fully defend the bill and expect favorable results. We have briefly analyzed below what are likely to be the most controversial issues, including those raised in your letter.

Community-Based Presumptions

One potential issue is whether the presumptions based on where a user lives, as outlined in the proposed AS 16.05.268(h), are consistent with the Alaska Constitution's provisions for equal access to fish and game. We believe that they are.

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In subsections (f), (g), and (h), the new subsistence statute establishes presumptions based on community characteristics. Under subsection (f), every area and community in the state will be classified into one of three categories.¹ Small communities that are subsistence dependent will be in category 1. Medium sized communities that are subsistence dependent will be in category 2. All other communities, large cities and suburbs or smaller and medium sized communities that are not subsistence dependent, will be in category 3. Subsection (g) lists factors the boards will use to determine subsistence dependence.²

¹ Subsection (f) states:

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

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

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

(3) category 3, an area that
(A) is an urban area or a single community where the human population is 7,000 or greater; or
(B) is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.

² Subsection (g) states:

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

(1) the social and economic structure;
(2) the stability of the economy;
(3) the extent and kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

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

(5) the cost and availability of goods and

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Subsection (h) establishes administrative presumptions about the qualifications of individuals living in the communities in the categories.³ Only those who qualify under the individual

-
- services to those domiciled in the area;
- (6) the variety of fish and wildlife species used by those domiciled in the area;
 - (7) the seasonal cycle of economic activity;
 - (8) the percentage of those domiciled in the area participating in hunting and fishing activities or using wild fish and game;
 - (9) the harvest levels of fish and game by those domiciled in the area;
 - (10) the cultural, social, and economic values associated with the taking and use of fish and game;
 - (11) the geographic locations where those domiciled in the area hunt and fish;
 - (12) the extent of sharing and exchange of fish and game by those domiciled in the area;
 - (13) additional similar factors the boards establish in regulation to be relevant to their determinations under this subsection.

³ Subsection (h) states:

(h) Participation in a subsistence harvest in a subsistence use area is limited to persons whose taking and use of fish and game in that subsistence use area meets the requirements for qualification under (i) of this section, with the following presumptions and requirements:

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

(2) a person who is domiciled in the subsistence use area in an area identified under (f)(2) of this section, and who intends to take fish or game for subsistence purposes is rebuttably presumed to meet the requirements for qualification under (i) of this section for that subsistence use area upon that person's signing a statement affirming that the person meets those

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requirements in (i) are authorized to subsistence hunt and fish, but (h) establishes presumptions about individual users based on where they live. Those who live in category 1 areas are presumed to individually qualify for subsistence hunting and fishing for the subsistence use area in which they live, but not for any other subsistence use area. They will not be required to submit any application or signed statement before hunting or fishing. The presumption is not conclusive and can be challenged by the state, but they will be allowed to subsistence hunt and fish in the subsistence area in which they live unless and until the state demonstrates, by clear and convincing evidence, that they are not qualified.

Those persons living in category 2 communities who choose to subsistence hunt and fish must first sign a statement in a form to be supplied by the department averring that they meet the individual qualifications standards of (i). Once they sign such a statement they are rebuttably presumed to qualify to subsistence hunt and fish in the subsistence use area in which they live, but not any other subsistence use area. Signing a false statement subjects the signer to prosecution for unsworn falsification. This presumption can be rebutted by the normal civil evidentiary standard: proof by a preponderance of the evidence.

Those persons living in category 3 communities, which will be larger cities or urban areas, smaller communities that do not have a demonstrated dependence on subsistence, or communities outside the subsistence use area, will qualify to subsistence hunt and fish under an individual application procedure outlined in subsection (i). They may not subsistence hunt or fish until their application is approved by the department.

This system of differing presumptions amounts to an administrative scheme to focus the state's efforts to weed out unqualified users onto those areas where most of the unqualified reside. Based on the information presented to the legislature, use of the three sets of standards will result in identifying, under (f)(1), communities or areas with a large majority of residents that

requirements; the department may rebut this presumption by a preponderance of the evidence that the person does not meet those qualification requirements;

(3) a person domiciled in an area identified under (f)(3) of this section or who is domiciled outside of the subsistence use area is qualified to participate in a subsistence fishery or hunt in that subsistence use area only upon certification by the commissioner that the person meets the requirements for qualification under (1) of this section.

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would individually qualify as subsistence users in the subsistence use area in which they live; under (f)(2), communities with a majority of qualified subsistence users; and under (f)(3), communities with a very a small minority of qualifying individuals. Communities outside the subsistence use area are also expected to have very few people who would qualify. It is expected that the legislature will make statutory findings based upon this information.

The presumptions in this statute are reasonable and have a strong factual basis. The presumptions will not exclude any qualified subsistence user from access to fish and game. Residence in a particular community or state does not determine a person's qualification to subsistence hunt and fish; it does, however, determine the amount of administrative paperwork the person will be required to submit. It will impose a higher administrative burden on those users who are domiciled in areas that have been determined to have no significant dependence on subsistence; but the status of the community will not be determinative of whether an individual finally qualifies as a subsistence user.

While there is some difference in treatment of the individual based on community standards, the actual access to fish and game for the subsistence is equal. No qualified user will be excluded. All those who actually and substantially rely on subsistence uses of fish and game in a particular area will be receive the subsistence preference. All those who are similarly situated with respect to the fish and game resources in an area are given equal opportunity to take that fish and game.

The legislation generally requires that qualifying dependence be current. This will mean that some people that have had reliance in the past, but have not recently relied on fish and game in a subsistence use area, will not qualify for the preference. This does not present a constitutional problem. The situations of these people with respect to the fish and game are not similar to the situation of those who have a current reliance. Of course, once the past user demonstrates a current reliance, he qualifies for the preference.

We believe that this statutory scheme satisfies the concerns expressed in McDowell v. State, 785 P.2d 1 (Alaska 1989). In that case, the supreme court of Alaska held that a qualification for a subsistence preference based conclusively and solely on an individual's residence in a rural area violated the provisions of the Alaska Constitution requiring equal access to natural resources. In Part A of the decision, three justices of the Alaska Supreme Court ruled that sections 3, 15, and 17 of article VIII of the

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Alaska Constitution⁴ prohibited the grant of exclusive or special privileges based on one's residence. Id. at 9.

We think that the new subsistence legislation is consistent with the principles laid out in the McDowell decision. The critical right in McDowell was the "equal right to participate in [hunts and] fisheries, regardless of where one resides." Id. Under the new subsistence legislation, the right to participate in subsistence hunts and fisheries is the same for all people who actually and substantially rely on fish and game for subsistence purposes. The differentiation in treatment based on residence does not involve the right to hunt or fish; no qualified person will be excluded. The only difference in treatment comes in the extent of paperwork required of residents in different kinds of communities.

The McDowell decision also found fault in the old law because it limited admission to a user group based on residence. 785 P.2d at 8. With the new legislation, admission to the subsistence user group is not limited by residence.

Section 17 of article VIII of the Alaska constitution requires equal treatment of "all persons similarly situated with

⁴ Section 3 of article VIII of the Alaska Constitution provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

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reference to the subject matter and purpose to be served by the law or regulation." Under the new legislation, all those who actually and substantially rely on the fish and game in an area will qualify for the subsistence preference. In McDowell, that was not the case. Urban users were excluded even though their reliance on fish and game may have been as substantial as that of rural users.

The difference in paperwork requirements for residents of different kinds of communities does not violate the equal access provisions. First of all, the paperwork requirements are not determinative of access to fish and game. Nor are any of the requirements so burdensome as to be an effective obstacle to access. The right affected by the discrimination under the new law is not the right to take fish and game, but only the right to equal treatment under the law common to all equal protection issues. An individual's right to equal paperwork requirements is probably not an important interest.

