

HB

63





# Alaska State Legislature

HOUSE OF REPRESENTATIVES  
COMMITTEE ON RESOURCES

POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-3715

## HOUSE RESOURCES COMMITTEE LETTER OF INTENT FOR

CSHB 63

The Legislature believes that the Board of Fisheries presently has the authority to establish regulations such as the superexclusive use area and vessel restrictions established in certain Bering Sea herring fisheries. The Legislature intends that this legislation clarify and confirm the Board's authority in making the type of allocative decisions exhibited by the Bering Sea herring regulations, and that through this legislation, the Legislature seeks to resolve any doubts raised by the Hebert case as to whether the Board of Fisheries had the authority to establish superexclusive use areas for regulating commercial fishing.

A handwritten signature in cursive script that reads "Adelheid Herrmann".

Adelheid Herrmann  
Adelheid Herrmann  
Co-chairman  
May 16, 1987

STATE OF ALASKA 1987 LEGISLATIVE SESSION  
FISCAL NOTE

Bill Version: HB 63 & SB 53  
Publish Date: \_\_\_\_\_

REQUEST: \_\_\_\_\_

Revision Date: 5/8/87 Agency Affected: Fish and Game  
Title: An Act authorizing Bd. of Fish and Game to adopt regulations establishing certain types of registration  
Sponsor: Hoffman/Binkley and use areas Components: \_\_\_\_\_  
Requestor: House Resources

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Roland Shanks  
Division: Commissioner's Office

Phone: 465-4100  
Date: 5/18/87

Approved by Commissioner: (Dore) Callensworth  
Agency: Fish and Game

Date: 5-14-87

- Distribution (by preparer):
- Legislative Finance
  - Legislative Sponsor
  - Requestor
  - Office of Management and Budget
  - Impacted Agency(ies)
  - Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION  
FISCAL NOTE

Bill Version: HB 63  
Publish Date: \_\_\_\_\_

REQUEST: \_\_\_\_\_

Revision Date: \_\_\_\_\_  
Title: An Act relating to the  
Board of Fisheries  
Sponsor: Hoffman  
Requestor: \_\_\_\_\_

Agency Affected: Dept. of Fish & Game  
BRU: \_\_\_\_\_  
Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0					
TRAVEL	0					
CONTRACTUAL	0					
SUPPLIES	0					
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	0					

CAPITAL	0					
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REVENUE	0					
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0					
FEDERAL FUNDS	0					
OTHER	0					
TOTAL	0					

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Roland Shanks  
Division: Commissioner's Office

Phone: 465-4100  
Date: 2/20/87

Approved by Commissioner: \_\_\_\_\_  
Agency: Fish and Game

Date: \_\_\_\_\_

Distribution (by preparer):  
Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)  
Senate Secretary

The bill does not make any change in the status quo of the Board of Fisheries activities.

The Board of Fisheries established superexclusive use areas in the western herring fisheries four years ago. In addition, exclusive use regulations have been established by the Board for salmon and king crab.

Exclusive use areas do not prohibit anyone from participating in the fisheries.

The fisheries are still open to anyone wishing to participate. It only restricts the number of separate herring fisheries a person may participate in. Numerous individuals from Anchorage, S.E. Alaska and outside the State have fished in these areas during the last four seasons while superexclusive registration has been in effect.

The proposed legislation does not require or mandate any action by the Board of Fisheries.

The legislation merely insures that the Board of Fisheries has the option of using exclusive, superexclusive and nonexclusive use areas as a management tool. The decision to do so remains with the Board.

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
SUNEAU ALASKA 99811  
907 465 1800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 29, 1987

SUBJECT: Superexclusive fishing zones  
(HB 63)

TO: Representative Lyman Hoffman

FROM: Edward H. Hein *EH*  
Legislative Counsel

HB 63 is a duplicate of SB 53, related to the Board of Fisheries' authority to establish superexclusive fishing zones. After studying the District Court's opinion and the appellate briefs in the Hebert case, I believe this legislation will resolve the problem, though it may be broader in scope than necessary to do the job.

In essence, the District Court found that the Board of Fisheries acted outside the scope of its statutory authority when it established the superexclusive use areas at Cape Romanzof and Norton Sound. Although the court recognized that improving and maintaining the economic health of those localities is a "legitimate and highly desirable goal for the state", the board has authority to act only for the purposes of conserving or developing the fishery resources of the state. And although the board has authority under AS 16.05.251(e) to allocate among different fishery user groups (i.e., personal use, sport, and commercial), the board does not have authority to allocate among members of a single user group, the court said.

SB 53 and HB 63 would remedy both of the problems pointed out by the court. Section 1 expands the authority of the board by allowing it to enhance and protect people's ability to take and use fishery resources. This would include protecting fishermen in given areas of the state by setting up superexclusive use areas. Granting the board such authority is consistent not only with the Hebert case, but also with Art. VIII, sec. 15, of the Alaska Constitution. That section allows the state to limit entry into any

Representative Hoffman  
January 29, 1987  
Page 2

fishery to prevent economic distress among fishermen and those dependent upon them for a livelihood. This is an exception to the prohibition in that same section against the establishment of an exclusive right or special privilege of fishery.

Section 2 of the bill amends AS 16.05.251(e) to make clear that the board may distinguish among users in a single use group, as well as among different groups. This language is needed in conjunction with section 1 to clearly authorize the board to create the superexclusive use areas.

This bill would provide the board authority to do more than create superexclusive fishing zones. For example, the board might use the authority granted in this bill to allocate within a user group for strictly conservation purposes. Allocation could be among sport fishermen, or personal use fishermen, as well as commercial fishermen. But I don't think there is much danger of abuse in this grant of authority because of the limitations of Article VIII of the state constitution. Sec. 17 of that article states that "Laws and regulations governing 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." Art. VIII, sec. 2, requires the legislature to "provide for the utilization, development, and conservation of all natural resources . . . for the maximum benefit of its people." And AS 16.05.251(e) requires the board to establish criteria for allocations. These provisions should be adequate to protect against the arbitrary abuse of the board's discretion.

If you have further questions or comments on this draft or related matters, feel free to contact me at your convenience.

