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The Honorable Frank Rue, Commissioner
Alaska Department of Fish & Game
P.O. Box 25526
Juneau, AK 99802-5526

Re: Procedure for a Constitutional Change Permitting a Subsistence Priority Based on Residence
2001 Op. Att'y Gen. No. 1

Dear Commissioner Rue:

This letter addresses a change to the Alaska Constitution to permit or require a priority for rural residents for hunting and fishing for subsistence uses. The precise issue is whether the change described would constitute an amendment that could be effected through a two-thirds vote of each house of the legislature, approved by a majority of voters, or whether it would be a revision that must be made by delegates to a constitutional convention and ratified by the voters.[1]

Conclusion:

[1] *See* Alaska Const. art. XIII, §§ 1, 4.

The Alaska Constitution was drafted to include strong principles of common access to fish and wildlife resources. But important as this is, it does not elevate a change permitting a rural subsistence priority from a simple amendment to a constitutional revision, under the analysis of *Bess v. Ulmer*.[2] The *Bess v. Ulmer* analysis reviews a constitutional change for its qualitative and quantitative significance. Qualitatively, a rural subsistence amendment would not be a far-reaching change in the nature of our basic governmental plan, and quantitatively, the change is small. The constitution has always permitted a priority for subsistence uses. It is the eligibility requirement of the priority that offends existing constitutional provisions, and the change would simply harmonize the rural priority with these sections.

Background:

A change to Alaska's constitution is necessary to permit or require a priority for hunting and fishing for residents of rural Alaska, based on the Alaska Supreme Court's decision that such a priority violates the Alaska Constitution as currently written. In *McDowell v. State*,[3] the court found that a priority based on residence violates article VIII, sections 3, 15, and 17.[4]

[2] 985 P.2d 979 (Alaska 1999).

[3] 785 P.2d 1 (Alaska 1989).

[4] The court also found that section 17, the "equal application clause," is essentially a more stringent equal protection clause for cases involving natural resources. The court analyzed the law under article VIII, but used the same approach it employs in equal protection cases, recognizing that citizens' interest in equal access to natural resources is very high and therefore requiring that the State demonstrate both an important legislative purpose and narrowly tailored

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The court held that, while these three constitutional provisions have various ramifications, they share at least one meaning: that exclusive or special privileges to take fish and wildlife are prohibited. The court found that section 15 states this explicitly with regard to fisheries and that the convention proceedings show that the framers intended the same meaning for sections 3 and 17.[5] The common use and no-exclusive-right-of-fishery clauses reflect the framers' "anti-exclusionist values."[6]

These values, strongly expressed during the constitutional convention, developed in part from Alaska's experience with prestatehood federal fisheries management, especially its experience with fish traps. The Alaska Supreme Court has called fish traps "unquestionably the most productive method of catching salmon ever used."[7] Before statehood, fish traps funneled much of Alaska's salmon to relatively few, absentee interests. While federal regulations permitted anyone to construct and operate a trap in areas declared to be available for trap fishing, the cost of construction and operation excluded the average Alaska fisherman from its use. Eventually the operation of fish traps became concentrated in the cannery operators and owners, with some cannery corporations owning several dozen traps.

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means when it provides a priority. The court then held the state subsistence law invalid on the alternative grounds that while the State's interest in the law was important, the law did not accomplish its purpose with the least possible infringement on article VIII's open access values. *Id.* at 10-11.

[5] *Id.* at 5.

[6] *State v. Ostrosky*, 667 P.2d 1184, 1191 (Alaska 1983).

[7] *Metlakatla v. Egan,* 362 P.2d 901 (Alaska 1961).

This "robber baron" experience was not limited to Alaska's salmon fisheries. According to a convention delegate, Alaskans felt discriminated against by the United States government and repressed by absentee interests that controlled many of Alaska's resources, particularly fishing and mining.[8] Their major grievances against the federal government included the lack of local authority to control and regulate commercial fishing, mining, and other natural resources development.[9] E.L. Bartlett, Alaska's delegate in Congress, told the delegates at the convention's opening session that, while Alaska had experienced exploitation on a grand scale, the potential for future exploitation of natural resources was infinitely greater than anything they had seen to date.[10] He warned of an influx of interests wanting to develop Alaska's vast resources, some that would be less than scrupulous in achieving their ends.[11]

