

SCOMM

147:32



Alaska State Legislature

Representative Peggy Wilson

House District 2

Putting Alaska's Families First

SPONSOR STATEMENT

House Bill 188

"An Act relating to the authority of the Board of Fisheries to allocate within fisheries; and providing for an effective date."

This bill is a response to two recent decisions of the Alaska Supreme Court. The Court's interpretation is contrary to a longstanding acceptance and practice of the Board, and, if allowed to stand, will interfere with the fair and effective management and allocation of fishery resources. The Alaska Supreme Court interpreted AS 16.05.251(e) narrowly and ruled that the provision, which grants the Alaska Board of Fisheries authority to allocate "among" fisheries, does not include the power to allocate fisheries resources "within" an individual "fishery."

This legislation would add the words "and within" to the sentence describing the Board's authority; reaffirming the longstanding and time-honored authority of the Board to allocate fishery resources within a fishery. Authority to allocate within fisheries is bounded by the Board's statutory purposes, by a statutory requirement to consider allocation criteria, and by constitutional equal protection requirements. This authority has been used responsibly by the Board for decades.

The bill is needed both to preserve the Board's traditional management authority to adopt regulations necessary for the conservation and development of fisheries and to remove the cloud of doubt that the reasoning applied by the Alaska Supreme Court casts over existing regulations. This bill would ensure that existing regulations including long-standing allocations between fishing districts within the Bristol Bay administrative area, restrictions on transfers between districts within administrative areas, and equal share allocations allowing fisheries that are otherwise unmanageable to proceed and will not be subject to challenge under the same reasoning applied by the Alaska Supreme Court in *Grunert v. State*, 109 P.3d 924 (Alaska 2005) and *State of Alaska v. Grunert*, 139 P.3d 1226 (Alaska 2006). Although it is unclear whether the court's decisions would result in the invalidation of existing regulations, a number of regulations could be overturned if the court's reasoning is carried to its logical conclusion.

March 12, 2007

25-LS0709\A

SPONSOR STATEMENT
House Bill 188

By simply adding the two words "and within" to the statute, it **does not** and **would not** authorize the Board of Fisheries to create a co-operative fishery and should not be construed as doing so. The court in the two *Grunert* cases clearly stated that a cooperative fishery is "fundamentally at odds with the Limited Entry Act" and that such a "radical departure from the historical model" would require legislative authorization. Thus, this bill, which simply clarifies the legislature's historical intent to give the Board authority to allocate among **and within** the state's fisheries, will not authorize the creation of co-operative fisheries.

Because of the court's unique interpretation of state law, both existing regulations and the Board's ability to require traditional management measures are currently in doubt, creating great uncertainty in Alaska's fisheries. Reaffirming the Board's authority will resolve this uncertainty, preserving existing regulations and traditional management tools.

From: Alitakrat@aol.com [mailto:Alitakrat@aol.com]
Sent: Tuesday, March 20, 2007 9:29 AM
To: Suzanne Hancock; Sonya Hymer
Subject: Re: on the move

Hi Suzanne

I am very relieved that things have progressed so well. I will be leaving back to Alitak next week and will be very busy with my work there. I should have some access to email and you can leave messages at 371 2001 if there is anything else I can do.

I sent a strong worded opinion to Sonya Hymer regarding HB 188. I know there will be people from Kodiak that support this bill. My educated guess is that the Olga Bay Seafood Producers Alliance will see it as the only way to further their co-op fishery agenda. This is the cycle year for Kodiak proposals to the BOF. I expect to see a proposal for allocation within a fishery from that group. HB 188 would pave the way.

The Alitak set net fishery has been very very contentious over the years. We have had bitter conflicts and beach brawls over line changes, rock sets, shore leads, area boundaries, site surveys, escapement and management issues, allocations and co-ops.

We now have regulations that the vast majority of sieners and setnetters are satisfied with and we have enjoyed stable management for several seasons. In Kodiak HB 188 will serve a very few set netters with the destabilization of the entire fishery.

I am aware that some regulation that are already implemented may need adjustments if HB 188 is not passed. I say don't correct a wrong with another wrong.

A few years back I am on record with the BOF as being in support of a per-capita allocation plan. Oddly enough the folks from up the bay were adamantly opposed to such an idea. My change of opinion is a result of education, observation, and adaption. Today I see RSDA's as the new hope for a stable industry.

Fishing has never been fair. Some folks have luck, some don't, some have connections or better work ethics and some are born with an edge. It's what makes us who we are. HB 188 is not for real fishermen.

Please be very careful when considering HB 188

Thanks

Rick Metzger

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March 19, 2007

Cook Inlet Fisherman's Fund
P.O. Box 39408
Ninilchik, Alaska 99639

Rep. Paul Seaton
State Capital Room 102
Juneau, Alaska 99801-1182

Dear Rep. Paul Seaton;

We of the Cook Inlet Fisherman's Fund are totally against House Bill #188. The Alaska Supreme Court Ruling should stand that the Alaska Board of Fisheries may not allocate within a fishery.

We urge you to do all you can to kill this bill!!

