MEMORANDUM

State of Alaska

Department of Law

TO: Pat Pourchot, Legislative Director
Office of the Governor

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FILE NO: 223-99-0112

TELEPHONE NO: (907) 465-3600

SUBJECT: Possible Effect of Alaska Supreme Court Decision on Proposed Subsistence Amendment

FROM: James L. Baldwin
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You have requested an analysis of whether the Alaska Supreme Court's recent opinion in *Bess v. Ulmer*, ___ P.2d ___, 1999 WL 619092 Supreme Court No. S-08811/8812/8821 (Alaska August 17, 1999) would prevent the legislature from proposing a constitutional amendment establishing a priority for subsistence uses of fish and game.[1] The recent decision in *Bess* is a final opinion issued by the court in the case. This question was first considered after the supreme court issued a preliminary opinion and order before the 1998 general election. This memorandum will reconsider the question in light of the court's final opinion. In summary, there is nothing in the final opinion to change our original conclusion that a proposed change to the state constitution authorizing a priority for the subsistence taking of fish and game may be adopted by the legislature using the amendment process set out in article XIII, section 1 of the Alaska Constitution.

In *Bess* the court determined that the legislature's power to propose a change in the text of the Alaska Constitution is limited to amendments which are changes that are "few, simple, independent, and of comparatively small importance."[2] According

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[1] For the purpose of this memorandum, it is assumed that the proposed amendment would be similar in content to SJR 101 under consideration by the Twentieth Alaska State Legislature during its first special session that was in May 1998.

[2] *Bess* Slip Op. at 8. An amendment would make changes of this nature, while a revision would not. The court also associated this standard with the idea that an amendment is related to a single subject so that the people have an opportunity to express approval or disapproval of each proposal offered for ratification. *Id.* at 6.

to the Alaska Supreme Court, the legislature may not propose basic changes to the "substance and integrity" of the state constitution. The court conceded that the distinction between an amendment and a revision is difficult to define. When substantial alterations to the text of the constitution are proposed which are so numerous and important to the core institutions of state government, these changes may be characterized as revisions which may only be proposed by a popularly elected constitutional convention. *See* Alaska Const. art. XIII, §§ 1 and 4.

In *Bess*, the court evaluated three proposed constitutional amendments. The principal attack was against the marriage amendment.[3] However, two other proposed amendments were implicated when the appellants argued that, by offering three amendments, the legislature was attempting to revise the constitution without first convening a constitutional convention to adopt the proposals. These other amendments included the amendment restricting prisoners' rights to federal rights and the amendment reorganizing the reapportionment process.[4]

In the decision, the court addressed the contention that collectively and individually these amendments constituted a "qualitative" revision of the state constitution. The court stated:

> The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole.

Bess, Slip Op. at 8. This contention involves a claim that a proposed amendment makes such basic changes to the form of government established in the constitution that it should be examined and adopted only by a constitutional convention which is expressly chosen for this purpose. A constitution is intended to bring stability to government. For this reason, the framers required that a revision be a focused effort through a democratically elected body that is not easy to convene.

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[3] The marriage amendment was passed by the Twentieth Alaska Legislature during its second regular session in the form of HCS CSSJR 42(RLS) and is formally designated as Legislative Resolve 71. This amendment would define marriage as being solely between a man and a woman.

[4] The prisoners' rights amendment, formally designated Legislative Resolve 59, would limit the rights of state prisoners to whatever rights they may have under the federal constitution. Legislative Resolve 74 proposes amendments to the article on legislative apportionment and would establish a redistricting board.

The court relied heavily on a rationale developed by the Supreme Court of California in *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).[5] The *Raven* court was considering a challenge to an initiative, entitled by its framers as the "Crime Victims Justice Reform Act," which altered various California constitutional provisions and statutes relating to criminal law and procedure. The court upheld all of the challenged provisions except for one. It annulled a constitutional amendment that provided:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

801 P.2d at 1086.[6]

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[5] *Raven* is the leading case in which the qualitative/quantitative analysis was applied to annul a discrete provision of questionable validity. There were other cases leading up to *Raven* where the purported amendment was unquestionably a revision. *See*, *e.g.*, *Holmes v. Appling*, 392 P.2d 636 (Or. 1964) (upholding the secretary of state's refusal to prepare a ballot title for a "proposed constitutional amendment" which would have repealed the existing constitution and adopted an entirely new constitution); *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948)(striking down an initiative measure that would have added 21,000 words to the then-existing 55,000-word constitution), *cert. denied*, 336 U.S. 918 (1949).

[6] According to the Alaska Supreme Court there was an "obvious resemblance" between this amendment and the prisoners' rights amendment removed from the ballot in *Bess*. *Bess*, Slip Op. at 8. In fact the state conceded during argument that if the court were to adopt the rationale of the California Supreme Court, the prisoners' rights amendment would be very difficult to defend against the argument that it constituted a proposed revision of the constitution.

Raven restated the analysis used by the California courts in deciding claims that an amendment was in fact a revision:

> [O]ur revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision.

Id. at 1085 (citations omitted). The Alaska Supreme Court adopted this dual method of analysis. In applying the analysis the court agreed with the conclusion of the California court that the measure was a qualitative revision but differed in one respect by finding that the prisoners' rights amendment also was a quantitative amendment.[7]

The *Raven* court concluded that the amendment at issue there would qualitatively revise the state constitution because

> [i]n essence and practical effect, new article I, section 24 would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating.

