

**Alaska Independent Fishermen's  
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March 16, 2016

House Fisheries Committee  
Representative Louise Stutes, Chair  
State Capitol Room 416  
Juneau AK, 99801

Via Email: [reid.harris@akleg.gov](mailto:reid.harris@akleg.gov)  
Phone: 907-465-4087

Re: HB 366

Dear Representative Stutes and Members of the House Fisheries Committee:

I am president of the Alaska Independent Fishermen's Association (AIFMA). AIFMA is a fishermen's cooperative, organized in Alaska in 1966, and represents commercial fishing permit holders in Bristol Bay, who are members of AIFMA. I am writing on their behalf regarding HB 366.

Although HB 366 has the understandable goal of trying to encourage residents of economically depressed areas of Alaska to purchase commercial fishing permits in those areas, HB 366 employs unconstitutional means of doing so. Furthermore, HB 366 will not accomplish its goal, and the bill may even defeat the ability of commercial fishermen to negotiate fair prices. I'll explain.

**A. HB 366 violates the Prohibition of Special Privileges of Fishery by Section 15 of Article VIII of the Alaska Constitution.**

Article VIII, Section 15, of the Alaska Constitution provides in part that "[n]o exclusive right or *special privilege* of fishery shall be created or authorized in the natural waters of the State." (Italics added) Although this prohibition does not prevent the State from managing fisheries to prevent economic distress among fishermen, the prohibition expressly bars special privileges in doing so.<sup>1</sup>

HB 366 creates an impermissible "special privilege of fishery." The bill does so by establishing criteria for leasing permits based on "the degree of economic hardship posed to the applicant and

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<sup>1</sup> See Section 15, Art. VIII, Alaska Constitution.

the applicant's community by not being able to gain entry in to the fishery for which the leased permit is for" and on other criteria tailored to an individual's lack of alternative occupations and income, and the historical dependence of the applicant, the applicant's family, or the applicant's community on a particular fishery. See proposed AS 16.44.050(c). These criteria create a special privilege for applicants who meet the criteria. That violates Section 15 of article VIII of the Alaska Constitution.

In *McDowell v. State*, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court explained that, in Article VIII, Section 15, Section 3 (the "common use" clause) and Section 17 (the "uniform application clause" that laws and regulations governing the use of natural resources "shall apply equally to all persons similarly situated") mean that "exclusive or special privileges to take fish and wildlife are prohibited." 785 P.2d at 15. Section 15 states this explicitly with respect to fisheries. *Id.* The proceedings of the Constitutional Convention show that the same meaning was intended with respect to sections 3 and 17. A memorandum of the Constitutional Convention Committee on Resources expresses the view that the common use clause has as one of its purposes a prohibition on exclusive grants or special privileges. The memorandum states: "The expression 'for common use' implies that these resources are not to be subject to exclusive grants or special privileges as was so frequently the case in ancient royal tradition." 785 P.2d at 15-16 citing Alaska Constitutional Convention Papers, Folder 210, Papers Drafted by Committee on Resources, entitled "Terms." The Committee on Resources commentary with respect to the uniform application clause states:

This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state.<sup>2</sup>

Similarly, in *Owsichuk v. State*, 763 P.2d 488 (Alaska 1988), the Court observed that the article VIII provisions were designed to ensure to the public the broadest possible access to wildlife, and that "the common use clause impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of *all* the people." *Id.* at 495 (emphasis added). "[A] minimum requirement of this duty is a prohibition against any . . . special privileges." *Id.* at 496.

**B. HB 366 violates the Equal Protection Clause of Section 1 of Article I of the Alaska Constitution.**

Article I, Section 1, of the Alaska Constitution provides in part that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." It requires analysis using a "sliding scale approach instead of the tiered approach of federal equal protection analysis." *State, by and through the Departments of Transportation and Labor v. Ensearch Alaska Construction, Inc.*, 787 P.2d 624, 631 (Alaska 1989). This sliding scale analysis "often provides greater protection to individual rights than does the U.S. Constitution." *Id.* The first task is to determine the importance of the individual interest impaired by the challenged enactment. *Id.* "[T]he right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes." 787 P.2d at 632.

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<sup>2</sup> *McDowell*, 785 P.2d at 16 citing 6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).

While the goal of HC 366 trying to encourage residents of economically depressed areas to purchase permits is important, it conceals the “underlying objective of economically assisting one class over another,” which the Court has held to be an “illegitimate” objective. 787 P.2d at 634. Therefore, HB 366 violates the equal protection clause of the Alaska Constitution by assisting one class of citizens over another.

**C. HB 366 will not accomplish its goal and will instead use subsidies to re-create the problem it tries to solve.**

The proposed AS 16.44.050 would allow permit banks to borrow funds and accept gifts or grants from any federal or state agency or municipality, private organization, or other source, or the gift or grant of any permit for a fishery located within the region of a permit bank. Because the permit bank would be an instrumentality of the State, such gifts or grants would be tax deductible.

The bank could enter into lease-to-purchase agreements offering favorable terms for purchase by an applicant. After the purchase is consummated (even if a loan for the purchase price is not yet paid off), the applicant could sell the permit on the market, and make a profit at the expense of the entities or persons that gave funds, gifts or grants to the permit bank. In other words, HB 366 allows schemes that abuse federal, state or local funds, grants or gifts. Such schemes abuse government and donors and unjustly enrich unscrupulous applicants. That is poor public policy. Moreover, an applicant who buys from a permit bank could sell the permit to an out-of-state or out-of-region buyer, and doing so would then re-create the very same problem HB 366 is trying to solve. Therefore, HB 366 bill does accomplish its goal and does not solve the problem it tries to solve.

**D. HB 366 fails to prevent permit banks from colluding with processors to defeat the interests of fishermen in negotiating a fair price.**

Nothing in HB 366 prevents the board of a permit bank from colluding with a particular processor (or processors) to lease permits to applicants who would agree to sell fish to that processor or those processors. Such collusion would allow processors to gain greater control of a fishery and to defeat the ability of fishermen to negotiate fair prices. Therefore, the bill is counter-productive to the goal of creating economic benefits for fishermen and local communities.

For these reasons, I encourage the House Fisheries Committee to hold, rather than advance, HB 366.

Thank you for considering these comments. If given the opportunity, I would be pleased to testify.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Harsila". The signature is fluid and cursive, with the first name "David" and last name "Harsila" clearly distinguishable.

David Harsila, President  
Alaska Independent Fishermen's Marketing Association