

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672  
7650 SENATE RESOURCES

## WATER MANAGEMENT FEES

### WHY A WATER MANAGEMENT FEE ?

The State of Alaska is considering a water management fee for a number of reasons, not the least being a method for the state to recover the cost of managing Alaska's water resources from the users of that resource. A water management fee has a few other benefits that the Department feels make the overall management fee proposal a complete management package. The management fee concept in addition to management cost recovery, promotes the idea that water is a valuable natural resource that is required by all Alaskans to fulfill their basic needs, such as for drinking and bathing, but is also used for the generation of power (hydroelectric, natural gas and oil), food (agriculture, seafood and other processing), timber, other petroleum products, mining, and many other products and services used on a day-to-day basis. These same water resources are used in their natural state to protect fish and wildlife and their habitat, recreation, transportation and water quality. The management fee concept may also promote water conservation. There are a number of studies that show, as the cost of water increases, the use of water decreases. The management of Alaska's water resource will also benefit the state's water rights program by providing the opportunity to update many of its water right files by eliminating those water rights no longer in use or by decreasing those water rights where the total quantity of water is no longer being used. The holders of these water rights will let the Department of Natural Resources know when they stopped using water or are using less water than what was originally granted to them when they receive their management fee notice each year. The updating of the water rights system will help the water manager better understand the water use requirements for specific commercial and industrial water users, sources of water in specific areas, where water is used and what it's used for.

### WHO PAYS ?

Individuals and commercial and/or industrial businesses who use Alaska's water resources. In reality, it's not cost effective or feasible to charge all water users a fee. It has been estimated to cost the state \$50.00 to send and receipt a bill, so the lower limit of a management fee would have to be \$50.00. If the management fee is set at \$1.00 per acre foot of water used, no water user using less than 50 acre feet per year would be charged. 50 acre feet of water is equal to about 44,600 gallons of water per day. The homeowner using an individual water system (well, stream, or lake), most small businesses, community water systems (serving less than 90 homes), and placer miners using a suction dredge smaller than 6 inches would not be subject to a management fee. The larger water users (50 acre feet per year or more) would be subject to the management fee. These could include commercial and industrial businesses, seafood processors, public water supply, agriculture, mining, pulp mills, oil and gas development, oil and gas processing and other large water users.

## **WOULD THE AVERAGE HOMEOWNER BE AFFECTED BY THE MANAGEMENT FEE**

No, a homeowner using a well, spring, stream or lake for his water supply would not be affected by the management fee. The management fee would only apply to those water users using a quantity of water equal to or greater than 50 acre feet of water per year. A typical single family home uses about 500 gallons of water per day or 0.6 acre feet per year.

## **WHAT WILL THE FEES BE USED FOR ?**

Our State Constitution does not allow the revenue generated from the management fee to be dedicated for a specific purpose. The Department of Natural Resources would account for these revenues under a separate accounting system and would request the legislature to appropriate these revenues each year to the Department for the purpose of managing the state's water resources. The yearly revenues would be used to collect, analyze and distribute water resource data, administer the water rights program, water resource planning, enforcement and compliance, and public education. Any revenues generated in excess of those necessary for management purposes can be used to strengthen the state's stream gaging network, establishment of instream flow reservations, and to provide funds to improve or construct remote water systems for towns and villages.

## **HOW MUCH REVENUE CAN BE GENERATED ?**

Currently there are about 12,000 active water right files in the state. Those water users with a Permit to Appropriate Water or a Certificate of Appropriation would be subject to management fees if their use of water is 50 acre feet per year or more. Of the 12,000 active files less than 1265 use a quantity of water equal to or greater than 50 acre feet per year. The quantity of water associated with these 1400 water right files is about 16,720,000 acre feet per year. The largest single category of water user, if you include pending water right applications, is for fish and wildlife conservation. There are 43 files in this category with a total quantity of 9,780,000 acre feet or 58% of the total quantity associated with the 1265 water right files. The water in this category is proposed for use, or is used, for instream flow reservations, fish ladders, and habitat enhancement projects. Of the 43 water rights in this category, 42 belong to the Alaska Department of Fish and Game. It is the intent of the department to exempt state agencies and non-profit organizations from the management fee. If the water used by these exempted agencies and organizations are subtracted from the total quantity of water (16,720,000 acre feet), the quantity subject to management fees would total 3,400,000 acre feet. Assuming the management fee was set at \$1.00 per acre foot per year, the revenues generated could total as much as 3.4 million dollars a year. As the state grows and water appropriations increase accordingly, the revenues would also increase.

**NOTE:** These revenue figures are subject to the review and updating of the estimated 1265 water right files in which water use of 50 acre feet a year or more is on record.

## Selected Water Uses and Hypothetical Annual Fees

(Averages of selected examples from "Water Management Fee Impact" paper)

Water Use	Average (gal/day)	Average (Acre Ft/Yr)	Average Fees
Single Family Domestic (Fully Plumbed)	500	.6	None
Seafood Processing	1,060,000	1,187.5	1,187
Wood Fiber (Alaska Pulp Co. & Ketchikan Pulp Corp.)	49,000,000	55,510	55,510
Placer Mining (small to medium size)	11,470,000	12,153	3038
Bottled Water (Alaska Pure Mountain Spring Water, Juneau)	55,000	61.6	61
Oil & Gas	115,295	969.7	970
Hydro Electric	144,000,000	161,260	40,315
Public Water Supply	4,200,000	4,707	4,707

## LARGEUSE.XLS

WATER APPROPRIATIONS 50 ACRE-FT. PER YEAR OR GREATER			
Type of Use	No. of Large Users	Ave. Acre-Ft Per User	Total Acre-Ft per Year
Cash Grains	2	405	810
Potatoes	1	100	100
Field Crops	12	145	1744
Farms-general	31	1584	49099
Animals-noncommercial	1	123	123
Lawn and Garden	5	266	1331
FinFish Fishing	1	5000	5000
Fish Hatcherles	79	4478	353736
Lode Gold	11	861	9472
Placer Gold	896	2130	1908270
Molybdenum Mining	1	1447	1447
Metal Mining	5	678	3389
Coal Mining	1	281	281
Crude Petroleum	2	1253	2505
Sand and Gravel	1	539	539
Aggregate Wash	2	328	657
Highway Construction	2	1202	2403
Frt. Trucking Terminal	1	484	484
Meat Packing	2	1086	2171
Seafood Canned	8	2874	22993
Seafood Fresh	1	81	81
Pulp Mills	1	5415	5415
Urea and Fertilizer	4	1149	4597
Petroleum Refining	1	855	855
Electric Power Generation	21	81983	1721650
Hydro Power Generation	72	35577	2561528
Public Supply	42	6531	274303
Sanitary and Waste	1	1954	1954
Steam Supply	3	67	202
Construction Material Whsl.	1	4000	4000
Office Building	1	61	61
Golf Course	2	60	120
Rec. Services	6	519	3115
Colleges	2	175	351
Wildlife Conservation	43	227537	9784083
Total	1265		16728869

\* Does not include applications accepted, and pending.

## **WATER MANAGEMENT FEE IMPACTS**

The impacts addressed by this paper are related to costs to specific water users within an industry and not the industry in general. Each water user may be charged a management fee based on its Certificate of Appropriation (water right). If the water user has a Permit to Appropriate Water, the quantity of water actually being used, based on records of that use, may be used to determine the annual fee. If no records exist, the fees may be based on the quantity granted by the Permit to Appropriate Water. If a water right holder is no longer using the quantity of water granted under the Certificate of Appropriation, the water right holder may relinquish the unused water in accordance with AS 46.15.140.

This paper will use examples of water use from the following industries: seafood processing, lumber/pulp mills, hydroelectric (private and federal), placer mining, coal mining, bottled water, oil and gas production, community water supply and public water supply. The Division of Water has over 15,800 active water rights files of which about 1300 use 50 acre feet of water or more a year. Only these 1300 water users will be subject to the management fee.

The fee, for the purpose of this paper, will be \$1.00 per acre foot (AF) of water used, except for those non-consumptive water uses associated with placer (gold) mining and hydroelectric power generation, which will be .25 cents per AF. Fees will not be charged to other state agencies or to nonprofit organizations.

### **SEAFOOD PROCESSING**

The seafood processing industry includes the processing of any type of seafood in cans, frozen or shipped fresh. Water use in this industry varies depending on the type of processing, final product and the age of the facility. Water use also varies by season, and is sometimes used year round or for only a few months during the summer. Examples of water use in this industry are as follows: Trident Seafoods (Akutan), 193 AF/Y or 62,889,243 gallons per year; Trident Seafoods (Sand Point), 806 AF/Y or 262,635,900 gallons per year; Peter Pan Seafoods (Dillingham), 1,034 AF/Y or 336,929,900 gallons per year; Peter Pan Seafoods (Unimak), 1,613 AF/Y; Aleutian Dragon Fisheries (Chignik), 3,298 AF/Y (includes small hydro plant); Inlet Fisheries (Kenai), 76.8 AF/Y; Northern Victor Partnership (west of Unalaska); 672 AF/Y; Seasonal Seafoods (Kenai), 278.8 AF/Y; Alaska Packers Association (South Naknek); 3,226 AF/Y, and Alaska Packers Association (Ugashik River), 677.5 AF/Y.

### **WOOD FIBER**

Our records only show one lumber mill now operating in the state that has its own water right. There are other mills in operation but they use water supplied to them by public water systems. There may also be other plants in operation that have never applied for water rights. The one lumber plant we know of is Chilkoot Lumber Company located in Haines. and it uses 78.7 AF/Y. There are two pulp mills

operating in Alaska, which are located in Sitka and Ketchikan. Sitka Pulp uses 56,119 AF/Y or 18,286,000,000 gallons per year and Ketchikan Pulp uses 54,900 AF/Y. These are the two largest water users in the state not counting hydroelectric power plants. These pulp mills each use twice the quantity of water that the Municipality of Anchorage uses in a year.

## **MINING**

Of the estimated 1300 water rights in the State using 50 AF/Y or more, 800 of them are in the mining industry. There are about 200 placer miners in the State that on the average hold 4 water rights. Placer mining in general is done two ways. 1. A suction dredge takes the water, uses it and returns it to the original source in a short period of time. 2. A sluice box or wash plant is used allowing the water to be held in a settling pond and recycled. The quantity of water used depends on the type of equipment used, size of settling ponds, material being processed, topography, and many other factors which may effect the quantity and how water is used. The water used in this process is eventually returned to the stream from which it was taken. Some examples of water use by mining are: Alaska Gold Company (Anvil Creek), 2,353 AF/Y or 766,727,400 gallons per year; Keith Tryck (Ophir Creek), 1,647 AF/Y, Chomco Mining (unnamed creek in the interior); 1,412 AF/Y, Valdez Creek Mine, the largest placer mine in North America uses 46,000 AF/Y or 1,498,900,000 gallons per year and Greens Creek Mine (Southeast Alaska), 1145 AF/Y. Note: the quantities for placer mining were based on a 12 hour work day for 200 days a year.

There is only one coal mining operation in Alaska, the Usibelli Mine at Healy. The mine has water rights to only 8000 gallons per day, which is equal to only 9 AF/Y and not subject to a management fee. Permits to Appropriate Water have been issued to Diamond Shatmr Chuit Coal, Cook Inlet area, and to Idimitsu, for the Wishbone Hill mine, Sutton. These coal mines have not been developed and no water is being used.

## **BOTTLED WATER**

There is only one water bottling company that has a Permit to Appropriate Water, Alaska Pure Mountain Spring Water in Juneau uses 80.6 AF/Y or 28,218,696 gallons per year. WETCO, the largest water bottling company in Alaska purchases its water from the Municipality of Anchorage. In addition to bottling water for export WETCO also distills vodka and sells water in bulk to a company in Japan, where the water is used for making perfume.