Thank you,


Douglas Blossom
Pres. CIFF

Louie Flora

From: Rep. Paul Seaton
Sent: Thursday, March 22, 2007 11:02 AM
To: louie.flora@legis.state.ak.us
Subject: FW: HB 188

From: Ron & Julie Kavanaugh [mailto:sylstar@ak.net]
Sent: Wednesday, March 21, 2007 5:00 PM
To: Sonya Hymer; Sen. Gary Stevens
Cc: Rep. Peggy Wilson; Rep. Paul Seaton; Rep. Kyle Johansen; Rep. Craig Johnson; Rep. Bryce Edgmon; Rep. Lindsey Holmes
Subject: HB 188

Sonya,

Ron and I are truly concerned about HB188. We understand the intent of the bill is to protect regulations regarding fisheries currently operating under an allocation within a fishery. Although we sympathize with this dilemma, it circumvents and ignores the basic issue, which is the constitutionality of such a regulation by the BOF or legislation authorizing a regulation that allocates specific resource rights to an individual.

The Board of Fish is requesting legislation to allow and justify prior actions. Their lack of concern for the legality of these prior actions during inception is distressing. The only argument to justify this bill is their improper actions. We would request that our representative(s) protect our State's constitution. In our opinion, only a constitutional amendment would allow the BOF to act allocatively within a fishery.

Ron & Julie Kavanaugh

FV Sylvia Star
Kodiak Alaska

486-5061

Chignik Lagoon Village Council
PO Box 09
Chignik Lagoon, AK 99565
(907) 840-2281
FAX 840-2217

Representative Bryce Edgmon
State Capitol, Rm 424
Juneau, AK 99801
907-465-4451
FAX 465-3445

Dear Representative Edgmon:

Chignik Lagoon is a community with a long history of commercial salmon fishing. Today our residents still rely on the resource for income as well as for subsistence. The Chignik Cooperative came into place in the season of 2002 for our fishery, a decision made by the Board of Fisheries, and created hardship upon the community. Those who did not join were mostly family fish operations and the spirit of making a living by working hard were trampled upon by an allocation that forced them to stay on the beach while the larger group went fishing for their allocation. It was indeed a strange and unhealthy environment.

In the spring of 2005, a decision was made by the Alaska Supreme Court in *Grunert v. State* that the Board of Fisheries may not allocate within a fishery. This threw the cooperative out of our fishery. The fishermen of our community were once again able to make a living without an allocation holding them back. Just the fishermen who were willing to work were making a paycheck and no longer were the outside investors collecting off of our fishery.

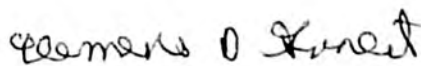
Recently a bill has been brought forth by Representative Peggy Wilson, this would be House Bill No. 188, asking that the Board of Fisheries be given back their authority to allocate fisheries among and within personal use, sport, guided sport, and commercial fisheries. We as a community **strongly** oppose this bill for the protection of our fishery and our community. This is not just a local issue but an issue that could adversely affect all fisheries and communities around the state. It is also a constitutional matter that cannot put aside. These type of decisions should not rest on such a small board but should be kept within the judicial system to make decisions that effect our fishery so drastically.

We are asking that all Representatives on the legislature to use extreme caution with this bill and support our tribe in trying to protect our community and fishery. Your support would be extremely appreciated by all of our local fishermen and residents of Chignik Lagoon.

Sincerely,

Chignik Lagoon Village Council

Clemens D Grunert, President



David Anderson, Vice President

John Jones, Member

Frank Grunert, Member

Clifford Brandal, Member

cc: Rep Kyle Johansen, Rep. Craig Johnson, Rep. Gabrielle LeDoux, Rep. Peggy Wilson, Rep. Lindsey Holmes, Rep. Paul Seaton, Sen. Charlie Huggins, Sen. Ben Stedman, Sen. Lyda Green, Sen. Gary Stevens, Sen. Lesil McGuire, Sen. Bill Wielechowski, Sen. Thomas Wagoner, Sen. Hollis French, Sen. Gene Theriault

Clemens D Grunert
F/V Adventuress
PO Box 28
Chignik Lagoon, AK 99565
(907) 840-2214

Representative Bryce Edmon
State Capitol, Rm 424
Juneau, AK 99801-1182
907-465-4451
FAX-465-3445

Dear Representative Edgmon:

I am writing this letter as a lifelong resident of 56 years, 44 years as a fisherman, and 27 years as permit holder. I am also president on the tribal council as well as the power utility and a member of the Chignik Lagoon Native Corporation. I have never spent more than 4 months away from my village in my lifetime. Currently I run a family fish operation. I invest my time in this village and the fishery so that it can be a good place to live and make a living for the younger generations.

House Bill No 188 worries me not only for the elimination of checks and balances for the fishing industry in Alaska, if it were to pass, but also for the disrespect it shows the judiciary system for the State of Alaska.