EHH:mkr  
m8/068

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 17, 1987

Representative Lyman Hoffman  
House of Representatives  
P.O. Box V  
Juneau, Ak 99811

Dear Representative Hoffman:

Re: State v. Hebert  
(herring use areas)

Lee Goodman of your staff has requested our office to expand upon Larri Spengler's February 10, 1987, analysis of State v. Hebert, to explain the wider ramifications that the district court's decision may have for fisheries board allocation regulations, if the decision is affirmed on appeal.

As explained in Larri Spengler's letter, the trial court in Hebert held that as of the date the board of fisheries adopted the Norton Sound superexclusive herring area regulation, 5 AAC 27.987, the board's statutory authority to conserve and develop the state's fisheries (AS 16.05.251) did not allow the board to make allocations within one user group (i.e., among commercial users) in order to provide an economic advantage to one segment of the user group. The court, in dicta, also opined that the 1986 amendment to the board's authority, AS 16.05.251(e) (Ch. 52, SLA 1986), which expressly allows "allocation of fishery resources among personal use, sport, and commercial fishing ..." also does not allow the board to make allocations within one use group. The Hebert court also found that there was insufficient evidence to support a finding that the superexclusive herring area regulation was intended in part as a conservation measure, to require less efficient harvesting means.

The Hebert decision is presently on appeal before the Alaska Court of Appeals. If the Court of Appeals (and any higher appellate court) simply affirms the trial court decision without modification, this decision might provide a basis for challenges to other fisheries board regulations that, to a greater or lesser extent, provide an economic advantage to, or otherwise allocate a certain portion of the harvest to a particular segment of a commercial, sports or personal use fishery. Each case would have to be analyzed on its own facts, but it is possible that the Hebert decision, if affirmed could be a basis for challenging such fisheries allocation regulations as the Cook Inlet management plan

FILED 1987  
XXXXXXXXXXXXXXXXXXXX  
Steve Cowper, Governor  
REPLY TO:

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Representative Lyman Hoffman  
House of Representatives

February 17, 1987  
Page 2

(which allocates among various segments of a commercial fishery) the False Pass fishery (which allocates to an existing local fishery), the Stepovak fishery plan (which also allocates among commercial uses), and several other regulatory provisions that make similar allocations. You may wish to consult the Department of Fish and Game for additional examples.

It would be difficult to predict the outcome of a challenge to fish board allocation regulations that might be brought under the Hebert rationale, because any decision would turn upon the particular board record and facts in each situation. If the Hebert decision were to be affirmed, however, it would place new constraints upon the fisheries board regarding its ability to make harvest allocations within a particular use group.

As mentioned in Larri Spengler's letter, the Hebert case turns upon statutory construction; the legislature has the authority to modify the statutes to reflect a different intent, so long as it is consistent with relevant constitutional principles.

If we can be of further assistance to you, please let us know.

Yours sincerely,

GRACE BERG SCHAIBLE  
ATTORNEY GENERAL

By: *Sarah E. McCracken*  
Sarah E. McCracken  
Assistant Attorney General

SEM/jmo

cc: Don W. Collinsworth, Comm'r ADF&G  
Steven Pennoyer, Deputy Comm'r ADF&G  
Roland Shanks, ADF&G  
Larri I. Spengler, AGO Jnu  
Pete Froelich, AGO Jnu  
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1381025

KOKECHIK FISHERMEN'S ASSOCIATION  
BOX 5450  
CHEVAK, ALASKA 99563

November 16, 1986

Senator Frank Ferguson  
Alaska State Senate  
Pouch V  
Juneau, AK 99811

Dear Senator Ferguson,

The Kokechik Fishermen's Association represents 178 commercial herring fishermen in the villages of Hooper Bay, Chevak, and Scammon Bay. We are asking for your help in a very serious problem we are facing in the 1987 herring season. We know that other herring groups like your constituents in Norton Sound, and groups in Senator Binkley's District are facing the same problem.

As a result of prosecution in two separate cases, Alaskan State Superior Courts have ruled that the Board of Fish's determination to restrict entrance into the herring fisheries above Cape Newham through "super-exclusive use registration" was an abuse of the Board's authority. Both Courts determined that "super-exclusive use registration" was an social and economic allocation of the State's resources. The Courts declared this type of allocation exceeded the authorities conveyed to the Board of Fish by the Legislature. Both Courts ruled that only biology could dictate the Board's decision making. The State has begun the appeal of that decision to the State Supreme Court.

We are now facing a Board of Fish meeting in December. Given the status of "super-exclusive use registration" the Board of Fish may decide not to impose that limit again to exclude outside boats walking the coast, and harming our limited local economies. In that case, our entire coastline would be exposed in 1987 to the outside boats.

There is also an alternative. The Board of Fisheries could reimpose "super-exclusive use registration", and have it subsequently flaunted and overturned by outside boat captains in 1987 who are sure that the Courts will again rule "super-exclusive use registration" invalid.

In either case, our small herring fisheries are in danger. Bristol Bay's large herring fishery will continue to drop from 23,000 metric tons in 1985 to a projected 8,000 metric tons in 1987. This will result in higher herring prices throughout Western Alaska, a boom to our fisheries. But those outside gillnetters who need to make money will cheat even more, and go north.

The big boats with hydraulics will just outfish our smaller boats. Norton Sound, Nelson-Nunivak Islands, Goodnews Bay, and



# BERING SEA FISHERMAN

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Permit No. 179

October 1986 Volume 7, Number 5

Published by the Bering Sea Fishermen's Assn., 623 Christlansen Dr., Anchorage, AK 99501

## Exclusive Registration Overturned...For Now

The rocky history of super-exclusive use areas suffered another upheaval in August. A Nome District court Judge echoed a previous ruling that the Board of Fisheries had exceeded its authority in establishing the regulation.

Western Alaska fishermen first started trying to establish exclusive registration five years ago. At that time the Norton Sound fishermen were continually out-fished by the more sophisticated "high-tech" boats from further south. Norton Sound was a new herring fishery, so there was no "traditional" commercial use. Exclusive registration would permit the local fishermen to develop their fishery into a reliable local industry. Since then Cape Romanzof and Nelson/Nunivak Island herring fisheries have come online, increasing the need for exclusive registration protection.

The super-exclusive use designation prohibits fishermen from

taking part in an exclusive use fishery and in any other herring fishery in the State during the same year. According to BSFA Director Henry Mitchell, "if this regulation falls, what will happen is the non-local boats will move in and they can easily take 40-50-60 percent of the resource."

