

**ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672**  
**7651 SENATE RESOURCES**

This legislation complies with our constitution and has no legal need for an amendment. I have steadfastly opposed the rural amendment or any other that would override the equal protection or common use clauses of our constitution. I continue to do so.

I understand, however, that there is a strong political desire from some for an amendment which would protect subsistence in the future.

If people wish to discuss an amendment that:

1. requires the legislature to provide for the identification of fish stocks and game populations subject to subsistence uses,
2. requires the legislature to provide for the preference of subsistence use over other consumptive uses of those stocks and populations, and
3. takes effect on the day Congress amends Title VIII of ANILCA to allow compliance by Alaska's new subsistence law as drafted by the Subsistence Advisory Council,

I am willing to listen.

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.

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

March 17, 1992

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

Dear Senator Jones:


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

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

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

Thank you for consideration of our respectful request.

Sincerely,

  
Mary L. Lekanof  
President

cc: Following Alaska State Senate Committees  
Judicary  
Finance  
Rules

92-013

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 AB 443 Substantive. 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 A.D.M. honor our state Constitution.

Equal Rights to ~~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. Newcomer

P.O. Box 70941

Ft. H., AR 99707.

P.1

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



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

TO: ~~Senator Lloyd Jones~~ DATE: 3/6/92  
~~SENATE RESOURCES COMMITTEE~~ FAX 465-2864  
JUNEAU

FROM: TIM STEUENS

PAGES: (Including this page) 2

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

SENATOR JONES'S OFFICE NUMBER  
465-3743

MAR 06 '92 10:37 JOHNSON-LIEBER-

THANK YOU.  
*Tim Steuens*

12830 Huffman Circle  
Anchorage, AK 98518  
March 6, 1992

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

Dear Sir:

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

Sincerely,



Tim Stevens  
(907) 345-3804

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

March 6, 1992

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

Reference SB 443/HB552 "Subsistence"

Dear Senator Jones:

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

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

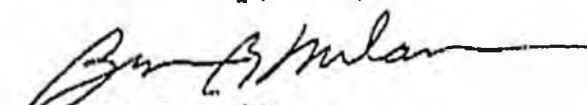
We are all Alaskans regardless of race, creed or color and that is the principles that the United States and Alaska were founded upon. This is a principle we cannot negotiate.

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

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

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

Sincerely,



Ben R. Milam

FACSIMILE TRANSMITTAL COVER SHEET

TO: Senate Resources Committee

PHONE:

FAX: 562-4376

NUMBER OF PAGES: 2

---

FROM: BEN R. MILAM

PHONE: 274-7232

FAX: (907) 274-9524

COMMENTS:

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

## All Community Legislatures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Warren E. Olson  
5961 Orth Circle  
Anchorage, Alaska  
99516

346 1811

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



## ALASKA OUTDOOR COUNCIL, INC.

F O Box 34097  
Juneau, AK 99803  
463-3830

March 20, 1992

Senator Jones  
State Capitol  
Juneau, AK 99801-1182

Dear Senator Jones:

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

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

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

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

For example:

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

All Legislators, page 2

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

2) We helped develop the concept of a priority based on a resource dependent subsistence lifestyle;

3) We worked constructively with the Governor's Subsistence Advisory Council on this legislation;

4) We have sought agreement with Native groups and others regarding resource and habitat enhancement and other management issues;

5) We have fought for continued subsistence uses in National Parks as authorized by ANILCA;

6) We initiated action to have Alaska represented at the Convention on International Trade in Endangered Species to protect Alaska Natives' subsistence uses of walrus;

7) We are supporting HB 446, the wildlife conservation viewing tag bill, that will benefit non-consumptive uses of fish and game; and

8) We participated on the public Wolf Management Planning Team in a constructive, good faith effort.

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

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

1) ensures sound resource perpetuation and management;

2) maintains the equal rights, equal protection and common use provisions of our state constitution;

3) provides for a subsistence priority for fish and game and for other uses within the bounds of the constitution;

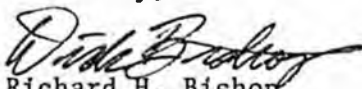
4) does not influence Indian country legal arguments; and

5) allows people to enjoy the physical and philosophical satisfaction of sustaining their Alaskan lifestyles through the responsible uses of fish and wildlife.

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

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

Sincerely,



Richard H. Bishop  
Legislative Affairs

CC: Governor Hickel  
Commissioner Rosier

*By Ar Adams*  
~~JULIE KITKA TESTIMONY TO SENATE RESOURCES COMMITTEE~~  
~~(ALASKA LEGISLATURE) MARCH 5, 1992~~

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

*by Ar Adams*  
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 THE PUBLIC POLICY OF OUR STATE. BEFORE I GET INTO DISCUSSION 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 THE IMPORTANCE OF THIS ISSUE IN HISTORICAL CONTEXT.

FIRST, PLEASE UNDERSTAND WHY THE ALASKA FEDERATION OF NATIVES, A WIDE RANGE OF OTHER NATIVE ORGANIZATIONS AROUND THE STATE, AND VIRTUALLY EVERY MEMBER OF THE STATEWIDE NATIVE COMMUNITY 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 A SUBSISTENCE PREFERENCE ON FEDERAL LANDS 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 POLITICAL FACT IS THAT, IF THE ONLY SUBSISTENCE USERS IN RURAL ALASKA WERE NON NATIVE HOMESTEADERS, TRAPPERS AND SOURDOUGHS, THERE WOULD NEVER HAVE BEEN ANY TITLE VIII OF

ANILCA. THAT ACT OF THE CONGRESS ARTICULATED IN MODERN FORM THE TRADITIONAL OBLIGATION OF THE UNITED STATES TO PROTECT ITS INDIGENOUS PEOPLES 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 BE SEEN NOT SIMPLY AS A SUBSET OF "FISH AND GAME MANAGEMENT" RATHER, IT IS A SUBSET OF THIS STATE'S AND THIS NATION'S SOCIAL POLICIES TOWARD THE PEOPLE WHO ARE FROM ALASKA. ALTHOUGH SUBSISTENCE LAW DEALS WITH ANIMALS, THEIR HABITATS AND THE EFFICIENCY OF THEIR MANAGEMENT BY PUBLIC AGENCIES, THE REAL ISSUE AT STAKE IS THAT OF HUMAN USES - THE ALLOCATION OF THOSE LIMITED FISH AND GAME RESOURCES AMONG COMPETING USER GROUPS. THAT SOCIAL, RATHER THAN SCIENTIFIC, QUESTION IS AT THE HEART OF THE CURRENT QUANDARY AND CANNOT BE AVOIDED.

WHY IS THE ALLOCATION OF FISH AND GAME SUCH A CRITICAL SOCIAL QUESTION? IT IS BECAUSE THE PRACTICE OF SUBSISTENCE REMAINS AN ABSOLUTE NECESSITY FOR THE ECONOMIC AND CULTURAL SURVIVAL OF RURAL ALASKAN VILLAGES DURING 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 PRODUCTIVE LABOR 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 ECONOMICS ALONE WILL NOT EXPLAIN WHY THE CURRENT SUBSISTENCE DILEMMA IN STATE POLITICS HAS SO GALVANIZED THE INTEREST AND PARTICIPATION OF NATIVES. THE PERSONAL AND CULTURAL NEEDS OF NATIVE PEOPLE ARE CENTRAL THROUGH OUR INVOLVEMENT AS WELL. SUBSISTENCE AND THE LAND CONNECT US TO OUR PAST AND TO EACH OTHER. THEY PROVIDE PRODUCTIVE LABOR - A NECESSITY FOR HEALTHY HUMAN BEINGS EVERYWHERE IN THE WORLD. SUBSISTENCE IS THUS A 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.

AS A CONSEQUENCE OF THESE ECONOMIC AND CULTURAL FACTS, 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 LAW, AN EFFECTIVE, LONG TERM PROTECTION OF THE TRADITIONAL SUBSISTENCE PRACTICES OF OUR NATIVE COMMUNITIES. THAT VALID PUBLIC PURPOSE, AND THE FACT REMAINS THAT, WITHOUT IT, MOST NATIVE VILLAGES IN THIS STATE ARE DOOMED. THE CONSTANTLY SUBSISTENCE TURMOIL OF THE PAST DECADE HAS TAUGHT US THAT WE MUST NOT SETTLE FOR ARRANGEMENTS THAT ARE POLITICALLY OR JUDICIALLY UNSTABLE OVER

TIME. WE WANT THIS ISSUE SETTLED ONCE AND FOR ALL IN A MANNER WHICH GUARANTEES THE LONG TERM SURVIVAL OF OUR PEOPLE.