Id. at 1087 (italics in original). The court went on to explain that new section 24 was invalid only because it was so sweeping:

> It is true, as the Attorney General observes, that in two earlier cases we rejected revision challenges to initiative measures which included somewhat similar restrictions on judicial power. In *In re Lance W.* (1985) 37 Cal.3d 873, 891, 210 Cal.Rptr. 631, 694 P.2d 744, we upheld a provision limiting the state exclusionary remedy for search and seizure violations to the boundaries fixed by the Fourth Amendment to the federal Constitution. In *People v. Frierson* (1979) 25 Cal.3d 142, 184-187, 158 Cal.Rptr. 281, 599 P.2d 587, we upheld a provision which in essence required California courts in capital cases to apply the state cruel or unusual punishment clause consistently with the federal Constitution.

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[7] The *Raven* court found that the amendment at issue there was not a revision quantitatively, as it "deletes no existing constitutional language and it affects only *one* constitutional article, namely, article I." 801 P.2d at 1086-87 (italics in original).

> Both *Lance W.* and *Frierson* concluded that no constitutional revision was involved because the isolated provisions at issue therein achieved no far reaching, fundamental changes in our governmental plan. But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution. New article I, section 24, more closely resembles *Amador's* hypothetical provision vesting all judicial power in the Legislature, a provision we deemed would achieve a constitutional revision. As noted, in practical effect, the new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.

Id. at 1089. The qualitative effect of the prisoners' rights amendment was found in the dramatic loss of power of the judicial branch of state government to interpret and protect the rights of litigants.

The extent of change necessary before a measure becomes a qualitative revision cannot be precisely answered. In *Bess*, the court struck the prisoners' rights amendment on qualitative and quantitative grounds but left standing the redistricting amendment, which altered a substantial check on legislative power and proposed several changes to sections within the article on legislative apportionment. Similarly, in other cases, the California Supreme Court rejected "revision" attacks on constitutional amendments that made major changes to the structure and operation of the state government. *See Amador Valley*, 583 P.2d at 1286-89 (imposing limits on taxation of real estate); *Brosnahan v. Brown*, 651 P.2d 274, 288-89 (Cal. 1982)(making numerous changes to the provisions of the constitution on rights of criminal defendants); *Legislature of State of California v. Eu*, 816 P.2d 1309, 1316-20 (Cal. 1991)(term limits on state legislators). These cases establish that substantial changes in the structure of government or the rights of individuals can be proposed and ratified as amendments.

A successful challenge of the subsistence amendment will turn on whether it can be shown to "substantially alter the substance and integrity of the state constitution as a document of independent force and effect." *Bess*, Slip Op. at 8 (quoting from *Raven*, 801 P.2d at 1087). Also part of the analysis is whether a number of other sections of the constitution would be expressly or impliedly altered by the addition of the material contained in the measure under consideration. *Id.* at 4. The arguments advanced against the proposed subsistence amendment during past regular and special sessions of the legislature focus on allegations of a weakening of the right of equal access to fish and game afforded by existing articles I and VIII of the Alaska Constitution. In *McDowell v. State*, 785 P.2d 1 (Alaska 1989), a statute granting a preference to rural residents to take

fish and game for subsistence purposes was found to violate the reservation for common use set out in article VIII, section 3 of the Alaska Constitution, the no exclusive right of fishery clause in article VIII, section 15, and the uniform application clause set out in article VIII, section 17. The foregoing sections appear to provide a specially focused kind of equal protection requirement for resource allocation purposes.[8] Based on the scope of the decision in *McDowell*, the subsistence amendment would appear to be limited to making changes in other sections within article VIII applicable to natural resources of the state.

The interests of subsistence users of fish and wildlife resources could be characterized as a small and limited aspect of fishery management in the state. According to the Department of Fish and Game, 20 percent of the state's population are engaged in subsistence. However, only two percent of the fish and wildlife taken each year is harvested by subsistence users.[9] It is also a fact that during the period that the subsistence priority enacted in 1986 was in effect, no major reallocations between users of fish and wildlife resources were necessary. Using these comparisons, a strong case may be made that the change embodied in the subsistence proposal is not so important to the structure and integrity of the state constitution to require a fresh look at the entire document before the legislature is authorized to enact a subsistence priority. The stability of the state would not be threatened by this fairly specific change in the organic law. In the words of the Alaska Supreme Court, the subsistence amendment recently under consideration by the legislature would be "few, simple, independent, and of comparative unimportance." As for its quantitative effect, the proposed amendment would bear only on provisions in article VIII of the constitution. These changes resemble the alterations embodied in the redistricting amendment which were found to collectively be an amendment rather than a quantitative revision. Finally, the concept of a priority for the subsistence use of fish or wildlife resource is not complex. The amendment is precisely worded and is easily understood.

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[8] A subsistence priority has some of the attributes of the limited entry fishery authorized by article VIII, section 15. Each measure permits the creation of a class of persons entitled to take fish and wildlife resources. The limited entry amendment was found to not violate the equal protection guarantee of the state and federal constitutions. *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983). This supports the conclusion that the effect of the subsistence amendment would be localized within article VIII of the Alaska Constitution.

[9] These statistics were taken from *Subsistence in Alaska: 1998 Update,* Division of Subsistence, Alaska Department of Fish and Game (March 1, 1998).

For the foregoing reasons, we believe there is nothing in the final opinion in *Bess* that prevents the legislature from using the process described in article XIII, section 1 to change the Alaska Constitution. Based on our review of the final opinion in *Bess* the legislature retains the power to validly adopt a resolution similar to SJR 101 (20th Leg. 1st Spec. Sess.) proposing an amendment to the Alaska Constitution authorizing the establishment of a priority for subsistence uses of fish and game.

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