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MEMORANDUM

April 5, 2016

SUBJECT: Constitutional questions regarding CSHB 366()
(Work Order No. 29-LS0283\L)

TO: Representative Jonathan Kreiss-Tomkins
Attn: Reid Magdanz

FROM: Alpheus Bullard 
Legislative Counsel

Mr. Magdanz asked me to address whether HB 366 (Work Order No. 29-LS0283\L) raises certain constitutional issues. These constitutional provisions are: the "common use" clause of sec. 3, the "no exclusive right of fishery" clause of sec. 15, and the "uniform application" clause of sec. 17 of art. VIII of the Constitution of the State of Alaska and the United States Constitution's commerce and privileges and immunities clauses. Mr. Magdanz also asked that I address a specific concern as to whether allowing permit banks to lease entry permits, which individual permit holders may not do, raises an equal protection issue.

Article VIII, secs. 3, 15, and 17 of the Constitution of the State of Alaska

Article VIII of the Constitution of the State of Alaska addresses the natural resources of the state. The degree to which the bill would be found by a court to implicate the article's "common use" clause, "no exclusive right of fishery" clause, and "uniform application" clause will depend on whether a court finds that the leasing of entry permits by a state instrumentality limits who may access the state's fisheries resource.

The Alaska Supreme Court has held that these provisions are not implicated unless limits are placed on the admission to resource user groups. *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994); *McDowell v. State*, 785 P.2d 1, 8 & n.14 (Alaska 1989); and *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 492 (Alaska 1988).

While the existence of permit banks might reduce the financial costs of access to the state's fishery resource for some residents, the establishment of the banks would not directly impair other persons' access to the resource. In my opinion, the establishment of permit banks, and an accompanying process through which state residents may lease entry permits from the banks, will not prevent any person from purchasing a permit or serve to grant any person an exclusive or special privilege to the resource.

Common Use and No Exclusive Right of Fishery Clauses

The Alaska Constitution provides for equal access to fish and game resources.¹ However, the limited entry amendment to art. VIII, sec. 15 allows the state to limit entry into fisheries in order to achieve certain conservation and socio-economic goals.² There is no open access in a limited entry fishery. Only those individuals or vessels³ who obtain an entry permit are allowed to participate in a limited entry fishery. Accordingly, the Alaska Supreme Court has recognized that the concept of limited entry into commercial fisheries is inconsistent with the common use section of the Alaska Constitution. *State v. Ostrosky*, 667 P.2d 1184, 1189 (Alaska 1983).

While the court has acknowledged that any inconsistency with the common use section, equal protection clause, or other provision of the Alaska Constitution was cured by the 1972 limited entry amendment to art. VIII, sec. 15,⁴ it has also clarified that the limited entry amendment does not justify every possible limited entry scheme that fosters resource conservation and promotes economic security for fishermen. "[W]hatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause." *Johns v. Commercial Fisheries Entry Comm'n.*, 758 P.2d 1256, 1266 (Alaska 1988) citing *Ostrosky*, 667 P.2d at 1191.

Because the bill does not limit access to the resource and is intended to *reduce* the financial barriers for state residents seeking to participate in the state's commercial

¹ Article VIII, sec. 3, Constitution of the State of Alaska.

² Article VIII, sec. 15, Constitution of the State of Alaska states:

No Exclusive Right of Fishery. 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 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. [Emphasis added.]

The adoption of the limited entry amendment, which added the second sentence to sec. 15, created an exception to the prohibition against exclusive rights or privileges of any fishery for purposes of limiting entry into fisheries.

³ There exists one vessel-based state limited entry fishery. The Bering Sea Hair Crab fishery is a vessel-based limited entry system (*see* AS 16.43.451 - 16.43.521).

⁴ *Id.* at 1189 - 90.

fisheries, perhaps decreasing the "impingement" of the existing limited entry system on the common use and no exclusive right of fishery clauses, it is unlikely that a court would find that the bill unconstitutionally implicates the "common use" or "no exclusive right of fishery" clauses.

Uniform Application Clause

In addition to fundamental equal protection afforded by art. I, sec. 1 of the Constitution of the State of Alaska, the Constitution of the State of Alaska also contains an additional equal protection provision, the uniform application section of art. VIII,⁵ that is applicable in the context of use and disposal of natural resources. Again, this provision is only implicated if limits are placed on the admission to resource user groups. *Tongass Sport Fishing Ass'n*, 866 P.2d at 1318; *McDowell v. State*, 785 P.2d 1, 8 & n.14 (Alaska 1989), and *Owsichek*, 763 P.2d at 492. Accordingly, if the bill is found to implicate the uniform application section, it will be because the bill allows only residents to lease permits, and this restriction is interpreted as a limit on nonresidents' access to the state's fishery resource.

