

SCOMM

10:45

May 14, 1979

The Honorable Jay S. Hammond
Governor
State of Alaska
Pouch A
Juneau, Alaska 99811

Re: FCCSNB 359 (relating to
salmon enhancement)
Our file: J-88-054-79

Dear Governor Hammond:

At your request, we have reviewed FCCSNB 359 which makes certain amendments to the existing statutory scheme for private regional aquaculture as a means of rehabilitating and enhancing Alaska's salmon fisheries, AS 16.10.375 - 16.10.620. In addition, the bill sets out several legislative findings of fact related to the private aquaculture program and its financing scheme as well as a generalized statement of the purpose of the program.

The legislative findings include: salmon enhancement results in a general benefit to the state and a greater direct benefit to commercial, subsistence and sport fisheries; the benefit to the commercial fisheries results in enhanced economic benefits to commercial fishermen; a regional approach to salmon enhancement is most desirable; fisheries commerce overlaps local government boundaries, and it is impracticable for local governments to be the vehicle for efficient salmon enhancement; and the most equitable and non-discriminatory method to provide revenues for regional salmon enhancement is to levy assessments against commercial fishermen in the region.

The bill provides that a qualified regional aquaculture association, upon becoming a non-profit corporation, is established as a service area in the unorganized borough for the purpose of providing salmon enhancement services in the area. The creation of such service areas is authorized by art. X, § 6 of the Alaska Constitution and AS 29.03.020.

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The bill provides that the assessments levied against commercial fishermen to finance the activities of regional aquaculture associations henceforth would be "royalty assessments" instead of mere "assessments." Standing alone, this change conceivably could create a problem regarding the constitutional prohibition on dedicated funds. Ak. Const., art IX, §7; See May 2, 1975 Attorney General's Opinion re: Dedication of Revenues Derived From the Lease or Sale of State Natural Resources. However, the particular label given by the legislature to a monetary exaction is not determinative; rather, the court will look to the real nature of the obligation imposed. Northwestern Mutual Life Insurance Company v. State Board of Equalization, 166 P.2d 917 (Cal. 1946); Smith v. Carbon County, 63 P.2d 259 (Utah 1936). For this reason, we believe that this change presents no problem.

The bill also provides that a precondition to imposition of an assessment is that the Commissioner of Commerce and Economic Development enter into any necessary agreements with local governments. Such agreements are authorized in Article X, § 13 of the Ak. Const., and arguably are a constitutional precondition to the legislature establishing a service area which includes land within the boundaries of an organized borough. This change statutorily imposes such a requirement, thereby obviating any constitutional challenge to the overall program which might have been mounted on this ground.

The bill provides that an assessment levied may be equal to either 2 or 3 per cent of the fair market value of the fish sold within a particular region, but may not exceed 3 per cent of such value. The existing scheme sets no values for the assessment, another possible ground for constitutional challenge of the overall scheme obviated by the bill.

The bill provides that an assessment may be terminated upon a majority vote of commercial fishermen in a given region either before any financial obligations relating to the assessment have been incurred or after all financial obligations relating to the assessment have been met. Existing law provides that an assessment may be terminated only at the request of a qualified regional association after all financial obligations relating to the assessment have been met; this latter provision would be retained under the bill.

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The bill provides that a limited entry permit holder qualified to vote on an assessment levied by a regional association may request the Commissioner of Commerce and Economic Development to reduce or terminate the assessment. The Commissioner may terminate or reduce the assessment if he finds it to be unreasonable or no longer needed by the regional association. It also authorizes commercial fishermen to petition for an election of all limited entry permit holders within the region on the issue of terminating the assessment if all financial obligations relating to the assessment have been met.

Finally, the bill makes a number of technical amendments to the existing private aquaculture statutory scheme.