In overturning the regulation, acting district court Judge Bradley Gater wrote, "the purpose and effect of super-exclusive use in the regulation at issue is local economic development and protection for local fishermen, neither of which relates to the purposes for which the Board was created or authorized to act."

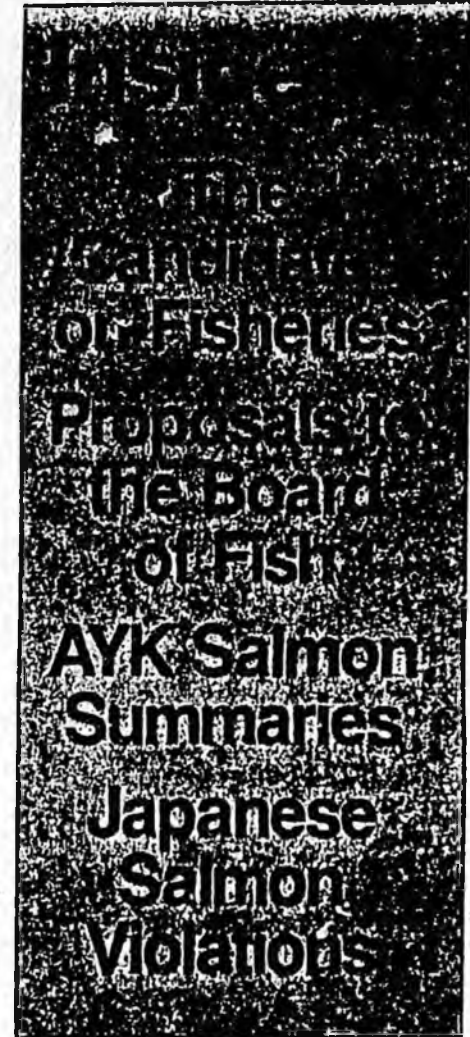
More simply, the Judge was saying that the Board of Fisheries established super-exclusive use areas only for socio-economic reasons but that they don't have the authority to consider socio-economic factors in allocating the resource.

In Nelson Island in 1985 for ex-

ample, nine non-local vessels took 40 percent of the herring quota. "These western herring fisheries were largely developed to contribute to the economic health of the local communities," Mitchell said. "Somehow we have to limit the number of boats in the fishery, or we'll defeat the purpose of the fishery."

Exclusive registration was defeated twice by the Board of Fisheries before it was finally passed in 1982. During the 1983 herring season fisherman Steve Heffernan was cited for fishing in Norton Sound as well as in Security Cove and Goodnews Bay. After a two year delay the court decided in favor of Heffernan, overturning the regulation for the first time. In the meantime however the Board of Fisheries had reworded its justification for exclusive registration. In the new wording, exclusive registration was justified for reasons of management of the herring as

continued on page 14



spawning activity of chum, pink and sockeye salmon near the headwaters of Hooper Bay tributaries. The actual number of spawning fish was small, but more extensive surveys may reveal a larger spawning population.

## Exclusive Registration Overturned *continued from page 1*

well as socio-economics. The Board thought the new wording would be acceptable to the court.

The following season (1985) the State announced that it intended to enforce the super-exclusive regulation. That season fisherman Jay Herbert was charged with fishing in Norton Sound having already fished in

Security Cove and Bristol Bay.

In August Judge Gater ruled that the Board of Fisheries had again exceeded its authority. In his decision Gater claimed that, "If there is a development or conservation purpose to super-exclusive use regulation in Norton Sound, it is clearly not based upon the need for a more man-

ageable fishery." The case was dismissed.

The ruling on Herbert's case leaves western Alaska fishermen two options for saving the regulation that is so important to their livelihood. The decision could be appealed, or fishermen could seek a legislative cure.

"A legislative cure would in-

volve amending the Board of Fisheries mandate to permit the Board to consider socio-economic factors in allocating a resource." Mitchell said, "We will work to make sure that this regulation does not fall."

that decision. Since the Governor makes the recommendation, and the president makes the appointment, Young would not intercede or get conflicts started."

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*continued on page 12*

The Alaska fishermen's loan program was founded to... (pro- predominantly resident fishery

The Alaska fishermen's loan program was founded to... (pro- predominantly resident fishery

The Alaska fishermen's loan program was founded to... (pro- predominantly resident fishery

By Krysl Holmes

The North Pacific Fisheries Management Council (NPFMC) passed a resolution urging Con-

mits from their parents. Also, children could not inherit permits weren't transferable, serious problems. For example if however, posed apparently more Prohibiting the sale of permits, Alaskans.

Alaskans. Prohibiting the sale of permits, Alaskans. Prohibiting the sale of permits, Alaskans.

When limited entry was enacted, according to a previous study by CFE, "It was hoped the program would help support a stable economic base in relative-

tries. U.S. processors fear they might be forced to compete with com-

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

February 10, 1987

The Honorable Lyman Hoffman  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Re: Herring area legislation

Dear Representative Hoffman:

You have asked for a description of the herring superexclusive use area litigation, and of its possible ramifications. As I understand it, you are inquiring about this case because it relates to HB 63, which you introduced. (That bill is virtually identical to SB 53, introduced by Senator Binkley.)

The Alaska Board of Fisheries has adopted superexclusive use areas in managing the herring commercial fisheries in the state. The regulations require that participants in the commercial herring fisheries either fish in one of several small areas, or anywhere else in the state. See, for example, 5 AAC 27.987. This mandate was violated by a Mr. Hebert, who, in a criminal prosecution before a state district court, moved to dismiss the charge, alleging that the regulation exceeded the authority of the Board of Fisheries. State v. Hebert, No. 2NO-S86-069 Cr. (Alaska Dist. Ct., Feb. 6, 1986). The Board of Fisheries in general has the authority to adopt regulations for the "conservation and development" of fishery resources. AS 16.05.221(a).

The judge in that case ruled that he could find no evidence supporting a conservation rationale. He found that the regulation had been adopted in order to benefit the less efficient, less well-financed fishermen from particularly cash poor areas of Alaska, and that while the socioeconomic goals were laudable, they did not fall within the board's current authorities.