I was one of the very few that did not join the cooperative fishery at all for its duration in our fishery. Even though my income and fishing time was stripped from me and my family, I could not put aside my stand against the co-op. Besides that I don't think there were any guarantees that you would make more in the co-op because you had to be a catcher boat or a tender to do that and not everyone got selected for those jobs.

This bill needs more than one week's consideration, not like the co-ops three days, to put it in place. Residents of villages and the earnings as fishermen are at stake and it goes without saying that those are important and need a lot of time and public comment first. The high cost of fuel has raised the cost of living in the village so much that it would not take much to turn most fishing villages into ghost towns.

So I ask that all of these necessary things are considered and to move slowly on Bill No 188.

Sincerely,

Clemens D Grunert Jr

cc:Rep. Kyle Johansen, Rep. Craig Johnson, Rep. Gabrielle LeDoux, Rep. Peggy Wilson, Rep. Lindsey Holmes, Rep. Paul Seaton, Senator Charlie Huggins, Sen. Ben Stedman, Sen. Lyda Green, Sen. Gary Stevens, Sen. Lesil McGuire, Sen. Bill Wielechowski, Sen. Thomas Wagoner, Sen. Hollis French, Sen. Gene Therriault

Chuck Robinson

From: Chuck Robinson
Sent: Monday, March 19, 2007 5:05 PM
To: Paul Seaton (rep.paul.seaton@legis.ak.us)
Subject: House Bill 188

VIA FAX: 907-465-3472

Dear Representative Seaton:

I would like to comment on House Bill 188, a bill introduced by Representative Peggy Wilson, which seeks to give the Alaska Board of Fisheries the authority to allocate fishery resources within a fishery. If enacted by the legislature this bill would authorize the Board to allocate fishery resources among similarly situated fishermen. Under equal treatment and protection clauses of Article VIII, section 17 of the Alaska Constitution, Article 1, section 1 of the Alaska Constitution and the 14th Amendment to the United States Constitution this bill would be unconstitutional.

These constitutional provisions require that all persons similarly situated must be treated equally under the law. Of particular interest is Art. VIII, sec. 17 of the Alaska Constitution, which embodies the principle contained in the other constitutional provisions. Art. VIII, sec. 17 states: **Uniform Application.** 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. The Alaska Supreme Court has held that this constitutional provision may invoke a more stringent review of a regulation than standard equal protection analysis under Art. 1 Sec. 1 of the state's constitution. See *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989).

To satisfy the uniform application clause of Art. VIII, state fish and game regulations creating non-uniform classifications must have (1) a legitimate purpose; *Owsich v. State, Guide License & Control Board*, 763 P.2d 488, 496-97 nn. 13 & 14 (Alaska 1988); (2) the individual interest in equal access to fish and game is a highly important interest running to each person within the state. *Commercial Fishing Commission v. Apokedak*, 606 P.2d 1255, 1265 & n. 41 & 42 (Alaska 1980); (3) accordingly, once a legitimate purpose has been established by the state, the weight of that interest must be important to counter balance the important individual interest implicated. *McDowell v. State*, 785 P.2d at 10; and (4) the means used to further the important state purpose must be carefully drawn and designed for the "least possible infringement on article VIII's open access values." *McDowell*, 785 P.2d 10, *Johns v. Commercial Fishing Entry Commission*, 758 P.2d 1256, 1266 (Alaska 1988); *State v. Ostrosky*, 667 P.2d 1184, 1191 (Alaska 1983), appeal dismissed *Ostrosky v. Alaska*, 467 U.S. 1201 (1984).

Thus, similarly situated fishermen must be treated equally. There is no legitimate purpose that the state can have to create non-uniform classifications between fishermen who are in the same class that would withstand constitutional challenge if the Board were by legislation allowed to treat fishermen of the same class and user group differently.

For instance, all Prince William Sound (PWS) seine fishermen have the same salmon limited entry permit to harvest salmon from the same administrative area using the same gear to harvest salmon stocks. These seiners are within a single fishery. These fishermen are similarly situated for purpose of allocating salmon stocks to be harvested. If House Bill 188 were to pass, the Board could adopt a regulation within this single fishery that says all PWS seiners whose last name begins with A-M will fish on Mondays through Friday during the fishing season, while the rest of the PWS seiners whose last name begins with N-Z shall be permitted to fish only on Saturday and Sunday during the fishing season. Since all PWS seiners are similarly situated because they fish in the same fishery using the same gear to harvest the same fish stocks they are in the same user group and must by constitutional law be treated equally with regard to fish allocations. Thus, the board's regulation would run contrary to Art. VIII, sec. 17's uniform application of laws and regulations regarding use or disposal of natural resources. There are a myriad of instances or other examples where the Board could allocate within the same or single fishery and treat persons similarly situated differently. This would be against and in violation of the constitution's equal treatment and protection clause.