SINCE EARLY 1990, IMMEDIATELY FOLLOWING THE McDOWELL DECISION BY THE ALASKA SUPREME COURT, THE STATEWIDE NATIVE COMMUNITY HAS CONSISTENTLY SUPPORTED THE GOAL OF RETURNING UNITARY FISH AND GAME MANAGEMENT ON ALL LANDS 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 OF DUAL MANAGEMENT OF HIGHLY MOBILE FISH STOCKS AND GAME POPULATION 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 AT LARGE) CAN RESOLVE THE CURRENT IMPASSE BETWEEN FEDERAL AND STATE LAWS. IT IS CLEAR TO US THAT, AS A THRESHOLD MATTER, THE SOLUTION MUST INCLUDE AN APPROPRIATE AMENDMENT TO THE ALASKA CONSTITUTION, PASSED BY TWO-THIRDS OF BOTH HOUSES OF THE LEGISLATURE AND BY A SIMPLE MAJORITY OF THE VOTERS IN THE NEXT GENERAL ELECTION. WHATEVER STATUTE LEGISLATION MAY OR MAY NOT BE A PART OF THE SOLUTION TO OUR CURRENT DILEMMA IN ALASKA, THE CONSTITUTION MUST BE AMENDED.

AN APPROPRIATE CONSTITUTIONAL AMENDMENT, IN TURN, MUST ACCOMPLISH AT LEAST TWO THINGS: FIRST, IT MUST EMBODY AN UNEQUIVOCAL POLICY STATEMENT, BY THE PEOPLE OF ALASKA, RECOGNIZING SUBSISTENCE AS PRIORITY USE OF FISH AND GAME RESOURCES THROUGHOUT THE STATE. THAT HISTORICAL PRINCIPLE IS SO CRITICAL TO THE FUTURE OF ALASKA, IT DESERVES TO BE STATED

CLEARLY IN OUR BODY OF ORGANIC LAW. SECOND, AN AMENDMENT MUST GIVE THE LEGISLATURE THE AUTHORITY, WHICH IT DOES NOT NOW ENJOY, BASED ON THE ALASKA SUPREME COURT'S FINDING McDOWELL v STATE, TO ENACT AN APPROPRIATE AND EFFECTIVE MECHANISM FOR DEFINING WHO IS ELIGIBLE FOR THE SUBSISTENCE PREFERENCE, WHETHER THAT ELIGIBILITY SHOULD BE DETERMINED BY <sup>LOCATION</sup> 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 OTHER QUESTIONS OF 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 GOES ON TO REITERATE THAT HE HAS STEADFASTLY OPPOSED AMENDING THE CONSTITUTION FOR A RURAL PREFERENCE OR FOR THE OTHER MECHANISM THAT WOULD 'OVERRIDE THE EQUAL PROTECTION OR COMMON USE CLAUSES OF OUR CONSTITUTION", AND HE CONTINUES TO DO SO. 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 REQUIRES THE LEGISLATURE TO PROVIDE 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 CONSTITUTIONAL QUESTION - AN OPPORTUNITY WHICH WAS NOT AFFORDED TO THEM BY A ONE VOTE MINORITY IN THE ALASKA HOUSE OF REPRESENTATIVES IN 1990. THE GOVERNOR'S STATEMENT ALSO APPEARED TO RECOGNIZE THE LONG TERM HISTORIC IMPORTANCE OF THE SUBSISTENCE QUESTION AND ITS RIGHTFUL PLACE IN THE CONSTITUTION AS GUIDANCE TO FUTURE LEGISLATION, FUTURE GOVERNORS AND FUTURE COURTS.

HAVING SAID THAT, I WOULD ALSO CAUTION THAT THE KIND OF AMENDMENT DESCRIBED IN THE GOVERNOR'S STATEMENT MAY WELL NOT BE THE KIND OF CONSTITUTIONAL AMENDMENT I HAVE DESCRIBED TO YOU. I WOULD ALSO ADD A STRONG DISAGREEMENT WITH THE GOVERNOR'S APPARENT REASONS FOR HIS CURRENT WILLINGNESS TO DISCUSS AN AMENDMENT. THE ALASKA NATIVE COMMUNITY DOES NOT FEEL THAT THE CONSTITUTION OF THIS STATE, WHICH IS ONE OF THE MOST PRECIOUS DOCUMENTS WE HAVE, SHOULD BE TREATED AS A FORM OF POLITICAL LEVERAGE IN THE PROCESS OF LEGISLATION OR ATTACHED TO ACTIONS BY THE UNITED STATES CONGRESS. WE OWE THE CONSTITUTION BETTER TREATMENT THAN THAT. IF SUBSISTENCE, AS AN END IN ITSELF, IS

ONE OF THOSE FUNDAMENTAL POLITICAL CONSIDERATIONS DESERVING INCLUSION IN THE CONSTITUTION, WE SHOULD DO IT AND WE SHOULD DO IT NOW.

IT IS ALSO WORTH ADDING THAT THERE ARE MANY GOOD LEGAL MINDS IN THIS WHO SIMPLY DISAGREE WITH THE GOVERNOR'S CONTENTION THAT HIS BILL, NOW BEFORE THIS LEGISLATURE, COMPLIES WITH THE CONSTITUTION AS IT CURRENTLY READS. TO MY KNOWLEDGE, NO WRITTEN OPINION BY THE ATTORNEY GENERAL OF THIS STATE CONCERNING THE CONSTITUTIONALITY OF THE GOVERNOR'S PROPOSED BILL HAS BEEN RENDERED. I WOULD LIKE TO TAKE THIS OPPORTUNITY TO SUGGEST THAT THE LEGISLATURE REQUEST SUCH A WRITTEN OPINION, SPECIFYING THAT THE ATTORNEY GENERAL EXPLAIN NOT ONLY WHETHER OR NOT THE BILL IS CONSTITUTIONAL (WHICH IS ESSENTIALLY A POLITICAL CALL) BUT ALSO THE LEGAL REASONING BEHIND THAT DETERMINATION (WHICH IS AN EXERCISE IN LAW). WE ALL NEED TO HEAR FROM THE ATTORNEY GENERAL AND THE GOVERNOR ON WHY THIS BILL, FOLLOWING THE McDOWELL DECISION BY THE ALASKA SUPREME COURT, IS NOT JUST AS VIOLATIVE OF THE FULL PROTECTION OR COMMON USE CLAUSES OF THE CONSTITUTION AS WAS THE OLD RURAL PREFERENCE IN STATE LAW WHICH WAS NULLIFIED.

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, <sup>we</sup> I HAVE CONTACTED THE GOVERNOR'S OFFICE IN ORDER TO

SET UP DETAILED AND INTENSIVE DISCUSSIONS BETWEEN THE ALASKA FEDERATION OF NATIVES AND THE GOVERNOR'S STAFF IN ORDER TO SEE IF THERE IS COMMON GROUND REGARDING A CONSTITUTIONAL AMENDMENT AND, OR A STATUTE.

NOW 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, THE NINE-MEMBER GOVERNOR'S SUBSISTENCE ADVISORY COUNCIL DURING THE PAST FOUR MONTHS. ALTHOUGH THE INDIVIDUAL MEMBERS OF THE COUNCIL AND THE ORGANIZATIONS THEY REPRESENTED DID NOT SIGN OFF ON THE FINAL 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 WHAT WE HAVE SEEN HAS BEEN A FAITH EFFORT BY CITIZENS AND POLITICAL LEADERS TO TRY TO FIND AN APPROPRIATE STATUTORY SOLUTION. 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 POLITICS.

THE ISSUE BEFORE US, HOWEVER, IS NOT THE PROCESS BUT THE PRODUCT; AND I NEED TO STATE AT THE OUTSET OF THIS COMMITTEE'S EXAMINATION OF THE BILL THE FACT THAT IT CANNOT BE SUPPORTED BY THE ALASKA FEDERATION OF NATIVES OR THE STATEWIDE NATIVE COMMUNITY WITHOUT SIGNIFICANT ALTERATION. I DO NOT MEAN MERELY FINE TUNING OR LANGUAGE CHANGES. I MEAN THAT, ALTHOUGH THE THREE TIER STRUCTURE OF COMMUNITY PRESUMPTIONS OF ELIGIBILITY

FOR THE SUBSISTENCE PREFERENCE MAY HAVE SOME POTENTIAL FOR PROGRESS IN OUR CURRENT DILEMMA, THE BILL BEFORE YOU REPRESENTS A SIGNIFICANT LOSS OF SUBSISTENCE PROTECTIONS TO NATIVE VILLAGES ALL ACROSS RURAL ALASKA, WITH OR WITHOUT A CONSTITUTIONAL AMENDMENT AND REGARDLESS OF WHAT THE CONGRESS SHOULD DO OR WILL DO WITH ANILCA. AS A STARTING POINT, I NEED TO LIST FOR YOU FIVE ABSOLUTELY FUNDAMENTAL AREAS OF CONCERN WHICH MAKE THE GOVERNOR'S BILL AN HISTORICAL BACKWARDS STEP FOR NATIVE PEOPLE.