That case is currently on appeal to the Alaska Court of Appeals. State v. Hebert, Court of Appeals No. A-1743. Briefing is completed, and eventually a decision will be issued. In the meanwhile, the regulations are technically enforceable; a district court decision dismissing a criminal prosecution is not equivalent to a superior court decision in a civil case enjoining the enforcement of a regulation. The decision is not binding on

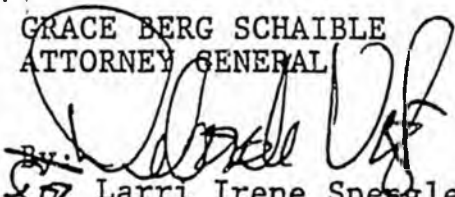
other courts; the result of the judge's order is simply that that particular criminal prosecution is dismissed.

The superexclusive use area regulatory mechanism as applied to vessels has been common for years in the state's salmon fisheries, and has also been employed in other fisheries, such as king crab and tanner crab. 5 AAC 39.120; 5 AAC 34.020; 5 AAC 35.020. Assuming for the moment that the district court was correct in determining in the Hebert case that the Board of Fisheries may not regulate for only socioeconomic reasons within a particular commercial fishery under the current statutes, the other instances in which superexclusive use area had been employed are not necessarily invalid. The analysis in each situation would depend upon what the board record discloses about the conservation basis for the regulation. Clearly, even under the Hebert case, a conservation related justification which was supported by the facts would provide adequate legal support for superexclusive use areas.

The district court decision in the Hebert case hinges solely upon statutory construction, and any decision from the court of appeals will be similarly limited in scope, since those are the only issues presented in the appeal. Thus, whatever the court determines the statutes to currently mean, the legislature has the authority to modify the statutes to reflect some other intention, consistent, of course, with relevant constitutional principles.

Sincerely,

GRACE BERG SCHAIBLE  
ATTORNEY GENERAL

By:   
Larri Irene Spengler  
Assistant Attorney General

LIS:cck

cc: Senator Binkley  
Alaska State Legislature

Don Collinsworth, Commissioner  
Steve Pennoyer  
Norman Cohen  
Roland Shanks  
ADFG

The Honorable Lyman Hoffman  
Alaska State Legislature

February 10, 1987  
Page 3

Ed Hine  
LAA/Legal Services Office

Liza McCracken  
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B.J. Jordan  
DOL

HB63 file  
SB53 file



# Alaska Department of Fish & Game

## NEWS

January 9, 1987

For Further Information Contact:  
Robert Clasby at 465-4210

### Herring Superexclusive Use Areas

JUNEAU - Commercial herring fishermen are advised that while the superexclusive use area regulations for the Goodnews Bay, Nelson Island, and Nunivak Island Districts have expired, those for the Cape Romanzof and Norton Sound Districts are still in effect and enforceable. Persons discovered in violation of those regulations will be cited. The Board of Fisheries may address the issue of Bering Sea herring superexclusive use areas before the 1987 season. A legal challenge of the regulations is currently under review by the Alaska Court of Appeals. It is hoped that review will be completed and a decision issued by the court before the 1987 season starts. Another announcement will be made just before the start of the season to advise fishermen if there are any changes in the status of these regulations.

# STATE OF ALASKA

STEVE COWPER, GOVERNOR

## DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 3-2000  
JUNEAU, ALASKA 99802-2000  
PHONE: (907) 465-4100

March 17, 1987

The Honorable Lyman Hoffman  
Alaska State Legislature  
P. O. Box V  
Juneau, AK 99811

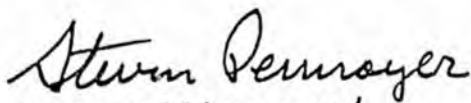
Dear Representative Hoffman:

Thank you for your memo on HB 63. I found the information very useful. We will be considering the bill in the Fisheries Cabinet as you have requested.

I believe that you have helped to resolve one of the greatest concerns about the bill. It is an important distinction that you make about the intent of the legislation. It could be very useful to have the board's authority clarified and confirmed.

Once again, thank you for the memo. We will keep in contact with your office as this issue proceeds.

Sincerely,

  
Don W. Collinsworth  
Commissioner

Memorandum -----

DATE: March 11, 1987

FROM: Representative Lyman Hoffman

TO: Don Collingsworth, Commissioner of the Department of Fish and Game

SUBJECT: House Bill 63

In discussing House Bill 63 with various members of the Department and Administration, it has become apparent that the Bill is seen by some as an allocative issue. In hopes of getting Departmental and Administrative support, I would like to clarify the issue. I would appreciate your discussing this with your fisheries mini cabinet, thank you.

The issue of HB 63, while attempting to resolve an allocative problem in the herring fisheries, is not intrinsically an allocative issue. At issue is the Board of Fisheries' authority to premise allocative decisions on factors other than strictly conservation and development considerations.

It has been generally assumed that the Board has this authority. As pointed out by a letter from Sarah McCracken (of the attorney general's office) to Representative Lyman Hoffman, the Board has frequently assumed this authority in past decisions. As evidenced by the appeal of the Nome court decision, the State believes that the Board of Fish does indeed have allocative authority in realms other than conservation and development.

The Governor's position on this issue is clear. Harold Sparck requested that the Governor introduce legislation to limit participation in the western Herring fisheries. In responding to the request, the Governor replied, "The continuation of effort limitation in the eastern Bering Sea herring fisheries is primarily an issue of allocation of the resource between Alaskan residents, with some conservation benefits to management. These are matters that have normally been handled

by the Board of Fisheries, I think they have done an excellent job in that regard, and I will do my part to see that continue. I do not believe that it would be in the best interest of all concerned for the Legislature to become involved in the fisheries allocation business."

Obviously the Administration supports the Board process. The authority, and in fact the responsibility to allocate must lie somewhere. The Governor claims it should not repose in the legislature. We agree. House Bill 63 serves to clarify that the authority and responsibility for allocation lies with the Board of Fisheries.

If the State is unsuccessful in the Appeal of the Hebert case, the burden of fish allocation will be in a limbo status. The Board will not be able to allocate, and the Administration and Legislature will be deferring that responsibility based on the premise that it is the Boards prerogative. H.B. 63 is intended to prevent this dead-lock both while the appeal is being decided, and on the chance that the appeal is unsuccessful.

