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STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y . STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM

May 26, 1983

SUBJECT: Constitutionality of penalties for illegal
 purchase of fish (CSHB 376 (Resources))

TO: Representative John Ringstad
 Representative Richard Shultz
 Co-Chairmen, House Resources Committee

FROM: Edward H. Hein *EH*
 Legislative Counsel

In drafting the committee substitute for HB 376 it occurred to me that there is a substantial constitutional problem with penalty provisions already in statute for illegal purchases of fish.

Briefly, the problem is this: AS 16.10.265 makes it unlawful for someone in the business of buying fish (processors, fish buyers, or their agents, etc.) to buy from a seller who does not have the required permit. Punishment for this offense varies depending on whether it is a first, second, or third conviction. A first conviction is punishable as a class B misdemeanor, mandatory minimum fine of \$1,000, and a maximum fine of \$5,000 and a maximum 90 days imprisonment. Under AS 16.05.680(2) it is unlawful for any person, including processors and fish buyers, to purchase fish from a seller who does not have the required permit. This offense is punishable under AS 16.05.720 as a class A misdemeanor, maximum fine of \$5,000 and maximum sentence of one year imprisonment.

The problem is that a processor or fish buyer may be prosecuted under either section for the same criminal conduct. The elements of proof essential to conviction are exactly the same. Thus a prosecutor would have unbridled discretion to file charges under either statute, depending on which penalty the prosecutor wanted to subject a defendant to.

Unless a court were to determine that there is some substantial difference in the elements of proof essential to

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conviction under both statutes, the disparity of punishments is likely to be found in violation of the equal protection and due process requirements of the Alaska and United States Constitutions. As the Alaska Supreme Court has said,

We have never held that statutes which allow differing punishments for the same criminal conduct are necessarily unconstitutional as giving prosecuting officials unwarranted charging discretion. However, we have recognized that a substantial question is thereby presented.

Holden v. State, 602 P.2d 452, 454 (Alaska 1979).

In addition to any possible constitutional problems, you may wish to consider whether the statutory punishment scheme frustrates the apparent legislative intent in enacting AS 16.10.265 last year. That statute was apparently intended to increase the penalty for those who profit financially from illegally purchasing fish. The result now is that we may be punishing the person who makes an occasional illegal purchase to put fresh fish on the dinner table more severely than we punish the commercial buyer who has a financial incentive to break the law.

If you have any questions or comments about the subject of this memorandum, feel free to contact me at your convenience.

EHH:ljb
22/001

Amendments to House Bill 376
Proposed by Commercial Fisheries Entry Commission
May 23, 1983

New Title: "An Act establishing landing permits and amending the Limited Entry Act; and providing for an effective date."

* Section 1. AS 16.05 is amended by adding a new subsection to read:

Sec. 16.05.675. LANDING PERMIT. (a) The holder of a federal fishing permit to operate commercial fishing gear in the fishery conservation zone who has in his possession a landing permit issued by the Commercial Fisheries Entry Commission may transport, possess, sell, or offer to sell within the state fish taken in the fishery conservation zone.

(b) The commissioner may adopt regulations establishing eligibility for landing permits. Landing permits may not be authorized for any fishery unless the commissioner finds in writing that the issuance of such permits is consistent with state conservation and resource management practices.

(c) The Commercial Fisheries Entry Commission may establish by regulation annual fees for landing permits which reasonably reflect the costs incurred in the administration and enforcement of the provisions of this section.

* Section 2. AS 16.05.680(2) is amended to read:

(2) to purchase fish from a fisherman who neither is the holder of a permit issued under AS 16.43 or a landing permit issued under AS 16.05.675, nor is exempt under AS 16.05.660, or

* Section 3. AS 16.10.265(a) is amended to read:

Sec. 16.10.265. PURCHASE OF FISH FROM PERMIT HOLDERS. (a) It is unlawful for an individual while acting as a fish processor or primary fish buyer, or as an agent, director, officer, member, or employee of a fish processor, of a primary fish buyer, or of a cooperative corporation organized under AS 10.15 to intentionally or knowingly make an original purchase of fish from a seller who does not hold an entry permit or interim-use permit issued or transferred to the seller in accordance with AS 16.43, or a landing permit issued under AS 16.05.675.

Section 1. of HB 376 amending AS 16.43.040 is renumbered Section 4.

Section 2. of HB 376 amending AS 16.43.100(a) is renumbered Section 5.
and rewritten to add a new paragraph (17) to read:

(17) issue landing permits to qualified applicants and collect
fees as provided in AS 16.05.675.

The remaining sections of HB 376 are renumbered consecutively.

IV. ANALYSIS: HB 376 Page 2 of 2

Section 1 instructs the commission to adopt regulations providing for measures to be taken in instances where a tie vote occurs in the adjudication of a permit application.

Section 2 grants the commission the power to charge reasonable fees to defray the costs of service it renders to members of the public.

Section 3 instructs the commission to issue regulations governing the correction of its administrative error, as, for example, where an applicant has been mistakenly credited with points for vessel ownership when the applicant did not own a vessel.

Section 4 is a technical change reflecting the fact that AS 16.43.380(3), which defines the term "fishery", was amended in 1981 to provide that a fishery may cover more than one administrative area.

Section 5 is intended to clarify in AS 16.43.150(f) what is already apparent elsewhere in the Limited Entry Act, namely that the permit of "minor economic hardship" applicant under AS 16.43.250(c), which permits are expressly non-transferable does not survive the death of the holder, and cannot be transferred in any way after his death.