FIRST, THE LEVEL OF PROTECTION FOR THE SUBSISTENCE PREFERENCE IN LEVEL ONE COMMUNITIES (WHICH ARE ALL VILLAGES IN THE BUSH) IS NOT AS HIGH AS THE LEVEL OF PROTECTION OFFERED IN THE FEDERAL LAW AND THAT HAD BEEN OFFERED IN THE STATE LAW NULLIFIED BY THE McDOWELL DECISION. AS ORIGINALLY CONSIDERED BY THE SUBSISTENCE ADVISORY COUNCIL, THIS BILL WOULD HAVE PROVIDED TO SUCH COMMUNITIES AN IRREBUTTABLE PRESUMPTION ELIGIBILITY FOR THE PREFERENCE. HOWEVER, LATE IN THE ADVISORY COUNCIL'S PROCESS, THE ATTORNEY GENERAL'S OFFICE STRONGLY ADVISED THAT THE WORD IRREBUTTABLE BE REMOVED, MEANING THAT CERTAIN INDIVIDUALS RESIDING IN SMALL NATIVE VILLAGES MAY IN FACT BE REQUIRED TO PROVE INDIVIDUAL ELIGIBILITY ACCORDING TO STANDARDS WHICH ARE DIFFICULT TO ENFORCE. THAT FACT OPENED THE HISTORICAL DOOR TO THE GENERAL EROSION OF LEGAL PROTECTIONS OF THE SUBSISTENCE ELIGIBILITY IN THE NEEDIEST COMMUNITIES OF OUR STATE - PRECISELY THOSE PLACES FOR WHICH SUBSISTENCE PREFERENCE WAS DRAFTED IN THE FIRST PLACE. FACED WITH THIS FACT, THE STATEWIDE NATIVE COMMUNITY HAS NO CHOICE EXCEPT TO POINT OUT THAT THIS BILL

REPRESENTS A SIGNIFICANT "NET LOSS" OF PROTECTIONS, WHEN COMPARED TO FEDERAL LAW; AND WE ARE ON THE PUBLIC RECORD AS MAINTAINING A POSITION WE WILL NOT NEGOTIATE OR COMPROMISE AWAY THOSE ECONOMIC AND CULTURAL DEFENSES OF THE VILLAGES.

SECOND, THE GOVERNOR'S BILL BEGINS FROM THE FAULTY PREMISE OF EXEMPTING WHOLE FISH STOCKS AND GAME POPULATIONS (THAT IS ENTIRE GEOGRAPHICAL AREAS OF THE STATE) FROM ALL SUBSISTENCE USES, REGARDLESS OF THE INDIVIDUAL ELIGIBILITY FOR THE SUBSISTENCE PREFERENCE OF PEOPLE AND COMMUNITIES INSIDE THOSE AREAS. IN SHORT, WHATEVER THE VALUE OF THE GOVERNOR'S SYSTEM OF ELIGIBILITY FOR THE SUBSISTENCE PREFERENCE, IT IS NOW CLEAR THAT PRELIMINARY POLICY DECISIONS WERE MADE TO ENSURE THAT ENTIRE AREAS OF THE STATE, DELINEATED BY THE BOARDS OF FISH AND GAME, WOULD AUTOMATICALLY BE EXEMPTED BECAUSE THEY REPRESENT PLACES IN WHICH THERE ARE SIGNIFICANT USER GROUP CONFLICTS OVER LIMITED RESOURCES, SUCH AS ON THE KENAI PENINSULA AND OTHER AREAS. BUT THE WHOLE POINT OF HAVING A SUBSISTENCE PREFERENCE AT ALL IS TO PROTECT LEGITIMATE SUBSISTENCE USERS IN PLACES WHERE THERE IS CONFLICT, NOT WHERE THE ISSUE IS MOOT. IF PEOPLE AND COMMUNITIES ARE ELIGIBLE FOR THE SUBSISTENCE PREFERENCE IN ANY LOCATION OF THE STATE, BASED UPON THEIR LIFESTYLE AS DEFINED IN THIS LEGISLATION, 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 AS WELL.

THIRD, THE GOVERNOR'S BILL EFFECTIVELY GUTS THE FUNDAMENTAL

MANAGEMENT PRINCIPAL WHICH PREVADES TITLE VIII OF ANILCA AND WHICH HAS BEEN SUBSEQUENTLY 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" USES AND PRACTICES OF ALASKAN COMMUNITIES. THAT LANGUAGE IN FEDERAL LAW CONSTITUTES THE LEGAL BOWL WORK OF SUBSISTENCE PROTECTIONS FOR OUR NATIVE VILLAGES. IF IT IS REMOVED OR SIGNIFICANTLY DIMINISHED, IT REPRESENTS AN ENORMOUS STEP BACKWARDS FOR US AND OPENS THE HISTORICAL DOOR TO THE GRADUAL EROSION OF THE ENTIRE SYSTEM. THE GOVERNOR'S BILL, WHILE MAKING CERTAIN RETORICAL JESTURES IN THE DIRECTION OF "LEAST ADVERSE IMPACT" AND "CUSTOMARY AND TRADITIONAL USES," EFFECTIVELY SUBSTITUTES A CONCEPT OF "REASONABLE OPPORTUNITY" WHICH THE BOARDS MUST PROVIDE TO SUBSISTENCE USERS. WHEN COMPARED WITH THE FEDERAL STANDARD, THAT CONCEPT IS HOPELESSLY INADEQUATE AND MUST BE REWRITTEN TO REFLECT ANILCA LANGUAGE.

FOURTH, THE GOVERNOR'S BILL, IN DEFINING ELIGIBILITY FOR THE SUBSISTENCE PREFERENCE BY LIFESTYLE, RATHER THAN RESIDENCE, INEVITABLY RUNS INTO THE PROBLEM OF SETTING UP QUANTIFIABLE, PROVEABLE CRITERIA OF INDIVIDUALIZED ELIGIBILITY. IF AN ALASKAN IN ANY OF THE THREE LEVELS OF COMMUNITIES IS REQUIRED TO PROVE HIS OR HER INDIVIDUAL ELIGIBILITY FOR THE PREFERENCE, THERE ARE SEVEN STANDARDS TO BE MEASURED ON A CUMULATIVE POINT SYSTEM. I BELIEVE THAT THIS COMMITTEE SHOULD CAREFULLY JUDGE MEASURABILITY AND VALUE OF THOSE SEVEN CRITERIA AND ASK ITSELF WHETHER THEY

ARE IN FACT ENFORCEABLE. TO ME, THEY APPEAR TO BE MUSHY, ILL DEFINED BEHAVIORAL DESCRIPTIONS, AND TO THE EXTENT THAT THEY DO HAVE QUANTIFIABLE NUMBERS ATTACHED TO THEM, THEY ARE EFFECTIVELY UNENFORCEABLE. THIS MEANS THAT A SYSTEM OF ELIGIBILITY FOR PREFERENCE IN THE MOST EMOTIONALLY CHARGED ISSUE OF STATE POLITICS WILL ESSENTIALLY REST ON THE "HONOR SYSTEM." I SUBMIT TO YOU THAT SELF ENFORCEMENT WILL NOT GET THE JOB DONE AND THAT WHAT WILL RESULT INSTEAD WILL BE AN AGONIZING TANGLE OF BUREAUCRACY, INTRUSIVE INVESTIGATION, ECONOMIC COST TO THE STATE, AND ENDLESS LEGAL APPEALS WHICH WILL MAKE THE PROBLEM OF IMPLEMENTING THE LIMITED ENTRY PERMIT SYSTEM IN COMMERCIAL FISHING LOOK EASY BY COMPARISON. IN EFFECT, THE GOVERNOR'S BILL SUBSTITUTES FOR RESIDENTS, WHICH IS EASY TO PROVE OR DISPROVE, BEHAVIORAL STANDARDS OF LIFESTYLE WHICH ARE AMBIGUOUS, VAGUE AND POTENTIALLY UNENFORCEABLE.