The Alaska court use a "uniform-balancing" test for reviewing equal protection challenges under the state constitution. The "uniform balancing" test places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984). The minimum burden that the state must meet is the substantial relationship test: the state must show that the classification is reasonable and not arbitrary and is based on some ground of difference having a fair and substantial relation to the object of the legislation. State v. Ensearch Alaska Construction, Inc., 787 P.2d 624, 632 n.12 (Alaska 1990). In this case the right to equal paperwork, unlike the right to access to fish and game, is probably not an important individual right. The classification would, therefore, only have to meet the substantial relationship test.

The classification for purposes of paperwork requirements based on residence meets the substantial relationship test. The requirements are more burdensome for category 2 residents than category 1 residents and more burdensome for category 3 residents than the other two categories. But this graduated burden is fairly and substantially related to the purpose of the requirements: to direct the state's enforcement resources to those areas representing the biggest threat to the goal of preferring only actual and substantial reliance. The lighter burden on category 1 residents is based on the fact that a large majority will qualify. The heavier burden on category 2 residents is based on the fact that a high percentage of category 2 residents are not qualified. The even heavier burden on category 3 residents and residents of communities outside the subsistence use area is directly related to the fact that an extremely high percentage of category 3 residents are certainly not qualified. A tougher standard for category 2 and 3

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residents will result in preventing the highest number of unqualified persons from subsistence hunting and fishing. The discrimination in the paperwork requirements bears a fair and substantial relationship to the object of the requirements: preventing subsistence hunting and fishing by the most clearly unqualified users. We, therefore, believe that these provisions would pass constitutional muster should the bill become law.

Limitations to Subsistence Use Areas

Under the provisions of the bill, the entire state would be divided up into subsistence use areas. Every fish stock and game population would be within a subsistence use area. There is no danger that someone would be precluded from subsistence use of fish or game because it was not within a subsistence use area. It is true that fish and game within a category 3 community located in a particular subsistence use area would not be subject to the subsistence preference. Section 2, Line 11, SB 443. That was also the case with the 1986 subsistence law. AS 16.05.258(a) states:

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(Emphasis added). No court has ever required that regulation of seasons, bag limits, methods and means, etc., be uniform for every species throughout the state. There is no constitutional requirement that if a particular kind of use is allowed in one area of the state, the same kind of use must be allowed in all other areas.

What the constitution does require is that if a use is allowed, all persons that are similarly situated with respect to the resource and the purpose of the law be treated equally. There is no requirement of equal treatment of resources, rather than users of those resources.

There is also no constitutional requirement that once a person qualifies for a subsistence use in one area, she be entitled to a subsistence preference in another area. A person reliant on fish and game in Area A must be treated the same as all others similarly reliant on Area A fish and game; but that person need not be treated the same with respect to fish and game in Area B. Only those who have similar reliance on Area B fish and game must receive equal treatment.

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Page 9The Twelve Month Qualification Period

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At first blush, the twelve-month provision might seem to create a durational residency problem. It does not. Several points must be kept very clear. Under this bill, residence in a particular area is never required for qualification. Residence in the subsistence use area is not required. Furthermore, the twelve-month period is closely related to the patterns of use and fish and game in Alaska.

The goal of the legislation is to give a preference to those who currently, actually, and substantially rely on fish and game in particular areas of the state. There must necessarily be some kind of test to identify actual and substantial reliance on that fish and game. To avoid spurious claims of reliance based on very short-term or only sporadic use, some time requirements are necessarily included. In deciding what time period would make the most sense, the advisory council looked at the patterns of fish and game use in Alaska. Most uses are seasonal. For example, salmon are generally only available during a certain time-span during the year. With game, hunting is generally limited to one or two seasons to get the best quality of meat or to avoid interference with species reproduction. In any case, patterns of use are tied to yearly cycles. If the qualifying time was less than the preceding 12 months, persons in certain areas might be disadvantaged because of the seasonal availability of fish and game. If the time period was longer than twelve month you would expect to see duplication of activity which would be less probative of current reliance. The twelve-month period is obviously the most appropriate for this particular test. It is a necessary test of bona fide reliance and we believe it will be upheld by the courts if challenged.

If you have further questions about issues raised by the subsistence legislation, I would be happy to discuss these matters with you at your convenience.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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The Honorable Mike Navarre
Majority Leader, House of Representatives
16th Alaska Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Navarre:

At the House Majority caucus yesterday, you asked me to briefly assess whether the subsistence provisions in ANILCA can be successfully challenged in court. Those provisions require that the federal government take over management of fish and wildlife on federal land unless Alaska enacts a subsistence preference for rural residents, something which the Alaska Supreme Court held in McDowell v. State, 785 P.2d 1 (Alaska 1989), is not permitted by the Alaska Constitution. In my opinion, it is unlikely that the ANILCA subsistence provisions can be successfully challenged.

Two legal questions would be presented in any federal court challenge to ANILCA's subsistence provisions. (Since ANILCA is a federal statute, it would have to be challenged in federal court.) The first is whether the classification between rural residents and urban residents for subsistence purposes satisfies the equal protection guarantee in the United States Constitution. The second is whether, if the rural/urban classification satisfies the federal equal protection guarantee, the threatened federal takeover of fish and wildlife on federal land nonetheless is invalid as an unconstitutional violation of the state's right to manage fish and wildlife.

I. The rural/urban classification for subsistence in ANILCA probably does not violate the federal equal protection guarantee.

When a federal statute is challenged as violating the equal protection guarantee of the United States Constitution, the federal courts apply a very deferential test when no fundamental right (e.g., freedom from racial discrimination) is involved: "[W]e confine our consideration to whether the statutory classification 'is rationally related to a legitimate governmental interest.'" Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988) (citation

Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988) (citation omitted). (That is a substantially more deferential test than the Alaska Supreme Court applies to state legislation challenged under the equal protection guarantee in the Alaska Constitution.) Although the Lyng case involved monetary resources, the Court noted that "our review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to [allocate those finite resources] to improve the general welfare is lodged in Congress rather than the courts." Id. at 373 (citation omitted). This would appear equally applicable to finite nonmonetary resources, like fish and wildlife.

In section 801 of ANILCA, Congress made a number of findings with respect to the importance of subsistence to rural residents. Such findings are not reweighed by the courts, and the courts will not substitute their judgment for that of Congress. See Kleppe v. New Mexico, 426 U.S. 529, 541 n. 10 (1976). (The Kleppe case also is discussed in connection with the second legal question below.) The evidence before Congress, while some may perhaps dispute it, is that there is a difference between rural residents' reliance on fish and wildlife and urban residents' reliance on those resources. Congress' findings with respect to to the importance of subsistence to rural residents would, I believe, be found by the federal courts to support the ANILCA subsistence preference for rural residents.

II. Congress probably has the constitutional authority to authorize a federal takeover of fish and wildlife management on federal land.

In Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976) (footnote omitted), a unanimous United States Supreme Court held that the Property Clause, art. IV, sec. 3, cl. 2, of the United States Constitution gives the United States Congress constitutional authority to regulate fish and wildlife on federal land: "In our view, the 'complete power' that Congress has over public lands [under the Property Clause] necessarily includes the power to regulate and protect the wildlife living there."

The Court also rejected New Mexico's argument that interpreting the Property Clause to give Congress the power to regulate fish and wildlife on federal land impermissibly intrudes on state sovereignty. In the Court's view, "when Congress so acts [under the Property Clause], the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const., Art. VI, cl.2." 426 U.S. at 543 (case citations omitted).