The primary difference between the standard equal protection provision and the uniform application section is that the uniform application section may require more stringent review by the courts. *Gilbert v. Department of Fish and Game*, 803 P.2d 391, 396 (Alaska 1990). See also *McDowell*, 785 P.2d at 10; *Owsichek*, 763 P.2d at 498 n. 17. When a challenge is brought under the uniform application clause, the Alaska Supreme Court has summarized the procedure for analysis as follows:

To satisfy the uniform application clause of article VIII, [state laws and regulations, that relate to fish and game,] creating non-uniform classifications must (1) have a legitimate purpose. (2) The individual interest in equal access to fish and game resources is a "highly important interest running to each person within the state." (3) Accordingly, once a legitimate purpose has been established by the state, the weight of that interest must be "important" to countervail the important individual interest implicated. (4) The means used to further the important state purpose must be carefully drawn and designed for "the least possible infringement on article VIII's open access values."

Gilbert, 803 P.2d at 399 (footnotes and citations omitted).⁶ Accordingly, to survive a

⁵ Article VIII, sec. 17 of the Constitution of the State of Alaska provides:

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.

⁶ The Alaska Supreme Court has also stated:

challenge under the uniform application clause, the state's objectives (in establishing permit banks and leasing entry permits to residents) must be justified by an important state interest.⁷

The bill includes legislative findings that provide that the number of commercial fishing permits held by certain residents has declined, that this decline has led to economic distress, and that the state has a compelling interest in addressing this distress. Because the economic health of the state's communities is likely to be interpreted as an important state interest, and the bill's provisions are likely to be interpreted as addressing this interest, a court would likely find that the bill does not violate the uniform application clause.

Federal Commerce Clause

The bill's establishment of regional community permit banks and a process by which state residents may lease commercial fishing entry permits does not raise any issues under Art. I, Sec. 8, Cl. 3 of the U.S. Constitution (Commerce Clause). The Commerce Clause provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." "Although the Clause speaks in terms of powers bestowed upon Congress, the [U.S. Supreme Court] long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 64 (1980).

The limitation imposed by the Commerce Clause on state regulatory power is by no means absolute, and the states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

In determining whether a State has overstepped its role in regulating interstate commerce, [the U.S. Supreme Court] has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burden they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, [397 U.S. 137, 142 (1970)], statutes in the second group are subject to more demanding scrutiny. The [U.S. Supreme Court] explained in *Hughes v. Oklahoma*, [441 U.S. 322, 336 (1979)], that once a state law is shown to discriminate

In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important [and the] means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values.

McDowell, 785 P.2d at 10.

⁷*Id.* at 10.

against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by nondiscriminatory means.

Maine, 477 U.S. at 138. In deciding whether the Commerce Clause has been violated, a court must first determine whether the state action regulates even-handedly or imposes actual discrimination against interstate commerce. "Discrimination" in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994). Under this principle, a statute that facially discriminated against interstate commerce would be considered invalid, although it may be upheld under certain circumstances.

A court is unlikely to find that a process by which state residents may lease commercial fishing entry permits has an adverse effect on interstate commerce. The establishment of permit banks that lease a small percentage of entry permits⁸ will not impose greater costs on nonresident permit holders or limit their access to the state's fisheries resource. Leasing a small percentage of the available entry permits to state residents would not affect commerce between the states or serve to "burden" nonresidents who have, or seek to acquire, permits to participate in the state's fishing industry.

In *Carlson v. State*, 919 P.2d 1337 (Alaska 1996) (*Carlson II*) (*cert. denied*, 540 U.S. 963 (2003)), *rev'd in part on other grounds*, 270 P.3d 755, (Alaska 2012) and *State v. Dupier*, 118 P.3d 1039, 1053 (Alaska 2005), nonresident plaintiffs challenged the fee differentials charged by the State of Alaska's Commercial Fisheries Entry Commission to nonresident fishers for commercial fishing permits as, among other arguments, a violation of the Commerce Clause of the U.S. Constitution. The Alaska Supreme Court held that the higher fees paid by nonresidents for the permits did not implicate interstate commerce.⁹ The establishment of an entity that would lease some permits to certain state residents seems even less likely to be interpreted by a court as a possible imposition on interstate commerce than were the higher fees for entry permits charged nonresidents at issue in *Carlson II*.

The establishment of permit banks that lease a limited number of commercial fishing entry permits to state residents is a means of serving state interests that is unlike the higher fees charged nonresidents at issue in *Carlson II* and more like that portion of the state's existing Commercial Fishing Loan Act (AS 16.10.300 - 16.10.370). The Loan Act

⁸ Note that the Commerce Clause could be implicated if a large number of entry permits were reserved for leasing under the bill

⁹ The Court noted that the United States Supreme Court instead analyzes statutes based on residency under the Privileges and Immunities or Equal Protection Clauses of the United States Constitution. *Id.* at 1340 - 1341.

provides low interest loans to state residents to purchase commercial fishing entry permits, "to promote . . . the development of a predominantly resident fishery . . ." (AS 16.10.300) without impairing nonresidents access to the state's fisheries resources or imposing addition economic costs on nonresidents. The permit banks will provide a similar benefit to residents.

Privileges and Immunities Clause

Article IV, Sec. 2 of the Constitution of the United States provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Alaska Supreme Court has adopted a two-step privileges and immunities test:

First, the activity in question must be sufficiently basic to the livelihood of the nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . .

Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest.

Carlson, 919 P.2d at 1341.