## **OIL AND GAS**

The oil and gas companies in Alaska use water for many purpose including exploration, production and processing. Most of the fresh water used on the North Slope by the major oil companies is used for exploration. This includes the building of ice roads, drilling pads and in the drilling process. The water authorized for use is normally issued under a temporary water use permit for short periods of time and

for quantities less than 40,000 gallons per day. The water used for production is normally salt water or water extracted from the oil as it is produced from the well. This water is reinjected to facilitate oil production. Processing the oil to make a product such as gasoline or chemicals requires a large quantity of water. Unocal Chemical (Kenai), uses 2800 AF/Y; Tesoro Petroleum (Kenai), 425.7 AF/Y; Phillips Petroleum (Kenai), 854.8 AF/Y; and Chevron USA (Kenai), 566.6 AF/Y. The Alyeska Pipeline terminal site in Valdez uses 201.6 AF/Y.

## **HYDROELECTRIC**

The use of water to produce power through hydroelectric facilities is the state's largest water user. Many of these large hydroelectric projects are state owned and include the Terror Lake, Bradley Lake, Swan Lake, and Tyee Hydroelectric projects. There are many other hydroelectric projects which are either privately owned or owned by the federal government. As stated previously, state agencies would be exempted from paying a management fee. The federal government and private owners would pay a fee of .25 cent per AF. The water used for power production at some of these private and federal projects is as follows: The Alaska Power Administration, owns the Snettlesham and Eklutna Hydroelectric projects. The federal Snettlesham project uses 350,000 AF/Y or 114,050,000,000 gallons per year and might be subject to a management fee of \$87,500, the Eklutna project uses 240,000 AF/Y. Private hydroelectric projects include, the City of Sitka's Blue Lake and Green Lake projects. The Blue Lake project uses 214,395 AF/Y and might be subject to a management fee of \$53,599, Green Lake uses 224,414 AF/Y and might be subject to a management fee of \$56,104. Chugach Electric Association owns the Cooper Lake Hydroelectric project, which uses 90,600 AF/Y. Smaller projects include Focus Energy's project in Ouzinkie, which uses 5,067 AF/Y and Earle Ausman's project in Palmer, which uses 4,342 AF/Y. There are many micro hydro projects owned by individuals for their personal use or for small business that also use over 50 AF/Y.

## **PUBLIC WATER SUPPLIES**

There are thousands of public and community water supply systems operating in the state. Only those systems using over 50 AF/Y or 44,600 gallons per day would be subject to a management fee. This means that most towns, communities and villages serving less than 1000 people or 150 fully plumbed homes, would not be subject to a management fee unless the community or public water system is serving a large water user such as a seafood processor. Examples of water use by communities and public water systems are: Norfolk Utility (Eagle River), 150 AF/Y, Eklutna Utilities Inc. (Eagle River), 277 AF/Y, Settlers Bay (Knik) 560 AF/Y, Municipality of Anchorage, 26,000 AF/Y or 8,472,126,000 gallons per year, City of Fairbanks, 6,504 AF/Y, City and Borough of Juneau, 4,599 AF/Y, City of Sitka, 3,536 AF/Y, City of Palmer, 672 AF/Y and Port Graham, 67 AF/Y. The export of water from the State of Alaska to areas outside of Alaska is likely. The total quantity of water associated with these exports is unknown, but it could become one of Alaska's largest water user industries.

# WATER FEES LEGISLATION

The Commissioner may "establish, by regulation, in appropriate circumstances, water use fees or provide for the sale of water resources." (HB550 and SB442)

The water resources of Alaska, according to our State Constitution, are owned by the people of Alaska. The State of Alaska "manages" this common property resource in a trust relationship and it must do so "consistent with the public interest". In response to this trust relationship, the State believes it appropriate that those who use very large volumes of Alaska's water should help pay for the cost of managing that resource. The State also believes that large withdrawals of water from a hydrologic unit should be assessed a fee commensurate to the cost of managing the impact on the ecosystem and the value of the resource. Additionally our water has been harvested and exported without any compensation for some time.

Alaska is now facing even greater demands for water, and the cost of water resource inventory and management continues to go up. Even though Alaska has over 40% of our nation's fresh water resources, not including ice and snow, and in parts of our State this resource is replenished by up to 400+ inches of precipitation a year, we have the smallest management team of any state. This is because we have a huge water resource, in most of Alaska, and the conflicts over water have been few. But in the face of growing populations, in urban and rural areas, and in light of the increasing demand for water in and outside of Alaska, we need to be smart in our water management. This costs money, and with declining oil revenues we need to look creatively and responsibly at how we will pay for smart water management and encourage conservation.

So the question before the legislature today is not whether the State will appropriate large quantities of water for instate or interstate use, it already is. The question is should the people of Alaska, receive appropriate compensation for these large commercial uses of their water resources?

There are some legal parameters that restrict how we approach this issue. In 1982, in *Sporhase v. Nebraska*, the U.S. Supreme Court held that the notion that water is "owned" by a state is a legal fiction. The Court found that water is a commodity in interstate commerce. Therefore, stated very simply, any law that discriminates against the interstate commerce of water is unconstitutional. Or, said another way, a state cannot pass a law that prohibits water exports just because the state may be opposed to the export of water, nor can a state structure water fees that are discriminatory.

As I have pointed out, Alaska is exporting water and glacial ice. These exports have been authorized in bulk and in added value products. In either case the State is allowing the exploitation of a common property natural resource without compensation. If this were allowed for any other commodity, it would be considered a clear violation of the public trust.

With the creation of the new Division of Water, we were faced with some decisions that had essentially been made by prior administrations. This is not to judge those decisions one-way-or-another, but to place them in the proper context. The State has permitted 26 firms to harvest and export glacial ice. This unique commodity is valued at \$500 per ton wholesale, without any compensation to the people of Alaska. The State has also permitted the export of large volumes of water. Most recently 52 million gallons of water a year from Burnett Inlet in Southeast. The owner of a local hatchery developed a scheme to export Alaska water to a firm in Monterey, California for bottling. The hatchery owner plans to charge the California company 1 cent per gallon. However the people of Alaska receive no compensation.

We now have applications from another California company which plans to eventually export up to 500,000 acre feet (163 billion gallons) of water a year. Under the law, if these applications meet the requirements of our statutes and regulations and the water can be taken without harming the public interest (fish, wildlife, recreation, water quality, etc.) the permit "shall" be issued. We will of course place responsible stipulations on such permits to ensure the public interest is protected.

Is it not appropriate for the state to seek some compensation for the exploitation of the people's resource? Additionally, should not the state seek to recover the extraordinary administrative costs associated with large appropriations of water? In our opinion, it is irresponsible for the State not to seek at least some compensation for the exploitation of our resources.

We have introduced legislation that would allow the state to begin to recover some compensation from the very large users of the people's water. The bill is drafted in broad terms. It would expressly authorize the Commissioner of Natural Resources to charge water use fees or sell water resources to the extent permissible under the Alaska and Federal Constitutions. Remember, we cannot discriminate, even in our fees schedule, against interstate commerce. So a fee would have to apply to in-state and interstate uses.

Water is a basic commodity in a wide range of resource development and manufacturing industries in Alaska. These include the more exotic bottled water industries which also sell water in bulk to manufacturing firms, wood fibre processing, fish hatcheries and fish processing, mining, oil and gas development, construction, agriculture, fertilizer production, recreation and conservation, and power generation to name a few. Some of these uses are considered to be

consumptive while others are believed to be non-consumptive. In either case the cost of water resource management is the same. In almost every case these industries use Alaska water to acquire or add value to their products. To say that the State is subsidizing some industries by allowing them to use Alaska water without cost may be too harsh, but none-the-less true.

To provide a revenue stream for state water management programs, as well as encourage water conservation in those industries that use very large volumes of water, and to further encourage conservation when water is removed from a hydrological unit of the state, we have suggested, as an example, the following approach: The State would assess a flat fee of \$1.00 per acre foot for any use of 50 acre-feet per year (44,640 gallons per day) or more. In the case of a transfer of water out of a hydrological unit, an additional conservation fee of \$5 per acre-foot would be assessed. We also propose that this conservation fee escalate with the cumulative amount of water removed from the hydrological unit by a user. This conservation fee, depending on the amount removed from the hydrological unit, could yield \$10 million a year, or more, to the people of Alaska. It should be noted, however, that any fee structure would be fleshed out by regulation and public hearings.

What is a hydrological unit? A hydrological unit is the scientific delineation of a large drainage or combination of drainages that function in a related manner. This delineation is made by the U.S. Geological Survey. Many hydrological units in Alaska are larger than many states east of the Mississippi River. For example, Southeast Alaska is one hydrological unit.

The hypothetical assessment of a \$1.00 per acre-foot water management fee for any use of water 50 acre-feet per year or more, means that most Alaskans would not pay a fee for the use of water, but large industries that use significant volumes would. No single family home with a well uses this amount of water. Consumptive and non-consumptive beneficial uses of water could also be reviewed to structure a fee schedule reflective of those differences. But such a fee would create, based on existing appropriations of water, about \$3.4 million in new revenue to the State. Future uses of water taken from a hydrological unit may exceed \$10 million a year. Currently the budget of the Division of Water is about \$2.6 million of which \$1.9 million is from the General Fund. This example is meant to serve as an illustration of the kind of approach that could be implemented through regulation.

In addition to covering the cost of water management, what would these revenues be used for? Our State Constitution does not allow revenue to be dedicated for a specific purpose. The Department of Natural Resources would account for these revenues under a separate accounting system and would request the legislature to appropriate them to the Department for the purpose of managing the state's water resources. The revenues would be used to collect, analyze and distribute water resource data, administer the water rights program, water resource planning, enforcement and

compliance, and public education. Revenues generated in excess of those necessary for management purposes should be used to strengthen the state's stream gaging network, adjudicate instream reservations in critical areas, and improve or construct remote water systems for towns and villages without safe drinking water.

But, would such a fee cause economic harm to Alaskan industries? You be the judge.

Under the hypothetical approach already mentioned, the Ketchikan Pulp Mill, one of the largest users of water in the state (17.9 billion gallons per year) would only pay \$54,900 based on their permit. If they used less water than allowed by their permit, which is generally the case, they could pay less. How about the largest placer mine in North America, the Valdez Creek Mine? Even with all uses of water (consumptive and non-consumptive) included for this massive operation, the total bill would be \$46,000 or less. Small placer operators generally do not use more than 50 acre-feet a year and many are, by regulatory definition, non-consumptive uses.

Based on applications for beneficial uses of water, the Kensington Mine, near Juneau, would pay about \$8,000 a year, the AJ Mine withdrawal from Gold Creek would require no more than about \$14,000 a year. And the Usibelli Coal Mine would pay nothing each year as they do not use 50 acre-feet per year. And so it goes.

Let's look at public water supplies. How much would the Municipality of Anchorage pay? Based on current use, \$26,000 a year. Fairbanks would pay \$6,504; Juneau would pay \$4,599; and Sitka \$3,536 each year. These are not significant amounts for municipalities to pay in the face of the revenues they already collect. But why should a municipality pay if a state agency does not? Many municipalities sell or charge for water used by industry. For example an Anchorage brewery pays about \$79,000 a year to the Municipality of Anchorage. The Hilton Hotel pays over \$60,000 a year and the Sheraton almost \$34,000. BP main office pays the municipality over \$41,000 a year. The Northway Mall pays over \$10,000 a year and the Dimond Center, not including Safeway, Pay & Save and Lamonts, pays over \$71,000 a year. WETCO, a bottled water company that also makes vodka and exports bulk water to Japan as a base for perfumes, buys 1.6 million gallons of water a year from the Municipality of Anchorage. Juneau sells water to the cruise ships while they are in port. Other than the pulp mill most local industries in Ketchikan are connected to the public water supply.

And what about the commercial fishing industry? Peter Pan Seafoods in Dillingham, would pay about \$1,034; Trident Seafoods in Sand Point about \$806; Inlet Fisheries in Kenai, only \$76; and Aleutian Dragon Fisheries in Chignik, about \$1,344 a year. Is this a significant economic burden on these industries?