The rationale for this conclusion is that all states consent to the provisions of the United States Constitution, including the Property Clause and the Supremacy Clause, upon

Hon. Mike Navarre
Alaska House of Representatives

May 6, 1990
Page 3

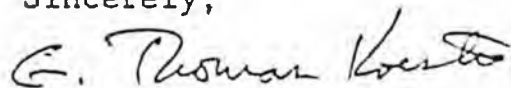
admission to the Union. In art. XII, sec. 13, of the Alaska Constitution, we consented to "[a]ll provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States." These clearly include the specific powers -- such as the Property Clause power over federal land -- which the United States Constitution grants to the national government.

The decision in the Kleppe case was by a unanimous Supreme Court only fourteen years ago. In any action seeking to prevent the federal government from taking over management of fish and wildlife on federal land, the lower federal courts will be bound by the Kleppe decision. They therefore would have to deny any injunction sought to prevent such a takeover unless and until the Supreme Court reverses Kleppe. Because it would take at least three to four years before the case could reach the Supreme Court (assuming it was willing to take it), we would be left with at least that much time during which the federal government would be managing fish and wildlife on federal land.

I have not reached this conclusion lightly. For years, I have been a strong proponent of the state's rights and strenuously resisted attempts by the federal government to diminish those rights. See, e.g., Watt v. Alaska, 451 U.S. 259 (1981) (successful defense of Alaska's entitlement to 90 percent of federal oil and gas leasing revenues from the Kenai National Moose Range); Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (author of amicus brief, in which 32 other states joined, in support of Utah's successful equal footing doctrine claim). If the Kleppe decision had not been decided in 1976, I could and would make very strong arguments that the federal government does not have constitutional authority to enact laws governing fish and wildlife in Alaska, even on federal land, with some substantial possibility of success. In light of the Kleppe decision, however, I believe such arguments will not succeed.

I hope this answers your questions. If I can be of further assistance, please contact me at your convenience.

Sincerely,



G. Thomas Koester
Assistant Attorney General



ALASKA OUTDOOR COUNCIL, INC.

P O Box 34097
Juneau, AK 99803
463-3830

March 20, 1992

Senator Halford
State Capitol
Juneau, AK 99801-1182

Dear Senator Halford:

As you may know, the Alaska Outdoor Council voted to take no position on the Governor's subsistence bill (SB 443/HB 552) when it was introduced.

Our position reflected concerns about: (1) the constitutionality of differences in individual qualifying procedures related to residence; (2) the lack of a mandate to verify individuals' qualifications in outlying areas; (3) the potential influence on Indian country arguments; (4) modest criteria to qualify for subsistence; (5) the need to make clear that both subsistence and other uses should be provided for when resources have recovered from a low level; and (6) the need for a definition of "urban". We also oppose related constitutional amendments which are unnecessary to make the bill workable and would invite backsliding in terms of equal protection and common use of the fish and game resources. To comply with ANILCA by amending our Constitution does not "return State management". It simply locks in Federal judicial oversight on the State's execution of ANILCA subsistence mandates.

However, the Governor's bill does address many of our concerns and we applaud this progress. Specifically, it establishes individual criteria based on resource dependency, regardless of where a person lives, as the means to qualify for a priority. It clearly limits "customary trade" to non-commercial activities. It makes clear that subsistence uses will be regulated. It mandates increasing fish and game numbers when populations are low. It greatly strengthens resource protection and management.

The Alaska Outdoor Council is participating in your consideration of the legislation. We have recognized the importance of working for a good solution rather than against poor solutions. Recent Council policies and action demonstrate this.

For example:

- 1) We have formally recognized the important of non-commercial use

All Legislators, page 2

of fish and game for food to support people's lifestyles;

- 2) We helped develop the concept of a priority based on a resource dependent subsistence lifestyle;
- 3) We worked constructively with the Governor's Subsistence Advisory Council on this legislation;
- 4) We have sought agreement with Native groups and others regarding resource and habitat enhancement and other management issues;
- 5) We have fought for continued subsistence uses in National Parks as authorized by ANILCA;
- 6) We initiated action to have Alaska represented at the Convention on International Trade in Endangered Species to protect Alaska Natives' subsistence uses of walrus;
- 7) We are supporting HB 446, the wildlife conservation viewing tag bill, that will benefit non-consumptive uses of fish and game; and
- 8) We participated on the public Wolf Management Planning Team in a constructive, good faith effort.

The point is, we are working to resolve subsistence and other fish and game issues in ways that enhance everyone's opportunities to responsibly use fish and game resources.

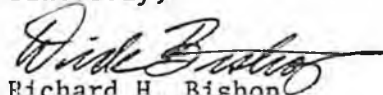
Our goals with regard to the subsistence legislation are to help pass a bill that:

- 1) ensures sound resource perpetuation and management;
- 2) maintains the equal rights, equal protection and common use provisions of our state constitution;
- 3) provides for a subsistence priority for fish and game and for other uses within the bounds of the constitution;
- 4) does not influence Indian country legal arguments; and
- 5) allows people to enjoy the physical and philosophical satisfaction of sustaining their Alaskan lifestyles through the responsible uses of fish and wildlife.

We believe these goals can be met. We believe that in meeting them, other people's goals can also be met. Further, we believe that such a fair and equitable solution will have inherent stability and permanence that cannot be achieved in any other way, not even by constitutional amendment.

We look forward to helping you complete this work that the Governor has started.

Sincerely,


Richard H. Bishop
Legislative Affairs

CC: Governor Hickel
Commissioner Rosier

Testimony to
Alaska Senate Resources Committee
on SB443 - Subsistence Legislation
by Richard H. Bishop
for the Alaska Outdoor Council

My name is Dick Bishop; I live at 1555 Gus's Grind, Fairbanks, 99709.

I am testifying on behalf of the Alaska Outdoor Council, a statewide coalition of over 10,000 Alaskans including 50 groups, who support sound scientific management of fish and wildlife and public access to public resources consistent with Alaska's Constitution.

The Outdoor Council's policy regarding a subsistence priority law is that a priority law is unnecessary to accommodate subsistence uses, but if a priority is established it should be based on individual criteria related to resource dependency, --that is, a subsistence lifestyle--and must be constitutional under the present state Constitution. The Council has never opposed subsistence use; the Council has consistently supported the practice of using the resources of the land to feed one's family. But the Council has consistently opposed the rural priority and other discriminatory criteria.

The Alaska Outdoor Council, at its statewide convention on March 1, voted to take no position on SB443 and HB552 at this time, but ordered its Board of Directors to monitor the legislation and respond to changes as needed.

Concerns expressed by Outdoor Council members were:

1. Different qualifying procedures for subsistence priority applicants would depend on place of residency. Some viewed this as unconstitutional, others saw it as less serious legally but nevertheless unfair. Still others saw it as the basis for legal argument favoring Indian country. The Legislature should be sure that qualifying procedures are fair, constitutional and without Indian country implication. The Outdoor Council has recommended in previous discussions that all applicants file an affidavit similar to the Permanent Fund dividend affidavit which could be questioned by the State if necessary.
2. There is no mechanism in the bill to verify individual qualification in rural areas and regional centers. The bill makes presumptions about the proportions of people who qualify in rural areas and regional centers, based on general background information provided by the Department

of Fish and Game. To be sure these presumptions are correct and are fairly applied in the future, the Department and Boards need a system to verify and periodically update the information. We have recommended that a scientific sampling scheme be developed by the Department to gather information on which periodic recommendations can be made to the Boards regarding the applicability of presumptions made in Section 16.05.268(h).