I would strongly urge you to oppose HB 188 or any similar version of it that gives the Board authority to

3/21/2007

allocate fish resources within a fishery. Failure of this bill will no doubt reaffirm the State's long tradition and constitutional protection against discrimination in the allocative use or disposal of the state's natural resources among persons similarly situated regarding the use and disposal of the state's fish resources. The scope of the issue raised in HB 188 is far larger and greater than the Board adopting cooperative fishery regulations. If passed, this bill would have a unfair and discriminatory effect on all state fisheries. It would be contrary to the State's constitutional promise and guarantee to its people and others in the state that when it comes to laws and regulation governing the use or disposal of the state's fishery resources all persons similarly situated shall be treated equally.

Chuck Robinson

Louie Flora

From: David Otness [djounderthevolcano@yahoo.com]
Sent: Monday, April 30, 2007 8:07 PM
To: Louie Flora
Cc: fritz@xyz.net
Subject: HB 188

Paul and whomever,

I for one, and many others have serious misgivings about the Chignik co-op running rampant over those who chose not to join.

This is a serious, fractious issue which deserves much scrutiny.

It used to be one permit holder fished one area in a given year and now this slippery slope has people collecting money even though they're not even present.

Arne Hatch of the Miss Melody was packing salmon for Icicle at Egigik while collecting "sure thing" dough from the co-op.

This kind of back door politics {HB 188 }has no place in resolving our allocation disputes.

If you guys pass this be assured the Governor will have been lobbied regarding the issue and I would hope it meets a veto pen.

I'm leaving for PWS with Crowley tomorrow and will be somewhat out of touch, however I do hope your conscience is hard at work on this when you vote

Sincerely, David Otness

Do You Yahoo!?

Tired of spam? Yahoo! Mail has the best spam protection around <http://mail.yahoo.com>

From: Dean Anderson [sardinea@comcast.net]
Sent: Thursday, May 03, 2007 7:34 AM
To: Rep. Paul Seaton
Subject: HB188
Follow Up Flag: Follow up
Flag Status: Blue

Paul House bill has a familiar odor to it. I don't trust the sponsor's intentions one bit. In other words it smells of co-op and lets not enable the B.O.F. to experiment with other salmon fisheries in the state along with Chignik.
Sincerely, Dean Anderson

Not offered

25-LS0730\M

Kane

5/11/07

SENATE CS FOR CS FOR HOUSE BILL NO. 186()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES HARRIS BY REQUEST, Thomas, Kelly, Seaton, Johnson, Wilson, Kerttula, Roses

A BILL

FOR AN ACT ENTITLED

1 "An Act amending the powers of the Board of Fisheries to allocate fishery resources and
2 to establish and regulate commercial cooperative fisheries; relating to sharing with
3 certain federal agencies records required of sport fishing guides; providing for an
4 effective date by delaying the effective date of repeal of the authority of the Commercial
5 Fisheries Entry Commission to maintain the vessel-based commercial fisheries limited
6 entry systems for the Bering Sea Korean hair crab and weathervane scallop fisheries,
7 and the effective date of conforming amendments related to the repeal of those systems;
8 and providing for an effective date."

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

10 * Section 1. The uncoded law of the State of Alaska is amended by adding a new section
11 to read:

12 LEGISLATIVE INTENT AND PURPOSE. (a) It is the intent of the legislature to

1 clarify that the Board of Fisheries has authority under AS 16.05 and AS 16.43 to establish and
2 allocate fishery resources to commercial cooperative fisheries and that AS 16.43 does not
3 limit that authority.

4 (b) The purpose of the amendments made by secs. 2, 3, and 5 of this Act is to overrule
5 the holdings in *Grunert v. State*, 109 P.3d 924 (Alaska 2005) and *State v. Grunert*, 139 P.3d
6 1226 (Alaska 2006).

7 * **Sec. 2.** AS 16.05.251(a) is amended to read:

8 (a) The Board of Fisheries may adopt regulations it considers advisable in
9 accordance with AS 44.62 (Administrative Procedure Act) for

10 (1) setting apart fish reserve areas, refuges, and sanctuaries in the
11 waters of the state over which it has jurisdiction, subject to the approval of the
12 legislature;

13 (2) establishing open and closed seasons and areas for the taking of
14 fish; if consistent with resource conservation and development goals, the board may
15 adopt regulations establishing restricted seasons and areas necessary for

16 (A) persons 60 years of age and older to participate in sport,
17 personal use, or subsistence fishing; or

18 (B) persons under 16 years of age to participate in sport
19 fishing;

20 (3) setting quotas, bag limits, harvest levels, and sex and size
21 limitations on the taking of fish;

22 (4) establishing the means and methods employed in the pursuit,
23 capture, and transport of fish;

24 (5) establishing marking and identification requirements for means
25 used in pursuit, capture, and transport of fish;

26 (6) classifying as commercial fish, sport fish, guided sport fish,
27 personal use fish, subsistence fish, or predators or other categories essential for
28 regulatory purposes;

29 (7) watershed and habitat improvement, and management,
30 conservation, protection, use, disposal, propagation, and stocking of fish;

31 (8) investigating and determining the extent and effect of disease,

1 predation, and competition among fish in the state, exercising control measures
2 considered necessary to the resources of the state;

3 (9) prohibiting and regulating the live capture, possession, transport, or
4 release of native or exotic fish or their eggs;