But wait, what about things like fish hatcheries and hydroelectric projects? After all they use a lot of water. We have proposed, from the beginning, that nonprofit users

of water would not be required to pay under regulations to be adopted pursuant to this act. To our knowledge all of the fish hatcheries that use fresh water are either owned by the state or operated as nonprofit corporations, and it really doesn't make much sense for one state agency to pay another for water. Most large hydroelectric projects would also be exempt and any that pay (private or federal projects) would only pay, possibly \$.25 per acre foot a year, for the water they use not the water stored in their reservoir.

One notion, that has been suggested, is that industries that discharge water that is cleaner than what they took should receive a credit against the annual fee. Why not? This certainly provides an economic incentive to clean up their discharge without more costly regulation.

An important concern is the question of environmental protection. Do we have sufficient laws and regulations to ensure the protection of our fish, wildlife and recreational uses of water? As most Alaskans know, our State Constitution is unique in that it has a section on natural resource management and requires that fish and wildlife be protected. In addition to the protection outlined in our constitution we have a number of statutes which we have reviewed. It is our conclusion that Alaska has three basic laws that ensure environmental protection. The State Water Use Act requires that any significant appropriation of water be in the public interest. This requires consideration of eight different criteria including fish and wildlife, recreation, and water quality. In addition, recent amendments to the Water Use Act, known as the instream flow section, ensures that if any person, including the Department of Fish and Game, believes a water appropriation may harm environmental concerns, they can request an instream reservation to protect those uses. Finally, Title 16, one of the basic permitting laws in the Department of Fish and Game, ensures that any activity within a stream or lake that would impact fish and wildlife must be permitted by Fish and Game.

In addition to these laws, the Division of Water has made it clear to any who have requested applications for water, especially with the intention of large scale export, that we cannot permit an appropriation of water that we believe harmful to the environment.

It is important to understand the scale within which water exports are being considered. As I pointed out earlier, Alaska has, according to the U.S. Geological Survey, over 40% of our nation's fresh water resources. Alaska discharges about 1 billion acre-feet or 326 trillion gallons of water per year into the ocean. Remember one acre foot of water equals 325,851 gallons. In those areas of export interest the annual precipitation is between 150 to 400 and more inches a year. In fact the precipitation is so high and the topography of much of Southeastern so dramatic, that it is often said that the rain hits the mountains and falls into the ocean.

So much for general discussion, let's look at a specific application for export. Sun Belt Water, Inc. of California has applied for water from the Snettisham Hydroelectric Facility located just south of Juneau. This project draws water from Long Lake and Crater Lake and uses an average of over 350,000 acre feet (115 billion gallons) per year. Long Lake alone has a drainage area of over 32.5 square miles from which it collects water. The annual precipitation in these drainages range from 190 to 260 inches a year. We have 34 years of flow records on this lake system. The proposed water withdrawal point for Sun Belt is the tailrace of the dam which is located at tide water. There is a small fish hatchery there which is operated by the Department of Fish and Game and already has a water permit that would not be impacted by the Sun Belt application.

How much water can be responsibly "taken" from this discharge point for export? Sun Belt has requested 150,000 acre-feet per year. Over a dozen state and federal agencies have begun an intense review of this application and will provide their comments and concerns to us. I should point out that Sun Belt is required to obtain a number of other state and federal permits for this venture before any water is taken. I should also point out that if the water fee legislation is not passed and the permits are issued, the people of Alaska will not receive any compensation.

We have dozens of sites similar to Long Lake in southeastern Alaska. The Division of Water has begun its own internal study of potential sources so that the State has a better understanding of the scope and potential for this new industry. In order to provide even greater protection of the State's interest the State may decide to reserve through legislation or itself apply for water rights to high quality sources of water. This would be done through the normal water appropriation and adjudication process as prescribed by law. The State could then offer the specific amounts of water it wishes to export on a contractual rather than a permit basis. In this way the State of Alaska, not an outside interest, could better control the water by determining if the contract should be extended at the end of each contract. For foreign exports this approach may be very appropriate and necessary. This is why we have included the notion of the state selling water in the legislation. It is important to note that any person, not just residents of Alaska, any person, foreign or domestic, may apply for an appropriation of Alaskan water. Once a certificate is issued the holder of that "usufructuary" right can use it forever, provided the use remains the same and it is not abandoned.

Remember, the question is not if the State will appropriate large quantities of water, it is and will continue to do so consistent with law. The question is can the people of Alaska recover reasonable compensation for the exploitation of this resource? We believe we have crafted a legally defensible approach that allows the State to do just that without causing economic harm to Alaskan industries while providing a new revenue stream that can support other water based public policy objectives.

# WATER FEES

(Hypothetical Fee Schedule)

The following table is a suggestion of how such fees could be assessed to large users of water.

<u>Quantity Acre Feet Per Year</u>	<u>Water Stays Within a Hydrologic Sub-unit</u>		<u>Water Transferred Out of a Hydrologic Sub-unit</u>	
	<u>Low Range</u>	<u>High Range</u>	<u>Low Range</u>	<u>High Range</u>
+50 - 25,000	\$0.25	\$1.00	\$5.00	\$10.00
25,000 - 50,000	\$0.25	\$1.00	\$10.00	\$25.00
50,000 - 100,000	\$0.25	\$1.00	\$20.00	\$50.00
100,000 - 200,000	\$0.25	\$1.00	\$30.00	\$75.00
200,000 - 500,000	\$0.25	\$1.00	\$50.00	\$100.00
500,000 - 1,000,000	\$0.25	\$1.00	\$75.00	\$200.00
1,000,000 - 2,000,000	\$0.25	\$1.00	\$100.00	\$400.00

A Hydrologic Unit or Sub-unit - As established by the U.S. Geological Survey on current Hydrologic Unit Maps of the State of Alaska

No one party or group of related parties may cumulatively control an appropriation of water in excess of the amounts listed in the table without being assessed a water fee representative of their total cumulative appropriation level.

It is the intention of the Division of Water to develop a water fee schedule through a public scoping process, draft regulations, and public hearings.

DRAFT

(This material prepared by the Division of Water, State of Alaska)

WALTER J. HICKEL  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

442

February 19, 1992

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

Dear Senator Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to specifically authorize the Commissioner of the Department of Natural Resources to establish water use fees or provide for the sale of water resources.

The bill is designed to provide for the recovery of the market value of water resources conveyed by the state, particularly under circumstances involving the conveyance of rights to consumptive uses of large quantities of water.

Regulations developed with public involvement will spell out the details of who will be charged for water, but we estimate that only those who use 50 or more acre feet per year (approximately 45,000 gallons a day) will be affected. State agencies, nonprofit groups, such as hatcheries, single family domestic users, and other water users to be identified during the legislation and regulation writing process would not be subject to the fee.

Water revenues can be used to support a wide variety of water-related programs, including safe drinking water, water quality and water flow measurements.

The waters of the State of Alaska are an important and extremely valuable natural resource. The state has an important interest in recovering, for the benefit of the people of Alaska, the real value of the state's water and the real costs of managing and conserving water resources. I urge your early and favorable consideration of this bill.

Sincerely,

A handwritten signature in cursive script that reads "Walter J. Hickel".

Walter J. Hickel  
Governor

FISCAL NOTE

No. 1

II Version: SB 442

(S) Publish Date: 2-19-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

BILL

Revision Date: \_\_\_\_\_ Department Affected: Natural Resources  
 Title: Water Use fees and Sale BRU: Water Management  
 of Water \_\_\_\_\_ Components: Water Management  
 Sponsor: Rules Committee  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 916

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	150.9	110.3	110.3	110.3	110.3	110.3
TRAVEL	8.0	8.0	8.0	8.0	8.0	8.0
CONTRACTUAL	88.5	44.0	44.0	44.0	44.0	44.0
SUPPLIES	6.0	6.0	6.0	6.0	6.0	6.0
EQUIPMENT	45.0	15.0	15.0	15.0	15.0	15.0
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	298.4	183.3	183.3	183.3	183.3	183.3

CAPITAL						
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REVENUE: Prog Rec						
Funding Source: 1005	800.0	2,500.0	3,000.0	3,250.0	3,500.0	3,500.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FEDERAL FUNDS						
OTHER: Prog Receipt						
Funding Source: 1005	298.4	183.3	183.3	183.3	183.3	183.3
TOTAL	298.4	183.3	183.3	183.3	183.3	183.3

POSITIONS:

FULL-TIME	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PART-TIME						
TEMPORARY	1.0					

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: David Orr Phone: 762-2572  
 Division: Water Management Date: 14-Jan-92

Approved by Commissioner: HB Harold C. Heinze Date: 14-Jan-92  
 Agency: Department of Natural Resources

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

Additional Information  
Water Use Fees and Sale of Water Bill

Operations

- 100 Personal -- One Hydrologist II, Range 16, Southeast (pft)  
Services One NRM I, Range 18, Southeast (pft)  
One NRT II, Range 12, Southcentral (temp. -- update of  
water records during 1 year period)
- 200 Travel -- For field work throughout Southeast on streams and  
other water bodies; to regional offices to update water  
files
- 300 Contractual Aircraft and boat charters, office space rent for two  
new employees, newspaper advertising, water marketing  
services and analyses, etc.
- 400 Supplies -- Misc. office supplies, small professional tools, survey  
supplies for field work
- 500 Equipment -- Computer terminals for two positions to support data  
collection and storage; professional hydro-survey  
equipment

Requested funds would be used to process and administer large scale water appropriations, assess and collect water user fees, and market water and ice resources.

Revenues:

1. Water Use Fees: Once water user records are updated, water fees from existing appropriations can be collected. New applications for 350,000 acre feet of water have been received, and we expect applications for an additional 500,000 acre feet by the end of FY 93 (for water export to California).
2. Water Sales: The sale of water for export could generate significant new revenues for the State of Alaska. Delivery and infrastructure costs are yet to be determined, but prices paid for water in California provide some indication of the potential size of water fees. The California water bank is buying water rights from agricultural sources at \$125 per acre foot. The cost of local water delivered to coastal communities of California is about \$500 per acre foot, and the price of reclaimed water is about \$1400 per acre foot. Current estimates for desalinated water are \$1800 to \$2000 per acre foot. Santa Barbara has authorized paying up to \$1960 per acre for desalinated water delivered to that county. The initial target volume for sales would be 1-2 million acre feet per year. Alaska's rivers discharge between 800 million and 1 billion acre feet into the ocean each year.

Funds collected from water fees and sales could be used to offset the cost of water management programs, increase the network of stream gages, augment the STORET water data base, and fund village safe water projects.