3. The minimum criteria for individual qualification as a priority user do not characterize someone who "lives off the land" in a subsistence lifestyle. If this law is enacted, we believe experience will demonstrate that the minimum criteria must reflect a greater dependence on fish and game resources.
4. The proposed legislation, as it now stands, must contain a "neutrality statement" clarifying that the Legislature intends that as law it neither adds to or diminishes the legal arguments for Indian country. The difference in administrative requirements for priority use applicants, based upon residency, raises the question. Any legislation which provides benefits to residents of primarily Native communities--and which Natives living in more cosmopolitan areas do not receive--can be used in arguments for Indian country. The 9th Circuit Court of Appeals recently made this clear in its Tyonek ruling wherein they declared that the federal rural priority helped Tyonek meet the "Indian country test".
5. The bill should ensure that subsistence AND other uses should resume when resources recover. Presently, only subsistence uses are required to be reinstated in Section 16.05.268(2).
6. "Urban" should be defined. It is important in deciding how and where the administrative requirements are applied to individuals in Sec. 16.05.268(f).

The long, discriminatory history of the subsistence priority law has so sensitized people that they are extremely wary of continued unfair treatment or loss of privileged use. There is a tendency to see "boogey men" in many provisions of this bill.

However, the Outdoor Council wants to avoid the situation Mark Twain described when he said: "It's easy to find fault, if one has that disposition. There once was a man who, not being able to find any other fault with his coal, complained that there were too many prehistoric toads in it."

There are people determined to find lots of toads in this bill--and there are some, but they do not warrant total rejection

of the bill. Selective toad-squashing can improve the bill.

The principle of basing a priority upon individual criteria related to resource dependency is a quantum leap forward--both legally and ethically.

This bill corrects numerous serious flaws in past legislation. It greatly improves resource protection provisions. It conforms to the principles of basing a priority on resource dependency measured by individual criteria. It allows a person to qualify regardless of residency location. It prohibits commercial sale of subsistence resources, such as salmon roe or herring roe on kelp. It mandates action to increase low fish or game numbers. The bill has strengthened resource protection and management.

From the perspective of your committee's major responsibility of good resource stewardship, we see no reason that it's passage should be delayed. Other committees will address our concerns regarding legal and constitutional issues.

We applaud the Governor for his determination to develop a good subsistence law. We urge the Legislature to follow his lead.

No constitutional amendment is required to make this proposed law workable. The Alaska Outdoor Council opposes any constitutional amendment regarding a subsistence priority.

ALASKA OUTDOOR COUNCIL

Press Release
March 2, 1992

Contacts: Richard Bishop 455-6151
Randy Smith 277-1617

Alaska Outdoor Council Reacts to New Subsistence Bill

The Alaska Outdoor Council voted to take a "wait and see" posture on Governor Hickel's subsistence bill at its annual convention this past weekend in Fairbanks.

In related action the Council opposed all of the legislative resolutions aimed at putting a subsistence priority in the state's Constitution.

Delegates to the Council's convention expressed grave concern over the lack of equal treatment proposed in the bill.

Randy Smith, executive director, noted there are no provisions in the bill to ensure that residents of small communities who are presumed to meet the criteria actually do meet it. He also expressed concern about vague, undefined terms which have caused problems with the previous and current laws.

Delegates were concerned that the bill held no "neutrality statement" with regard to implications for Indian country status and that the individual requirements were far too lenient.

MORE

The delegates did agree that the bill was an improvement over existing state and federal subsistence laws. They were uneasy about taking a position on a bill that is likely to be amended in unpredictable ways during the legislative process.

"The Outdoor Council applauds Governor Hickel's determination to develop a good law on subsistence use," said Smith. "The Governor's bill addresses several of our concerns about current laws on subsistence use of fish and game."

Smith noted three examples. The recent sale of herring roe taken under subsistence regulations and then sold would be prohibited under this bill; the bill allows qualified urban residents to receive the priority; and the Department must take corrective action if fish and game are too low to accommodate both subsistence and other consumptive uses.

The Council ordered its Board of Directors to monitor the legislation and respond to changes as needed.

* * *

SUBSISTENCE LEGISLATION NEEDS A "NEUTRALITY STATEMENT"

...Mary Bishop

presumption: (law) an inference required or permitted by law as to the existence of one fact from proof of the existence of other facts.

The Governor's proposed subsistence law makes a presumption that virtually ALL residents of villages, MOST residents of mid-sized communities, and FEW residents of large communities meet the individual criteria required for subsistence use.

Correspondingly, the legislation would establish three ways for an individual to attest that he/she meets the criteria: 1) do nothing! 2) sign an affidavit; or 3) hold an approved application.

Individuals would be treated differently on the basis of their residency. Thus, the statute can be used by advocates favoring Indian country--unless a neutrality statement is included.

A reading of the 9th Circuit Court of Appeal's *Tyonek* opinion, as well as the Tanana Chief Conference's brief in the current *Saason Henry* case, makes one point abundantly clear: ANILCA's rural subsistence priority contributed significantly to the courts opinion that the "Indian country test" had been fulfilled.

A key point to understanding Indian law in Alaska is the Indian country test: Whenever residents of a primarily Native American community receive different treatment than do Native Americans living in more cosmopolitan areas--and the different treatment is based upon residency, the community may be judged a "dependent Indian community"--under the governance of its tribal group. (See attachment and 18 USC 1151)

ANILCA demands that Alaska's rural village residents receive a harvest priority that cannot go to Natives living in Anchorage, Juneau, Fairbanks and Ketchikan.

A neutrality statement would say that no provision of the statute can be used to argue for or against tribal governance and Indian country land status. A neutrality statement is included within the "1991" amendment package to the Alaska Native Claims Settlement Act. Similarly, one should be included in any amendment of ANILCA regarding subsistence use.

Neutrality statements have been used in other federal statutes, including the Lacey Act. The effectiveness of those statements, when challenged in court, should be researched.

Opposition to the inclusion of a neutrality statement would seem to indicate that advocates want both subsistence priority and Indian country land status--and are attempting to use the priority as a legal step in gaining Indian country, as is exemplified by the *Tyonek* and *Sawson Henry* case.

The three levels of presumption also seem to stretch the state constitution to or beyond its limit.. Would the Justices rule that the fit between legislative enactment and public interest/equal protection is adequate? Would they rule that the difference in requirements between residents of mid-size and large community too frequently results in unequal treatment of individuals who are similarly situated with respect to the resource?

The proposed legislation should be amended by:

1. deleting the three levels of presumption and providing that everyone attest to the criteria in the same manner; OR
2. including a neutrality statement AND allowing only two levels of presumption (1. residents of areas where virtually everyone can be presumed to meet the criteria; and 2. all other residents) OR
3. including a neutrality statement. (This option seems constitutionally questionable but it may give protection to the state's interest in preventing Indian country status.)



United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
310 L Street, Suite 408
Anchorage, Alaska 99501

IN 2221

April 18, 1978

MEMORANDUM

TO: Superintendent, BIA, Anchorage Agency

FROM: Assistant Regional Solicitor, Anchorage

SUBJECT: Opinion on Enforcement of Rule No. 4--Exclusion of Non-Natives From Native Village of Tyonek

In your memorandum of last September 29th, you requested our opinion as to whether the Village of Tyonek had the authority to exclude a non-Native from the Village pursuant to its Rule No. 4 which reads as follows:

"No. 4: Any white men except government men or outsider coming in is allow to stay only 24 hrs. If weather permits them to go. And is not allowed to bring any Liquor. Article No. 4 have to be put up in posters. And anyone destroying these papers will be subject to penalty. Twenty-Five dollars fine if caught destroying the poster. (sic) Rules for Laws, of Native Village of Tyonek (May 18, 1942)"

Promulgation of Rule No. 4 was an exercise of the Village's power under section 1 of Article IV of the Village Constitution (ratified on November 27, 1939)--

"To control the use by members or nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve."

