

Bristol Bay Fishermen's Association

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Representative Louise Stutes
Chair, House Fisheries Committee
State Capitol Room 406
Juneau AK, 99801

Via email to: Representative.Louise.Stutes@akleg.gov
and Reid.Harris@akleg.gov

Re: Comments on HB 188.

Dear Representative Stutes and Members of the House Fisheries Committee,

I am president of the Bristol Bay Fishermen's Association (BBFA). Our association, formerly known as the Alaska Independent Fishermen's Marketing Association, organized in Alaska in 1966, is incorporated under Alaska law as a fishermen's cooperative, and represents holders of limited entry permits for commercial salmon fishing in Bristol Bay. I am writing on their behalf regarding HB 188.

HB 188 is similar to HB 366 in the last legislature. For both policy and legal reasons, we opposed HB 366, and we oppose HB 188 now. We continue to recognize that such legislation has the understandable goal of trying to encourage residents of economically depressed areas of Alaska to lease or buy commercial fishing permits in those areas. However, HB 188 is bad policy and employs unlawful means of accomplishing its ends. I'll address policy matters and then legal matters, with the assistance of counsel.

A. Matters of Policy.

1. Public funds should not be used to subsidize acquisition of limited entry permits either by a regional fisheries trust or a person to whom the trust transfers the permit.

Under HB 188, regional fisheries trusts could use public funds obtained from federal, state and municipal governments under the proposed Sec. 16.05.050(a)(5) to purchase limited entry permits under the proposed amended AS 16.43.170(b), which would allow transfer of permits to regional fisheries trusts. Then, the proposed AS 16.05.050(a)(6) allows the trusts to lease the permits to residents of the area covered by the regional trust under terms that, according to the proposed statute, may include transfer of the permits to the lessee. In other words, government funds could be used to subsidize acquisition of permits in a discriminatory manner based on place of residency.

As a matter of policy, public funds should not subsidize acquisition of limited entry permits to harvest a common-use public resource, when the subsidy occurs in the context of discrimination based on local residency or economic status. The reason such subsidies are not good policy is that they have nothing whatsoever to do with the purposes of limited entry, which are to conserve the fishery resources and prevent economic distress among fishermen who would otherwise face an unregulated excess of permits competing for a finite resource.

2. HB 188 allows a regional fisheries trust to loan public funds to a person who acquires a subsidized permit, but does not require repayment of the loan.

The proposed Section 16.44.050 states the powers and duties of the regional fisheries trusts and these include "all powers necessary to carry out the purposes of [the trusts]." We should not forget that HB 188 began as HB 366 in the prior legislature, and that bill would have established regional fishery "banks". The trusts, like banks,

can loan funds under the above clause, including public funds acquired from government. Yet, nothing requires repayment to the trusts, let alone to government.

3. HB 188 allows a person who acquires a subsidized permit to sell the permit at the first opportunity to make a profit at public expense.

HB 188 is open to scamming of public funds. All a person needs to do is acquire a subsidized permit and sell it at the first opportunity for a profit. If the trust had acquired the permit with public funds, then the trust and the lessee/purchaser are simply scamming public funds. At this point you can see that HB 188, like HB 366 before it, remains poorly thought out.

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 188 is trying to solve. Therefore, HB 188 does not accomplish its goal and does not solve the problem it tries to solve.

4. HB 188 does not prevent unqualified persons from scamming public funds.

Nothing in HB 188 prevents a lessee from entering into side agreements with those not qualified to be lessees. For example, a lessee could have a side agreement with an unqualified person that specifies that the unqualified person lends funds to the lessee to purchase a subsidized permit from a trust, and that in return the lessee will repay the loan and pay to the unqualified person half the profits made upon a prompt sale by the lessee/purchaser. In other words, HB 188 does not prevent abuse of public funds in this manner.

5. Public funds should not be used for what banks and traditional lenders would not do.

The State of Alaska is foolishly wedded to the notion that public funds should be used for functions that banks and other lenders traditionally do. That notion has resulted in the legislature wasting vast amounts of public funds on mega-projects banks would not finance. This is no different, just on a smaller scale. If banks would not lend to a lessee, then government should not do so.

6. HB 188 fails to prevent the fishery trusts from colluding with processors to defeat the interests of fishermen in negotiating a fair price.

Nothing in HB 188 prevents the board of a trust 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 preventing economic distress among commercial fishers and creating economic benefits for them and local communities. It is also counterproductive to the Alaska statutes under which cooperatives, such as the Bristol Bay Fishermen's Association, are incorporated to assist fishermen in obtaining fair prices.

7. HB 188 lacks even the most standard conflict-of-interest provisions.

The proposed Sec. 16.44.020(g) prohibits a board member of a fishery trust from leasing a permit for the trust but does not even prohibit a family member of that board member from doing so. Ordinary conflict-of-interest standards reach board members, family members of board members, and business partners of board members. HB 188 invites corruption.

8. HB 188 needs to prevent trusts from supporting activities contrary to sound fisheries conservation.

Because the powers and duties of the trusts, in the proposed Section 16.44.050, include "all powers necessary to carry out the purposes of [the trusts]," these powers could include financing private fish hatcheries. For decades, fishery scientists around the country, including at ADF&G, have known that hatcheries can too often interfere with wild stocks and cause decreased productivity over time. Accordingly, in 1992 the legislature enacted AS 16.05.730 which establishes a priority for wild fish stocks over enhanced stocks by requiring sustained yield management of wild fish over hatchery fish. HB 188 should not allow an unbridled description of the powers and duties of the boards of the fisheries trusts, contrary to science and existing law.