Position Title		Hydrologist II		No. of Positions	1	Range/Step	16A	Barg. Unit	GGU
Time Status	PFT	Staff Months	12	Location	AWA		Election District	4	
TYPE OF EXPENDITURE			Amount	Justification This position will inventory water resources in Southeast Alaska and collect data on waterbodies, especially those that have been selected, or are highly likely to be selected, for large scale water appropriations and withdrawals.					
Salary		7.0	37.0						
Benefits			14.6						
Premium Pay			-						
Other			-						
Total Personal Services			51.6						
Travel			2.5						
Contractual			20.0						
Commodities			3.0						
Equipment			35.0						
Other									
Total Cost			112.1						
FUNDING SOURCE FOR TOTAL COST									
Federal Receipts		1002							
G.F. Match		1003							
General Fund		1004	112.1						
I-A Receipts		1007							
CIP Receipts		1061							
Other									

**Request For  
New Position**  
FNPW01

AGENCY Natural Resources  
 BRU Water Management  
 COMPONENT Water Management

Page 3 of 5  
 Revised Date: \_\_\_\_\_

**FY 93**

Position Title Natural Resources Manager I		No. of Positions 1	Range/Step 18A	Barg. Unit GGU
Time Status PFT	Staff Months 12	Location AWA		Election District 4
TYPE OF EXPENDITURE		Amount	Justification  The adjudication of water rights facility . Large scale water extraction in Southeast Alaska for intake and out of state use and the administration of water management (user) fee program for the Southeast region. This includes coordination of the project permitting process through the Alaska Coastal Management Program, and specific permitting requirement under AS 46.15 and other State and federal permits.	
Salary		42.6		
Benefits		16.1		
Premium Pay		0.0		
Other		0.0		
Total Personal Services		58.7		
Travel		2.5		
Contractual		9.25		
Commodities		1.5		
Equipment		10.0		
Other				
Total Cost		81.95		
FUNDING SOURCE FOR TOTAL COST				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004 *	81.95		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

**Request For  
New Position**  
RNPW02

AGENCY Natural Resources  
BRU Water Management  
COMPONENT Water Management

Page ~~4~~ of 5  
Revised Date: \_\_\_\_\_

**FY 93**

Position Title Natural Resources Tech. II		No. of Positions 1	Range/Step 12A	Barg. Unit GGU
Time Status Temp FT	Staff Months 12	Location EBA		Election District 99 (Statewide)
TYPE OF EXPENDITURE		Amount	Justification  This position will be a one (1) year temporary assigned the task of updating up to 10,000 water right files on the DNR, Land Administration System (LAS) computer system. The updated information will be needed in order to implement the water management user fee program through the State's Revenue and Billing System within the Division of Management.	
Salary		28.3		
Benefits		12.3		
Premium Pay		0.0		
Other		0.0		
Total Personal Services		40.6		
Travel		3.0		
Contractual		9.25		
Commodities		1.5		
Equipment		0.0		
Other				
Total Cost		54.35		
FUNDING SOURCE FOR TOTAL COST				
Federal Receipts	1002			
G:F. Match	1003			
General Fund	1004	54.35		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

**Request For  
New Position**  
FNPW03

AGENCY Natural Resources  
BRU Water Management  
COMPONENT Water Management

Page **5** of **5**  
Revised Date: \_\_\_\_\_

**FY 93**

FISCAL NOTE

Version: SB 442  
 (S) Publish Date: 2-19-92

STATE OF ALASKA  
 1992 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_

Department Affected: Fish and Game

Title: Water Use Fees

BRU: Habitat

Component: Habitat

Sponsor: Governor by Rules Committee

Requestor: Governor Hickel

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	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

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

GENERAL FUND	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

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: No impact on current year.

ANALYSIS: (Attach a separate page if necessary.)

Assuming there is no cost to the state for hatcheries and instream flow reservations there will be no fiscal impact.

Prepared By: Frank Rue, Director Phone: 465-4105

Division: Division of Habitat Date: 2/13/92

Approved by Commissioner: [Signature]

Agency: Department of Fish and Game Date: 2/13/92

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

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WALTER J. HICKEL  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 21, 1992

The Honorable Lloyd Jones  
Alaska State Senator  
Capitol, Room 30  
Juneau, AK 99801-1182

*Schuyler*  
Dear Senator Jones:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to subsistence.

Among the fifty states, only Alaska has a significant portion of its population who, in large part, live off the land. Subsistence is unique and special to Alaska. Because of the importance of subsistence to Alaska, both the United States Congress and past Alaska legislatures, have passed laws giving a preference to subsistence over other consumptive uses of the same resources.

Despite the general agreement that subsistence should have a preference, there has been monumental disagreement on how that preference should be implemented. For too many years, Alaskans on different sides of the subsistence issue have talked about each other, but never to each other. The effect of conflicting court opinions, federal Alaska National Interest Lands Conservation Act mandates, and legislative gridlock have produced a crisis in the management of our fish and game. We have a current situation where everyone loses.

For the past year, an outstanding group of citizens has been meeting steadily to try to resolve this problem. There are nine members of the Governor's Subsistence Advisory Council and all of Alaska owes a debt to them. The members are:

The Honorable Jay S. Hammond, Port Alsworth  
Mr. Dick Bishop, Fairbanks  
Mr. John James Burns, Fairbanks  
Mr. Mitch Demientieff, Nenana  
Mr. Eric Forrer, Juneau  
Mr. Matthew Iya, Nome  
Mr. Byron Mallott, Juneau  
Mr. Theo Matthews, Kenai  
Mr. Gene Peltola, Bethel

These nine members represent all sides of the subsistence issue. While some members were nominated by specific groups, I asked each member to participate as an individual.

February 21, 1992  
Page 2

The group had a goal that is simple to define, but very difficult to achieve: it was to find the best possible subsistence solution for Alaska. Many observers thought that was an impossible dream, that the members could never agree. There were times during meetings, when that appeared to be true, but the council members did not give up. Today I am introducing subsistence legislation that the council drafted. Every part of this legislation is the result of consensus among the members.

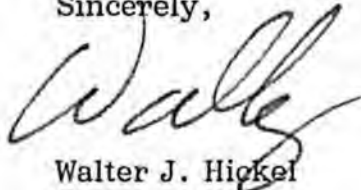
The legislation is not what any one member, any one group, nor I, by myself, would have drafted. It is legislation that protects the resource, the interests of every group, and can pass. In designing this statute, great emphasis has been placed on how it will actually work. Extensive time has been spent with the Alaska Departments of Fish and Game (ADF&G) and Law.

The legislation is designed for species protection, to function with a minimum of disruption for users, for ease of administration by the Board of Fisheries and the Board of Game, for management by the ADF&G, enforceability by the Department of Public Safety, and defensibility in court. The legislation will reduce the constant barrage of subsistence court cases by making the state's actions more defensible, but, much more importantly, by laying out clear guidelines for the boards and reducing the problems which caused people to sue.

A packet of material describing and explaining the bill will be provided to the Senate Secretary and Chief Clerk.

I realize the legislature has a constitutional responsibility to consider and, if necessary, amend bills to make them the best possible legislation. Neither I nor the council make any claim that this legislation is perfect, but every word in it has been the subject of hours or days of debate. The two things I ask of the legislature, are to maintain the goal of the advisory council by passing the best possible piece of subsistence legislation, and to act swiftly to solve the subsistence crisis and help heal Alaska.

Sincerely,



Walter J. Hickel  
Governor

SENATE COMMITTEE REPORT  
FIRST COMMITTEE OF REFERENCE

DATE: 2/21/92

FURTHER: Judiciary  
Finance

Date of 5-Day Notice: Feb 27, 1992  
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: March 27, 1992

Resources Committee considered SB 443

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

and recommends:

[ ] replace with \_\_\_\_\_ CS \_\_\_\_\_ ( )

[ ] 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

[X] individual recommendations

NEW FISCAL NOTES: Dept/Date

[ ] zero fiscal notes \_\_\_\_\_

[ ] fiscal notes \_\_\_\_\_

[ ] appropriation--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

[X] Governor's bill with fiscal notes:

zero fiscal notes DPS

fiscal notes F+G-B&S

F+G-Sub

LAW

DO PASS:

OTHER RECOMMENDATIONS:

~~Amendment~~ NO RTS  
Do Not Pass  
No Rec.

Lloyd Jones (Do Pass)  
Chair Signature and Recommendation

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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

240 Main Street, Suite 500  
Juneau, Alaska 99801-2101

### MEMORANDUM

March 23, 1992

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

**TO:** Senator Lloyd Jones, Chair  
Senate Resources Committee

**FROM:** George Utermohle, *GU*  
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 hunting and fishing 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, numerous provisions of SB 443 establish fixed standards or criteria to determine whether a person is eligible to engage in subsistence hunting and fishing or establish the conditions under which the person may apply for subsistence privileges or may engage in subsistence hunting and fishing. Each of these provisions is potentially subject to challenge on equal protection grounds by a person who is

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.<sup>1/</sup> 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.<sup>2/</sup> 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<sup>3/</sup>, no exclusive right of

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<sup>1/</sup> 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.

<sup>2/</sup> 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.

<sup>3/</sup> 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<sup>4/</sup>, and uniform application section<sup>5/</sup>. 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 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

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<sup>4/</sup> 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.

<sup>5/</sup> 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.<sup>6/</sup> 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

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<sup>6/</sup> 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. Sec. 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.<sup>2/</sup> 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); Owsichек 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 (Owsichек, 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." Owsichек, 763 P.2d at 496.

In Owsichек, 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'." Owsichек, 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

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<sup>2/</sup> 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 1 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.<sup>8/</sup>

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<sup>8/</sup> 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<sup>8/</sup> (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

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<sup>8/</sup>(...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.

<sup>9/</sup> 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;<sup>10/</sup>

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<sup>11/</sup> 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.

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<sup>10/</sup> 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.

<sup>11/</sup> 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<sup>12/</sup> 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.<sup>13/</sup>

A person who resides in a category 3 area<sup>14/</sup> 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

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<sup>12/</sup> 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.

<sup>13/</sup> 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.

<sup>14/</sup> 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,<sup>15/</sup> 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"<sup>16/</sup> 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.

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<sup>15/</sup> Page 10 - 11.

<sup>16/</sup> Owsichck, 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

Senator Lloyd Jones  
March 23, 1992  
Page 12

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.

GU:pl:lmb:mi  
92-069.lmb

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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

240 Main Street, Suite 500  
Juneau, Alaska 99801-2101

### MEMORANDUM

March 23, 1992

**SUBJECT:** Consistency of the Governor's subsistence bill with the Alaska National Interest Lands Conservation Act (SB 443)

**TO:** Senator Lloyd Jones, Chair  
Senate Resources Committee

**FROM:** George Utermohle *GU*  
Legislative Counsel

You have asked whether the Governor's subsistence bill is consistent with the subsistence provisions of the Alaska National Interest Lands Conservation Act (ANILCA; 16 U.S.C. 3111 - 3126).

#### SHORT ANSWER

SB 443 is not consistent with ANILCA in regard to who is eligible to participate in subsistence hunting and fishing. This inconsistency is very significant and requires either an amendment of ANILCA or a change to SB 443 in order to make the state and federal statutes consistent.

SB 443 applies only to subsistence uses of fish and wildlife, while ANILCA speaks in terms of subsistence uses of wild, renewable resources. This discrepancy may be significant.

There are also several instances where the provisions of SB 443 vary from those of ANILCA, but it is not clear how significant these variations are. It is possible that in many instances these provisions may be construed as consistent with each other.

#### DISCUSSION

The subsistence provisions of ANILCA have been the standard against which the state subsistence law was measured for determining whether the state retained management of subsistence use of fish and wildlife on federal public land.

State management of subsistence uses of fish and wildlife on federal public land, was contingent upon enactment and implementation of state laws which were consistent with ANILCA's provisions relating to a definition of subsistence (16 U.S.C. 3113), a preference for subsistence use of fish and wildlife (16 U.S.C. 3114), and for local and regional participation in management of subsistence (16 U.S.C. 3115).

ANILCA is ambiguous as to whether the state can regain management of subsistence uses of fish and wildlife on federal public land without action by the Congress. Under 16 U.S.C. 3115(d), the state could retain management of subsistence on federal public land if the state enacted and implemented laws consistent with ANILCA by December 2, 1981. The state could then retain management until the consistent state subsistence law was repealed. The McDowell decision of the Alaska Supreme Court effectively repealed the consistent state subsistence law. McDowell v. State, 785 P.2d 1 (Alaska 1989). ANILCA does not provide for reinstatement of state management authority over subsistence on federal public lands once the state has failed to comply with ANILCA. It is possible that the federal agencies responsible for implementing ANILCA (Department of the Interior and Department of Agriculture) may construe 16 U.S.C. 3115(d) in such a way as to allow the state to regain management authority at any time, provided that the state had a consistent subsistence law before December 2, 1981. However, if it is determined that ANILCA does not authorize the federal agencies to return management to the state, the state cannot regain management until the Congress amends ANILCA to provide such authority.

#### DEFINITION OF SUBSISTENCE

The ANILCA definition of subsistence, in essence, defines "subsistence uses" as the customary and traditional uses by rural Alaska residents of wild, renewable resources for (1) direct personal or family consumption as food shelter, fuel, clothing, tools, or transportation; (2) making and selling of handicrafts from nonedible byproducts of fish and wildlife; (3) barter or sharing for personal or family consumption; and (4) customary trade. The definition of "subsistence uses" also included definitions of "family" and "barter."