In summary, HB 63 takes no position on any specific allocative issue. The Bill's only intent is to clarify and confirm the Board's authority. The State has tacitly espoused the philosophy of HB 63 through its position in "State vs. Hebert," in the appeal to "State vs. Hebert," and in the Governor's comments to Harold Sparck. The sponsors of HB 63, would appreciate the State's support in passing this bill

STEVE COWPER  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

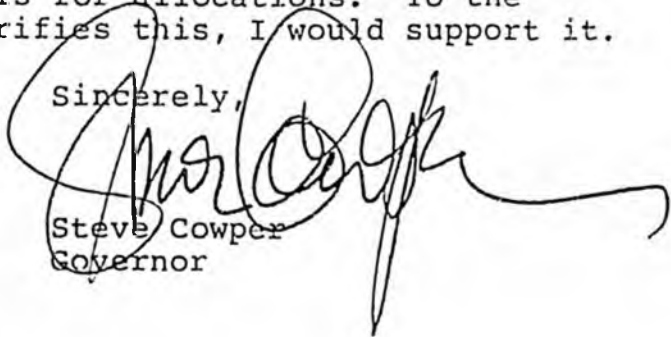
May 11, 1987

The Honorable Lyman Hoffman  
Alaska State House  
of Representatives  
P. O. Box V  
Juneau, AK 99811

Dear Lyman,

Thank you for giving me an opportunity to express my views on House Bill 63. I have read your correspondence with Commissioner Collinsworth and followed the bill's progress. You are correct in interpreting my remarks concerning my administration's support for the board's role in allocating fish resources. I further believe that the board and the public need to know the basis for allocations. To the extent that legislation clarifies this, I would support it.

Sincerely,

  
Steve Cowper  
Governor

Definitions of Superexclusive, Exclusive and Nonexclusive areas. Under these definitions, the Board of Fisheries may apply the restrictions to permit holders, crew members and vessels, as they deem appropriate.

#### SUPEREXCLUSIVE AREAS

A permit holder and/or vessel that fishes in a superexclusive area may not fish for that species in any other registration area of the state, superexclusive or otherwise, during the same year.

#### EXCLUSIVE AREAS

A permit holder who fishes in an exclusive area may not fish for the same species in any superexclusive or any other exclusive area during the same year. A person may fish in an exclusive area and any and all nonexclusive areas during the same year.

#### NONEXCLUSIVE AREAS

A permit holder and/or vessel may fish in any and all nonexclusive areas during the same year. A person fishing one or more nonexclusive areas may fish one exclusive area. A person fishing one or more nonexclusive areas may not fish in a superexclusive area.

#### "USE" AND "REGISTRATION" AREAS

The above definitions may be used with either the term 'use' or 'registration - exclusive use area, or exclusive registration area. "Registration" implies that the vessel or fishermen must actually register with the Department for the specific area in which the fishing will take place. "Use" implies that registration is not required, but that the fishing must still conform to the restrictions of the area's designation.

## LEGISLATIVE INTENT

The Legislature believes that the Board of Fisheries presently has the authority to establish regulations such as the superexclusive use area and vessel restrictions established in certain Bering Sea herring fisheries. The Legislature intends that this legislation clarify and confirm the Board's authority in making the type of allocative decisions exhibited by the Bering Sea herring regulations, and that through this legislation, the Legislature seeks to resolve any doubts raised by the Hebert case as to whether the Board of Fisheries had the authority to establish superexclusive use areas.

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1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 63 ( )

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

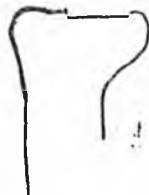
5 A BILL

6 For an Act entitled: "An Act authorizing the Board of Fisheries to adopt  
7 regulations establishing certain types of registra-  
8 tion and use areas."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 16.05.251(a) is amended by adding a new paragraph to  
11 read:

12 (14) establishing nonexclusive, exclusive, and superexclu-  
13 sive registration and use areas for conservation purposes or to imple-  
14 ment allocation decisions made in accordance with criteria established  
15 under (e) of this section.



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CS FOR HOUSE BILL NO. 63

IN THE LEGISLATURE OF THE STATE OF ALASKAS

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act authorizing the Board of Fisheries to adopt regulations establishing certain types of registration and use areas for regulating commercial fishing."

\* Section 1. AS 16.05.251(a) is amended by adding a new paragraph to read:

(14) establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing.

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 63 ( )

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act authorizing the Board of Fisheries to adopt  
7 regulations establishing certain types of registra-  
8 tion and use areas."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 16.05.251(a) is amended by adding a new paragraph to  
11 read:

12 (14) establishing nonexclusive, exclusive, and superexclu-  
13 sive registration and use areas for conservation purposes or to imple-  
14 ment allocation decisions made in accordance with criteria established  
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1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 63 ( )  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act authorizing the Board of Fisheries to adopt  
7 regulations establishing certain types of registra-  
8 tion and use areas *for regulating commercial fisheries*

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 16.05.251(a) is amended by adding a new paragraph to  
11 read:

12 (14) establishing nonexclusive, exclusive, and superexclu-  
13 sive registration and use areas for/conservation purposes or to imple-  
14 ment allocation decisions made in accordance with criteria established  
15 under (e) of this section. */regulating commercial fishing.*

Original sponsor: Hoffman

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 63 ( )

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the allocation of fishery re-  
7 sources by the Board of Fisheries."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 16.05.251(e) is amended to read:

10 (e) For the purposes of the conservation and development of the  
11 fishery resources of the state, and for the purposes of enhancing and  
12 protecting the ability of the people to take and use the fishery  
13 resources of the state, the [THE] Board of Fisheries shall establish  
14 criteria for the allocation of fishery resources among personal use,  
15 sport, and commercial fishing and for the allocation of fishery re-  
16 sources among groups of commercial fishermen within a fishery. The  
17 criteria may, as appropriate to particular allocation decisions,  
18 include factors such as

19 (1) the history of each personal use, sport, and commercial  
20 fishery;

21 (2) the number of residents and nonresidents who have  
22 participated in each fishery in the past and the number of residents  
23 and nonresidents who can reasonably be expected to participate in the  
24 future;

25 (3) the importance of each fishery for providing residents  
26 the opportunity to obtain fish for personal and family consumption;

27 (4) the availability of alternative fisheries resources;

28 (5) the importance of each fishery to the economy of the  
29 state;

1 (6) the importance of each fishery to the economy of the  
2 region and local area in which the fishery is located;

3 (7) the importance of each fishery in providing recrea-  
4 tional opportunities for residents and nonresidents.  
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IN THE DISTRICT COURT FOR THE STATE OF ALASKA  
SECOND JUDICIAL DISTRICT AT NOME

STATE OF ALASKA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JAY HEBERT, )  
 )  
 Defendant. )

RECEIVED  
Department of Law

AUG 23 1985

AM 7:8,9,10,11,12,1,2,3,4,5,6 PM

Case No. ZNO-586-069CR

MEMORANDUM ORDER REGARDING DEFENDANT'S  
MOTION TO DISMISS

Defendant is charged with three (3) counts of fishing for herring in violation of 5 AAC 27.927(a) & (b), all counts being misdemeanors. That regulation provides in pertinent part that any person who fishes for herring as a Commercial Fisheries Entry Commission ["Entry Commission" or "CFEC"] permit holder in a superexclusive use area at any time from February 1 through June 30 may not have participated during the same season as permit holder (or crew member) in the herring fishery in a non-exclusive use area. Defendant has moved for dismissal of the charges, arguing that enactment of the regulation is beyond the authority of the Board of Fisheries ["Board"]. The State has opposed the Motion. Defendant also has requested award of attorney fees and costs.