Permitting only state residents to lease entry permits from the regional community permit banks established by the bill is unlikely to violate the privileges and immunities clause. The opportunity to lease, instead of buy, a commercial fishing entry permit is probably not an activity that is "basic to the livelihood of the nation." The Privileges and Immunities Clause is not an absolute bar to discrimination. It only protects nonresident individuals against interference with their "fundamental rights."¹⁰ Given that the Supreme Court has held that every inquiry under the Privileges and Immunities Clause "must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures[.]"¹¹ a court is unlikely to find a program that provides for a small number of entry permits to be leased to state residents to assist residents and local economies interferes with nonresidents' fundamental rights.

Specific Equal Protection Concern

Mr. Magdanz asked that I address the argument that allowing permit banks to lease entry permits, when individual permit holders are not provided this same opportunity, may

¹⁰ "The privileges and immunities clause does not apply to corporations. . . ." *State Departments of Transp. & Labor v. Enserch Alaska Constr.*, Dissenting Opinion of Rabinowitz and Compton, Justices, 787 P.2d 624, 642 n.6 (Alaska 1989), *citing* L. Tribe, *American Constitutional Law* § 6-33 at 411 - 12, *quoting* *Robison v. Francis*, 713 P.2d 259, 264 n.5 (Alaska 1986).

¹¹ *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

violate these individuals' constitutional guarantees of equal protection.

The fundamental principle underlying the concept of equal protection is that similarly situated persons are to be treated equally. "The common question in addressing equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment."¹² The Alaska Supreme Court has found that equal protection under art. I, Constitution of the State of Alaska, is not violated if the person challenging the law is not similarly situated with those included or excluded, as appropriate to the particular case, under the law at issue. See *Brandon v. Corrections Corporation of America*, 28 P.3d 269 (Alaska 2001), and *Rutter v. Alaska Board of Fisheries*, 963 P.2d 1007 (Alaska 1998).

The permit banks established by the bill would hold entry permits for the purpose of leasing the permits, and by leasing the permits to state residents, presumably assist them and their communities. In contrast, an individual who holds an entry permit likely holds that permit for purposes of accessing the state's fishery resource the permit banks perform a public service and use the proceeds to extend that service to others. Accordingly, it is unlikely that a court would find that permit banks and individual permit holders are similarly situated vis a vis the leasing of entry permits.

However, if a permit bank became a profit-making entity that benefited a select group it is possible that individual permit holders might be construed to be similarly situated. In this situation, the court would examine the importance of the individual permit holders' interests being affected, the importance of the state purposes asserted in establishing the permit bank leasing system, and the closeness of the "fit" between the bill's provisions and the achievement of the state's purpose. Individual permit holders' equal protection claims would be addressed by a state using a sliding scale.¹³ First, the court would determine the importance of the interest impaired by the bill's provisions. This first step in the analysis is critical -- it determines the level of scrutiny to be applied, and strength of the justification the state must provide.¹⁴ Then the court would look at the purposes served by the statute. Lastly, the court would look at how well the bill's means fits the purpose.

It is unlikely that a court would interpret the interest at stake here, the right to lease an entry permit, as a fundamental or important constitutional rights, and therefore the right to lease would likely be subject to "minimum scrutiny." The court would likely find that

¹² *Anderson v. State*, 78 P.3d 710, 718 (Alaska 2003).

¹³ *Matanuska-Susitna Borough School v. State*, 931 P.2d 391, 396 (Alaska 1997).

¹⁴ See *id.*

an individual permit holder's interest in leasing the individual's permit is economic. Where the interest is economic, the Alaska Supreme Court applies minimum scrutiny:

Under the Alaska Constitution, the "legitimate reason test" is "the standard level of scrutiny . . . in equal protection cases," and we apply it to laws that do not employ classifications based on suspect factors or infringe on fundamental rights. Under this test, a law "will survive as long as a 'legitimate reason for the disparate treatment exists' and the law creating the classification 'bears a fair and substantial relationship to that reason.'"^[15]

At the minimum level of scrutiny, the state needs only demonstrate only that the distinction between who may lease an entry permit rationally relates to a legitimate governmental interest. Accordingly, the state must only demonstrate that prohibiting individual permit holders from leasing the individuals' permits is reasonable, not arbitrary, and is based on grounds that bear a fair and substantial relationship to the purpose of the regulatory distinction. If treating individual permit holders differently from permit banks is found to be reasonable, even if the means to achieve the state's interest could be more closely tailored to fit that interest than the meaning the bill provides, a court will uphold the bill's provisions allowing a permit bank to lease an entry permit because such a provision must only bear a rational relationship to a legitimate state interest.

A court would likely find that establishing permit banks that may lease permits to persons who would otherwise not be able to access the state's commercial fishery resource bears a "fair and substantial" relationship to the state's legitimate purpose in assisting its residents and the economies of its communities and the bill's disparate treatment of permit banks as individuals who hold a permit would be upheld.

If you have further questions, please do not hesitate to contact me.

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¹⁵ *Griswold v. City of Homer*, 252 P.2d 1020 (Alaska 2011) (internal citations omitted).