Thus, based on Alaska's history as a territory without control of its fisheries and other natural resources, the framers took the principles of non-exclusivity very seriously. The Alaska Supreme Court recognized the importance of these provisions in *McDowell*, and gave meaning to their purpose by striking down the statutory rural priority. Because a subsistence priority based on residence violates the Alaska Constitution's non-exclusivity provisions, a rural priority can be accomplished only by

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[8] Victor Fischer, *Alaska's Constitutional Convention* (University of Alaska Press 1975), at 6.
[9] *Id.*
[10] *Id.* at 130.
[11] *Id.*

changing the constitution.[12] The analysis that follows considers whether this change would be so significant, qualitatively and quantitatively, that it could not be accomplished through an amendment.

Analysis:

Notwithstanding the importance of non-exclusivity to the framers, a change of this principle would not elevate a rural subsistence amendment to the level of a revision requiring a constitutional convention. Based on the Alaska Supreme Court's test to distinguish amendatory changes from revisory changes, a provision permitting a rural subsistence priority would change a small part of one of the principles underlying Alaska's management of its natural resources, but it would not substantially affect the basic governmental framework set forth in the Alaska Constitution.

The Alaska Supreme Court issued the controlling case on this question in 1999.[13] In *Bess v. Ulmer*, citizen groups challenged three ballot propositions to amend the state constitution, alleging that they were "revisions" that could be made only in a

[12] The Alaska Constitution previously has been amended to permit an exception to the non-exclusivity provisions. In 1972, article VIII, section 15 – the "no exclusive fishery" provision—was amended to state that the section does not restrict the power of the State to limit entry into any fishery for conservation or economic reasons. *See State v. Ostrosky*, 667 P.2d 1184, 1188 (Alaska 1983). The Alaska Supreme Court later upheld a statute imposing a limited entry system, finding that this amendment permitted it, notwithstanding that other provisions of the Alaska Constitution would otherwise prohibit a limited entry system. *Id.* at 1190. The court did not consider whether the constitutional change was validly accomplished through a resolution and vote of the people rather than through a constitutional convention.

[13] *Bess v. Ulmer,* 985 P.2d 979 (Alaska 1999)

constitutional convention.[14] In determining whether proposed changes to the constitution are amendments or revisions, the court considered their quantitative and qualitative effects. The court included both qualitative and quantitative factors in its analysis because a revision might be necessitated either by an enactment "so extensive in its provisions as to change directly the 'substantial entirety' of the constitution by the deletion or alteration of numerous existing provisions," or by a "relatively simple enactment [that accomplishes] far reaching changes in the nature of our basic governmental plan ***."[15]

The court did not rely on either the qualitative or quantitative effect alone, however; it adopted a hybrid approach.[16] Thus, where the quantitative effect of a proposed change is minimal, "the qualitative force of [the] change would have to be greater" to require a convention.[17] Conversely, a more extensive quantitative effect might not constitute a revision if the corresponding qualitative impact were inconsequential.

Applying the hybrid test, the court in *Bess* found that two of the three proposed amendments were appropriate for a ballot amendment, because their effect on the constitution was limited. A measure to prohibit an interpretation of the constitution to

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14 *Id.* at 980.
15 *Id.* at 987 (quoting *Amador Valley v. State*, 583 P.2d 1281, 1286 (Calif. 1978)).
16 *Id.* at 987.
17 *Id.* at 988.

require the State to recognize same-sex marriages was "sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment."[18] Similarly, while a measure to alter the reapportionment scheme of the constitution shifted the power to reapportion from the executive to a neutral body, it did not deprive the executive branch of a "foundational power" and therefore was not consequential enough to constitute a revision.[19]

QUALITATIVE EFFECT OF A RURAL SUBSISTENCE PRIORITY

The *Bess* court's analysis of the third measure it examined was based largely on the measure's qualitative effects, and therefore helps to demonstrate why a rural subsistence amendment would not be a significant qualitative change. The *Bess* analysis makes clear that the determinative test for whether a constitutional change is qualitatively significant is the extent to which it would change the structure or power of the government. Because a rural subsistence priority would not substantially alter the constitution's governmental framework or authority, it would not effect a substantial qualitative change.