1. Factual Allegations

It is alleged that defendant participated as a permit holder in the Norton Sound district, a superexclusive use area, making three deliveries of herring on June 17th through 18th, 1985. It is further alleged that defendant had already participated as a permit holder in non-exclusive area - making eight deliveries of herring in Security Cove and Bristol Bay in May of 1985.

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AUG 18 1985

DISTRICT ATTORNEY  
NOME, ALASKA

## 2. Regulatory History

The Board of Fisheries was created as a separate State executive branch entity "for purposes of the conservation and development of the fishery resources of the state." A.S. 16.05.221 (1975). The Board is empowered to adopt regulations to carry out those general purposes, in accordance with the Administrative Procedure Act (A.S. 44.62), for the specific purposes set out in A.S. 16.05.251. Changes in A.S. 16.05.251 or regulations issued thereunder after June of 1985 are not (and cannot be) in issue in the instant case, except to the limited extent such changes might assist in interpretation of laws or regulations in effect during the 1985 hearing season.

Effective 1983, the Board first designated the Norton Sound district an "exclusive use" herring fishery, under the predecessor regulation 5 AAC 27.985 (repealed January 1, 1985 but virtually identical to the present 5 AAC 27.987).

Following reports and testimony regarding the purposes and effects of 5 AAC 27.985, the Board adopted 5 AAC 27.987 (the regulation which is the subject of the present Motion) at its November, 1984 meeting; the new regulation was substantively identical to the prior 5 AAC 27.985 except for the new subsection citation and a change in terminology from "exclusive use area" to "superexclusive use area". Among other subjects at the November meeting, the Board in executive session discussed a pending case [State v. Hebert, ZUT-883-032CR] which challenged the existing exclusive use regulation on, *inter alia*, the same grounds as the present Motion.

On February 2nd, 1985, written Findings were entered by the Board chairman to support the earlier November, 1984, Board decision. Defendant's Exhibit G./1: Of the six findings, five

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1. There is dispute as to whether the purported "Findings" were in fact considered and adopted by the Board. Compare, e.g., Defendant's Memorandum in Support of Motion at page 5 and State's Opposition to Motion to Dismiss at page 9. For purposes of this Motion, the findings are attributed to the Board.

... to the need for exclusive use regulations in order to give less efficient local fishermen a competitive advantage in the area and thereby benefit the local economy; the remaining findings, number six, refers to the need to reduce superexclusive use area participants' effort and efficiency and the need to maintain a "cautious, conservative regulatory environment."

Finding number six bases the need for reduced participant effort and efficiency on the comparatively recent development of the local herring fishery, which in turn results in a "level of knowledge of the status of the herring resource [which] is less than of stocks elsewhere in Alaska ... A slower paced fishery on stocks of unknown magnitude, distribution, and resiliency is appropriate." The need for a cautious, conservative regulatory environment is based on the "significant degree of subsistence utilization of the herring resource in the A-Y-K region, compared to other regions of the state." /2. Findings, page 2 [Exhibit G].

These findings are presumably based upon the extensive 1982 and 1984 Board meetings and the testimony and reports therein submitted. See Defendant Exhibits D, E and F; State Exhibits 3, 4 and 7.

### 3. Analysis

As the Alaska Supreme Court recently noted:

Regulations promulgated by an executive department must be authorized by statute. A.S. 44.62.020. Furthermore, a regulation must be consistent with and reasonably necessary to carry out the purposes of the authorizing statute. A.S. 44.62.030. A regulation is consistent with a statute if it has a reasonable relation to statutory objectives. Beech v. Sabre Jet Race, 349 P.2d 585, 587-588 (Alaska 1960). A regulation is presumptively valid, therefore the burden of proving invalidity is on the party challenging the regulation. Union Oil Co. v. State (Natural Resources), 574 P.2d 1266, 1271 (Alaska 1978).

2. "A-Y-K" is a commonly used abbreviation for the Arctic/Yukon/Kuskokwim fisheries.

State v. Alaska Pipeline Service Co., Opinion No. 3092 at 8  
(Alaska Aug. 1, 1986) (footnotes omitted).

Regulations adopted by state administrative agencies are examined for compliance with the Alaska Administrative Procedure Act.<sup>3</sup> In reviewing the challenged regulations herein, the court must determine whether the regulation is consistent with and reasonably necessary to effect the purposes of the Board's statutory authority, and whether the regulation is reasonable and not arbitrary. Kelly v. Zamarelli, 485 P.2d 906, 907 (Alaska 1971).

The Fisheries Board was created "for purposes of the conservation and development of the fishery resources of the state." A.S. 16.05.221(a). The Board was authorized to promulgate regulations (as of the 1985 season) to effect its conservation and development purposes by several specified means, of which the pertinent mechanisms were: (1) creation of fish sanctuaries; (2) establishment of open and closed fishing seasons and areas; (3) setting of quotas, bag limits, harvest levels and sex and size limits on fish; (4) establishment of means and methods for pursuit, capture and transport of fish; and (5) establishment of requirements for marking and identifying such means. A.S. 16.05.251(a)(1)-(5) (as amended 1984). The Board also could adopt regulations permitting subsistence use of fish, with priority to such use and restricting subsistence use compared to the other consumptive uses. A.S. 16.05.251(b).