5 (10) establishing seasons, areas, quotas, and methods of harvest for
6 aquatic plants;

7 (11) establishing the times and dates during which the issuance of
8 fishing licenses, permits, and registrations and the transfer of permits and registrations
9 between registration areas is allowed; however, this paragraph does not apply to
10 permits issued or transferred under AS 16.43;

11 (12) regulating commercial, sport, guided sport, subsistence, and
12 personal use fishing as needed for the conservation, development, and utilization of
13 fisheries, including allocating to commercial cooperative fisheries;

14 (13) requiring, in a fishery, observers on board fishing vessels, as
15 defined in AS 16.05.475(d), that are registered under the laws of the state, as defined
16 in AS 16.05.475(c), after making a written determination that an on-board observer
17 program

18 (A) is the only practical data-gathering or enforcement
19 mechanism for that fishery;

20 (B) will not unduly disrupt the fishery;

21 (C) can be conducted at a reasonable cost; and

22 (D) can be coordinated with observer programs of other
23 agencies, including the National Marine Fisheries Service, North Pacific
24 Fishery Management Council, and the International Pacific Halibut
25 Commission;

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

28 (15) regulating resident or nonresident sport fishermen as needed for
29 the conservation, development, and utilization of fishery resources;

30 (16) requiring unlicensed fishing vessels present in or transiting the
31 waters of the state to report to the department the quantity, species, and origin of fish

on board; in this paragraph, "unlicensed fishing vessel" means a fishing vessel that is not licensed under AS 16.05.490 - 16.05.530;

(17) promoting fishing and preserving the heritage of fishing in the state.

* **Sec. 3.** AS 16.05.251(e) is amended to read:

(e) The Board of Fisheries may allocate fishery resources among and within personal use, sport, guided sport, and commercial fisheries, including allocating to cooperatives within a single fishery or between fisheries. The board shall adopt criteria for the allocation of fishery resources and shall use the criteria as appropriate to particular allocation decisions. The criteria may include factors such as

(1) the history of each personal use, sport, guided sport, 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;

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

(4) the availability of alternative fisheries resources;

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

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

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

* **Sec. 4.** AS 16.05.815(a) is amended to read:

(a) Except as provided in (b) and (c) of this section, records required by regulations of the department concerning the landings of fish, shellfish, or fishery products, and annual statistical reports of fishermen, buyers, and processors required by regulation of the department are confidential and may not be released by the department or by the Alaska Commercial Fisheries Entry Commission except as set out in this subsection. The department may release the records and reports set out in this subsection to the Alaska Commercial Fisheries Entry Commission. The

1 department and the Alaska Commercial Fisheries Entry Commission may release the
2 records and reports set out in this subsection to the recipients identified in this
3 subsection if the recipient, other than a recipient under (5) - (9) of this subsection,
4 agrees to maintain the confidentiality of the records and reports. The department and
5 the Alaska Commercial Fisheries Entry Commission may release

6 (1) any of the records and reports to the National Marine Fisheries
7 Service and the professional staff of the North Pacific Fishery Management Council as
8 required for preparation and implementation of the fishery management plans of the
9 North Pacific Fishery Management Council within the exclusive economic zone;

10 (2) any of the records and reports to the professional staff of the
11 Pacific States Marine Fisheries Commission who are employed in the Alaska Fisheries
12 Information Network project for the purpose of exchanging information with users
13 authorized by the department;

14 (3) any of the records and reports to the Department of Revenue to
15 assist the department in carrying out its statutory responsibilities;

16 (4) records or reports of the total value purchased by each buyer to a
17 municipality that levies and collects a tax on fish, shellfish, or fishery products if the
18 municipality requires records of the landings of fish, shellfish, or fishery products to
19 be submitted to it for purposes of verification of taxes payable;

20 (5) such records and reports as necessary to be in conformity with a
21 court order;

22 (6) on request, the report of a person to the person whose fishing
23 activity is the subject of the report, or to a designee of the person whose fishing
24 activity is the subject of the report;

25 (7) on request, annual statistical reports of a fisherman, buyer, or
26 processor to the fisherman, buyer, or processor whose activity is the subject of the
27 report, or to a designee of the fisherman, buyer, or processor whose activity is the
28 subject of the report;

29 (8) any of the records and reports to the Department of Public Safety
30 for law enforcement purposes;

31 (9) fish tickets, fish ticket information, records required of sport

1 **fishing guides**, and annual statistical reports of fishermen, buyers, and processors and
2 information in those reports to the law enforcement personnel of the National Marine
3 Fisheries Service and the National Oceanic and Atmospheric Administration for the
4 purpose of enforcing fishery laws in waters of this state and in waters of the exclusive
5 economic zone adjacent to this state;

6 (10) fish tickets, [AND] fish ticket information, **and records required**
7 **of sport fishing guides** regarding halibut to the International Pacific Halibut
8 Commission;

9 (11) any of the records and reports to the child support services agency
10 created in AS 25.27.010, or the child support enforcement agency of another state, for
11 child support purposes authorized under law; and

12 (12) any of the records and reports to the Department of Natural
13 Resources to assist the department in carrying out its statutory responsibilities in
14 regard to sport fishing operations and sport fishing guides within the Kenai River
15 Special Management Area under AS 41.21.500 - 41.21.514.