This standard is evident both from the *Bess* court's explanation of its decision on the third measure and from the cases upon which it relied. The measure was designed to limit the rights of criminal defendants to those guaranteed by the federal

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18 *Id.*

constitution. It attempted to accomplish this by dictating that Alaska courts could interpret the Alaska Constitution to provide only the protections that the United States Constitution provides, presumably as interpreted by federal courts:

> [n]otwithstanding any other provision of this constitution, the rights and protections *** afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections *** afforded under the Constitution of the United States to prisoners convicted of crimes."[20]

The measure's effect have would have taken from the state judiciary its independent judgment to define important constitutional rights. Qualitatively, it "substantially [altered] the substance and integrity of the state Constitution as a document of independent force and effect,"[21] because it took the ultimate protection of the constitutional rights of prisoners from the state and put it in the care of federal courts.[22] It also had a quantitative effect, "potentially alter[ing] as many as eleven separate sections" of the Alaska Constitution.[23]

The court's qualitative analysis thus focused on the impact of the proposed change on the structure and power of government as framed in the constitution. Relying

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19 *Id.* (quoting *Legislature of the State of California v. Eu*, 816 P.2d 1309, 1318 (Calif. 1991)).
20 *Id.* at 987.
21 *Id.* (quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Calif. 1990))
22 *Id.* at 986.
23 *Id.* at 988.

substantially on California cases,[24] the Alaska Supreme Court focused on whether a change would "accomplish *** far reaching changes in the nature of our basic governmental plan ***."[25] Each of the California cases the court reviewed in *Bess* also based its qualitative analysis on this question. A proposed amendment to limit "the powers of incumbency" by providing for term limits and restrictions on legislators' retirement benefits was not a qualitative revision of the constitution, because although "[t]erm and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process," the proposed amendment left "the basic and fundamental structure of the Legislature as a representative branch of government *** substantially unchanged."[26]

Similarly, the *Bess* court relied on a California case finding a proposal entitled the "Crime Victims Justice Reform Act" to be a constitutional revision, based on its effect on "a core function of one of the three branches of government."[27] The proposal, similar to the proposal found to constitute a revision in *Bess*, would have limited the rights of criminal defendants to those provided by the federal constitution.[28]

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24 The court found it "helpful to look to the law of California, a state which has considered the issue carefully over a period of nearly one hundred years," since "the Framers of the Alaska Constitution did not sufficiently define the difference between the two concepts for our purposes, and because Alaska has not before had occasion to address the deceptively simple question of the distinction between revisory and amendatory changes." *Id.* at 984.

25 *Id.* (quoting *Amador Valley*, 583 P.2d at 1286).

26 *Id.* (quoting *Eu*, 816 P.2d at 1318).

27 *Id.* at 986 (discussing *Raven v. Deukmejian*, 801 P.2d 1077 (Calif. 1990).

28 *Raven*, 801 P.2d at 1080-1083.

The change could not be made by amendment, because it "would have fundamentally changed and subordinated the constitutional role assumed by the judiciary in the governmental process."[29] The other California cases that *Bess* cites also relied on the qualitative effect of the proposed change on the government.[30]

Based on this analysis, a rural subsistence amendment is far less significant than the prisoners' rights proposal. It would not make a "far reaching change in the nature of our basic governmental plan";[31] it would have no impact on the structure or authority of any of the three branches of government. Its only effect would be to permit a limited change to the principles of non-exclusivity for fish and wildlife by creating or permitting a priority for rural Alaska residents. Only the rights of Alaskans – not the power or structure of the government – would change.

Unlike the measure found to be a revision in *Bess,* which would have given the State's authority to protect the constitutional rights of prisoners to the federal government, the rural subsistence priority would not reduce or compromise the authority of the State to manage its own resources. Its effect would be quite the opposite, in fact; it

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[29] *Bess*, 985 P.2d at 986 (quoting *Eu,* 816 P.2d at 1318 (discussing *Raven*)).

[30] *See Brosnahan v. Brown*, 651 P.2d 274 (Calif. 1982) (The "Victims' Bill of Rights" was not a revision because it would not amount to a sufficiently far-reaching change in the nature of the basic governmental plan); *Amador Valley*, 583 P.2d at 1286-87 (A proposition to substantially change the tax system was not a revision because it would not make far-reaching changes in the nature of the basic governmental plan).

