

LEGAL SERVICES

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MEMORANDUM

February 3, 2015

SUBJECT: Transferring the duties of the Alaska Commercial Fisheries Entry Commission to a Division of the Department of Fish and Game (Work Order No. 28-LS0485A)

TO: Representative Louise Stutes
Attn: Reid Harris

FROM: Alpheus Bullard *AB*
Legislative Counsel

This memorandum accompanies the bill described above. I have several comments.

The bill abolishes the Alaska Commercial Fisheries Entry Commission (commission), assigns the commission's adjudicatory functions to the Office of Administrative Hearings, and transfers the commission's other duties to the Department of Fish and Game (department). The commission was established in 1973. Much of the existing statutory framework for the commission has not been amended since that time. Accordingly, please review the provisions of the bill carefully to ensure that they are consistent with your intent.

Constitutional Issue - establishing a departmental division through legislation

The Constitution of the State of Alaska was designed with a strong executive in mind. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976) at 3, n.3. The power provided to the executive by the Constitution of the State of Alaska includes the power to "make changes in the organization of the executive branch or in assignment of functions among its units which [the governor] considers necessary for efficient administration."¹ The executive

¹ Art. III, sec. 23 of the Constitution of the State of Alaska provides:

Reorganization. The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a

order power of the governor is discussed in the Alaska Constitutional Convention Proceedings (pages 2226 - 2229) and it appears clear that the delegates viewed it as providing the governor the power, as an administrative matter, to organize the functions of the executive branch, but not to enlarge, diminish, or otherwise alter those functions.

"The legislative power of the State is vested in a legislature. . . ." Art. II, sec. 1, Constitution of the State of Alaska. *Black's Law Dictionary* (8th ed. 2004) defines "legislative power" as the power of the legislature "to make laws and to alter them." *Id.* at p. 919. It's not clear to what degree this law making power permits the legislature to dictate the manner in which the department is structured. Art. III, sec. 23 is entitled "[r]eorganization." This suggests that organization of executive branch departments is a task for the executive branch subject to legislative disapproval. Such an understanding is supported by the section's provision that a change in the organization of the executive branch that requires the force of law takes effect if the legislature takes no action.

In *Bradner*, the Alaska Supreme Court recognized that implicit in the Alaska constitution is the doctrine of separation of powers. That doctrine, that one branch of government may not exercise the powers committed to another branch, is designed to avoid the "tyrannical aggrandizement of power by a single branch of government" *Bradner, supra*, at 5.² The doctrine limits the authority of each branch to interfere with the powers that have been delegated to the other branches. Determining whether an intrusion by one branch of government into the powers of another branch amounts to a violation of the doctrine in a specific situation can be difficult.

To determine whether the legislature has violated the separation of powers doctrine by statutorily establishing a commercial fisheries entry division within the department, a court would examine the nature of the power assigned to the division, whether the legislature is assigned such a power under the constitution, whether the constitution suggests that this power is to be shared by two branches, and whether the limits of any

majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

Note that if the legislature were to merge the sport fish and commercial fisheries divisions, this provision permits the governor to again reorganize the department. If such a re-reorganization required changes to statute, the governor would have to make the change through an executive order. If the governor were to again separate the department's administrative duties relating to sport and commercial fisheries, the legislature would have to disapprove of the governor's reorganization to maintain a structure that merges these responsibilities in a single administrative unit of the department.

² See also *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947 (Alaska 1975).

express grant have been exceeded or there has been an encroachment on another branch. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35 (Alaska 2007), citing *Bradner*, 553 P.2d at 6 - 8.

The Constitution of the State of Alaska grants both the legislature and the executive broad power to organize administrative bodies.³ Alaska courts have also recognized that the legislature has constitutional power to allocate executive department functions and duties among the different administrative bodies within state government.⁴ However, while the legislature has the authority under art. III, sec. 22 of the constitution to allocate executive and administrative "functions, powers, and duties" between administrative bodies by law, that portion of this bill which establishes a new division within the department and transfers the commission's duties to that division may be interpreted by a court as addressing the internal organization of the department instead of allocating executive functions, powers, and duties among principal departments. The question is, to what degree is the determination of the organizational structure of the department a shared responsibility between the executive and legislative branches -- because the blending of governmental powers is permitted only to the extent granted by the constitution and will not be inferred in the absence of an express constitutional provision. *Bradner*, 553 P.2d at 7.

If this bill becomes law and is subsequently challenged, I don't know whether a court would find that the legislature overstepped its authority. While AS 16.05.090(c)⁵ provides that a section of subsistence hunting and fishing be established in the

³ Art. III, sec. 22 of the Constitution of the State of Alaska provides:

Executive Branch. All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.

⁴ See *Alaska Public Interest Research Group v. State*, 167 P.3d 27 (Alaska 2007), and *Capital Information Group v. State, Office of the Governor*, 923 P.2d 29, 40 (Alaska 1996).

⁵ AS 16.05.090(a) provides:

(a) The commissioner may, with the approval of the governor, establish a departmental division of commercial fisheries, a departmental division of sport fisheries, a departmental division of game, and other departmental divisions as are necessary.

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department, the constitutionality of any statutory directive relating to inter-departmental organization is not assured. What is certain, is that the executive branch has the constitutional authority to subsequently reorganize the department and reassign these duties through executive order in a manner "consider[ed] necessary for efficient administration," despite those provisions of the bill which establish the commercial fisheries entry division and task it with the commission's duties.

Other Notes

Employees of the commission are currently in the exempt service. Under the bill, employees of the department working in the commercial fisheries entry division will likely be in the classified service, as are the majority of the department's other employees. Is this consistent with your intent?

Please review my changes relating to a moratorium on new entrants in a fishery. These appear in bill secs. 2 and 40, AS 16.05.251(g) and AS 16.43.225(b), respectively. Currently, the process involves the commissioner of the department, the Board of Fisheries, and the commission. Please ensure that these bill sections work in the manner you intend without the involvement of the commission.

Under existing AS 16.43.120, the Administrative Procedure Act (AS 44.62) does not apply to adjudicatory proceedings of the commission. While the bill transfers the responsibility for these hearings to the Office of Administrative Hearings (AS 44.64), sec. 21 of the bill continues to provide that hearings are not subject to AS 44.62. Is this your intent?

A number of provisions amended in the bill contain dated references. For example, see AS 16.43.230 (designation of distressed fisheries) (bill sec. 43) referencing the number of units of gear fished in a fishery during any one of the four years immediately preceding January 1, 1973. Do you want to update these references?

Finally, because AS 16.43 is subject to some delayed amendments in 2018 (under Ch. 2, SLA 2014), some sections in this bill will not take effect until 2018. See secs. 82, 91, 93, 95, and 97.

Please review the bill to determine whether it achieves your goals. If you have questions, please do not hesitate to contact me.

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Enclosure