The Village Constitution was adopted pursuant to the Indian Reorganization Act of June 18, 1934, as amended by the Acts of June 15, 1935 and May 1, 1936 (25 U.S.C. secs. 473a, 476). Various federal and state court decisions have recognized the Tyonek Natives as a "tribe" whose IRA "Tyonek Tribal Council" constitutes the "local government of the reservation . . . which is recognized by the United States as the spokesman for the people of Tyonek in all reservation affairs." Fondahn v. Native Village of Tyonek, 450 F.2d 520, 521 (9th

298 F. Supp. 17 and 26 (D. Ariz. 1968 and 1969) (tribal order excluding non-Indians from reservation constituted passage of bill of attainder and denial of free speech and property prohibited by Indian Civil Rights Act of 1968); and Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975) (non-Indians may initiate action under Indian Civil Rights Act of 1968); and Mayer v. Nebraska, 262 U.S. 390, 400 (1923) ("liberty" in due process clause denotes, among other things, the right "to engage in any of the common occupations of life" and "to . . . establish a home").

Notwithstanding the foregoing opinion, it might be helpful to note that if the Tyonek group someday finds itself in a federal court case testing the tribal authority to exclude or remove non-Natives from the Village of Tyonek, the argument might be advanced that even though the lands within the former reserve no longer constitute "Indian country" under tribal jurisdiction, the village itself is a dependent Indian community falling within the second definition of "Indian country" in 18 U.S.C. sec. 1151 (1976) as being "all dependent Indian communities within the borders of the United States" While this definition has historically been applied to Indian pueblos (e.g., United States v. Sandoval, 231 U.S. 28, 47-48 (1913) and United States v. Chavez, 290 U.S. 357, 364 (1913)), such definition has been extended to other areas of Indian occupancy after a review of evidence relating to the following criteria used to determine the existence of a "dependent Indian community," to wit: "the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area" (e.g., Bureau of Indian Affairs). United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971); also, State v. Cutnose, 532 P.2d 896, 902 (N. Mex. 1974). However, the courts have stressed that "the mere presence of a group of Indians in a particular area would undoubtedly not suffice" to establish a dependent Indian community. United States v. Martine, supra, at 1024, and State v. Cutnose, supra, at 898. One Alaska court determined that the term "all dependent Indian communities" in 18 U.S.C. sec. 1151 "does not apply to Metlakatla because Metlakatla is not dependent as a community and any benefits available to the residents as Indians are the same as those available to any Indian in Alaska, including Indians living in apartment houses in Ketchikan." United States v. Booth, supra, 17 Alaska at 569-570 and 161 F. Supp. at 273. To

advance the argument that the Village of Tyonek is still Indian country because it is a dependent Indian community might appear to be somewhat expedient in light of previous judicial determinations that the Village was in Indian country by virtue of the reservation status of the area withdrawn for the Tyonek Natives. A corollary jurisdictional problem which would also have to be addressed would be to define or describe the exact territorial boundaries of the "dependent Indian community" if in fact the Village is such a community.

Finally, in direct response to the specific question set forth in your opinion request, and on the basis of our foregoing opinion, we conclude that although the Tyonek Village Council acted under color of Rule No. 4 by requesting the non-Native to leave the Village, such action would not be supported by the courts because Rule No. 4 is no longer applicable to non-Natives and any action pursuant thereto would be without lawful authority.

James R. Hochershead
James R. Hochershead



CORDOVA DISTRICT FISHERMEN UNITED

P.O. Box 939

Cordova, Alaska 99574

Phone (907) 424-3447 Fax (907) 424-3430

March 7, 1992

Position Paper

SB 433

Cordova District Fishermen United commends the Subsistence Task Force for crafting a reasonable and equitable bill to address the issue of subsistence. CDFU supports SB 443 and urges the Senate Resources Committee to accept the bill in its present form and avoid making substantive changes to its content or intent.

CDFU endorses the proposal to prioritize communities based on population and traditional dependency on subsistence to determine access to subsistence resources. This plan will ensure that Alaskans who rely on indigenous fish and game as primary food sources will have priority over less dependent communities for subsistence harvesting. The proposal also provides clear guidelines defining subsistence user groups which will facilitate and simplify the management of fish and game resources for subsistence based on sustained yield.

CDFU supports the definition of "customary trade" as defined in SB 443. This definition clearly states that subsistence foods may not be sold in commercial channels and will clarify the current vagueness surrounding what constitutes customary trade.

It is CDFU's position that SB 443 adequately addresses the taking of fish and game for subsistence and provides a fair and objective system to determine access to and use of subsistence resources. We urge your support of SB 443 as it is presently written.

ANCHORAGE TRIBES OF TLINGIT AND HAIDA INDIANS OF ALASKA (ATTHIA)
670 W. FIREWEED LANE, SUITE 106, ANCHORAGE, ALASKA 99503-2578
TELEPHONE: 907/278-4154

*file
subsistence
bill
SB 443 (73)*

received
3-21-92

March 17, 1992

Honorable Lloyd Jones
Alaska State Senate
Chairman, Senate Resources
Committee
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Jones:

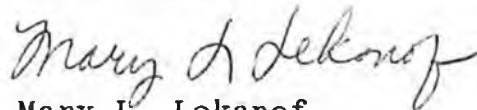
The Anchorage Tribes of Tlingit Haida Indians of Alaska during a Subsistence Committee meeting held on March 16, 1992, adopted the following motion:

"Ron Mallott/Ruth Willard motion that we direct letter to Senate Resources Committee and request that they withhold any determination on SB 443 pending outcome of AFN Subsistence Summit to be held March 23-24, 1992 carried.

Therefore, this is a formal request on behalf of our organization that your committee place the bill in pending until March 25, 1992.

Thank you for consideration of our respectful request.

Sincerely,



Mary L. Lekanof
President

cc: Following Alaska State Senate Committees
Judiciary
Finance
Rules

92-013

CERENE J. PAUL
847 Faultline Ave.
North Pole, Ak. 99705

SENATE RESOURCES COMMITTEE

HOUSE BILL 552

HB-552 is the same as previous Legislation in that it still discriminates on the basis of a person's residence. Urban/Rural was found unconstitutional by the Court. Under the new proposed section, Sec. 16.05.268 par. (f) HB-552 substitutes numbers of human population per community and requires a Rural residency to qualify and disqualifies you if you reside in an Urban area where human population is 7,000 or greater. Par. (g) states, the Boards shall jointly consider the relative importance of subsistence etc. The Boards of Fish & Game can not solve this enormous problem.

I oppose HB-552 in it's present form, it does not allow for equal access or an equal opportunity. Prior to the subsistence law in 1978 it seemed that all Alaskan's were happy with the existing conditions, today none are!

Let me state that I utterly oppose any and all of the numerous proposals to amend the State Constitution for subsistence and to mandate State discrimination for the Minority and against the Majority of Alaska Residents!

Several hundred years ago Patrick Henry said, "Give Me Liberty Or Give Me Death," I say give all Alaskan's equal treatment under the law.

All Community Legislatures

Subject: Remove the 1986 law on subsistence from Alaska state law.

Why: The Federal Government through action by its federal agencies have implemented regulations which exclude Ketchikan, Juneau, Fairbanks and Anchorage explicitly from participating in harvest of renewable resources, as well as Seward, Valdez, Talkeetna, Tok, Big Delta and other communities throughout Alaska. As stated in the summary on Federal Regulations even Sitka once it has reached certain size will be restricted. These communities are considered urban in nature and therefore banned from use of renewable resources for Subsistence purposes on federal land.

I recently appealed a decision by the Wrangell St. Elias Park Superintendent to the National Park Service Director, Alaska Division, on denying my rights as a United States Citizen, to hunt in the Wrangell St. Elias Park, an area I had hunted (12) years ago, prior to the establishment of the park. I was denied access because my residency (Anchorage) is WEST of the Lake Louise Road. I was not only denied my rights to hunt but have been denied the right to participate with residents EAST of the Lake Louise Road to harvest any resources designated subsistence resources for their use from the park. I cannot assist them in picking berries from the park, packing moose from the park nor assist them in bringing any subsistence harvest from the core park to their table!