The statutory scheme relating to private aquaculture, and particularly the method of financing it, is currently the subject of a lawsuit in the First Judicial District at Juneau. Alex et al. v. Southern Southeast Regional Aquaculture Association, et al., No. 1JU-78-191 Civil. The state is a named defendant in that action, and conceivably could be found liable for an amount exceeding one million dollars. The impact of this bill on that litigation is unclear at this time. However, it is our opinion that nothing contained in this bill will prejudice the state's position in that action. On the other hand, certain provisions of this bill -- the findings and statement of purpose; the recognition of qualified regional associations as service areas; the setting of the assessment rate at either 2 or 3 per cent of the fair market value of fish sold; the provisions for termination of the assessment upon request of limited entry permit holders -- actually may strengthen the state's position in the litigation.

Summarizing, the existing statutory scheme has been challenged on constitutional grounds. This bill does not address all of the constitutional challenges raised in that litigation. However, it does not create any additional constitutional difficulties and may, in fact, strengthen the state's position in that litigation. The Department of Law has no objection to it becoming law.

Sincerely,

Avrum M. Gross
Attorney General

AMG:dIm:GTK

Original sponsor: Gardiner

Offered: 5/1/79

1 IN THE HOUSE BY THE FREE CONFERENCE COMMITTEE
2 FREE CONFERENCE CS FOR HOUSE BILL NO. 359
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 ELEVENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to salmon enhancement."

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

8 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

9 (1) efficiently enhancing the salmon fisheries will result in a
10 substantial contribution to increased food production and is an appropriate
11 use of the resource;

12 (2) efficiently enhancing the common property salmon fisheries
13 will result in a general benefit to the state and in a greater direct benefit
14 to the commercial, subsistence, and sport fisheries;

15 (3) a direct economic benefit to the commercial fisheries results
16 from efficient salmon enhancement and includes enhanced economic return to
17 those persons commercially harvesting the resource;

18 (4) efficient salmon enhancement will result in increased economic
19 benefit to the coastal and interior regions of the state;

20 (5) regional user involvement in salmon enhancement planning and
21 production will promote maximum benefit to the users as well as maximum
22 resource protection;

23 (6) fisheries commerce in the coastal and interior regions of the
24 state overlap many local government boundaries, is not tied to local govern-
25 ment boundaries, and is primarily in the unorganized borough;

26 (7) it is impracticable for the framework of local government in
27 the state to be the vehicle for efficient aquaculture development;

28 (8) regional organizations comprised of user groups will effec-
29 tively promote aquaculture development in the state;

1 (9) the most equitable and nondiscriminatory method for providing
2 revenues for regional salmon enhancement is to authorize regional associa-
3 tions to assess percentage royalty shares against those persons commercially
4 harvesting the resource within the region.

5 (b) It is the purpose of AS 16.10.375 - 16.10.620 to provide for con-
6 tinuing efficient aquaculture development in the coastal and interior regions
7 of the state in a manner which equally affects and benefits all persons
8 similarly situated and to encourage the development of small, private, non-
9 profit hatcheries that may provide important benefits to the state through
10 increased employment, educational training, and research opportunities.

11 * Sec. 2. AS 16.10.380 is amended by adding a new subsection to read:

12 (c) A qualified regional association, when it becomes a nonprofit
13 corporation under AS 10.20, is established as a service area in the
14 unorganized borough under AS 29.03.020 for the purpose of providing
15 salmon enhancement services.

16 * Sec. 3. AS 16.10.440(b) is amended to read:

17 (b) The Board of Fisheries may, after the issuance of a permit by
18 the commissioner, amend by regulation adopted in accordance with the
19 Administrative Procedure Act (AS 44.62), the terms of the permit re-
20 lating to the source and number of salmon eggs, the harvest of fish by
21 hatchery operators, and the specific locations designated by the depart-
22 ment for harvest. The Board of Fisheries may not adopt any regulations
23 nor take any action regarding the issuance or denial of any permits
24 required in [PROMULGATE REGULATIONS NECESSARY TO IMPLEMENT] AS 16.10.-
25 400 - 16.10.470.