FINALLY, I NEED TO POINT OUT THAT THE GOVERNOR'S BILL ACCORDS ENTIRELY REGULATORY DISCRETION TO THE BOARDS OF FISH AND GAME. REPEATEDLY, THROUGHOUT THE TEXT, THE BOARDS ARE GIVEN AUTHORITY TO IMPLEMENT THIS SYSTEM, WHICH, IF THEY WISH, MAY BE DONE IN SUCH A WAY AS TO DIMINISH SUBSISTENCE PROTECTIONS. ONE OF THE FUNDAMENTAL LESSONS SUBSISTENCE USERS HAVE LEARNED OVER THE PAST TWO DECADES IS THAT IT IS NOT ENOUGH SIMPLY TO GET A GOOD STATUTE IN FEDERAL OR STATE LAW. THAT IS THE FIRST STEP, OF COURSE, BUT IT IS ALSO NECESSARY TO HAVE AN ADMINISTRATIVE SYSTEM, BOARDS, DEPARTMENTS AND ADVISORY MECHANISMS WHICH ARE READY AND WILLING TO CARRY IT OUT IN FACT. TIME AND AGAIN,

SUBSISTENCE USERS HAVE THOUGHT THEY HAD A GOOD STATUTE, ONLY TO SEE IT WHITTLED DOWN LITTLE BY LITTLE IN THE REGULATORY PROCESS BY POLITICAL ELEMENTS DEDICATED TO THE DIMINISHING OF SUBSISTENCE PROTECTIONS. WHAT NATIVE PEOPLE AND OTHER SUBSISTENCE USERS NEED IS NOT ONLY A CONSTITUTIONAL AMENDMENT AND A STATUTE BUT A STRUCTURE OF BOARDS AND DEPARTMENTAL AUTHORITY COMMITTED TO DEFENDING SUBSISTENCE AS VIGOROUSLY AS THEY DEFEND THE INTEREST OF SPORT AND COMMERCIAL USES.

IN LIGHT OF THE FUNDAMENTAL PROBLEMS I HAVE BRIEFLY LISTED HERE, I HAVE ALSO CONTACTED THE GOVERNOR'S OFFICE IN ORDER TO OPEN NEGOTIATIONS ONLY ON THE QUESTION OF AN APPROPRIATE CONSTITUTIONAL AMENDMENT BUT ALSO REGARDING TEXT OF THIS BILL. I WANT YOU TO KNOW THAT THE ALASKA FEDERATION OF NATIVES AND THE STATEWIDE NATIVE COMMUNITY COMMITTED TO DOING EVERYTHING POSSIBLE TO NEGOTIATE AN APPROPRIATE SETTLEMENT OF THESE DIFFERENCES. WHILE WE WILL NOT YIELD ON CRITICAL ISSUES OF SUBSISTENCE PROTECTIONS FOR THE VILLAGES, WE WILL CONTINUE, AS WE HAVE FOR THE PAST FEW MONTHS ON THE SUBSISTENCE ADVISORY COUNCIL, TO KEEP TALKING WITH THE GOVERNOR AND OTHER INTERESTS IN ORDER TO SEE WHAT CAN BE ACCOMPLISHED. IT IS MY PERSONAL HOPE AND INTENT THAT WE MAY BE ABLE TO COME TO SOME AGREEMENT WITH GOVERNOR HICKEL ON BOTH THE QUESTION OF A CONSTITUTIONAL AMENDMENT AND A STATUTE. NOT THE LEAST REASON FOR THIS EFFORT DURING THE NEXT FEW WEEKS 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 LAST BEST OFFER WHICH THE GOVERNOR, IN HIS WISDOM, FEELS THAT HE CAN MAKE TO THE NATIVE PEOPLE ON SUBSISTENCE. WE WILL THEN KNOW FOR CERTAIN WHETHER THOSE CHANGES WHICH THE GOVERNOR HAS BEEN WILLING TO MAKE WILL BE ACCEPTABLE TO THE NATIVE COMMUNITY OR NOT. IF THEY ARE, THEN WE MAY WELL HAVE A SOLUTION. IF THEY ARE 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 IN THE CURRENT ROUND OF NEGOTIATIONS, 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 IN THE CURRENT LEGISLATIVE SESSION. 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.



# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 27, 1992

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

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

WALTER J. HICKEL, GOVERNOR

REPLY TO:

1031 W 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
FAX: (907) 276-3697

KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 452-1568  
FAX: (907) 456-1317

P.O. BOX K - STATE CAPITOL

Post-It™ brand fax transmittal memo 7671		# of pages ▶ 1
To <i>M. Kie Campbell</i>	From <i>L. Nelson</i>	
Co. <i>GAJ - JAJ</i>	Co. <i>A-G-O-A-N</i>	
Dept.	Phone #	
Fax #	Fax #	

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

Dear Senator Hoffman and Representative Lincoln:

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

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

### Community-Based Presumptions

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

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

THE HONORABLE LYMAN F. HOFFMAN  
THE HONORABLE GEORGIANNA LINCOLN

MARCH 27, 1992  
PAGE 4

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

<sup>1</sup> Subsection (f) states:

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

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

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

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

<sup>2</sup> Subsection (g) states:

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

- (1) the social and economic structure;
- (2) the stability of the economy;
- (3) the extent and kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;
- (4) the amount and distribution of cash income among those domiciled in the area;

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 3

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

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

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

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

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

(7) the seasonal cycle of economic activity;

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

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

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

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

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

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

<sup>3</sup> Subsection (h) states:

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

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

(2) a person who is domiciled in the subsistence

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 4

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

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

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

---

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

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

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 5

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

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

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

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

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

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 6

Alaska Constitution requiring equal access to natural resources. In Part A of the decision, three justices of the Alaska Supreme Court ruled that sections 3, 15, and 17 of article VIII of the Alaska Constitution<sup>4</sup> prohibited the grant of exclusive or special privileges based on the characteristics of the community in which a user resides. Id. at 9.

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

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

---

<sup>4</sup> Section 3 of article VIII of the Alaska Constitution provides:

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

Section 15 of article VIII provides:

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

Section 17 of article VIII provides:

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

MAR-27-1992 11:27 FROM AGU/NAT RES/ANCH TO GUV OFC/JND P.07

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 7

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

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

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

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

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

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 8

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

Limitations to Subsistence Use Areas

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

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

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

---

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

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

The Honorable Lyman F. Hoffman  
 The Honorable Georgianna Lincoln

March 27, 1992  
 Page 9

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

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

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

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

---

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

The Honorable Lyman F. Hoffman  
 The Honorable Georgianna Lincoln

March 27, 1992  
 Page 10

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

#### The Twelve Month Qualification Period

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

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

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

---

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

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 11

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

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

Tier II Criteria

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

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

The Honorable Lyman F. Hoffman  
The Honorable Georgianna Lincoln

March 27, 1992  
Page 12

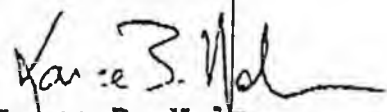
ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law or from ANILCA, but is intended to more clearly state how "local residency" will be measured. If the Tier II provision of the subsistence legislation did not contain a "local residency/proximity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

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

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

CHARLES E. COLE  
ATTORNEY GENERAL

By:

  
Lance B. Nelson  
Assistant Attorney General

---

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

PUBLIC HEARING ON  
PROPOSED REGULATIONS IN THE FEDERAL REGISTER  
SUBSISTENCE MANAGEMENT FOR FEDERAL PUBLIC LANDS IN ALASKA  
FEBRUARY 27, 1992, 7:00 P.M.  
HOLIDAY INN, ANCHORAGE, ALASKA

1.3

1 distributed. And we also have a couple of copies of the Final  
2 Environmental Impact Statement on Subsistence Management. And  
3 if anybody else needs a copy of this, you can stop by our  
4 office on C Street, or we'd be happy to mail you one. These  
5 have just started coming from the printer, and we're just  
6 getting ready to distribute them. So -- in fact, I think some  
7 of them have already been mailed. But they're being  
8 distributed this week.