I have appealed this decision to the highest level with the park service and am now a plaintiff on the McDowell II case with the Federal Government.

Although the committee formed by Governor Hickel on subsistence has honorable intentions their efforts will be to no avail. All "ground" has been plowed to the farthest horizons on subsistence. The governors board cannot pass on the problems inherent with the 1986 state subsistence law or the 1980 federal law on subsistence to the citizenry boards of fish and game. This was done by our state legislatures and our congressional people in the past and it has failed dismally. Let seasons and bag limits prevail. Let means and methods, if reasonable, prevail. Residents of Alaska whether rural or urban are not going to accept being restricted from the harvest of fish and game for their dinner table because of residency, nor should they. The Alaska Supreme Court struck down the residence requirement in McDowell I. Unfortunately the State of Alaska has not decided to challenge the decision by Judge Cutler to retain the remainder of the 1968 state law therefore the 1986 Subsistence law continues to fumble along harming all Alaskans.

Where do you draw the boundaries? Ten miles out of town? Fifty miles out of town? One thousand miles out of town? Five miles up or down the river? Fifty miles up or down the river or five hundred miles up or down the river? What town? What river?

These boundaries cannot be defined without excluding your neighbor, fishing and hunting friends and residents throughout Alaska. This is an insult! Income cannot be used because what thoughtful Alaskan would take the chance of turning the fish and game harvest into a welfare program!

The cost to implement this folly has been staggering! Since 1978 and earlier Alaskan residents have spent \$1,000,000.00 fighting to keep their rights, (I know, I keep the books) to harvest fish and game for their own personal use. Asking an unnamed federal employee who would be able to estimate the cost factor by all government agencies, state and federal, over the past fourteen years, his remark was, and I quote, We've out spent you two hundred to one! \$200,000,000.00 and the critter hasn't flown yet! For two hundred million we could have dismantled the fence around the barley project and put a buffalo in everyone's backyard!

In 1972 The Alaska Native Claims Settlement Act was passed. In that contract the native community received forty four million acres. The primary purpose for these acres was subsistence. All persons who hunt or fish who read the papers must be aware that these are private properties owned by the natives, to be respected as private property. Notices are continually placed in the paper notifying outdoor users of the boundaries of these properties. Subsistence laws, state or federal do not apply to these acres! These acres were very strategically selected to maximize fishing and hunting opportunities especially adjacent to waterways. Ninety eight percent of the villages are at sea level which gives a tremendous advantage to the local resident for harvesting fish and game. Eighty five percent of the subsistence harvest (federal figures) comes from three resources, namely, sea mammals (natives have exclusive use, 1972 Sea Mammal Act), waterfowl, (natives have a special spring season) and fisheries.

Public Law 92-203, 92nd Congress, H.R. 10367, December 18, 1971, Declaration of Policy, Section 2, paragraph (b) "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist are hereby extinguished". In addition to the forty four million acres, all Alaska residents have participated in this contract with five hundred million dollars from our resource base in accelerated payments (former Governor Hammonds plan, 1975) to the native people.

This is the real history of Alaska for the past 20 years. Every Alaskan has participated in paying a just contract for our native neighbors.

By following Governor Hickel's lead on navigable water, Alaska can and will retain management of our waterways. Quoting from a proposed resolution before the Alaska Outdoor Council, "Under our Alaska Statehood Compact Agreement with the United States Government Alaska received title to 103 million acres of land, all marine coastlines and all navigable waters of Alaska. Under our Compact Agreement the United States Government transferred all management rights of fish, woods, waters, wildlife and all common property and replenishable natural resources to the State of Alaska. The United States Supreme Court under the Gulkana decision reconfirmed the State of Alaska owns all title and management rights to navigable waters and resources including fisheries and sub-surface resources and extraction rights.

The State of Alaska owns the management rights to all waters in the state of Alaska under the navigable waters pursuant to the Statehood Compact Agreement under Alaska Public Waters Law pass by the Alaska Legislators and under the United States Supreme Court decision, State of Mississippi versus Philip's Petroleum where the court ruled if tidal water floods an area even two inches once a year the management rights and land title rights shall be transferred to the state."

The governor is to be commended for his aggressive action on the waters of Alaska for the benefit and well being for all Alaskans no matter what their residency or age. Alaskans have proven many times over their ability to manage and increase fish and other renewable resources.

Its time for the Legislatures from the above mentioned communities as well as all communities prohibited from subsistence use to abide by our constitution and bring an end to this insulting behavior by the federal government. All Alaska's children, young and older adults deserve better from their elected officials, they expect and deserve to be treated equally.



Warren E. Olson
5961 Orth Circle
Anchorage, Alaska
99516

346 1811

Past member of State of Alaska Citizens Advisory Commission on Federal Lands, appointed by the Alaska Legislatures.

P.1

JOHNSON-LIEBER, INC.
1225 E. International Airport Rd
Suite #210
Anchorage, AK 99518-1410



TEL: (907) 562-2665 FAX: (907) 561-5132

TO: Senator Lloyd Jones DATE: 3/6/92
Senate Resources Committee FAX 465-2864
JUNEAU

FROM: Tim Stevens

PAGES: (Including this page) 2

MESSAGE: (If Any) PLEASE DELIVER ASAP!
CONCERNS SATURDAY'S TELECONFERENCE
ON SUBSTANCE.

SENATOR JONES'S OFFICE NUMBER
465-3743

MAR 06 '92 10:37 JOHNSON-LIEBER-

THANK YOU.

Tim Stevens

12830 Huffman Circle
Anchorage, AK 99518
March 6, 1992

Mr. Lloyd Jones
CHAIRMAN SENATE RESOURCES COMMITTEE
P.O. Box 5
Juneau, AK 99811

Dear Sir:

Please, I beg you, do not even consider a constitutional amendment on the subsistence issue. This would in no way regain state management of our fish and game resources. If I am correct in my thinking, the opposite effect would take place. It would lock in federal judicial oversight if we comply with ANILCA on the subsistence issues.

Sincerely,



Tim Stevens
(907) 345-3804

BEN R. MILAM
HC 02, BOX 7403 G
PALMER, ALASKA 99645

March 6, 1992

Honorable Senator Lloyd Jones
Senate Resources Committee
Alaska State Legislature
State Capitol Building
Juneau, Alaska 99801-1182

Reference SB 443/HB552 "Subsistence"

Dear Senator Jones:

I understand that the "Subsistence Bill" is now before your committee. I urge you to reject this bill in total because it does not address the problem.

First and foremost it does not grant equal access for all Alaskans. Second it does not address the problem of proper resource management based on biological reasons. Third it incorporates a price tag of some \$600,000 per year without any means of placing that burden on those who will benefit.

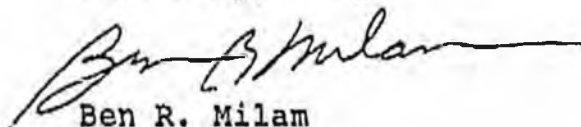
We are all Alaskans regardless of race, creed or color and that is the principles that the United States and Alaska were founded upon. This is a principle we cannot negotiate.

Our fish and game are one of the most important resources we own. Without them some people will go hungry and others will suffer financially without this strong tourist attraction. We must manage this resource without compromise. If we had a sound game management policy which managed game on a maximum sustained yield basis, we would not have the problem of allocation we face today.

Hopefully we are all beginning to realize that our state income is dwindling as oil production slows. In the past sportsmen have borne the total cost of fish and wildlife management. We cannot be expected to bare the cost of a program which is inherently detrimental to the majority of Alaskans and the resource itself. Any bill you pass must pass the cost on to those who benefit.