9. HB 188 needs to conform to law governing trusts and perhaps banking.

HB 188 purports to establish a means to create “trusts”. However, that is a misnomer because they are not trusts in a legal sense. The beneficiaries are not ascertainable. HB 188 does not state a fiduciary duty running to any beneficiary. Because the beneficiaries cannot be ascertained, there is no legal right for anyone to sue the trusts for breach of a fiduciary duty.

Also, we should remember that HB 188 started out as HB 366 which purported to establish “banks,” and that HB 188 simply strikes substitutes trusts for banks. That does nothing to solve problems. Because HB 188 grants unlimited powers to the trusts, they could operate somewhat like banks by loaning money and investing. So, HB 188 needs to be reconsidered with respect to whether the unlimited powers raise issues with banking law.

B. Legal Issues.

1. HB 188 probably creates an unconstitutional special privilege of fishery.

Article VIII, Section 15, of the Alaska Constitution provides:

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.

After we addressed this issue in our comments on HB 366, the office of Legislative Legal Services issues a memorandum which addresses this issue.¹ The memorandum, at p. 2, correctly states that *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983) and *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1266 (Alaska 1988) stand for the proposition that the limited entry system must entail the “least possible infringement” on the common use clause (Art. VIII, § 3) and the no exclusive right of fishery clause (Art. VIII, § 15). However, the memorandum ignores the more recent case, *Vanek v. State*, 193 P.3d 283, 290 (Alaska 2008). It establishes that any impingement on the prohibition of exclusive rights or special privileges of fishery that “is not required by the purposes of limited entry” is not allowed. Those purposes are stated in Article VIII, § 15. They are “resource conservation,” “prevent[ion] [of] economic distress,” and the “efficient development of aquaculture.” *Id.* Therefore, any special privilege of fishery is unconstitutional if it is not required by those purposes.

The subsidized scheme of HB 188 creates a special privilege for some people to acquire or lease a subsidized limited entry permit. That limited entry permit is the “key” that unlocks the door to commercial fishing. On the face of HB 188, those who lease or acquire from a trust a subsidized permit clearly will have a “special privilege” of accessing and entering a commercial fishery at less cost than those who obtain permits on the conventional market.

Although the proposed Sec. 16.44.010 in HB 188 claims that the purposes of the regional fisheries trusts include “prevention of economic distress among fishermen and those dependent on them for a livelihood” and “resource conservation,” these claims are mere window-dressing. First, nothing in HB 188 promotes conservation, so that claim is manifestly false window-dressing. Second, AS 16.43.290 provides for the optimum number of entry permits for each fishery, and *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d at 1266 unequivocally states that “[t]he optimum number provision of the Limited Entry Act is the mechanism by which limited entry is meant to be restricted to its constitutional purposes.” In other words, that number is what seeks to prevent economic distress among fishermen and help conserve the resources. Subsidized permits do not do so. Therefore, the claim that HB 188 does so is false window-dressing meant to cover-up that fact that it

¹ Legal Services, Div. of Legal and Res. Services, Legislative Affairs Agency, State of Alaska, Memo to Rep. Kreiss-Tomkins, from A. Bullard, re Constitutional Questions re CSHB 366 (Apr. 5, 2016), available at http://www.akleg.gov/basis/get_documents.asp?session=30&docid=16320.

is outside those purposes of Article VIII, sec. 15. Besides, HB 188 does not address fishermen. It addresses prospective, would-be fishermen.

Furthermore, the memorandum from legislative Legal Services asserts that HB 188 is intended to reduce financial barriers for state residents seeking to participate in the state's commercial fisheries, "perhaps 'decreasing the 'impingement' of the existing limited entry system.'" ² If it were true that HB 188 decreases impingement of the existing system, then the existing system would not be the "least possible infringement." That would mean that the existing system would be unconstitutional, which it is not, and that Article VIII, section 15 requires the system proposed by HB 188, which of course it does not.

Finally, an attorney, Mr. Brennan, submitted comments which claim HB 188 is constitutional but do not state why he reaches that conclusion and do not analyze Article VIII, sec. 15. His letter is unhelpful.

2. HB 188 violates the Equal Protection Clause of Section 1 of Article I of the Alaska Constitution by allowing some persons to benefit from the system but not others who are similarly situated.

Our comments on HB 366 raised the issue of whether it creates a method that allows some persons to benefit from the system but not others who are economically similarly situated, and therefore violates equal protection. Tellingly, the Legal Services memorandum does not address this issue. Instead, it addresses a different issue, i.e., whether allowing the trusts to lease permits but not others to do so violates equal protection.

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.

While the goal of HB 188 of trying to encourage residents of economically depressed areas to lease or buy 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 188 violates the equal protection clause of the Alaska Constitution by economically assisting one class of citizens over another.

Although proponents of HB 188 claim it is similar to the Commercial Fishing Revolving Loan Fund, that claim is false because the Fund does not assist one class over another, while HB 188 does.

CONCLUSION

For these reasons, I encourage the House Fisheries Committee to hold, rather than advance, HB 188. Thank you for considering these comments. If given the opportunity, I would be pleased to testify.

Regards,



David Harsila
BBFA President

² Legal Services, Memorandum, *supra*, at pp. 2-3.