SB 443 defines the term "subsistence" as the noncommercial, customary and traditional taking and uses of fish and game by a resident in a subsistence use area of the state for (1) direct personal or family consumption as food, clothing, or transportation; (2) the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption; (3) sharing; and (4) barter and customary trade of a portion of fish or game resources harvested primarily for personal or family consumption. The fact that SB 443 defines the term "subsistence" instead of "subsistence uses" is probably inconsequential.

The most significant difference between the ANILCA definition and SB 443's definition is that SB 443 does not limit subsistence to rural residents. The bill provides that any resident of the state whether the person resides in a rural or urban area of the state may qualify for subsistence use of fish and wildlife, if the person can show the requisite history of use and dependence on fish and wildlife. The fact that a resident who lives in an area that is traditionally considered rural can be barred from subsistence activities and the fact that a resident of an urban area can engage in subsistence activities makes SB 443 inconsistent with ANILCA. The federal court of appeals has already determined that the former state system, which limited participation in subsistence activities to residents of rural areas where subsistence was a principal element of the local economy, was inconsistent with ANILCA. Kenaitze Indian Tribe v. State of Alaska, 860 P.2d 312 (CA 9 1989). The court construed ANILCA literally to require that all rural residents of the state be eligible for subsistence activities regardless of the nature of the economy or degree of dependence on subsistence in the area where the person lived.

SB 443 also deletes references to "wild, renewable resources" and to "shelter," "fuel," and "tools". The bill essentially deletes these terms because they are not relevant in the context of subsistence uses of fish and wildlife. The deletion of these terms from the definition of "subsistence uses" or "subsistence" may or may not be significant. In approving the state subsistence law in the past, the federal government did not express any concerns over the fact that the Department of Fish and Game had no authority to provide for these other uses of other renewable resources. If the state must provide for subsistence use of these other renewable resources, the legislature would have to provide for such uses through the Department of Natural Resources --the Department of Fish and Game has jurisdiction over only fish and wildlife.

SB 443 also defines the terms "customary and traditional" and "customary trade." The definition given to these terms by SB 443 varies from the definition of these terms in federal subsistence regulations. It is possible that the definition of these terms in SB 443 is inconsistent with the meanings ANILCA intended to apply to these terms.

#### PREFERENCE FOR SUBSISTENCE USES OF FISH AND WILDLIFE

ANILCA provides that the taking of fish and wildlife for nonwasteful subsistence uses has a priority over takings of fish and wildlife for other purposes. If it is necessary to restrict the taking of fish and wildlife for subsistence uses, then the priority is implemented by applying the following criteria: (1) customary and direct dependence upon the resource as a mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources.

SB 443 does not expressly provide, outside of the bill's statements of findings, purpose, and intent, that subsistence is a priority use of fish and game. That omission may not be significant. The bill provides that, except in cases of shortages of fish and

game, a reasonable opportunity to engage in subsistence hunting and fishing shall be accorded to subsistence users. It is not clear whether the "reasonable opportunity" standard represents a significant deviation from the subsistence preference provisions of ANILCA. The bill provides that subsistence users always have access to fish and wildlife resources and that they are the last user group to have their harvest opportunities reduced when there is a shortage of fish or wildlife.

In the event that available fish or wildlife is not sufficient to provide for all subsistence uses, SB 443 provides that the available resources are to be allocated on the bases of (1) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of life; (2) the proximity of the domicile of the subsistence user to the stock or population; and (3) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. For the most part, these provisions are substantially similar to those in ANILCA. The one possible exception is that SB 443 considers the ability of the subsistence user to obtain food, while ANILCA considers the availability of alternative resources. It is not clear whether ANILCA would take into consideration the ability to obtain food through the cash economy, like SB 443 evidently does. ANILCA may be referring only to availability of alternative fish and wildlife resources.

#### LOCAL AND REGIONAL PARTICIPATION IN SUBSISTENCE MANAGEMENT

SB 443 does not propose any changes to the existing framework for local and regional participation in subsistence management. The current system for local and regional participation exists largely in regulations of the Department of Fish and Game. The current system should still be consistent with the requirements of ANILCA.

If I may be of further assistance, please advise.

GU:mi  
92-046.mai

Governor Hickel's statement to the Senate Resource Committee 4/5/92

It is highly unusual for a governor to appear and testify at a legislative hearing.  
- But this is an unusual and extraordinarily important issue.

We became a state, in large part so we could control our own fish and game.

While some would seek to expand federal control, I'm committed to regaining state management.

I'm going to use all the powers at my disposal to make it happen.

Three possible paths to regain state management have been discussed. I believe two of them offer limited chance of success and would divide Alaskans.

The first, a rural preference constitutional amendment, has already failed during the regular and special sessions of 1990. Its chances of success are no better now.

Such an amendment wouldn't really regain state control either, but rather management by state agencies as dictated by federal courts.

I remain totally opposed to the rural preference amendment or other amendments that would override the equal protection and common use clauses of our constitution.

The second path, which I am also reluctant to take, would be for the state to join the McDowell II lawsuit.

I don't know how that suit will come out, but I do know it will take years to resolve. While that happens the federal government will be settling into Alaska for the long haul.

The lawsuit, like a rural preference amendment, would divide Alaska, and if we lose, we would be in far worse shape than we are right now.

Sometimes lawsuits are necessary, but this is a matter better solved through legislation than litigation.

The proper path to resolve this issue is for Alaskans to work together to protect our common interests and regain state management.

Not management by the federal government  
and not management with federal courts dictating what we have to do.  
But, management by Alaskans working together.

I've lived in Alaska for 52 years and I've been involved in public life for 40.

Over, and over, and over again, I've seen one truth driven home.

If outside forces can divide Alaskans, they can conquer us.

Alaskans, regardless of group, have far more in common than not.

And all Alaskans have far more in common with each other than they do with some of the national preservation and animal rights groups that will influence management by the federal government.

Unfortunately, some people have been fighting about subsistence so long, it has become a habit. They would rather fight than win.

For too many years, Alaskans on different sides of subsistence talked about each other, but never to each other.

For the past year an outstanding group of citizens has been meeting steadily to change that.

The nine members of the Subsistence Advisory Council are: former Governor Jay Hammond

John Burns of Fairbanks

Mitch Demientieff of Nenana

Eric Forrer of Juneau

Matthew Iya of Nome

Gene Peltola of Bethel

Byron Mallott of Juneau, who was nominated by the Alaska Federation of Natives,

Theo Matthews of Kenai, who was nominated by the United Fishermen of

Alaska,  
and Dick Bishop - who was nominated by the Alaska Outdoor Council.

These nine members represent all sides of the subsistence issue.

I sat in on every meeting of the council and I take this issue so seriously I am continuing my personal involvement here today.

I gave the council a goal -  
keep it simple and find the best possible subsistence solution for Alaska.

Many observers thought that was an impossible dream, that the council members could never be expected to agree.

There were times when that appeared to be true, but the members never gave up.

All of Alaska owes these nine council members a debt of thanks.

They debated openly, they finally agreed. They drafted legislation and today we are here for its first legislative hearing.

Every part of this legislation is the result of consensus among the members.

The legislation is not what any one council member, nor I by myself, would have drafted. - It is legislation that protects the resource and the interests of every group, it complies with our constitution and can pass.

It is the first essential step towards really regaining management of our resources.

With general agreement within Alaska, our Congressional delegation can handle the minor amendment to Title VIII to allow this law to comply.

Our biggest obstacle is simply overcoming the ingrained belief of many people that subsistence can't be solved.

It can and we must.

I realize the legislature has a constitutional responsibility to consider and, if necessary, amend bills to make them the best possible legislation.

And I don't make any claim that this legislation is perfect, nor would the council.

But every word in it has been the subject of hours if not days of debate.

I ask only two things of you:

maintain the goal of the advisory council by passing the best possible piece of subsistence legislation, and

act swiftly to solve the subsistence crisis and help us heal Alaska.

Thank you.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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

240 Main Street, Suite 500  
Juneau, Alaska 99801-2101

### MEMORANDUM

March 27, 1992

**SUBJECT:** SB 443; Definition of "Sustained Yield"  
**TO:** Senator Lyman Hoffman  
**FROM:** George Utermohle *GU*  
Legislative Counsel

You have asked whether it is necessary that SB 443 contain a definition of "sustained yield."

It is not necessary that SB 443 contain a definition of "sustained yield." Sustained yield is a concept well understood by resource managers and does not need to be defined in statute. The Alaska Supreme Court has had no trouble understanding the constitutional concept of sustained yield and determining that a statutory definition of "sustained yield" in AS 41.17 was potentially violative of the constitutional concept. Southwest Alaska Conservation Council v. State, 665 P.2d 544, 548 n. 12 (Alaska 1983).

The definition of "sustained yield" contained in SB 443 incorporates several concepts from the Alaska Constitution and federal policy. The melding of these diverse concepts reflects substantive policy choices that are more appropriately addressed in a substantive provision of the bill, rather than in a definition. By moving the definition of "sustained yield" into the substantive provisions of SB 443, the policy choices made by the definition of "sustained yield" are more evident and more subject to open discussion.

If it is the intent of the legislature to include a definition of "sustained yield" in SB 443, a concise definition that does not incorporate so many issues into a single concept would be more comprehensible and easier to implement by resource managers.

The definition of "sustained yield" is applicable to sport and subsistence hunting and to sport, commercial, personal use, and subsistence fishing. For this reason the definition of sustained yield is outside of the title of SB 443. The Alaska Constitution

Senator Lyman Hoffman  
March 27, 1992  
Page 2

requires that a bill express its contents. Article II, sec. 13. The purpose of this provision of the constitution is to give the legislature and the people fair notice of the contents of a bill. Without mentioning in the bill title that SB 443 is defining "sustained yield," the legislature and people are not given notice that the bill is defining the term for purposes other than subsistence. To cure the defect in the title of the bill, the definition can be eliminated from the bill or made applicable to only subsistence use of fish and wildlife, or the title of the bill can be amended.

If I can provide further assistance, please advise.

GU:pl  
92-213.plm

No. 4

FISCAL NOTE

Bill Version: SB 443

(S) Publish Date: 2-21-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_

Department Affected: Fish and Game

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

BRU: Boards

Component: Board Services

Sponsor: Rules Committee

Requestor: \_\_\_\_\_

COMPONENT SERIAL NO. 

1	2	0	4
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	9.0	9.4	8.0	3.0	3.0	3.0
TRAVEL	180.0	187.5	160.0	85.0	85.0	85.0
CONTRACTUAL	90.0	93.5	90.0	37.0	37.0	37.0
SUPPLIES	1.8	1.9	1.6	.5	.5	.5
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	280.8 .0	292.3 .0	259.6	125.5	125.5	125.5 0.0

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

GENERAL FUND	280.8	292.3	259.6	125.5	125.5	125.5
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	280.8	292.3	259.6	125.5	125.5	125.5

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Laird Jones *Laird A. Jones* Phone: 465-4110

Division: Division of Boards Date: 2/20/92

Approved by Commissioner: *Carol R. Rios*

Agency: Department of Fish and Game Date: 2/20/92

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

**DIVISION OF BOARDS  
FISCAL NOTE FOR SUBSISTENCE BILL**

ANALYSIS

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

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

(1) "The boards shall by regulation, jointly identify and delineate areas of the state, utilizing game management unit, portion of game management unit, or community, as follows:

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

(2) communities where the human population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community, and that are not part of an urban area." 20 DAYS

(2) "Upon receipt of recommendations from the commissioner, the Boards of Fish and Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally used for subsistence in the areas and communities of the state identified by the boards under (e)(1) and (e)(2) of this section." 40 DAYS

(3) "Upon receipt of a recommendation from the commissioner, the boards shall, by regulation, adopt procedures by which the commissioner shall determine the qualification of subsistence users to subsistence hunt and fish in a specific subsistence use area." 10 DAYS

COSTS - FY93

<u>Personal Services:</u>	9.0
overtime for existing staff	
<u>Travel:</u>	180.0
travel and per diem for board members, Boards staff, and advisory committee meetings	
<u>Contractual:</u>	90.0
meeting space, printing and postage for proposal books, telephone and legal notice of meetings	
<u>Supplies:</u>	1.8
office supplies	
<b>TOTAL</b>	<b><u>280.8</u></b>

COSTS - FY94:

Personal Services	9.4
Travel	187.5
Contractual	93.5
Supplies	1.9
<b>TOTAL</b>	<b><u>292.3</u></b>

COSTS - FY95:

Personal Services	8.0
Travel	160.0
Contractual	90.0
Supplies	1.6
<b>TOTAL</b>	<b><u>259.6</u></b>

COSTS - FUTURE YEARS

Personal Services	3.0
Travel	85.0
Contractual	37.0
Supplies	.5
<b>TOTAL</b>	<b><u>125.5</u></b>

No. 3

FISCAL NOTE

Bill Version: SB 443

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

(S) Publish Date: 2-21-92

Revision Date: \_\_\_\_\_

Department Affected: Fish and Game

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

BRU: Subsistence

Component: Subsistence

Sponsor: Rules Committee

Requestor: \_\_\_\_\_

COMPONENT SERIAL NO. 