Again, please do not pass this bill in it's current form and DO NOT even consider a constitutional amendment. If you want to do something positive, urge the Governor to enter a lawsuit against the federal government to remove the rural preference.

Sincerely,



Ben R. Milam

FACSIMILE TRANSMITTAL COVER SHEET

TO: Senate Resources Committee

PHONE:

FAX: 562-4376

NUMBER OF PAGES: 2

FROM: BEN R. MILAM

PHONE: 274-7232

FAX: (907) 274-9524

COMMENTS:

Please pass this information to the Senate Resources Committee as testimony to hearings conducted Saturday, March 7, 1992 on subsistence

March 6, 1992

Sen Resource Comm.

Sen Lloyd Jones

Dear Sir,

As a resident of Alaska for 39 years I am not in favor of HB 552 and HB 443 Subsistence. Even though it is better than what we have now I think we should keep in agreement with our state Constitution.

This bill will create more rules and regulations and a new bureaucracy to monitor it and make more paperwork.

It will also create a special class of citizens. I think we should sue the federal government to make ANILCA honor our state Constitution -

Equal Rights to Fish and Game Stocks for Everyone - and everything else they haven't done yet after 33 years. We got along for years without subsistence regulations and I don't think we need them now.

I think we can regulate subsistence through seasons and bag limits.

Sincerely,

Paul L. Newcome

P.O. Box 70941

Ft. Peck, AK 99707.



UNITED FISHERMEN OF ALASKA

211 4th Street, Suit 112
Juneau, AK 99801
907-586-2820
Fax# 907-463-2545

MEMBER ASSOCIATIONS

Alaska Crab Coalition
Alaska Independent Fishermen's
Marketing Association
Alaska Longline Fisherman's
Association
Alaska Trollers Association
Bering Sea Fishermen's Association
Bristol Bay Driftnotters Association
Concerned Area 'M' Fishermen
Cook Inlet Aquaculture Association
Copper River Fishermen's Cooperative
Cordova District Fishermen United
Kenai Peninsula Fishermen's Association
North Pacific Fisheries Association
Northern Southeast Regional
Aquaculture Association
Peninsula Marketing Association
Petersburg Vessel Owners Association
Prince William Sound
Aquaculture Association
Prince William Sound Seiners Association
Seafood Producers Cooperative
Southeast Alaska Seiners
Southern Southeast Regional
Aquaculture Association
United Cook Inlet Drift Association
United Southeast Alaska Gillnetters
Western Alaska Cooperative
Marketing Association
Area K Seiners Association

March 26, 1992

The Honorable Rick Halford
Member, Senate Resources Committee
State of Alaska
Post Office Box V
Juneau, Alaska 99811

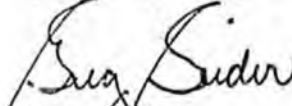
Dear Senator Halford:

The United Fishermen of Alaska's Board of Directors voted, at its annual meeting held February 7-13 in Juneau, to support the legislation that was the result of the Governor's Subsistence Advisory Council recommendations. We would like to advise you that we strongly support Senate Bill 443.

The continued support of these measures by the United Fishermen of Alaska is dependent upon a review of any amendments that may be made by the legislature.

The United Fishermen of Alaska supports this legislation in the present form. We simply believe that it equitably deals with all the user groups of Alaska's fish and game resources.

Very truly yours,


Greg Seider
Executive Director

GS:phi



UNITED FISHERMEN OF ALASKA

211 4th Street, Suit 112
Juneau, AK 99801
907-586-2820
Fax# 907-463-2545

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Aquaculture Association
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United Southeast Alaska Gillnetters
Western Alaska Cooperative
Marketing Association
Area K Seiners Association

March 26, 1992

The Honorable Lloyd Jones
Chairman, Senate Resources Committee
State of Alaska
Post Office Box V
Juneau, Alaska 99811

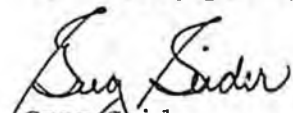
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Greg Seider
Executive Director

GS:phl

Sec. 16.05.940. DEFINITIONS. In AS 16.05 - AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish, but does not include processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of the vessel; in this paragraph "operate fishing gear" means to deploy or remove gear from state water, remove fish from gear during an open fishing season or period, or possess a gill net containing fish during an open fishing period;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

(10) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(11) "fish derby" means a contest in which prizes are awarded for catching fish;

(12) "fishery" means a specific administrative area in which a specific fishery resource is ~~commercially~~ taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource; in this paragraph "gear" and "type of gear" have the meanings given in AS 16.43.990;

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water that is completely enclosed by a generally escape-proof barrier; in this paragraph, "fish" does not include shellfish, as defined in AS 16.40.199;

(15) "fish stock" means a species, subspecies, geographic grouping or other category of fish manageable as a unit;

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skin, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 - AS 16.40;

(18) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(19) "hunting" means the taking of game under AS 16.05 - AS 16.40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state;

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(22) "operator" means the individual by law made responsible for the operation of the vessel;

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(24) "person with physical disabilities" means a person who presents to the

department either written proof that the person receives at least 70 percent disability compensation from a government agency for a physical disability or an affidavit signed by a physician licensed to practice medicine in the state stating that the person is at least 70 percent physically disabled;

(25) "resident" means a person who for the preceding 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph; and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(26) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(27) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 - AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(28) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(29) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(30) "subsistence hunting" means the taking of, hunting for, or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game;

(31) "subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis;

(32) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game:

(33) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(34) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(35) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft.

S B

4 4 9

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 3/16/92

FURTHER:

Date of 5-Day Notice: 3/19/92
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: 3/26/92

Judiciary

Committee considered

SB 449

"An Act relating to the transfer of a limited entry permit, including a transfer due to an execution; and providing for an effective date."

and recommends:

replace with CS SB 449 ()

- same title
- new title
- technical title change (HB only)

attaches amendment(s)

adopts _____ Letter of Intent

further referral to the _____

do pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES: Dept/Date

zero fiscal notes _____

fiscal notes _____

appropriation--no fiscal note

DO PASS:

[Handwritten signatures]

PREVIOUS FISCAL NOTES: Dept/Date

Governor's bill with fiscal notes:
zero fiscal notes F&G 3/12/92 / REV 3/22/92
CAED 3/13/92 / F&G Comm Fish Entry Comm 3/11/92
fiscal notes _____

OTHER RECOMMENDATIONS:

[Handwritten signature]

[Handwritten signature]
Chair: Signature and Recommendation

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: SB 449

(S) Publish Date: 3-16-92

Revision Date: _____

Department Affected: FISH AND GAME

Title: Regulate the transfer of limited entry fishing permits

BRU: Commercial Fisheries Entry Commission

Component: Limited Entry Program Administration

Sponsor: Rules Committee

Requestor: Governor

COMPONENT SERIAL NO.

	4	7	1
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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	0.0	0.0	0.0	0.0	0.0	0.0

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

REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Roger Kolden Phone: 789-6160

Division: Commercial Fisheries Entry Commission Date: 03/11/92

Approved by Commissioner: _____

Agency: CFEC Date: 3/11/92

No. 4Bill Version: SB 449(S) Publish Date: 3-16-92

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSIONRevision Date: 3/12/92Department Affected: Fish and GameTitle: Transfer of limited entry permitsBRU: Commercial FisheriesComponent: Commercial FisheriesSponsor: Rules Committee by Governor

Requestor:

COMPONENT SERIAL NO.

4	5	9
---	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0.0	0.0	0.0	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
----------------------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0.0	0.0	0.0	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: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Geron Bruce G.B.Phone: 465-4100Division: Commissioner's OfficeDate: 3/12/92Approved by Commissioner: Don SomervilleAgency: Department of Fish and GameDate: 3/12/92

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

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 449

Revision Date: _____

Department Affected: Commerce & Econ. Dev.