16 * **Sec. 5.** AS 16.43.950 is amended to read:

17 **Sec. 16.43.950. Applications of regulations of Board of Fisheries.** Nothing
18 in this chapter limits the powers of the Board of Fisheries, including the power to
19 determine legal types of gear, [AND] the power to establish size limitations or other
20 uniform restrictions applying to a certain type of gear, **and the power to establish**
21 **and allocate fishery resources to commercial cooperative fisheries**. Holders of
22 interim-use permits or entry permits issued under this chapter are subject to all
23 regulations adopted by the Board of Fisheries.

24 * **Sec. 6.** Section 28, ch. 137, SLA 2002, is amended to read:

25 Sec. 28. Sections 5, 10, 12, 14, 16, 18, 21, 23, and 27 of this Act take effect
26 December 30, **2013** [2008].

27 * **Sec. 7.** The Act takes effect immediately under AS 01.10.070(c).



Alaska State Legislature

Representative Peggy Wilson

House District 2

Putting Alaska's Families First

MEMORANDUM

DATE: January 29, 2008

TO: Representative Paul Seaton, Chair
House Special Committee on Fisheries

FROM: Representative Peggy Wilson, Chair *PW*
House Health Education and Social Services Committee

SUBJ: Sponsor Substitute for House Bill 188 [25-LS0709\K] – Request for Hearing

I am requesting a hearing for House Bill 188 as soon as possible. Attached you will find a copy of SSHB 188, corresponding sponsor statement, and a indeterminate fiscal note dated 4/26/07 from the Department of Law. In addition, I have provided several memorandum's that answer specific questions regarding this bill. This bill packet also includes a resolution from the Alaska Board of Fisheries.

This sponsor substitute adds detailed language to address several concerns heard since this bill was first introduced. Specifically under Section 1 there is language that refers to new Section 3 of this proposed CS. In Section 3, subsection (j) was added to augment what was meant by the words – and within that is being proposed as additional language to AS 16.05.251(e). In essence, nothing in subsection (e) authorizes the Board of Fisheries (BOF), without separate express statutory authorization to allocate to a cooperative fishery or an individual fisherman.

Furthermore, language was added to the purpose and intent of this legislation to preserve those portions of the decisions of the Alaska Supreme Court in *Grunert v. State*, 109 p.3d 924 and *Alaska Board of Fisheries v. Grunert*, 139 P3d 1226 holding that the BOF may not authorize cooperative salmon fisheries without express legislative authorization and nothing authorizes the BOF to allocate to an individual fisherman.

Please let Cliff Stone of my staff know if there is anything else we can provide. Thank you for your consideration.



Alaska State Legislature

Representative Peggy Wilson

House District 2

Putting Alaska's Families First

SPONSOR STATEMENT

Sponsor Substitute House Bill 188

"An Act relating to the authority of the Board of Fisheries to allocate within fisheries; and providing for an effective date."

This bill is a response to two recent decisions of the Alaska Supreme Court. The Court's interpretation is contrary to a longstanding acceptance and practice of the Board, and, if allowed to stand, will interfere with the fair and effective management and allocation of fishery resources. The Alaska Supreme Court interpreted AS 16.05.251(e) narrowly and ruled that the provision, which grants the Alaska Board of Fisheries authority to allocate "among" fisheries, does not include the power to allocate fisheries resources "within" an individual "fishery."

This legislation would add the words "and within" to the sentence describing the Board's authority; reaffirming the longstanding and time-honored authority of the Board to allocate fishery resources within a fishery. Authority to allocate within fisheries is bounded by the Board's statutory purposes, by a statutory requirement to consider allocation criteria, and by constitutional equal protection requirements. This authority has been used responsibly by the Board for decades.

The bill is needed both to preserve the Board's traditional management authority to adopt regulations necessary for the conservation and development of fisheries and to remove the cloud of doubt that the reasoning applied by the Alaska Supreme Court casts over existing regulations. This bill would ensure that existing regulations including long-standing allocations between fishing districts within the Bristol Bay administrative area, restrictions on transfers between districts within administrative areas, and equal share allocations allowing fisheries that are otherwise unmanageable to proceed and will not be subject to challenge under the same reasoning applied by the Alaska Supreme Court in *Grunert v. State*, 109 P.3d 924 (Alaska 2005) and *State of Alaska v. Grunert*, 139 P.3d 1226 (Alaska 2006). Although it is unclear whether the court's decisions would result in the invalidation of existing regulations, a number of regulations could be overturned if the court's reasoning is carried to its logical conclusion.