26 * Sec. 4. AS 16.10.470(b) is amended to read:

27 (b) A person who holds a permit for the operation of a salmon
28 hatchery under AS 16.10.400 - 16.10.470 and each regional association
29 levying a royalty assessment under AS 16.10.530 shall submit an annual

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1 financial report to the Department of Commerce and Economic Development
2 on a form to be provided by the Department of Commerce and Economic
3 Development.

4 * Sec. 5. AS 16.10.510(9) is amended to read:

5 (9) make grants for organizational and planning purposes to
6 qualified regional associations which have formed a nonprofit corpora-
7 tion, in amounts not exceeding \$100,000 per region and up to an addi-
8 tional \$100,000 on a 50/50 cash matching basis with the regional associ-
9 ations which have an authorized royalty assessment under AS 16.10.530 or
10 AS 16.10.540. The state portion of the matching share shall be avail-
11 able when a final vote for assessments is made under AS 16.10.530 or
12 AS 16.10.540. This provision also applies to qualified regional asso-
13 ciations which have formed a nonprofit corporation before June 24, 1977.

14 * Sec. 6. AS 16.10.520(b) is amended to read:

15 (b) Loans for the total project costs may be made if the commis-
16 sioner determines that the applicant has sufficient financial resources
17 to insure the establishment of an equity position in the project equal
18 to 10 per cent of the loan within six years or less, either through
19 a royalty [AN] assessment levied under AS 16.10.530 or AS 16.10.540 or
20 other means approved by the commissioner. For purposes of this subsec-
21 tion, "total project costs" includes planning and construction costs for
22 the facility and the cost of operations for not more than the first six
23 years. The costs for operations shall be loaned on an annual basis.

24 * Sec. 7. AS 16.10.520(c) is amended to read:

25 (c) All loans must be secured by collateral satisfactory to the
26 commissioner, including but not limited to a first deed of trust, assign-
27 ment of lease and leasehold improvements, sale of surplus fish from the
28 hatchery, or royalty assessments from fishermen levied under AS 16.10.-
29 530 - 16.10.540.

1 * Sec. 8. AS 16.10.530 is amended to read:

2 Sec. 16.10.530. ROYALTY ASSESSMENT ON SALE OF SALMON. (a) The
3 commissioner, on request of the qualified regional association for the
4 area in which the royalty assessment is to be levied, [AND] after consul-
5 tation with the commissioner of fish and game and after reaching any
6 necessary agreements with local governments, shall establish areas in
7 which a royalty [AN] assessment shall be levied on the sale of one or
8 more species of salmon caught by persons holding entry permits
9 [LICENSED] under AS 16.43.010 - 16.43.380 [AS 16.05.540 - 16.05.600], in
10 the area in which the royalty assessment is to be levied. A request by
11 the qualified regional association shall include a description of com-
12 pliance with (e) of this section. The commissioner shall determine
13 whether the procedural requirements under (e) of this section were
14 followed and whether the proposed assessment is reasonable. A royalty
15 [AN] assessment levied under this section shall be for the purpose of
16 providing revenue for the qualified regional association for the area in
17 which the royalty assessment is made. The rate and conditions of
18 royalty assessments, including species to be involved, shall be stated
19 by the appropriate qualified regional association in conjunction with
20 the request to the commissioner under this subsection. The royalty
21 assessment may be equal to either two or three per cent of the fair
22 market value of the fish but may not exceed three per cent of the fair
23 market value of the fish.

24 (b) (repealed)

25 (c) The commissioner and the appropriate qualified regional asso-
26 ciation must agree on a means of collection of the royalty assessment
27 and the commissioner may, by regulation, require its collection by
28 buyers of the salmon upon the sale of which a royalty [AN] assessment is
29 levied.

1 (d) The royalty assessment shall terminate

2 (1) upon request of the qualified regional corporation when
3 all financial obligations relating to the royalty assessments have been
4 met; or

5 (2) upon majority vote at an election held under (h) of this
6 section, in the area in which the royalty assessment is levied either
7 before any financial obligations relating to the royalty assessment
8 have been incurred or after all financial obligations relating to the
9 royalty assessment have been met.