Title: Transfer of entry permit on execution

BRU: Investments

Component: _____

Sponsor: Senate Rules by Request of Governor

Requestor: Judiciary

COMPONENT SERIAL NO.

0	3	8	4
---	---	---	---

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	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND RESOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

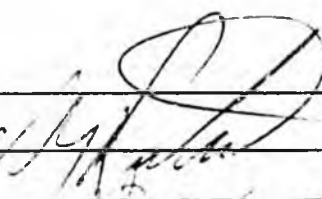
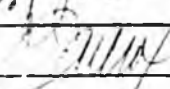
GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: 0

ANALYSIS (Attach a separate page if necessary.)

Prepared By: Martin J. Richard, Director  Phone: 465-2510
 Division: Investments Date: 3/23/92
 Approved by Commissioner: Glenn A. Olds 
 Agency: Department of Commerce & Economic Development Date: 3-24-92

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

No. 3

FISCAL NOTE

Bill Version: SB 449

(S) Publish Date: 3-16-92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____

Department Affected: Commerce & Econ. Dev.

Title: Draft bill establishing procedures to
govern transfers of entry permits

BRU: Investments

Component: _____

Sponsor: _____

Requestor: _____

COMPONENT SERIAL NO.

0	3	8	4
---	---	---	---

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	0	0	0	0	0	0

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

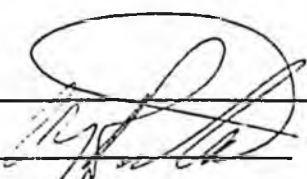
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: 0

ANALYSIS (Attach a separate page if necessary.)

Prepared By: Martin J. Richard, Director  Phone: 465-2510

Division: Investments Date: 3/13/92

Approved by Commissioner: Glenn A. Olds  Date: 3-13-92

Agency: Department of Commerce & Economic Development Date: 3-13-92

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

FISCAL NOTE

No. 2
 II Version: SB 449
 (S) Publish Date: 3-16-92

STATE OF ALASKA
 1992 LEGISLATIVE SESSION

Revision Date: _____
 Title: Regulate transfer of limited entry permits due
to execution
 Sponsor: Governor
 Requestor: _____

Department Affected: Revenue
 BRU: Revenue Operations
 Component: _____

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						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE FUND SOURCE						
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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						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: The Department of Revenue is unaffected by this legislation.

Prepared by: Rod Mourant *Rod Mourant* Phone: 465-2300
 Division: Commissioner's Office Date: March 12, 1992
 Approved by Commissioner: Darrel J. Rexwinkel *Darrel J. Rexwinkel*
 Agency: Revenue

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

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 16, 1992

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

449

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to establish procedures for, and in certain circumstances to restrict, the transfer of limited entry permits. A limited entry permit is required for the commercial taking of certain fishery resources in Alaska.

Section 2 of the bill is a housekeeping measure (1) to clarify that AS 16.43.170(b) applies to all voluntary limited entry permit transfers, not just those transfers governed by an agreement between the permit holder and a third party, and (2) to codify a longstanding practice of the state. Section 3 of the bill sets out the conditions governing the transfer of a limited entry permit when the transfer is requested due to a valid execution on that permit.

Since the enactment of AS 16.43.150(g), which protects a limited entry permit from execution by creditors, the courts have nonetheless ruled in two specific cases that a permit holder's interest in a limited entry permit may be executed upon to satisfy a third-party claim against that permit holder. Under state law, only the Commercial Fisheries Entry Commission ("the commission") is authorized to transfer title of a limited entry permit. The commission's existing statutes do not provide for transfers to a third party in the case of an execution by creditors of a permit holder. The bill is intended to address this statutory deficiency. AS 16.43.150(g) is amended in sec. 1 of the bill, to acknowledge the transfer provisions added by sec. 3 of the bill.

The conditions established in proposed AS 16.43.170(g)(1) - (5), in sec. 3 of the bill, for a transfer related to an execution on the permit conform to those conditions presently required in existing AS 16.43.170(b) for a voluntary transfer of a permit and for transfer of the title of a permit which is held by the Department of Commerce and Economic Development (DCED) under AS 16.10.300 - 16.10.370 or by the Commercial Fishing and Agriculture Bank (CFAB) under AS 44.81. Proposed AS 16.43.170(g)(4) is applicable when the limited entry permit requested to be transferred is subject to a certificate of title issued to DCED or CFAB to secure a loan extended by either entity. Presently, the

Transmittal Letter

The Honorable Richard I. Eliason
March 16, 1992
Page 2

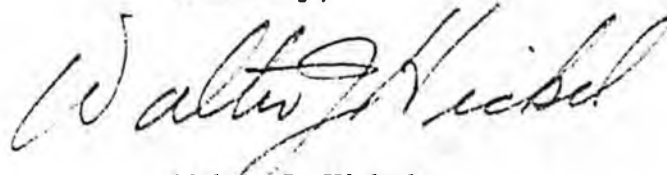
commission denies a holder's request made under AS 16.43.170(b) for the transfer of the title to a limited entry permit if that permit is already subject to such a certificate. Proposed AS 16.43.170(g)(4) would allow the commission, for the same reason, to deny a request for the transfer of the title to a limited entry permit made because of a valid execution against that permit.

The Alaska Statehood Act entrusted Alaska with management of its fish and game resources to further the economic well-being of Alaska. Consistent with this responsibility, and recognizing that many Alaska fishers are dependent solely upon fishing for their livelihoods, sec. 3's proposed AS 16.43.170(g)(6) seeks to protect those fishers' permits from transfer by valid execution if the commission determines that the permit is a "necessary means of support" for the fisher and those dependent upon the fisher.

Finally, the bill provides the State of Alaska with a right of first refusal to purchase a limited entry permit requested to be transferred due to a valid execution against that permit. The state would have an opportunity to purchase a limited entry permit after an execution sale when the state's interests would be served by doing so. See proposed AS 16.43.170(g); sec. 3 of the bill. A similar opportunity is already reserved for the state under Alaska law in the event of foreclosure upon a limited entry permit by DCED or CFAB.

I urge your early and favorable consideration of this bill.

Sincerely,

A handwritten signature in cursive script, reading "Walter J. Hickel". The signature is written in dark ink and is positioned above the printed name and title.

Walter J. Hickel
Governor

*offer SB449
amendment in
Judiciary
Tuesday*

MEMORANDUM

TO: The Honorable Pat Rodey
Vice-Chairman
Senate Judiciary Committee

DATE: March 24, 1992

FAX NO: 789-6170

TELEPHONE NO: 789-6160

FROM: COMMERCIAL FISHERIES
ENTRY COMMISSION
Bruce Twomley, Chairman
Rich Listowski,
Commissioner
Frank Homan, Commissioner

SUBJECT: SB 449; Corrected Page
2 of Proposed Senate
Judiciary Committee
Substitute

Yesterday we submitted to you a proposed Judiciary Committee substitute for SB 449.

The interlined statutory citation is correct on page 1 of our proposal but incorrect in the two entries on page 2. The correct statutory citation in all three cases is AS 16.10.338.

Attached is a corrected page 2 of the proposed Judiciary Committee substitute for SB 449. Please substitute the attached page 2 for the original page 2 we submitted to you yesterday.

Thank you.

cc: Honorable Rick Halford, Chairman, Senate Judiciary Committee
Martin Richard, Director of the Division of Investments, Department of Commerce
Greg Winegar, Manager of the Juneau Lending Branch, Department of Commerce
Lori Nottingham, Deputy Legislative Liaison, Office of the Governor
Deborah Behr, Esq., Assistant Attorney General
John T. Baker, Esq., Assistant Attorney General