[31] *Bess*, 985 P.2d at 986.

would effectuate the original purpose of the framers by permitting the State to again achieve what Alaskans sought at statehood – local management of Alaska's resources.[32]

Further, the change would not substantially offend the original underlying objectives of the non-exclusivity provisions. The change could not give non-Alaskan interests any advantage over Alaskan interests, and would not concentrate commercial benefits in any particular group. Its alteration of the non-exclusivity provisions would not permit the politically powerful to appropriate Alaska's fish and wildlife at the expense of those less influential. Rather, the change would simply reflect Alaskans' belief that subsistence hunting and fishing should be protected in times of shortage for rural residents, those who generally rely upon it most.

QUANTITATIVE EFFECT OF A RURAL SUBSISTENCE PRIORITY

Because the qualitative effect of a rural subsistence priority would be negligible, such a proposal would not be revisory unless its quantitative effect were significant.[33] Quantitatively, a rural subsistence priority would modify the limits of several sections of the Alaska Constitution. Because a priority based on a citizen's residence violates sections 3, 15, and 17 of article VIII, the change would impact these

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[32] A statewide law granting a priority to rural residents for hunting and fishing for subsistence uses would bring Alaska into compliance with title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3111 *et seq.* This would permit Alaska to regain management authority over subsistence hunting and fishing.

[33] *Cf. id.* at 988 ("As the quantitative effect of the proposal is minimal, the qualitative force of [the] change would have to be greater to satisfy our hybrid test.")

provisions.[34] There is nothing determinative about the number of constitutional provisions a proposal affects, however, given the court's hybrid test. The *Bess* court found a potential impact on 11 separate sections of the constitution to be substantial,[35] but that was in conjunction with the substantial qualitative impact the court found.[36] In the same case, the court found that a proposal that revised, repealed, or added 14 provisions to be quantitatively "minimal."[37]

Because no bright line test determines when a proposal is quantitatively significant, it is helpful to consider the reason for considering the quantitative effect of a proposal to change a constitution. In *Bess*, the court discussed a California case finding a proposed amendment to the California Constitution to be a revision based in part on its quantitative effect. In *McFadden v. Jordan*,[38] the California Supreme Court rejected a proposed amendment that would have added a new article composed of 208 subsections totaling more than 21,000.[39] While the sheer number of changes in the proposal alone would justify the finding that the proposal was truly a revision, the court couched its reasons in terms of the public's inability to accept or reject each change separately. The

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34 *See McDowell v. State*, 785 P.2d at 9 (The 1986 subsistence statute providing a rural subsistence priority violate sections 3, 15, and 17 of article VIII of the Alaska Constitution). The change would also impact the equal protection clause, article I, section 1. *See supra* note 4.

35 985 P.2d at 987-88.

36 *See id.*

37 *Id.* at 988, 990.

38 196 P.2d 787 (Calif. 1948).

39 *Id.* at 790.

court complained that although the proposal was offered as a single amendment, it was obviously multifarious:

> It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all.[40]

The court found that such an appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a procedure, but found that it went beyond the legitimate scope of a single amendment proposal.[41] The Florida Supreme Court has articulated a similar basis for distinguishing amendments from revisions, finding that the power to amend the constitution includes "only the power to amend any section in such a manner that *** if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments *** to accomplish its purpose."[42] More generally, the California Supreme Court has opined that an enactment might be "so

40 *Bess*, 985 P.2d at 985 (quoting *McFadden*, 196 P.2d at 796-97).
41 *Id.*
42 *Id.* (quoting *Adams v. Gunter*, 238 So.2d 824, 831 (Fla.1970)).

extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions."[43]

A rural subsistence priority would be neither multifarious, nor change the "substantial entirety" of the constitution. While it would harmonize a residence-based priority with the several provisions that conflict with such a priority, overall the effect would be simply to permit one change. This would not make the type of sweeping changes that would threaten to "unsettle the balance of the constitution."[44]

Conclusion:

A measure to change the Alaska Constitutional to allow or require a priority for rural residents to hunt and fish for subsistence uses is neither quantitatively nor qualitatively significant enough to require a constitutional convention. It would have little impact on the constitution's framework for, or grant of authority to state government. It would change only one aspect of the constitution, a matter that the voters would understand and on which they would not have to compromise. Therefore, it is unlikely that the Alaska Supreme Court would find the change to constitute a revision rather than an amendment.

Sincerely,

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[43] *Id.* at 985-86 (quoting *Amador Valley*, 583 P.2d at 1286).

[44] *Id.* at 984 (quoting John A. Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* § 539 (Chicago, Callaghan and Company, 4th ed. 1887)).

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