Section 6 tightens up the "contrary intent" language in the existing law such that a permit will go directly to the deceased permit holder's surviving spouse unless the permit holder made other provision for its disposition in a valid will.

Section 7 is intended to end the possible ambiguity in the current language of AS 16.43.170(b) and make clear that the commission is not obligated to approve a permit transfer whenever the proposed transferee can show the present ability to actively participate. Under the proposed language of Section 7, the commission will plainly be able to disapprove a transfer when it would be improper, as, for instance, if the transfer is a lease forbidden by AS 16.43.150(g).

Section 8 is intended to give the commission discretion in determining what years are to be considered in setting eligibility to apply in a newly limited fishery. Under the law as currently interpreted, anyone who has ever held an Alaska gear license (first issued in 1960) in a given fishery is eligible to apply if that fishery is limited. As 1960 becomes increasingly distant, and the character of the State's fisheries changes, it is increasingly inappropriate to allow eligibility based on participation that may be twenty-five years in the past. The proposed amendment to AS 16.43.260(a) will give the commission the necessary flexibility.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 21, 1983

The Honorable Joe L. Hayes
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill proposing technical amendments to the Limited Entry Act, AS 16.43. These amendments are necessary to assure the continued smooth functioning of the limited entry program.

Section 1 of the bill deals with the potential problem of deadlocks when only two members of the Commercial Fisheries Entry Commission are participating in an adjudication. It instructs the commission to adopt regulations providing for measures to be taken in this situation.

Section 2 of the bill grants the commission the power to charge reasonable fees to defray the costs of services it renders to members of the public, such as processing permit transfer applications.

Section 3 of the bill instructs the commission to adopt regulations governing the correction of its administrative errors, as, for example, where an applicant has been mistakenly credited with points for vessel ownership when the applicant did not own a vessel. This section will not allow the commission to undo discretionary determinations made by previous members of the commission. Nor will it require the commission to reopen closed applications when a court determines that the commission has misinterpreted a statute or regulation.

Section 4 of the bill is a technical change reflecting the fact that AS 16.43.380(3), which defines the term "fishery", was amended in 1981 to provide that a fishery may cover more than one administrative area.

Section 5 of the bill slightly modifies existing AS 16.43.150(f), which states flatly that an entry permit survives the death of its holder. Revised section 150(f) would provide that permits held by persons who qualified as "minor economic hardship" applicants under AS 16.43.250(c) -- persons with minimal ties to the fishery in which they hold permits -- cease to exist when their holders die. These permits are currently non-transferable under AS 16.43.170(e) before the commission sets an optimum number under AS 16.43.290 in a fishery (unless the commission estimates that the number of permits outstanding in that fishery does not exceed the optimum number); they are transferable after the optimum number is set, but only to the commission under AS 16.43.170(c).

Section 6 of the bill modifies the "contrary intent" language in the existing law to make clear that, if there is a surviving spouse, the permit of the deceased permit holder will go directly to that surviving spouse unless the holder has made other provision for the permit's disposition in a valid will that has been probated. This modification should assure that the Limited Entry Act is construed consistently with Alaska's probate code, and that questions of probate law are left to the courts rather than to the Commission.

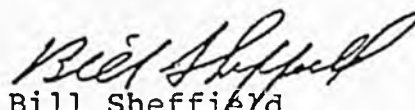
Section 7 of the bill is intended to end the possible ambiguity in the current language of AS 16.43.170(b) and make clear that the commission is not obligated to approve a permit transfer solely because the proposed transferee can show the present ability to actively participate. Under the amendments in sec. 7, even if a transferee demonstrates the ability to participate, the commission will plainly be able to disapprove the transfer if it would be improper, as, for instance, if the transfer is a lease forbidden by AS 16.43.150(g).

Section 8 of the bill is intended to give the commission discretion in determining what years are to be considered in setting eligibility to apply for an entry permit in a newly-limited fishery. Under the law as currently interpreted, anyone who has ever held an Alaska gear license (first issued in 1960) in a given fishery is eligible to apply if that fishery is then limited. This has not been a problem to date. But as 1960 becomes increasingly distant, and the character of the state's fisheries changes, it will be increasingly inappropriate to allow eligibility based on participation that may be 25

years in the past. The proposed amendment to AS 16.43.260(a) will give the commission necessary flexibility.

I urge your prompt action on this bill.

Sincerely,


Bill Sheffield
Governor

I. REQUEST

Bill/Resolution No.: HB 376
 Title: An Act amending the Limited Entry Act.
 Sponsor: Governor
 Requestor: Resource Committee

II. FISCAL DETAIL

Agency Affected: Dept. of Fish & Game
 Program Category Affected: Fish. Res. Consv. BRU, Program of Subprogram(s) Affected: Commercial Fisheries Entry Commission

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL: There will be no negative fiscal impact. The bill streamlines existing language in Title 16 of the statutes enabling the commission to operate more effectively.

IV. ANALYSIS: Attach a separate page for any Analysis (see attachment)

Prepared By: Derrill L. Johnson Phone: 465-4081
 Division: CFEC Date: 04/11/83
 Approved by Commissioner: John Williams Date: 04/11/83
 Department: Commercial Fisheries Entry Commission (ADF&G)

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

Q What kind of regs: for breaking ties? | Listowski
adopt regulations : APA public notice requirements | Williams
Twombly