4	8	3
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Expenditures/Revenues: (Thousands of Dollars)

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

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

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

POSITIONS:

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

Estimate of current year impact: No impact in FY 92

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

Prepared By: Robert Bosworth, Director *[Signature]*

Phone: 465-4147

Division: Division of Subsistence

Date: 2/20/92

Approved by Commissioner: *[Signature]*

Agency: Department of Fish and Game

Date: 2/20/92

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

FISCAL NOTE ANALYSIS: Division of Subsistence

**Development of a Subsistence Permitting Program:**

**OVERVIEW:**

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

**PROCESS:**

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

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

**CORE STAFFING:**

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

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

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

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

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

#### SUPPORT STAFF:

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

#### BUDGET--Division of Subsistence:

##### FY 93

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

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

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

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

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

**FY 94:**

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

**FY 95:**

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

**FY 96:**

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

**FY 97 and FY 98:**

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

FISCAL NOTE

No. 2

Bill Version: SB 443

(S) Publish Date: 2-21-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

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

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

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	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	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: \_\_\_\_\_

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

Prepared By: Captain Conrad G. Seibel Phone: 269-5509  
 Division: Fish & Wildlife Protection Date: 2/20/92  
 Approved by Commissioner: *Richard L. Burton* Richard L. Burton  
 Agency: Department of Public Safety Date: 2/20/92

FISCAL NOTE

No. 1

II Version: 5B443

(S) Publish Date: 2-21-92

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Department Affected: Department of Law  
 Title: "An Act relating to the taking of fish and game for subsistence..." BRU: Legal Services  
 Sponsor: Request of the Governor Component: Operations  
 Requestor: Governor's Office 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	85.0	85.0	85.0	45.0	45.0	
TRAVEL	5.0	5.0	5.0	3.0	3.0	
CONTRACTUAL	17.6	17.6	17.6	12.6	12.6	
SUPPLIES	2.4	2.4	2.4	2.4	2.4	
EQUIPMENT	6.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	116.5	110.0	110.0	63.0	63.0	-0-

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

GENERAL FUND	116.5	110.0	110.0	63.0	63.0	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

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

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

*Richard I. Pegues*

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Date: February 20, 1992  
 Approved by Commissioner: Charles E. Coze, Attorney General  
 Agency: Department of Law Date: February 20, 1992

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. \_\_\_\_\_

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

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

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

Position Title		Attorney IV		No. of Positions	1	Range / Step	24A	Barg. Unit	PX
Time Status	PFT	Staff Months	12	Location	Anchorage		Election District	7 through 15	
TYPE OF EXPENDITURE			Amount	Justification  Implementation of the subsistence preference law will require the full-time services of an attorney to handle: (1) court challenges of the law; (2) drafting and reviewing of a substantial body of regulations; and (3) representation of ADF&G and the Fish and Game Boards in disputes resulting from adverse preference qualification determinations. All of this work will require journey-level services of an Attorney IV.					
Salary			64,056						
Benefits			20,969						
Premium Pay									
Other									
Total Personal Services			85,025						
Travel			5,000						
Contractual			17,600						
Commodities			2,400						
Equipment			6,500						
Other									
Total Cost			116,525						
FUNDING SOURCE FOR TOTAL COST									
Federal Receipts 1002									
G.F. Match 1003									
General Fund 1004			116,525						
I-A Receipts 1007									
CIP Receipts 1061									
Other									

3 of 3

**Request For  
New Position**

AGENCY Department of Law  
 BRU Legal Services  
 COMPONENT Operations

**FY** 93

Page 1 of 2  
 Revised Date: \_\_\_\_\_

## A Brief Introduction to HB 552 and SB 443 (Subsistence)

### **How would the new law work?**

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

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

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

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

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

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

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

### **What are the qualification standards?**

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

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

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

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

#### **Where would people be able to go for subsistence hunting and fishing?**

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

#### **What are the advantages of this approach?**

It protects the resource. It does not divide villages. It protects residents of regional centers from growing out of subsistence, and it allows the small minority of urban residents who are subsistence users to participate. It complies with our constitution. Most importantly, because this legislation has been worked out with the help of all sides, it will protect subsistence and subsistence users while reducing the division and political instability that has plagued this issue.

AFN TESTIMONY TO SENATE RESOURCES COMMITTEE

(ALASKA LEGISLATURE) MARCH 5, 1992

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, LADIES AND GENTLEMEN:

MY NAME IS JULIE KITKA, AND I AM HERE TODAY TO TESTIFY IN MY CAPACITY AS PRESIDENT OF THE ALASKA FEDERATION OF NATIVES. THE SUBJECT BEFORE US IS SUBSISTENCE, ONE OF THE MOST COMPLEX AND DIVISIVE ISSUES IN OUR STATE'S POLITICS. BEFORE I ADDRESS THE PROVISIONS OF S.B. 443, RECENTLY INTRODUCED BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR, I WANT TO MAKE A FEW REMARKS WHICH WILL SET THIS CRITICAL ISSUE IN HISTORICAL CONTEXT.

FIRST, PLEASE UNDERSTAND WHY THE ALASKA FEDERATION OF NATIVES, MANY OTHER NATIVE ORGANIZATIONS AND LITERALLY THOUSANDS OF INDIVIDUAL NATIVES ARE SO INTIMATELY INVOLVED IN THIS QUESTION. IT IS BECAUSE SUBSISTENCE IS ESSENTIALLY A NATIVE ISSUE. IT IS HERE - IN OUR STATE'S POLITICS, AS WELL AS IN FEDERAL LAW - BECAUSE MORE THAN 80,000 ALASKA ESKIMOS, INDIANS AND ALEUTS ARE HERE. THE ECONOMIC AND CULTURAL SURVIVAL OF NATIVE INDIVIDUALS AND NATIVE COMMUNITIES IS THE ONLY REASON WHY THE CONGRESS ADOPTED THE SUBSISTENCE PREFERENCE IN THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT OF 1980. THE FACT THAT THE CONGRESS CHOSE TO IMPLEMENT THAT PROTECTION OF NATIVES BY USE OF COMMUNITY GEOGRAPHY, RATHER THAN INDIVIDUAL RACE, MAKES NO DIFFERENCE. THE SIMPLE TRUTH IS THAT IF THE ONLY SUBSISTENCE USERS IN RURAL ALASKA HAD BEEN NON-NATIVE HOMESTEADERS, TRAPPERS AND SOURDOUGHS, THERE WOULD NEVER HAVE BEEN ANY TITLE VIII OF

ANILCA. THAT ACT ARTICULATED IN MODERN FORM THE TRADITIONAL OBLIGATION OF THE CONGRESS TO PROTECT THE INDIGENOUS PEOPLES OF AMERICA FROM THE OVERWHELMING POLITICAL AND ECONOMIC POWER OF THE NON-NATIVE MAJORITY. ITS CONSTITUTIONAL FOUNDATION IS THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION; AND ACCORDINGLY, THE FEDERAL COURTS HAVE FOUND TITLE VIII OF ANILCA TO BE "INDIAN LAW".

IN LIGHT OF THIS POLITICAL REALITY, SUBSISTENCE MUST NOT BE VIEWED SIMPLY AS A SUBSET OF "FISH AND GAME MANAGEMENT" - AS IF IT WERE ONLY A QUESTION OF ANIMALS, HABITATS AND SCIENTIFIC COMPETENCE. RATHER, IT IS A SUBSET OF SOCIAL POLICY. THE REAL ISSUE AT STAKE IS THE ALLOCATION OF LIMITED FISH AND GAME RESOURCES AMONG COMPETING HUMAN USER GROUPS. IN SHORT, SUBSISTENCE IS ABOUT PEOPLE.

MORE SPECIFICALLY, THE PRACTICE OF SUBSISTENCE REMAINS AN ABSOLUTE NECESSITY FOR THE ECONOMIC AND CULTURAL SURVIVAL OF ALASKA'S NATIVE VILLAGES IN THE LAST DECADE OF THE TWENTIETH CENTURY. DESPITE LARGE INFUSIONS OF PUBLIC CAPITAL DURING THE PAST TWO DECADES, THE ECONOMIES OF MOST RURAL VILLAGES REMAIN UNDER-DEVELOPED, ARTIFICIAL DEPENDENCIES OF GOVERNMENT. THEY OFFER FEW INCOME-PRODUCING JOBS, AND THOSE WHICH DO EXIST ARE OFTEN IN THE HANDS OF TRANSIENT, NON-NATIVE PROFESSIONALS. MANY NATIVE PEOPLE, LACKING ANY INCOME BASE OTHER THAN SUBSISTENCE, HAVE COME TO RELY ON GOVERNMENT TRANSFER PAYMENTS FOR CASH IN AN EXTRAORDINARILY HIGH COST-OF-LIVING AREA. THE AVERAGE VILLAGE FAMILY PUTS TOGETHER A PATCHWORK QUILT OF CASH AND SUBSISTENCE

HARVESTS IN ORDER TO GET THROUGH EACH YEAR.

BUT, IN ADDITION TO ECONOMICS, THE CULTURAL NEEDS OF NATIVE PEOPLE ARE CENTRAL TO OUR INVOLVEMENT IN THE CURRENT ISSUE. SUBSISTENCE AND THE LAND CONNECT US TO OUR PAST AND TO EACH OTHER. THEY PROVIDE THE SATISFACTIONS OF PRODUCTIVE LABOR - A NECESSITY FOR HEALTHY HUMAN BEINGS EVERYWHERE IN THE WORLD. SUBSISTENCE IS SELF-SUSTAINING ACTIVITY IN WHICH NATIVE PEOPLE TAKE ENORMOUS PERSONAL PRIDE. IT TELLS US WHO WE ARE AND WHAT WE ARE WORTH; AND WITHOUT IT, WE WOULD BE LOST.

THE GOAL OF THE NATIVE COMMUNITY IN THE CURRENT SUBSISTENCE CONTROVERSY IS PRECISELY WHAT WE HAVE BEEN SEEKING FOR MORE THAN A DECADE: TO PROVIDE, IN BOTH FEDERAL AND STATE LAWS, AN EFFECTIVE, LONG-TERM PROTECTION OF THE TRADITIONAL SUBSISTENCE PRACTICES OF OUR COMMUNITIES. THAT IS A VALID PUBLIC PURPOSE. WITHOUT IT, MOST NATIVE VILLAGES IN THIS STATE ARE DOOMED. THE CONSTANT POLITICAL TURMOIL OVER SUBSISTENCE DURING THE PAST DECADE HAS TAUGHT US THAT WE MUST NOT SETTLE FOR ARRANGEMENTS THAT ARE POLITICALLY OR JUDICIALLY UNSTABLE OVER TIME. WE, LIKE THE GOVERNOR, WANT THIS ISSUE SETTLED ONCE AND FOR ALL; BUT WE WANT IT DONE IN A MANNER THAT GUARANTEES THE LONG-TERM SURVIVAL OF OUR PEOPLE.