9           The purpose of the hearing tonight is to take public  
10 comments on these proposed regulations for Federal Subsistence  
11 Management. And this portion of the regulations that we're  
12 going to look at outlines how the Federal Subsistence Program  
13 will be structured. It talks about the Federal Subsistence  
14 Board and advisory council system, how customary and  
15 traditional determinations are made. I know it's a little bit  
16 confusing. We have had two sets of regulations out for  
17 comment, as well as a Draft Environmental Impact Statement.  
18 The regulations we're looking at tonight, as I said, focus on  
19 a program structure, and there was a preliminary draft of  
20 those in our Draft Environmental Impact Statement that was out  
21 last fall. The other regulations that have been out for  
22 comment are the seasons and bag limits that will begin -- that  
23 will become effective next July, for the 1992/93 season. And  
24 this blue book is a result of the public comments that has  
25 come in on those. We started taking comments back in December

## R &amp; R COURT REPORTERS

810N STREET, SUITE 101  
277-0572-277-0573509 W. 3RD AVENUE  
277-85431007 W. 3RD AVENUE  
272-7515

ANCHORAGE, ALASKA 99501

# **CORRECTION**

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

PUBLIC HEARING ON  
PROPOSED REGULATIONS IN THE FEDERAL REGISTER  
SUBSISTENCE MANAGEMENT FOR FEDERAL PUBLIC LANDS IN ALASKA  
FEBRUARY 27, 1992, 7:00 P.M.  
HOLIDAY INN, ANCHORAGE, ALASKA

P R O C E E D I N G S

1  
2 MS. STADUM: Good evening. Can everybody hear me? It  
3 takes a lot of brave souls to come out this evening in the  
4 snow to talk about Federal Subsistence Regulations.

5 My name is Mary Stadum. I'm with the Fish & Wildlife  
6 Service, Office of Subsistence Management, here in Anchorage.  
7 I have with me Peggy Fox, who is also with the Fish & Wildlife  
8 Service Subsistence Office, here in Anchorage. And I have  
9 Laurel Kehler here, who is our court reporter, and is going to  
10 keep a transcript of the comments this evening.

11 We have a bunch of materials in the back. I think  
12 most of you probably have picked them up that need them. We  
13 have a copy of the regulations that we're taking comments on  
14 tonight. It says Federal Register on the front. There's a  
15 form to submit changes to the regulations. There's also a  
16 schedule in the back, and it does -- it is printed on both  
17 sides. It tries to outline the process of regulations and our  
18 decision making process with our Environmental Impact  
19 Statement. There's a lot going on in the Federal Subsistence  
20 Management area, and it's kind of hard to keep track of  
21 things. So, maybe, this will help a little bit.

22 We also have some other information in the back. We  
23 have a copy of proposals that came in for changes to next  
24 year's seasons and bag limits for Federal Subsistence  
25 Regulations, which has been out for a while. That has been

## R &amp; R COURT REPORTERS

810N STREET SUITE 101 509 W 3RD AVENUE 1007 W 3RD AVENUE  
277-0572-277-0573 277-8543 272-7515

ANCHORAGE ALASKA 99501

1 distributed. And we also have a couple of copies of the Final  
 2 Environmental Impact Statement on Subsistence Management. And  
 3 if anybody else needs a copy of this, you can stop by our  
 4 office on C Street, or we'd be happy to mail you one. These  
 5 have just started coming from the printer, and we're just  
 6 getting ready to distribute them. So -- in fact, I think some  
 7 of them have already been mailed. But they're being  
 8 distributed this week.

9           The purpose of the hearing tonight is to take public  
 10 comments on these proposed regulations for Federal Subsistence  
 11 Management. And this portion of the regulations that we're  
 12 going to look at outlines how the Federal Subsistence Program  
 13 will be structured. It talks about the Federal Subsistence  
 14 Board and advisory council system, how customary and  
 15 traditional determinations are made. I know it's a little bit  
 16 confusing. We have had two sets of regulations out for  
 17 comment, as well as a Draft Environmental Impact Statement.  
 18 The regulations we're looking at tonight, as I said, focus on  
 19 a program structure, and there was a preliminary draft of  
 20 those in our Draft Environmental Impact Statement that was out  
 21 last fall. The other regulations that have been out for  
 22 comment are the seasons and bag limits that will begin -- that  
 23 will become effective next July, for the 1992/93 season. And  
 24 this blue book is a result of the public comments that has  
 25 come in on those. We started taking comments back in December

1 on that portion of the regulations, and people have sent in  
2 proposals, and at this point, we have this proposal book back  
3 out for public review. But what we're focusing on tonight are  
4 the other portion of the regulations that look at the program  
5 structure, as I said before.

6 What we're going to do tonight is take a look at a  
7 little bit of background, kind of go over what's in the  
8 regulations. I'll be happy to answer any questions, but we'd  
9 like to take most of our time to listen to public comment and  
10 get your concerns.

11 For a little bit of background on these regulations,  
12 since the federal government became involved in subsistence  
13 management of fish and wildlife on public lands, July 1, 1990,  
14 prior to that on June 29th we published a set of temporary  
15 regulations that outlined how the federal subsistence program  
16 would function. These regulations were just to get started  
17 while an environmental impact statement was being prepared and  
18 while regulations were being developed with public comment and  
19 time to look at the various issues that are out there. We  
20 made some revisions and modifications in those original  
21 temporary regulations, and that's what are out tonight is  
22 proposed regulations. They were published in the Federal  
23 Register on January 30, and the public comment period is oper.  
24 until March 16.

25 We started the very beginning of the planning process

R & R COURT REPORTERS

810N STREET, SUITE 101  
277-0572 - 277-0573

508 W 3RD AVENUE  
277-8543

1007 W 3RD AVENUE  
272-7515

ANCHORAGE, ALASKA 99501

1 for federal subsistence management in the fall of 1990 with  
2 scoping meetings that led to the development of a draft  
3 environmental impact statement, and last fall we had hearings  
4 on those -- on that Draft Environmental Impact Statement.  
5 Also took comments, as I said, on the preliminary draft of the  
6 regulations. We've taken public comment on seasons and bag  
7 limits, starting in December, and now we're taking a specific  
8 look at these regulations.

9 In the Draft Environmental Impact Statement we  
10 developed four alternatives for the management of subsistence  
11 activities on federal lands. And the regulations that we're  
12 looking at tonight are the regulations that would implement  
13 the alternative that's selected in the final -- in the Record  
14 of Decision, in the Final Environmental Impact Statement.

15 I think I've kind of clarified that there are two  
16 processes going on; the seasons and bag limits and these other  
17 kinds of regulations. So, I think, what we'd like to do now  
18 is I'll ask Peggy Fox to highlight some of the areas that have  
19 already been brought to our attention of public concern in the  
20 areas where we would definitely like public comment on these  
21 regulations, and then after that, we'll take questions.

22 Peggy.

23 MS. FOX: Thank you. I would like to start -- before  
24 I get into, just very briefly, highlighting a few sections of  
25 the regulations, with saying that this proposed rule reflects

R & R COURT REPORTERS

810 N STREET, SUITE 101  
277-0572 • 277-0573

509 W 3RD AVENUE  
277-8543

1007 W 3RD AVENUE  
272-7515

ANCHORAGE, ALASKA 99501

1 the proposed action in the Draft Environmental Impact  
2 Statement. You can read this document and word for word go  
3 back to the appendix of the Draft Environmental Impact  
4 Statement, and find that that's where this came from. It has  
5 been somewhat confusing. We've been holding several meetings  
6 this week. People think that this document came out and it  
7 doesn't reflect any of the comments that they've been making  
8 since last October. Well, it isn't intended to. This is  
9 intended to reflect the Draft EIS. When we get to drafting  
10 the final rule, all those comments will be taken into  
11 consideration, along with the Record of Decision, and at that  
12 time, a final rule will result and be implemented, about  
13 July 1.

14 There's a few sections that, in particular, I wanted  
15 to make sure that people paid attention to and spend some time  
16 looking at. Section 6 in the -- in Sub-part A, the General  
17 Provisions, is a section on licensing permits, harvest  
18 tickets, tags and fees. And in there -- in that section, it  
19 does relate that, of course, every subsistence user needs to  
20 have some form of license or permit in the process of doing  
21 the subsistence taking of fish and wildlife.

22 What we are presenting here is some alternative  
23 systems -- permit systems, and would like you to look at what  
24 is being presented, as well as, perhaps, come forward with  
25 some other suggestions that might make these, in some cases,

## R &amp; R COURT REPORTERS

810N STREET, SUITE 101      509 W 3RD AVENUE      1007 W 3RD AVENUE  
277-0572-277-0573      277-8543      272-7515

ANCHORAGE, ALASKA 99501

1 more relevant for those that are actually doing the  
2 subsistence. For example, transferrable permits, as  
3 identified here, are -- the concept is that not every  
4 subsistence user is capable of going out and procuring their  
5 own bear or their own caribou, and, in some cases, -- and has  
6 reasonably proposed that, perhaps, they could assign their  
7 permit to someone else to do their harvesting for them. So,  
8 we've presented that as something we wanted to look at.