April 27, 2007

25-LS0709\K

SPONSOR STATEMENT
Sponsor Substitute House Bill 188

By simply adding the two words "and within" to the statute, it **does not** and **would not** authorize the Board of Fisheries to create a co-operative fishery and should not be construed as doing so. The court in the two *Grunert* cases clearly stated that a cooperative fishery is "fundamentally at odds with the Limited Entry Act" and that such a "radical departure from the historical model" would require legislative authorization. Thus, this bill, which simply clarifies the legislature's historical intent to give the Board authority to allocate among **and within** the state's fisheries, will not authorize the creation of co-operative fisheries.

Because of the court's unique interpretation of state law, both existing regulations and the Board's ability to require traditional management measures are currently in doubt, creating great uncertainty in Alaska's fisheries. Reaffirming the Board's authority will resolve this uncertainty, preserving existing regulations and traditional management tools.

The sponsor substitute adds detailed language to address several concerns heard since the original bill was introduced. Specifically under Section 1 there is language that refers to new Section 3. In Section 3, subsection (j) was added to augment what was meant by the words – **and within** that is being proposed as additional language to AS 16.05.251(e). In essence, nothing in subsection (e) authorizes the Board of Fisheries (BOF), without separate express statutory authorization to allocate to a cooperative fishery or an individual fisherman.

Furthermore, language was added to the purpose and intent of this legislation to preserve those portions of the decisions of the Alaska Supreme Court in *Grunert v. State*, 109 p.3d 924 and *Alaska Board of Fisheries v. Grunert*, 139 P3d 1226 holding that the BOF may not authorize cooperative salmon fisheries without express legislative authorization and nothing authorizes the BOF to allocate to an individual fisherman.

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB188-LAW-NAT-4-26-0
 Bill Version: HB 188
 () Publish Date: _____

Revision Date/Time (Note if correction):
 Title An Act relating to Board of Fisheries authority.

Dept. Affected: Law

RDU Civil

Component Natural Resources

Sponsor REPRESENTATIVE(s) WILSON

Requester House Fisheries

Component No. _____

Expenditures/Revenues

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	***	***	***	***	***	***

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY2007) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal: ☐

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached page.

Prepared by: Robert Meiners, Admin. Services Manager

Division Administrative Services Division

Phone 465-5427

Date/Time 4/26/07 10:25 AM

Approved by: Robert Meiners for Talis Colberg, Attorney General

Agency Department of Law

Date 4/26/2007

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

BILL NO. HB 188

ANALYSIS CONTINUATION

HB 188 would restore the ability of the Board of Fisheries to allocate fishery resources "within" a fishery. This authority was always presumed to exist under statutory language allowing the Board to allocate "among" fisheries prior the Alaska Supreme Court's Grunert decisions (109 P.3d 924; 139 P.3d 1226), and numerous existing regulations could be argued to involve allocations within fisheries. HB 188 will insulate these existing regulations from potential legal challenges as well as reducing the likelihood of legal challenges to the Board's exercise of other authorities such as establishment of quotas, harvest limits, trip limits, seasonal limits, exclusive registration requirements, and transfer requirements, all of which have allocative implications within fisheries.

Enactment of HB 188 will not result in any increased costs for the Department of Law; failure to address this issue is likely to significantly increase the workload within the Natural Resources section of the Department of Law and may require an indeterminate future increase in funding.

ALASKA BOARD OF FISHERIES
A Resolution Regarding Authority of the Board of Fisheries to
Allocate Within Fisheries
2007-252-FB

WHEREAS, Alaska Statute 16.05.251(e) provides that the Board of Fisheries may allocate fishery resources among personal use, sport, and commercial fisheries;

WHEREAS, Alaska Statute 16.05.251(e) has, prior to the Alaska Supreme Court's ruling in *Grunert v. State*, 109 P.3d 924, 330-32 (Alaska 2005) always been interpreted by the Board and its legal advisors to allow the Board to allocate fishery resources within a fishery;

WHEREAS, the Alaska Supreme Court, in *Grunert v. State*, 109 P.3d 924, 230-32 (Alaska 2005) and *State v. Grunert*, 139 P.3d 1226, 1235 (Alaska 2006), held that despite the provisions of AS 16.05.251(e) the Board does not have the authority to allocate fishery resources within a fishery;

WHEREAS, the Alaska Supreme Court in *State v. Grunert*, 139 P.3d 1226, 1236-37 (Alaska 2006); greatly limited the Board's ability to define what constitutes a fishery;

WHEREAS, there are numerous existing regulations that could be determined to directly or indirectly allocate within a fishery;

WHEREAS, among other regulations at risk are time honored and traditional regulatory tools such as allocating between subdistricts in a larger fishery; establishment of exclusive and superexclusive registration areas, and establishment of restrictive transfer requirements between subdistricts;

WHEREAS, other authorities of the Board, including the ability to establish quotas, trip limits, and daily, weekly or annual individual harvest limits in sport and commercial fisheries could be subject to attack on the basis that they may have the effect of allocating within fisheries;

WHEREAS, the authority to allocate within fisheries has always been bounded by the Board's statutory purposes, by a statutory requirement to consider allocation criteria, and by constitutional equal protection requirements;

WHEREAS, the authority to allocate within fisheries has been used responsibly by the Board for decades;