SINCE EARLY 1990, THE STATEWIDE NATIVE COMMUNITY HAS CONSISTENTLY SUPPORTED THE GOAL OF RETURNING UNITARY FISH AND GAME MANAGEMENT IN ALASKA TO THE STATE GOVERNMENT - AS LONG AS THE RIGHTS AND INTERESTS OF NATIVE PEOPLE ARE THEREBY PROTECTED. WE RECOGNIZE THAT THE CURRENT ARRANGEMENT - DUAL MANAGEMENT OF

HIGHLY MOBILE FISH STOCKS AND GAME POPULATIONS BY TWO SEPARATE LEVELS OF GOVERNMENT - IS ESSENTIALLY IRRATIONAL. BUT THE FACT REMAINS THAT, NO MATTER WHAT NATIVES THINK, ONLY THE STATE OF ALASKA (THIS LEGISLATURE, THIS GOVERNOR AND THIS ELECTORATE) CAN RESOLVE THE CURRENT IMPASSE BETWEEN FEDERAL AND STATE LAWS.

IT IS CLEAR TO US THAT, AS A THRESHOLD MATTER, ANY SOLUTION TO THIS SITUATION MUST INCLUDE AN APPROPRIATE AMENDMENT TO THE ALASKA CONSTITUTION, PASSED BY TWO-THIRDS OF BOTH HOUSES OF THE LEGISLATURE AND BY A MAJORITY OF THE VOTERS IN THE NEXT GENERAL ELECTION. WHATEVER STATUTE MAY OR MAY NOT BE A PART OF THE SOLUTION, THE CONSTITUTION MUST BE AMENDED.

AN APPROPRIATE CONSTITUTIONAL AMENDMENT, IN TURN, MUST ACCOMPLISH AT LEAST TWO THINGS: FIRST, IT MUST EMBODY A CLEAR POLICY STATEMENT BY THE PEOPLE OF ALASKA RECOGNIZING SUBSISTENCE AS THE PRIORITY USE OF FISH AND GAME RESOURCES THROUGHOUT OUR STATE. THAT PRINCIPLE IS SO CRITICAL TO THE FUTURE OF ALASKA THAT IT DESERVES TO BE INCLUDED IN OUR BODY OF ORGANIC LAW. SECOND, AN AMENDMENT MUST GIVE THE LEGISLATURE THE AUTHORITY, WHICH IT DOES NOT NOW ENJOY, TO ENACT AN APPROPRIATE MECHANISM FOR DEFINING WHO IS ELIGIBLE FOR THE SUBSISTENCE PREFERENCE. WHETHER THAT ELIGIBILITY SHOULD BE DETERMINED BY GEOGRAPHY OF RESIDENCE, COMMUNITY OR AREA CHARACTERISTICS, CUSTOMARY AND TRADITIONAL USES, LIFESTYLE, ECONOMIC DEPENDENCE, AVAILABILITY OF ALTERNATIVE RESOURCES, OR ANY COMBINATION OF SUCH CRITERIA, THIS LEGISLATURE MUST HAVE THE POWER TO ENACT IT, AND UNTIL THE PEOPLE GIVE THE LEGISLATURE THAT POWER, ALL QUESTIONS REGARDING

FEDERAL AND STATE STATUTES ARE MERELY SPECULATIVE.

ON FEBRUARY 28, THE OFFICE OF GOVERNOR HICKEL RELEASED A PUBLIC STATEMENT ON THE QUESTION OF A CONSTITUTIONAL AMENDMENT IN ASSOCIATION WITH HIS S.B. 443. IN IT, THE GOVERNOR STATED THAT HIS BILL "COMPLIES WITH OUR CONSTITUTION AND HAS NO LEGAL NEED FOR AN AMENDMENT." HE REITERATED THAT HE STEADFASTLY OPPOSES AMENDING THE CONSTITUTION FOR A RURAL PREFERENCE OR FOR ANY OTHER MECHANISM THAT WOULD "OVERRIDE THE EQUAL PROTECTION OR COMMON USE CLAUSES OF OUR CONSTITUTION". HOWEVER, THE GOVERNOR ADDED THAT "THERE IS A STRONG POLITICAL DESIRE FROM SOME FOR AN AMENDMENT WHICH WOULD PROTECT SUBSISTENCE IN THE FUTURE:" HE CONCLUDED BY SAYING THAT HE IS WILLING TO LISTEN IF PEOPLE WANT TO DISCUSS AN AMENDMENT THAT REQUIRES THE LEGISLATURE TO PROVIDE FOR THE IDENTIFICATION OF FISH STOCKS AND GAME POPULATIONS SUBJECT TO SUBSISTENCE USES; REQUIRES THE LEGISLATURE TO PROVIDE FOR THE PREFERENCE OF SUBSISTENCE USE OVER OTHER CONSUMPTIVE USES OF THOSE STOCKS AND POPULATIONS AND TAKES EFFECT ON THE DAY CONGRESS AMENDS TITLE VIII OF ANILCA TO ALLOW COMPLIANCE BY ALASKA'S NEW SUBSISTENCE LAW DRAFTED BY THE SUBSISTENCE ADVISORY COUNCIL.

I PERSONALLY REGARD THE GOVERNOR'S OPENING ON THE ISSUE OF A CONSTITUTIONAL AMENDMENT TO BE THE SINGLE MOST SIGNIFICANT DEVELOPMENT ON SUBSISTENCE IN THE PAST YEAR. IT APPEARS TO RECOGNIZE THAT, AT THE LEAST, THE PEOPLE OF ALASKA DESERVE THE OPPORTUNITY TO VOTE ON THIS CRITICAL QUESTION - AN OPPORTUNITY WHICH WAS DENIED TO THEM BY A SMALL MINORITY IN THE HOUSE OF

REPRESENTATIVES IN 1990. THE GOVERNOR'S STATEMENT ALSO APPEARS TO RECOGNIZE THE LONG-TERM HISTORICAL IMPORTANCE OF THE SUBSISTENCE QUESTION AND ITS RIGHTFUL PLACE IN THE CONSTITUTION AS GUIDANCE TO FUTURE LEGISLATURES, FUTURE GOVERNORS AND FUTURE COURTS.

HAVING SAID THAT, I WOULD CAUTION YOU THAT THE KIND OF CONSTITUTIONAL AMENDMENT DESCRIBED IN THE GOVERNOR'S STATEMENT MAY NOT BE THE KIND OF CONSTITUTIONAL AMENDMENT I HAVE ADVOCATED HERE. I WOULD ALSO ADD MY STRONG DISAGREEMENT WITH THE GOVERNOR'S APPARENT REASONS FOR CONSIDERING AN AMENDMENT. THE ALASKA NATIVE COMMUNITY DOES NOT FEEL THAT THE CONSTITUTION OF THIS STATE - ONE OF THE MOST PRECIOUS DOCUMENTS WE HAVE - SHOULD BE USED AS POLITICAL LEVERAGE IN THE LEGISLATIVE PROCESS OR MADE TO DEPEND ON ACTIONS BY THE UNITED STATES CONGRESS. WE OWE THE CONSTITUTION BETTER TREATMENT THAN THAT. IF SUBSISTENCE IS INDEED ONE OF THOSE FUNDAMENTAL POLICY ISSUES DESERVING OF INCLUSION IN THE CONSTITUTION, WE SHOULD DO IT BECAUSE IT IS RIGHT, AND WE SHOULD DO IT NOW.

IT IS WORTH ADDING THAT THERE ARE MANY GOOD LEGAL MINDS WHO DISAGREE WITH THE GOVERNOR'S CONTENTION THAT HIS BILL COMPLIES WITH THE CONSTITUTION AS IT NOW READS. TO MY KNOWLEDGE, NO WRITTEN OPINION BY THE ATTORNEY GENERAL CONCERNING THE CONSTITUTIONALITY OF THE GOVERNOR'S BILL HAS BEEN RENDERED. I WOULD LIKE TO SUGGEST THAT THE LEGISLATURE REQUEST SUCH A WRITTEN OPINION, SPECIFYING THAT THE ATTORNEY GENERAL EXPLAIN IN DETAIL NOT ONLY WHETHER THE BILL IS CONSTITUTIONAL (WHICH IS

ESSENTIALLY A POLITICAL CALL) BUT THE LEGAL REASONING BEHIND THAT DETERMINATION (WHICH IS AN EXERCISE IN LAW). WE ALL NEED TO HEAR WHY THIS BILL, FOLLOWING THE MCDOWELL DECISION, IS NOT JUST AS VIOLATIVE OF THE EQUAL PROTECTION OR COMMON USE CLAUSES OF THE CONSTITUTION AS WAS THE OLD RURAL PREFERENCE.

HAVING RAISED THOSE CAVEATS, LET ME CONCLUDE ON THE ISSUE OF A CONSTITUTIONAL AMENDMENT BY SAYING THAT THE GOVERNOR'S WILLINGNESS TO DISCUSS IT IS ENCOURAGING AND MAY CONSTITUTE A SIGNIFICANT BREAKTHROUGH, IF THE LANGUAGE OF SUCH AN AMENDMENT AND THE LANGUAGE OF AN APPROPRIATE STATUTE CAN BE WORKED OUT. ACCORDINGLY, I HAVE CONTACTED THE GOVERNOR'S OFFICE IN ORDER TO SEE IF THERE IS COMMON GROUND REGARDING A CONSTITUTIONAL AMENDMENT AND/OR A STATUTE.

LET ME MOVE ON, MR. CHAIRMAN, TO A BRIEF DISCUSSION OF THE STATUTORY LANGUAGE PROPOSED IN S.B. 443 NOW BEFORE THIS COMMITTEE. THIS BILL WAS WORKED ON EXTENSIVELY BY THE GOVERNOR'S OFFICE, THE ATTORNEY GENERAL'S OFFICE AND THE NINE-MEMBER GOVERNOR'S SUBSISTENCE ADVISORY COUNCIL, DURING THE PAST FOUR MONTHS. ALTHOUGH THE INDIVIDUAL MEMBERS OF THE COUNCIL AND THE ORGANIZATIONS THEY REPRESENT DID NOT SIGN OFF ON THE PRODUCT YOU HAVE IN FRONT OF YOU (BECAUSE EACH OF THEM MIGHT HAVE FOUND SIGNIFICANT FLAWS IN THE TEXT), THERE CAN BE NO DOUBT THAT THIS HAS BEEN A GOOD-FAITH EFFORT BY CITIZENS AND POLITICAL LEADERS TO TRY TO FIND A SOLUTION TO ALASKA'S DILEMMA. THE GOVERNOR IS TO BE COMMENDED FOR HIS EFFORTS AND PERSONAL COMMITMENT IN PULLING TOGETHER DIFFERENT USER GROUPS AND IN

GETTING THEM TO TALK FRANKLY AND HONESTLY WITH ONE ANOTHER ABOUT THE MOST DIVISIVE ISSUE IN STATE POLITICS.

THE QUESTION NOW BEFORE US, HOWEVER, IS NOT THE PROCESS BUT THE PRODUCT; AND I NEED TO STATE AT THE OUTSET THAT THIS BILL CANNOT BE SUPPORTED BY THE ALASKA FEDERATION OF NATIVES OR BY THE STATEWIDE NATIVE COMMUNITY WITHOUT SIGNIFICANT ALTERATION. IF ENACTED, IT WOULD PRODUCE AN UNACCEPTABLE LOSS OF SUBSISTENCE PROTECTIONS FOR NATIVE VILLAGES - WITH OR WITHOUT A CONSTITUTIONAL AMENDMENT AND REGARDLESS OF WHAT THE CONGRESS MIGHT DO WITH ANILCA. AS A STARTING POINT, I NEED TO LIST FOR YOU FIVE FUNDAMENTAL AREAS OF CONCERN WHICH MAKE THE GOVERNOR'S BILL AN HISTORICAL STEP BACKWARDS.