9 Community harvest permits, another alternative system  
10 that we are taking a look at here, and that the concept is  
11 that where there may be a predetermined level, perhaps, on  
12 caribou or moose, and a community wishes to have a bag limit  
13 on a community basis rather than an individual basis, that we  
14 would like to consider that as a proposal and try to find a  
15 way to make that workable.

16 Under Sub-part B of the program structure, Section 10  
17 addresses the composition of the board, and talks about their  
18 powers and duties, and quite clearly states out what their  
19 relationship to the councils is.

20 Section 11 is a section on the Regional Advisory  
21 Councils, lays out how they would be established, how they  
22 would operate with their responsibilities are, and in the  
23 Draft EIS there was a report -- an advisory report submitted.  
24 And included in that EIS that found that the Regional Advisory  
25 Councils found them to be inadequate. So this document

R & R COURT REPORTERS

810N STREET, SUITE 101      509W 3RD AVENUE      1007W 3RD AVENUE  
277-0572-277-0573      277-8543      272-7515

ANCHORAGE, ALASKA 99501

1 proposes that they be replaced with federal councils. So what  
2 is presented here is a process whereby they would be run in to  
3 the Federal Advisory Committee Act.

4 The next section is Local Advisory Committees, and  
5 that the Environmental Impact Statement is recommending that  
6 we work with the system that's already in place. Although you  
7 will read in here a procedure to establish them as federal  
8 committees, but that's only presented should that need to  
9 occur. And that could occur on the basis of a few committees,  
10 or it could be a wholesale decision to replace them all and  
11 make them federal committees.

12 Section 15 describes rural determination process, a  
13 process by which the board would determine which communities  
14 are rural and non-rural.

15 Section 16, customary and traditional use  
16 determination process, again, a process for the board to make  
17 determinations on what is customary and traditional use.

18 Section 18 is important for those subsistence users,  
19 in particular, who are concerned about how their needs will be  
20 addressed. It talks about the regulation adoption process,  
21 and lays out how the proposals that will come before the board  
22 to change the regulations will be brought to the councils and  
23 through the councils a recommendation will be made to the  
24 board. And it's our -- the federal government's  
25 responsibility to support the councils with the type of

R & R COURT REPORTERS

810N STREET, SUITE 101      509 W 3RD AVENUE      1007 W 3RD AVENUE  
277-0572-277-0573      277-8543      272-7515

ANCHORAGE, ALASKA 99501

1 information and contacts and resources that they may need to  
2 be able to analyze those proposals and present workable  
3 proposals to the board.

4 The only other section I wanted to point out was  
5 Section 24, where we have listed the present customary and  
6 traditional use determinations and to repeat that those have  
7 been adopted from the State's determination, but are available  
8 at this time for comments that would result in revisions or  
9 additions to the determinations.

10 Thank you.

11 MS. STADUM: Thank you, Peggy. At this time, if  
12 anybody has any general questions, we'll do our best to try to  
13 answer those, and then after we answer questions, we'll go  
14 ahead and take your comments.

15 Does anybody have questions, where we can clarify  
16 anything that we've talked about here in the regulations? No  
17 questions? We've answered all your questions or else we've  
18 stunned you.

19 We've asked that if you want to give any comments,  
20 that you fill out one of these blue forms. And I only have  
21 one person signed up at this point to testify. So, if anybody  
22 else would like to fill out a form and comment, you can see  
23 Kathyne at the back of the room.

24 At this time, we'll ask Mr. McKee if he'd like to come  
25 up to the microphone here, and I don't think it's on.

1 COURT REPORTER: It is on, I believe.

2 MS. STADUM: Okay.

3 MR. McKEE: My name is Charles McKee. I've been  
4 doing some investigation, and it's taken me to the point of  
5 writing a letter and sending it off to the Office of the Clerk  
6 of the US House of Representatives in Washington, DC.

7 I have it before me, and it covers many different  
8 aspects of our society, including the subjects here, but it  
9 doesn't specify subsistence in that word. I make reference to  
10 it as "convenience," because that's exactly what subsistence  
11 is. We do not go hunting or fishing where the fish are not  
12 there, or the animal that we hope to bag is not present, it's  
13 in that vicinity, much the same as a ship, carrying your  
14 cargo, hasn't come to dock yet. You don't swim out to the  
15 ship to unload it, you wait for it to come in so it's more  
16 convenient for you to unload your household items. So, it's a  
17 form of convenience rather than anything else that promotes  
18 subsistence lifestyle, regardless of what it is.

19 So, that is exactly where the organization chose to  
20 circumvent the national government, this nation. Notice I  
21 didn't make reference to it as federal, but national. They  
22 saw that we live by convenience, so they made it convenient to  
23 have their currency circulated over and above the United  
24 States currency, the national currency. And we can't subsist  
25 unless we have a currency to procure the equipment that we

R & R COURT REPORTERS

810N STREET, SUITE 101      509 W 3RD AVENUE      1007 W 3RD AVENUE  
277-0572 • 277-0572      277-8943      272-7515

ANCHORAGE, ALASKA 99501

1 pay for my medical. It was a biased program. I didn't know  
2 that I was in a Federal Reserve corporate court at the time.  
3 None of this was apparent to me until of recent, after I  
4 submitted this letter to the municipality, the 14th of this  
5 month, and then submitted it the following day to this  
6 Historical and Fine Arts Commission, the 15th. I had forgotten  
7 about the judge being a member of the commission, and I didn't  
8 even realize that he was directly employed by the mayor. His  
9 other immediate supervisor was the President of the United  
10 States. So he was working for two bosses, not to mention the  
11 fact that the whole argument was to try to procure Federal  
12 Reserve corporate currency to address my medical needs.  
13 Rather than to comply with the prepaid insurance policy, the  
14 case was controverted. My injury resulted in a near death  
15 experience because of it. My injury got so severe that it  
16 brought about a life threatening situation, which is why I  
17 wrote this letter, which is why I'm before you people, because  
18 it's completing a round-robin or round circle back to the  
19 Federal Reserve corporate structure and the people you work  
20 for.

21 I also include in there the fact that presidents have  
22 been assassinated over the attempt to change back to United  
23 States currency. I have in my hand a John F. Kennedy  
24 fifty-cent piece, which is what they used -- they minted these  
25 coins and gave to Jacqueline Kennedy for compensation for

## R &amp; R COURT REPORTERS

810N STREET, SUITE 101  
277-0372-277-0373509 W. 3RD AVENUE  
277-85431007 W. 3RD AVENUE  
272-7315

ANCHORAGE, ALASKA 99501

1 need to go out and conveniently subsist in the areas that --  
2 where the animals or fish may be at that given time.

3 So, that is exactly why the state has failed in its  
4 subsistence availability to the indigenous people of this  
5 country. They intended to fail so the federal bureaucracy of  
6 the Federal Reserve Corporation structure could move in and  
7 not become just temporary, but on a full-time basis. I say  
8 that with total experience. I've been in Alaska since 1975.

9 In 1985, Mayor Tom Fink was elected as mayor of  
10 Anchorage, Alaska, and he appointed people to the Anchorage  
11 Historical and Fine Arts Commission, which is located across  
12 from the Federal Building. I was commercial fishing, my job  
13 as a deckhand, out of Kodiak. What occurred was I was injured  
14 while employed as a deckhand.

15 During that period of time we would subsist to augment  
16 our food that was procured from convenient stores located in  
17 Kodiak. So, out of the need to seek medical, I filed a claim  
18 for medical insurance coverage and in it's federal  
19 jurisdiction, the case was taken before US District Judge,  
20 Honorable James von der Heydt. Von der Heydt -- Judge James  
21 von der Heydt was appointed by Mayor Tom Fink as one of the  
22 members of this Historical and Fine Arts Commission. My case  
23 was dismissed, eventually.

24 Mayor Tom Fink owned an insurance company, and it was,  
25 basically, over an attempt to get federal reserve currency to

R & R COURT REPORTERS

810N STREET, SUITE 101      509 W 3RD AVENUE      1007 W 3RD AVENUE  
277-0972-277-0973      277-8543      272-7515

ANCHORAGE, ALASKA 99501

1 through democracy to anarchism.

2 So, I submit this letter to this assemblage because if  
3 indeed we'd never wanted to bring about this situation, we  
4 would have thought about preventative measures rather than to  
5 strip the resource to such a degree that we would have  
6 argument as to who gets what first. You shorten the supply of  
7 the resource and you're going to bring about a division within  
8 the family, division within the society structure. As our  
9 past -- one of our past president's said, "A house divided,  
10 cannot stand." That's the basis for their working this  
11 situation into such a problematic situation.