In Kenai Peninsula Fishermen's Comm. Assn. v. State, 629 P.2d 897 (Alaska 1981), the Alaska Supreme Court examined the statutory rulemaking authority of the Board of Fisheries. "If ... the method of regulation affects the utilization of fishery resources by various user groups, it will still be within

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3. A.S. 44.62, the Alaska A.P.A., is expressly applicable to the Board of Fisheries. A.S. 16.05.251(a).

the Board's powers as set forth in the regulations. 628 P.2d at 903

(emphasis added). The court went on to provide definition of the key terms 628 P.2d at 903:

The terms "conserving" and "developing" both embody concepts of utilization of resources. "Conserving" implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. "Developing" connotes management of a resource to make it available for use."

While the Board has great discretion in rulemaking, the scope of its authority and permissible action "is not wholly without limitation. The Board must act under its specifically delegated regulatory powers, and actions taken must be premised on the need to effectuate conservation and development purposes."

*Id.* The issues, then, become simply (1) whether the superexclusive use regulation is within the specifically delegated powers of the Board, and if it is, (2) whether it addresses a need for conservation and/or development of the fishery resources.

Review of the extensive memoranda and exhibits is most instructive. The superexclusive use regulation was enacted to provide economic opportunity to local communities in the superexclusive use areas by ensuring their continued participation in the herring fishery; it was expressly intended to directly assist and advantage that one portion of the population, and not commercial fishing as a whole. See State Opposition to Motion to Dismiss at 2-4, 9-10; February Findings, Defendant Exhibit G, paragraphs 1-5; Transcript of Testimony (November, 1964), Defendant Exhibit D, pp. 6-9, 13-14. See also, Transcript of Testimony (December, 1962), State Exhibit 3, pp. 30A16-19, 31A5, 31A9-12, 31A15-16.

A possible secondary purpose, urged by the State, was the "slowing down" of fishery effort in order to make the superexclusive use area fishery more manageable. State

Defendant's Exhibit G, paragraph 6. The State affirmatively admits that super-exclusive use regulation has effectively favored local residents, both in numbers of fishery participants and in the catch allocation between local fishermen and non-local fishermen. State Opposition at 4-B.

Defendant takes the position that the "manageability" argument contained in Finding number six (Defendant Exhibit G) represents a "very poor attempt" to demonstrate a proper conservation or development purpose behind the superexclusive use regulation. Defendant's Memorandum in Support at 6-7. In addition to his position that "Finding" number six was not a proper finding -- never having been considered or approved by the Board (see footnote 1, supra), defendant asserts that there was no evidence presented to the Board to justify such a finding.

Id.

Finding number six, the "manageability" justification, which attempts to provide a conservation or development purpose for superexclusive use [Defendant Exhibit G], states:

Since the A-Y-K herring fisheries are so recently developed compared to other Alaska herring sea ice fisheries, the level of knowledge of the status of the herring resource is less than of stocks elsewhere in Alaska. Regulations which reduce the amount of effort and the efficiency of the participants or which reduce the rate at which effort grows and efficiency increases are therefore necessary. A slower paced fishery on stocks of unknown magnitude, distribution, and resiliency is appropriate. Further, the significant degree of subsistence utilization of the herring resource in the A-Y-K region, compared to other regions of the state, supports the Board's desire for a cautious, conservative regulatory environment.

Regulations must be tested "based on the total information before the Board at the time each was adopted." Kenai, 628 P.2d at 907. Although the evidence before the Board in November of 1984 (as well as in December of 1992) is filled with testimony and reports regarding the need for and desire to

assist local fishermen in super-exclusive use areas in competing against more efficient non-local fishermen, evidence supporting Finding number six is singularly lacking. That finding states that A-Y-K herring fisheries are "so recently developed" compared to other herring fisheries that the "level of knowledge of the status of the herring resource" is less. An extensive review of the testimony and reports to the Board provides no basis for either contention.

The report on "Pacific Herring Stocks and Fisheries in the Bering Sea, Alaska, 1984" ["Report"], was prepared by the Bering Sea Herring Program, Alaska Department of Fish and Game - Division of Commercial Fisheries, for the November, 1984 Board meeting [Defendant Exhibit E]. Taking into account the effects of extreme weather in Norton Sound during the 1984 season [State Opposition at 6], the DFCE Report indicates that the Norton Sound herring fishery was in operation between 1929 and 1946, although no harvest data was available the 1946-1928 reporting period; yet non-exclusive fisheries such as Bristol Bay and Security Cove did not begin until 1967 and 1978, respectively. Report (Table 1) at 12. Further, as to a lesser "level of knowledge", Table 6 of the Report shows the Relative Abundance Index and Estimated Biomass of Pacific herring for the years 1978 - 1984. That table is liberally sprinkled with footnotes indicating lack of data for various reasons in the different districts over the years; Norton Sound has no warnings for any of the years -- while the non-exclusive use area of Security Cove has warnings of insufficient data for the same period. Defendant Exhibit E at 17.

Because of the "lack of knowledge", Finding number six calls for regulation to reduce participants' effort and efficiency, and thereby produce "a slower paced fishery on stocks of unknown magnitude, distribution, and resiliency". It is not coincidental that, having decided to advantage the less efficient local fishermen in order to benefit them economically, the Board

"found" that a less efficient fishery is needed.

There was also no evidence before the Board as to whether to rationalize super-exclusive use as a method of allocating the catch of the fishery; rather, in originally passing exclusive use, the Board heard testimony that previous exclusive use attempts had had reduced gear levels, but might even result in increased numbers of participants and pressure. State Exhibit 7, Transcript of December 1952 Board Meeting, at 30A-6 ff., 30A-17, 31A-19. In fact the Board had reports that in Norton Sound, between the last year of nonexclusive use (1982) and 1984, numbers of permit holders fishing did not change and the catch increased -- except for 1984 when sea ice conditions prevented some local fishermen from participating. See Management Recommendations Re: Sea Herring Data Request, dated October 30, 1984, Defendant Exhibit F at 6; Sea Herring Stocks & Fisheries Report, Defendant Exhibit E at 9.

If there is a development or conservation purpose to superexclusive use regulation in Norton Sound, it is clearly not based upon the need for a more manageable fishery. Rather it must grow out of the desire to assist the local economy by protecting against more efficient competition.

Certainly it is a legitimate and highly desirable goal for the State to seek to improve and maintain local economic health. The question, however, is whether authority to enact regulations to protect the local economy has been given the Board of Fisheries by the legislature -- whether there is authority for this type or method of regulation under A.S. 16.05.251 and whether 5 AAC 27.957 is based on the need to conserve or develop herring resources, as required by A.S. 16.05.221(a).