10 (e) Before a royalty [AN] assessment is made under this section,
11 the qualified regional association for the area in which the royalty
12 assessment is to be levied shall hold an initial public meeting to
13 explain and discuss the necessity for the royalty assessment and to
14 explain the registration procedure established under (f) of this sec-
15 tion. Reasonable public notice of the meeting shall be sent to all
16 limited entry permit holders actively participating in a fishery in the
17 area, posted in at least three centrally located public places in the
18 area, and published in at least one newspaper of general circulation at
19 least one time a week for three consecutive weeks in the area, if one
20 exists. The notice shall briefly state the amount of the royalty assess-
21 ment and a short general description of the purposes for which the
22 royalty assessment money will be used. A ballot shall be mailed to all
23 limited entry permit holders actively participating in a fishery in the
24 area at least 20 days before the initial public meeting and contain a
25 copy of the notice and ask the question whether a royalty [AN] assess-
26 ment shall be imposed. At the public meeting the returned ballots shall
27 be counted by a special committee appointed by the regional association
28 for that purpose, and a vote by written ballot shall be taken on the
29 question from among the limited entry permit holders present at the

1 initial public meeting. After the vote is taken at the initial meeting
2 a second public meeting shall be held, upon the limited notice of publi-
3 cation in a newspaper of general circulation, each day for five consecu-
4 tive days and the mailing of personal notice to all limited entry permit
5 holders who actively participate in a fishery in the area at least
6 14 ys before the second public meeting, to give those who did not vote
7 by written ballot at the initial public meeting an opportunity to vote.
8 These votes shall be counted with the votes counted at the initial
9 meeting. A majority vote for the royalty assessment is required from
10 the combined total of the returned ballots and the votes by ballot cast
11 at both public meetings, before a royalty [AN] assessment may be im-
12 posed. No person may vote twice.

13 (f) The qualified regional association shall establish standard
14 registration procedures for voting on royalty assessments under this
15 section.

16 (g) A limited entry permit holder who would be qualified to vote
17 on a royalty assessment levied by a regional association may request the
18 commissioner to reduce or terminate a royalty assessment in the region.
19 The commissioner may terminate or reduce the royalty assessment if he
20 finds the royalty assessment to be unreasonable or to be no longer needed
21 by the regional association to meet the purposes of AS 16.10.372 - 16.-
22 10.620.

23 (h) Upon receipt of a petition requesting termination of the
24 royalty assessment and signed by not less than 10 per cent of the number
25 of persons qualified to vote under (e) of this section in the election
26 levying the royalty assessment in the area, the commissioner shall
27 determine if there are any outstanding financial obligations relating
28 to the royalty assessment. If the commissioner determines that there
29 are no outstanding financial obligations relating to the royalty assess-

1 ment, the commissioner shall notify the qualified regional association
2 for the area of his determination. The qualified regional association
3 shall, within two months after receiving notice of the commissioner's
4 determination, hold public meetings and, mail ballots in accordance
5 with (e) of this section. The ballots shall ask the question whether
6 the royalty assessment for the area shall be continued. Only a person
7 who is qualified to vote in accordance with (e) of this section may
8 receive and cast a ballot under this subsection.

9 * Sec. 9. AS 16.10.540(a) is amended to read:

10 (a) In place of or in addition to an assessment levied under
11 AS 16.10.530, an association of persons who hold entry permits [LI-
12 CENSED] under AS 16.43.010 - 16.43.380 [AS 16.05.540 - 16.05.600], which
13 consists of at least 51 per cent of the persons holding entry permits
14 [SO LICENSED] and actively participating in a fishery to be benefited by
15 a hatchery program, may levy and collect an assessment from among its
16 members for the purpose of securing and repaying a loan made under
17 AS 16.10.510.

18 * Sec. 10. AS 44.62.330(a) is amended by adding a new paragraph to read:

19 (46) Department of Commerce and Economic Development con-
20 cerning the Fisheries Enhancement Loan Program (AS 16.10.500 16.10.-
21 620).