12 So, rather than to allow the federal government to  
13 maintain its control over our society being in Alaska, or the  
14 nation or the world, I've been demanding that we recirculate  
15 the United States currency that's still in the circulation  
16 room in Washington DC. They've printed four years, starting  
17 with 1928 -- three batches, starting with 1928, again they  
18 tried in 1953, again they tried in 1963 United States notes in  
19 all denominations with a red seal on it with a regional  
20 treasury seal. There's a big difference between the current  
21 seal used and the original seal designed by committee by  
22 express purpose of the founding fathers of this country. It  
23 predates the federal's control, predates the Federal Reserve  
24 Corporation.

25 If you, indeed, want to effect a change in the amount

R & R COURT REPORTERS

810 N STREET, SUITE 101      509 W. 3RD AVENUE      1007 W. 3RD AVENUE  
277-0572-277-0573      277-8543      272-7519

ANCHORAGE, ALASKA 99501

1 losing her husband during his presidency. They didn't pay her  
2 off in Federal Reserve corporate notes. They gave her solid  
3 silver dollars -- or solid fifty-cent pieces to compensate her  
4 for her loss of husband.

5 So, in regard to the federal regulations, the proposed  
6 changes and interconnection between the fact that the state  
7 had been manipulated by the banks and the insurance industry  
8 manipulating the politicians within the state level and the  
9 local level and circumventing my justice so I can't subsist,  
10 so I can't receive sufficient monetary currency, regardless of  
11 what it is, whether, you know, you accepted a United States --  
12 whether it be in coin or paper to acquire the equipment and  
13 the transportation to get to the location of convenience of  
14 subsistence, whether it be in the Kenai Peninsula or  
15 Glennallen or Nome or wherever, right down here in Ship Creek.  
16 And, so, not to mention medical.

17 And so it's quite disturbing to find out that -- in  
18 fact, for you people, I'm sure, that you've been working under  
19 a system that was never intended to acquire the influence that  
20 it has achieved at this point, and to come up with all these  
21 regulations to force us into servitude, as I make reference to  
22 it, corporate cartels under federalism rule. And this letter,  
23 on page 10, the implication of the private oligarchy, the  
24 federalist few debasing itself to the point of anarchism. I  
25 have in parentheses, cartels, new world order, lowering down

## R &amp; H COURT REPORTERS

810N STREET, SUITE 101      909 W. 3RD AVENUE      1007 W. 3RD AVENUE  
277-0572-277-0573      277-8543      272-7513

ANCHORAGE, ALASKA 99501

1 of, for instance, aquatic life, try to focus on aerating the  
2 water, the lakes and streams, rivers. That would assist in  
3 the amount of fish that reside there or migrate back and  
4 forth, as an example.

5 MS. STADUM: Thank you, Mr. McKee. I'd like to take  
6 any other comments at this time. Do we have any other  
7 comments? If not, that concludes our hearing for this  
8 evening. The comment period on these regulations does end on  
9 March 16. We're taking comments on this proposal book until  
10 March 9, and if anyone has any questions, feel free to call  
11 the Subsistence Office, here at the Fish & Wildlife Service in  
12 Anchorage.

13 Thank you so much for your time.

14 (Off record - 7:43 p.m.)

15 \* \* \* END OF PROCEEDING \* \* \*

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

R & R COURT REPORTERS

810N STREET, SUITE 101      509 W 3RD AVENUE      1007 W 3RD AVENUE  
277-0572-277-0573      277-8543      272-7515  
ANCHORAGE, ALASKA 99501

C E R T I F I C A T E

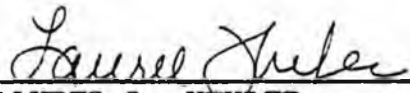
1 UNITED STATES OF AMERICA            )  
 2    ) ss.  
 STATE OF ALASKA                    )

3 I, Laurel L. Kehler, Notary Public in and for the State  
 4 of Alaska, residing at Anchorage, Alaska, and Reporter for R & R  
 5 Court Reporters, Inc., do hereby certify:

6 THAT the annexed and foregoing is a Transcript of the  
 7 Hearing on the Federal Register Subsistence Regulations,  
 8 Subsistence Management for Federal Public Lands in Alaska, taken  
 9 on the 27th day of February, 27, 1992, commencing at the hour of  
 10 7:00 o'clock p.m., at the Holiday Inn, Anchorage, Alaska;

11 THAT this Hearing Transcript, as heretofore annexed, is  
 12 a true and correct transcription of the proceedings, taken by  
 13 myself and thereafter transcribed by me.

14 IN WITNESS WHEREOF, I have hereunto set my hand and  
 15 affixed my seal this 28th day of February, 1992.

16  
 17   
 18 \_\_\_\_\_  
 LAUREL L. KEHLER  
 Notary in and for Alaska.  
 My commission expires: 10/24/94

ALASKA OUTDOOR COUNCIL

Press Release  
March 2, 1992

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

Alaska Outdoor Council Reacts to New Subsistence Bill

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

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

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

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

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

MORE

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

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

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

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

# # #

## SUBSISTENCE LEGISLATION NEEDS A "NEUTRALITY STATEMENT"

...Mary Bishop

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

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

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

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

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

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

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

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

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

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

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

The proposed legislation should be amended by:

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



## United States Department of the Interior

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

IN REPLY

April 18, 1978

## MEMORANDUM

TO: Superintendent, BIA, Anchorage Agency

FROM: Assistant Regional Solicitor, Anchorage

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

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

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

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

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

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

298 F. Supp. 17 and 20 (D. Ariz. 1968 and 1969) (tribal order excluding non-Indians from reservation constituted passage of bill of attainder and denial of free speech and property prohibited by Indian Civil Rights Act of 1968); and Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975) (non-Indians may initiate action under Indian Civil Rights Act of 1968); and Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("liberty" in due process clause denotes, among other things, the right "to engage in any of the common occupations of life" and "to . . . establish a home").

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

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

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

  
James R. Mothershead

SB 443  
HB 552

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



*Prepared by:*  
The Governor's Subsistence Advisory Council

## Contents:

Documents for the Legislative History of SB 443/HB 552

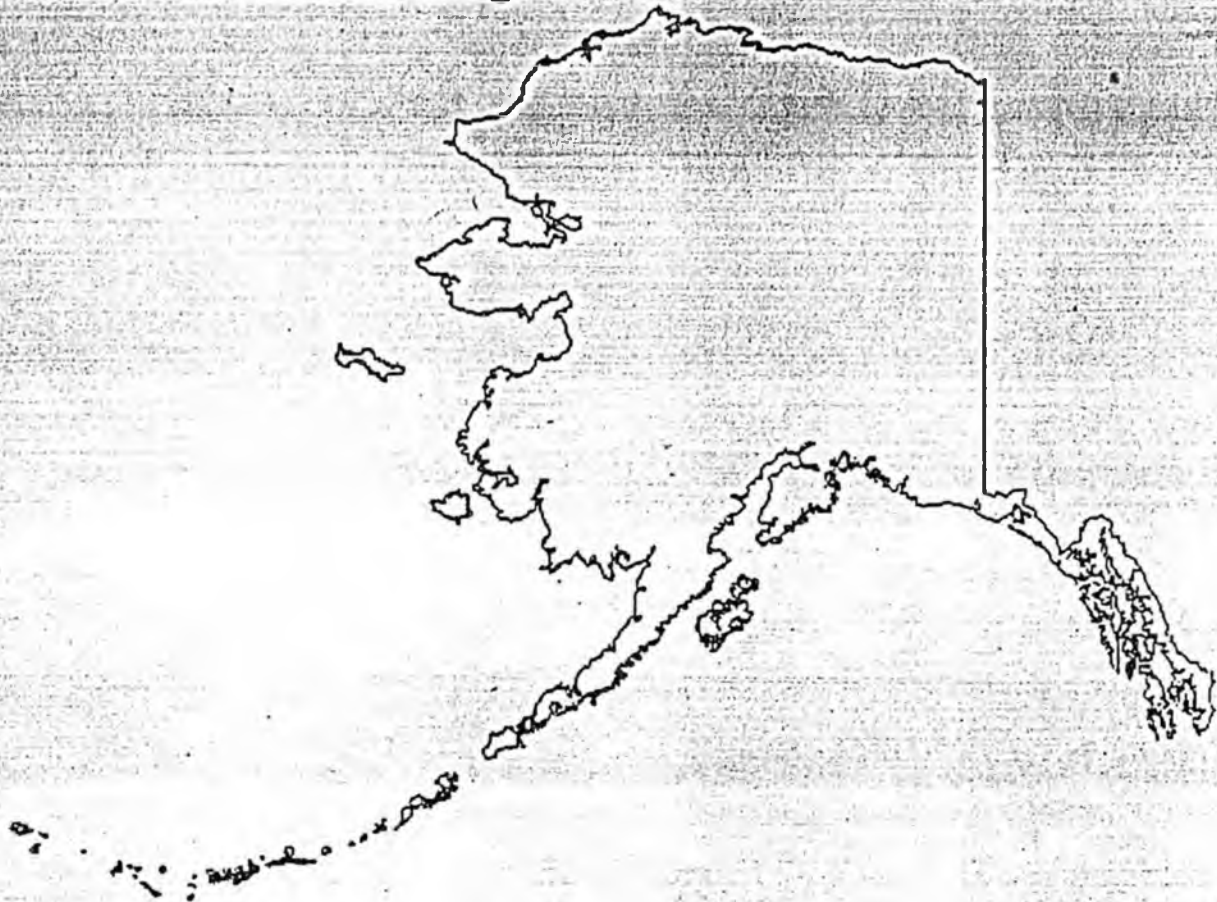
- I. Letter of Transmittal
- II. Introduction
- III. "An Act Related to the Taking of Fish and Game for Subsistence;  
and Providing for an Effective Date"
- IV. Department of Law Sectional Analysis
- V. Letter from the Governor to the Subsistence Advisory Council
- VI. Fiscal Notes
- VII. Sectional Analysis Appendices