In response to defendant's assertion that superexclusive use regulation is an unauthorized attempt to allocate herring resources between local and non-local fishermen without any conservation or development purpose, the State takes the position

"found" that a less efficient fishery is needed.

There was also no evidence before the Board on which to rationalize super-exclusive use as a method of solving the issue of the fishery; rather, in originally passing exclusive use, the Board heard testimony that previous exclusive use efforts had not reduced gear levels, but might even result in increased numbers of participants and pressure. State Exhibit 3, Transcripts of December 1992 Board Meetings, at 30A-6 ff., 30A-17, 31A-19. In fact the Board had reports that in Norton Sound, between the last year of nonexclusive use (1982) and 1984, numbers of permit holders fishing did not change and the catch increased -- except for 1984 when sea ice conditions prevented some local fishermen from participating. See Marine Resources Service Sea Service Date Request, dated October 30, 1984, Defendant Exhibit F at 6; Pauline Herrina Stocks & Fisheries Report, Defendant Exhibit 2 at 9.

If there is a development or conservation purpose to super-exclusive use regulation in Norton Sound, it is clearly not based upon the need for a more manageable fishery. Rather it must grow out of the desire to assist the local economy by protecting against more efficient competition.

Certainly it is a legitimate and highly desirable goal for the State to seek to improve and maintain local economic health. The question, however, is whether authority to enact regulations to protect the local economy has been given the Board of Fisheries by the legislature -- whether there is authority for this type or method of regulation under A.S. 16.05.251 and whether 5 AAC 27.997 is based on the need to conserve or develop herring resources, as required by A.S. 16.05.221(a).

In response to defendant's assertion that super-exclusive use regulation is an unauthorized attempt to allocate herring resources between local and non-local fishermen without any conservation or development purpose, the State takes the position

that superexclusive use is an authorized allocation of herring resources in favor of local economic needs, which allocation serves a valid fishery resource development purpose. The State does not dispute either the intent or effect of the allocation of herring resources; the real dispute is in regard to Board authority to allocate the resource to one section of the user group rather than among user groups or gear types.

The State bases its authority for allocation, via superexclusive use, in two sources: the Kasai Peninsula case (523 P.2d 897) and the 1985 amendment adding A.S. 16.05.25(a) to the Board's rulemaking authority. The latter argument is easily disposed of, and is addressed first.

Subsection (a), effective June 1, 1986, provides in pertinent part:

The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, ~~subsistence~~, ~~commercial~~, ~~fisheries~~. The criteria, may, as appropriate to particular allocation decisions, include factors such as

(1) the history of each personal use, sports, and commercial fishery;

(2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future; ...

(4) the availability of alternative fisheries resources; ...

(6) the importance of each fishery to the economy of the region and local area in which the fishery is located; ...

A.S. 16.05.25(a) (as amended 1985) (emphasis added; paragraphs 3, 5 and 7 omitted).

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4. Clearly this 1985 amendment added no authority for the Board to promulgate regulations in 1984, but may assist in clarifying the scope of the Board's rulemaking authority prior to its enactment. See State Opposition at 16.

The State's reliance on this provision as authority for allocating herring resources between local and non-local commercial fishermen is misplaced. This provision is a mere "clarification" of prior authority -- refers to a "classification" of user groups, not within user groups on the basis of local residency. Thus, as of June 1, 1986, the Board might choose to allocate none of a particular fishery catch to commercial (versus sport/personal use) fishing due to the dependency of local economies on commercial fishing.

The Board is authorized to regulate fishing to make the fishery "available for use". Kanai, 628 P.2d at 903. Thus, the Board may make decisions regarding utilization of the fishery by various user groups. Id. In Kanai, the court upheld the authority of the Board, in the face of statutory and constitutional challenge<sup>5</sup>, to treat differentially commercial, sports, and subsistence fishermen as distinct user groups. 628 P.2d at 904. Nothing in Kanai supports the State's position that the Board may allocate fishery resources among members of the same user group.

A careful examination of the various specific regulatory powers of the Board similarly reveals no authority to allocate resources within a user group to purposefully advantage certain fishermen solely on the basis of local residency or local economic need. See A.S. 16.05.251. The Board must act under its specifically delegated regulatory powers, for the purpose of conserving or developing the fishery resource. Kanai, 628 P.2d at 903.

#### 4. Conclusion

The legislature delegated to the Board of Fisheries the power to regulate fisheries for the purpose of fishery resource

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5. See article VIII, section 15, Alaska Constitution, discussed in Kanai, 628 P.2d at 903-904.

conservation and development. The scope of such authority is not unlimited, and is set out in A.S. 16.05.021(a) and 021. 5 AAC 27.997, designating Norton Sound a superexclusive sea bearing fishery, is not within the scope of the statutory authority of the Board. The purpose and effect of superexclusive use in the regulation at issue is local economic development and protection for local fishermen, neither of which relates to the purposes for which the Board was created or authorized to act.

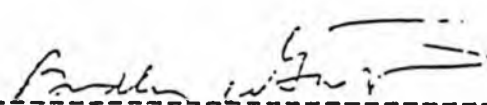
5. Order.

For the reasons set forth above, the court having carefully considered the applicable law and the record and arguments herein,

IT IS HEREBY ORDERED that Counts I, II and III in the above-referenced case are DISMISSED.

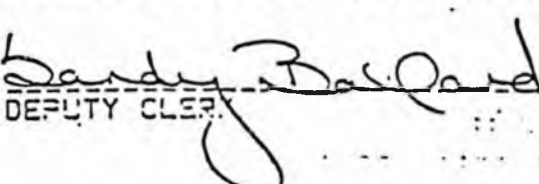
IT IS FURTHER ORDERED that defendant's request for costs and attorney fees, such request lacking any known or argued basis in law, is hereby DENIED.

DATED at Nome, Alaska this 18<sup>th</sup> day of August, 1986.

  
BRADLEY N. EASTER  
ACTING DISTRICT COURT JUDGE

I CERTIFY that a true copy of the foregoing order was delivered/mailed, postage prepaid, on the 18<sup>th</sup> day of August, 1986 to:

John Vasek, District Attorney, Nome  
Richard Burnham, Esq., Juneau

  
SANDY BARFORD  
DEPUTY CLERK