FIRST, THE LEVEL OF GUARANTEE OF THE SUBSISTENCE PREFERENCE IN VILLAGES OF THE BUSH IS NOT AS HIGH AS THE LEVEL OF GUARANTEE OFFERED IN FEDERAL LAW - AND IN STATE LAW BEFORE THE McDOWELL DECISION. AS ORIGINALLY CONSIDERED BY THE SUBSISTENCE ADVISORY COUNCIL, THIS BILL WOULD HAVE PROVIDED TO RESIDENTS OF SUCH COMMUNITIES AN IRREBUTTABLE PRESUMPTION OF ELIGIBILITY FOR THE PREFERENCE. HOWEVER, LATE IN THE PROCESS, THE ATTORNEY GENERAL'S OFFICE STRONGLY ADVISED THAT THE WORD "IRREBUTTABLE" BE REMOVED. SO, THE CURRENT BILL MEANS THAT SOME PEOPLE WHO RESIDE IN SMALL NATIVE VILLAGES MAY IN FACT BE REQUIRED TO PROVE THEIR INDIVIDUAL ELIGIBILITY. IF THAT HAPPENS - IF THE FABRIC OF GROUP RELATIONSHIPS IN NATIVE VILLAGES IS FURTHER WEAKENED BY AN EXTERNALLY-IMPOSED INDIVIDUALIZATION - THEN WE WILL HAVE DEALT A GRIEVOUS BLOW TO PRECISELY THOSE COMMUNITIES FOR WHICH

THE SUBSISTENCE PREFERENCE WAS DRAFTED IN THE FIRST PLACE.

SECOND, THE GOVERNOR'S BILL BEGINS BY EXEMPTING ENTIRE FISH STOCKS AND GAME POPULATIONS - THAT IS, WHOLE GEOGRAPHICAL AREAS OF THE STATE - FROM SUBSISTENCE USES, REGARDLESS OF THE ELIGIBILITY OF THE PEOPLE AND COMMUNITIES IN THOSE AREAS. IT IS CLEAR THAT PRELIMINARY POLICY DECISIONS WERE MADE BY THE GOVERNOR'S OFFICE THAT CERTAIN AREAS OF THE STATE WOULD HAVE TO BE AUTOMATICALLY EXEMPTED - BECAUSE THEY ARE PLACES IN WHICH THERE IS SIGNIFICANT USER GROUP CONFLICT OVER RESOURCES. BUT THE WHOLE POINT OF HAVING A SUBSISTENCE PREFERENCE IS TO PROTECT LEGITIMATE SUBSISTENCE USERS IN PLACES WHERE THERE IS CONFLICT, NOT WHERE THE ISSUE IS MOOT. IF ALASKANS ARE ELIGIBLE FOR THE SUBSISTENCE PREFERENCE IN ANY LOCATION OF THE STATE, BASED ON LIFESTYLE, THEY SHOULD ALL BE TREATED EQUALLY, NO MATTER HOW DIFFICULT THAT MAKES THE POLITICS OF THE FISH AND GAME BOARDS. TO DO OTHERWISE IS NOT ONLY UNFAIR BUT PROBABLY UNCONSTITUTIONAL.

THIRD, THE GOVERNOR'S BILL EFFECTIVELY GUTS THE FUNDAMENTAL MANAGEMENT PRINCIPLE WHICH PREVADES TITLE VIII OF ANILCA, AS REFINED BY THE FEDERAL COURTS: THE CONCEPT THAT THE BOARDS OF FISH AND GAME MUST MANAGE THE ENTIRE SUBSISTENCE SYSTEM IN SUCH A WAY AS TO INFLICT THE "LEAST ADVERSE IMPACT" ON THE "CUSTOMARY AND TRADITIONAL" PRACTICES OF ALASKAN COMMUNITIES. THAT LANGUAGE IN FEDERAL LAW CONSTITUTES THE LEGAL BULWARK OF SUBSISTENCE PROTECTIONS FOR NATIVE VILLAGES. ITS REMOVAL OR DIMINUTION WOULD OPEN THE DOOR TO A GRADUAL EROSION OF THE

ENTIRE SYSTEM. THE GOVERNOR'S BILL, WHILE MAKING RHETORICAL GESTURES IN THE DIRECTION OF CUSTOMARY AND TRADITIONAL USES," EFFECTIVELY SUBSTITUTES A CONCEPT OF "REASONABLE OPPORTUNITY," WHICH THE BOARDS MUST PROVIDE TO SUBSISTENCE USERS. WHEN COMPARED TO THE FEDERAL LANGUAGE, THAT STANDARD IS INADEQUATE AND MUST BE REWRITTEN.

FOURTH, THE GOVERNOR'S BILL - IN DEFINING ELIGIBILITY FOR THE SUBSISTENCE PREFERENCE BY LIFESTYLE, RATHER THAN BY RESIDENCE - INEVITABLY RUNS INTO THE PROBLEM OF SETTING UP DEMONSTRABLE CRITERIA OF INDIVIDUAL ELIGIBILITY. IF AN ALASKAN IN ANY OF THE THREE LEVELS OF COMMUNITIES IS REQUIRED TO PROVE HIS OR HER ELIGIBILITY FOR THE PREFERENCE, SEVEN STANDARDS ARE TO BE MEASURED ON A CUMULATIVE POINT SYSTEM. THIS COMMITTEE SHOULD CAREFULLY JUDGE THOSE SEVEN CRITERIA AND ASK ITSELF WHETHER THEY ARE IN FACT ENFORCEABLE. TO ME, THEY APPEAR TO BE ILL-DEFINED BEHAVIORAL DESCRIPTIONS, AND TO THE EXTENT THAT THEY HAVE NUMBERS ATTACHED, THEY ARE EFFECTIVELY UNENFORCEABLE. THIS MEANS THAT THE MANAGEMENT SYSTEM FOR THE MOST EMOTIONALLY CHARGED ISSUE IN STATE POLITICS WILL ESSENTIALLY REST ON THE "HONOR SYSTEM." I SUBMIT TO YOU THAT SELF-ENFORCEMENT WILL NOT WORK AND THAT THE RESULT WILL BE AN AGONIZING TANGLE OF BUREAUCRACY, INTRUSIVE INVESTIGATION, FISCAL COST TO THE STATE, AND ENDLESS LEGAL APPEALS WHICH WILL MAKE THE IMPLEMENTATION OF THE LIMITED ENTRY SYSTEM LOOK EASY BY COMPARISON.

FINALLY, THE GOVERNOR'S BILL ACCORDS ENTIRELY TOO MUCH REGULATORY DISCRETION TO THE BOARDS OF FISH AND GAME.

ONE OF THE FUNDAMENTAL LESSONS SUBSISTENCE USERS HAVE LEARNED OVER THE YEARS IS THAT IT IS NOT ENOUGH TO GET A GOOD STATUTE IN FEDERAL OR STATE LAW. THAT IS A FIRST STEP, OF COURSE. BUT IT IS ALSO NECESSARY TO HAVE AN ADMINISTRATIVE SYSTEM - BOARDS, DEPARTMENT AND ADVISORY MECHANISMS - WHICH IS WILLING TO CARRY OUT THE LAW. TIME AND AGAIN, SUBSISTENCE USERS HAVE THOUGHT THEY HAD A GOOD STATUTE, ONLY TO SEE IT WHITTLED DOWN IN THE REGULATORY PROCESS BY POLITICAL ELEMENTS DEDICATED TO THE REDUCTION OR ELIMINATION OF SUBSISTENCE PROTECTIONS. WHAT SUBSISTENCE USERS NEED IS NOT ONLY A CONSTITUTIONAL AMENDMENT AND AN APPROPRIATE STATUTE BUT A REGULATORY STRUCTURE COMMITTED TO DEFENDING SUBSISTENCE AS VIGOROUSLY AS IT DEFENDS THE INTERESTS OF SPORT AND COMMERCIAL USES.

IN CLOSING, I WANT YOU TO KNOW THAT THE ALASKA FEDERATION OF NATIVES AND THE STATEWIDE NATIVE COMMUNITY REMAIN COMMITTED TO DOING EVERYTHING POSSIBLE TO NEGOTIATE AN APPROPRIATE STATUTE AND CONSTITUTIONAL AMENDMENT. WHILE WE WILL NOT YIELD ON CRITICAL ISSUES OF SUBSISTENCE PROTECTION FOR THE VILLAGES, WE WILL CONTINUE, AS WE HAVE FOR MONTHS ON THE SUBSISTENCE ADVISORY COUNCIL, TO TALK WITH THE GOVERNOR AND OTHER INTERESTS IN ORDER TO SEE WHAT CAN BE ACCOMPLISHED. NOT THE LEAST REASON FOR THIS CONTINUING EFFORT IS THE FACT THAT THE AFN WILL HOLD A STATEWIDE SUBSISTENCE SUMMIT CONFERENCE IN ANCHORAGE ON MARCH 23 AND 24. AT THAT TIME, I HOPE TO BE ABLE TO PRESENT TO THE ASSEMBLED REPRESENTATIVES OF THE STATEWIDE NATIVE COMMUNITY THE BEST OFFER WHICH THE GOVERNOR, IN HIS WISDOM, FEELS THAT HE CAN

MAKE TO US ON SUBSISTENCE. WE WILL THEN KNOW FIND OUT WHETHER ANY CHANGES WHICH THE GOVERNOR HAS BEEN WILLING TO MAKE WILL MAKE HIS PROPOSAL ACCEPTABLE TO THE NATIVE COMMUNITY OR NOT. IF SO, THEN WE MAY WELL HAVE A SOLUTION. IF NOT, THEN WE REMAIN AT IMPASSE AND WE WILL CONTINUE TO WORK ON IT WITH THE GOVERNOR, THE LEGISLATURE, THE FEDERAL AGENCIES AND THE COURTS. HOWEVER IT COMES OUT, I WANT YOU TO KNOW THAT OUR ORGANIZATIONS REMAIN COMMITTED TO THE VALUE OF OPEN PUBLIC DIALOGUE AND NEGOTIATION, AND WE ARE AT YOUR SERVICE DURING YOUR CONSIDERATION OF THE SUBSISTENCE ISSUE. WHATEVER YOU NEED FROM US, YOU HAVE.

THANK YOU, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I WOULD BE HAPPY TO TRY TO ANSWER ANY QUESTIONS THE COMMITTEE MAY HAVE.



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

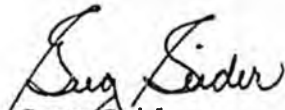
Dear Senator Jones:

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:ph1



## 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 HB 443 as it is presently written.

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 SB 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 see the federal government to make H.L.A. honor our state Constitution -

Equal Rights w/ men and  
Game Stocks for Everyone —  
and everything else they  
haven't done yet after 33 years.  
We got along for years  
without subsistence reg-  
ulations 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. Hs., AK 99707.



# Alaska State Legislature

Please enter into the record my testimony to the Senate Resoueces  
 committee name  
 committee on SB 443 , dated 03/07/92  
 bill/subject

*See attached*

Signed: *Richard H. Bostrom*  
 Testifier  
ALASKA OUTDOOR COUNCIL  
 Representing (Optional)  
1555 BUS'S BRIND FAIRBANKS 99709  
 Address  
907-455-6151  
 Phone No.

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. "Uchaa" 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 State Legislature

Please enter into the record my testimony to the Senate Resources  
 committee name  
 committee on SB 443 / HB 552, dated 03/07/92  
 bill/subject

Signed: Corne J. Paul  
 Testifier

SELF  
 Representing (Optional)

847 FAULTLINE AVE, NORTH POLE 99705  
 Address

488-6402  
 Phone No.

MAR 07 '82 11:55 LID - FAIRBANKS P. 2 2

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.