SB 443 - SRAE

SB'443  
HB 552

CMT SP. 11

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



*Prepared by:*  
The Governor's Subsistence Advisory Council



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 21, 1992

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

Dear President Eliason:

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

The Honorable Richard Eliason  
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,

S/S Walter J. Hickel  
Walter J. Hickel  
Governor

## 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 been used for subsistence. This would allow qualified subsistence users to hunt and fish as they have in the past. Group 3 areas would be closed to subsistence hunting and fishing, but 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.

## SENATE BILL NO. 443

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

## A BILL

## FOR AN ACT ENTITLED

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

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

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

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

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

13 (3) customary and traditional uses of Alaska's fish and game originated with Alaska  
14 Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses,

1 among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of  
2 identity for many subsistence users;

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

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


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

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

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

21 (b) It is the purpose of this Act

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

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

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

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

1 (c) It is the intent of the legislature

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

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

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

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

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

9 The Board of Fisheries and the Board of Game shall identify the fish stocks and game  
10 populations, or portions of stocks or populations, that are customarily and traditionally used for  
11 subsistence in the areas of the state identified by the boards under (f)(1) and (f)(2) of this section.

12 The commissioner shall provide recommendations to the boards on the identifications. The  
13 boards shall make identifications required under this subsection after receipt of the  
14 commissioner's recommendations.

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

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

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

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

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

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

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

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

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

1 this paragraph;

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

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

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

10 (B) shall distinguish among subsistence users, through limitations based  
11 on

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

14 (ii) the proximity of the domicile of the subsistence user to the  
15 stock or population; and

16 (ii) the ability of the subsistence user to obtain food if subsistence  
17 use is restricted or eliminated.

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

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

31 (e) Each board shall consider subsistence use area boundaries described in (d) of this

1 section. Each board shall delineate a different boundary for a particular stock or population if  
2 the appropriate board determines that the boundary of a subsistence use area is inconsistent with  
3 established patterns of taking and use of that fish stock or game population for subsistence, or  
4 is inconsistent with the efficiency and economy of effort, cost, and transportation inherent in the  
5 customary and traditional taking and use of fish and game for subsistence.

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

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

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

16 (3) category 3, an area that

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

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

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

- 26 (1) the social and economic structure;  
27 (2) the stability of the economy;  
28 (3) the extent and the kinds of employment for wages, including full-time, part-  
29 time, temporary, and seasonal employment;  
30 (4) the amount and distribution of cash income among those domiciled in the  
31 area;

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

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

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

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

30 (3) a person domiciled in an area identified under (f)(3) of this section or who  
31 is domiciled outside of the subsistence use area is qualified to participate in a subsistence fishery

1 or hunt in that subsistence use area only upon certification by the commissioner that the person  
2 meets the requirements for qualification under (i) of this section.

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

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

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

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

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

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

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

31 (7) whether the person's taking of fish and game occurred solely in the

Need to discuss  
subsistence -

1 subsistence use area.

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

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

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

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

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

22 (o) For purposes of

23 (1) subsection (b) of this section, "reasonable opportunity" is an opportunity, as  
24 determined by the appropriate board,

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

30 (B) based on, <sup>but not limited to</sup> the findings of the appropriate board on each of, the <sup>list</sup>  
31 following factors:

- 1 (i) resource population and management objectives;  
2 (ii) ~~estimated harvest per unit~~ of effort by participants in the  
3 fishery or hunt;  
4 (iii) ~~patterns and levels~~ of customary and traditional taking and use  
5 of the fish or game;  
6 (iv) ~~migratory patterns and availability~~ of fish or game;  
7 (v) ~~competition for the fish or game~~ from other subsistence and  
8 nonsubsistence uses; and  
9 (vi) ~~other factors that the appropriate board considers relevant.~~

10 (2) subsection (i) of this section, "preceding 12 months" means

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

13 (B) for a person described in (h)(2) of this section, the 12 months  
14 preceding the date of signing of the required statement;

15 (C) for a person described in (h)(3) of this section, the 12 months  
16 preceding the date of signing the application to the commissioner.

17 \* Sec. 3. AS 16.05.940(29) is amended to read:

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

23 \* Sec. 4. AS 16.05.940(30) is amended to read:

24 (30) "subsistence hunting" means the taking [OF, HUNTING FOR,] or possession,  
25 by a qualified resident, of game [BY A RESIDENT DOMICILED] in a subsistence use  
26 [RURAL] area of the state, in accordance with regulations adopted under AS 16.05.268, for  
27 subsistence uses by means defined by the Board of Game;

28 \* Sec. 5. AS 16.05.940(31) is amended to read:

29 (31) "subsistence [USES]" means the noncommercial, customary and traditional  
30 taking and uses of fish and game [WILD, RENEWABLE RESOURCES] by a resident  
31 [DOMICILED] in a subsistence use [RURAL] area of the state for direct personal or family

1 consumption as food[, SHELTER, FUEL], clothing, [TOOLS,] or transportation, for the making  
2 and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken  
3 for personal or family consumption, for sharing, and for barter and [THE] customary trade of  
4 a portion of fish or game resources harvested primarily [, BARTER, OR SHARING] for  
5 personal or family consumption; in this paragraph, "family" means persons related by blood,  
6 marriage, or adoption, and a person living in the same household on a permanent basis;

7 \* Sec. 6. AS 16.05.940 is amended by adding new paragraphs to read.

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

12 (37) "customary trade" means the limited, noncommercial exchange, for minimal  
13 amounts of cash, as restricted by the appropriate board, of fish or game resources harvested  
14 primarily for personal or family consumption; "customary trade" does not include sales in  
15 commercial channels; the terms of this paragraph do not apply to money sales of furs or  
16 furbearers;

17 (38) "game management unit" means a management area of the state established  
18 by the Board of Game under AS 16.05.255;

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

24 \* Sec. 7. AS 16.05.258 and AS 16.05.940(26) are repealed.

25 \* Sec. 8. REGULATIONS. Notwithstanding the provisions of AS 16.05.258, the Board of Fisheries,  
26 Board of Game, and Department of Fish and Game may adopt regulations necessary to implement the  
27 provisions of this Act.

28 \* Sec. 9. TRANSITION. (a) It is the intent of the legislature that the Board of Fisheries and the  
29 Board of Game expeditiously adopt regulations necessary to implement this Act.

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

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

4 \* **Sec. 10. REVIEW.** (a) The legislature acknowledges and recognizes that this Act deals with a  
5 subject of vital concern and that the subject merits review. Therefore, it is the intent of the legislature  
6 that the operation of this Act and the regulations adopted under this Act be fully reviewed by the  
7 governor no later than June 1, 1994.

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

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

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

17 \* **Sec. 11.** Sections 8 and 9 of this Act take effect immediately under AS 01.10.070(c).

18 \* **Sec. 12.** Sections 1 - 7 and 10 of this Act take effect on the effective date of regulations first  
19 adopted under this Act by the Board of Fisheries and the Board of Game, acting jointly.

GOVERNOR'S SUBSISTENCE BILL

SECTION-BY-SECTION DESCRIPTION

February 21, 1992

Section 1

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

Section 2

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

Proposed AS 16.05.268(a):

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

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

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

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

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

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

Proposed AS 16.05.268(b):

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

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

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