WHEREAS, reaffirmation of the Board's authority to allocate within fisheries would not authorize the Board of Fisheries to allocate fishery resources to a cooperative fishery without separate express statutory authorization;

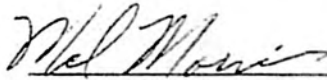
WHEREAS, reaffirmation of the Board's authority to allocate within fisheries would not authorize the Board of Fisheries to allocate to individual fishermen based on catch history without separate express statutory authorization;

WHEREAS, the ability to allocate within a fishery is vital to the Board's ability to fairly and effectively manage and allocate fishery resources and to prevention of undue economic hardship among subsections of a fishery;

NOW THEREFORE BE IT RESOLVED, that the Board of Fisheries respectfully requests that the 25th Alaska Legislature consider and adopt legislation such as that found in HB 188 reaffirming the ability of the Board of Fisheries to allocate within fisheries; and

BE IT FURTHER RESOLVED, that the Board of Fisheries respectfully requests that the 25th Alaska Legislature consider the reaffirmation of the ability of the Board of Fisheries to allocate within fisheries separately from any effort to grant the Board the ability to allocate to commercial fishing cooperatives or to allocate to individual fishermen based on catch history.

Adopted: April 16, 2007



Mel Morris, Chairman
Alaska Board of Fisheries

VOTE: 7/0

LEGAL SERVICES

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MEMORANDUM

March 26, 2007

SUBJECT: Specific issues regarding HB 188

TO: Representative Paul Seaton

FROM: Brian J. Kane *BJK*
Legislative Counsel

You have asked a number of questions regarding the potential effect of House Bill 188. I have addressed your first three questions in light of the *Grunert* decisions, and the last two in light of the changes proposed by HB 188.

(1) Do the *Grunert* decisions undermine *Herbert*? The majority opinions in *Grunert v. State (I)*, 109 P.3d 924 (Alaska 2005) and *State v. Grunert (II)*, 139 P.3d 1226 (Alaska 2006) make no mention of the decision in *State v. Hebert*, 803 P.2d 863 (Alaska 1990), regarding superexclusive fishing areas.

Hebert involved an evaluation of choice among several geographic areas under a "superexclusive use" fisheries regulatory scheme. Fishermen would be required to choose among several geographic areas where a fish species occurs. A person who registered to fish an area designated as "superexclusive" could not harvest that type of fish in any other area. On the other hand, one who registered to fish in an area that is not "superexclusive" could not also fish for the same species in a "superexclusive" area. The court upheld the superexclusive use regulatory system,

. . . and noted that "if anything, [it] furthers the interests underlying [Article VIII,] section 3's common use mandate." Thus, "broad public access" [described in earlier opinions as the hallmark of the common use clause of article VIII, section 3] is a principle that favors maximizing the number of persons able to participate in a hunt or fishery rather than maximizing an individual's opportunities to catch as much fish or harvest as much game in as many areas as possible.

Stephen M. White, "Equal Access' to Alaska's Fish & Wildlife," 11 Alaska Law Review 277, 281 (1994) (notes omitted).

Insofar as the regulation challenged in the *Grunert* litigation authorized an allocation of fishery resources within a single fishery in violation of the authorizing statute, the *Grunert* decisions are distinguishable. In that pair of cases, in response to declining

salmon prices in the Chignik commercial salmon fishery, the Board of Fisheries had adopted regulations authorizing a majority of Chignik salmon purse seine permit holders to apply to fish as a cooperative. When more than the minimum number of permit holders applied to participate, the board issued a single cooperative fishery permit to the cooperative, Chignik Seafood Producers Alliance, and allocated to the cooperative a percentage of the "harvestable surplus" of Chignik sockeye salmon based on the number of permit holders participating in the cooperative. The board's program regulations distinguished between the "cooperative fishery" and the "open fishery." "Cooperative fishery" was defined as "a commercial purse seine salmon fishery in which, by agreement of the participants, the number of fishing vessels may be reduced with the intent of decreasing overhead expenses associated with commercial fishing and controlling the rate of harvest to achieve a higher quality product," while the term "open fishery" was defined as "a commercial purse seine fishery conducted by [Commercial Fishery Entry Commission] permit holders who did not participate in the cooperative fishery." The court reasoned that the statute in question, AS 16.05.251(e), proposed for amendment in HB 188, did not allow the board to distinguish on the basis of the criteria in its regulation, and that its allocation of the harvestable salmon between the cooperative and the open fishers authorized an allocation of fishery resources within a single fishery in violation of the statute.

The *Hebert* and the *Grunert* decisions, together, proceed from different starting points. *Hebert* unquestionably involved active participation by individual fishermen; in *Grunert II*, the court noted:

"the Chignik cooperative fishery scheme is fundamentally at odds with [the idea of active individual participation] because [in permitting people who are not actually fishing to benefit from the fishery resource], it allows people who are not actually fishing to benefit from the fishery resource." 109 P.3d at 935. The cooperative scheme addressed in *Grunert I* differed from the cooperative scheme we consider here, but our conclusion is the same: The legislature must give the board statutory authority to create a fishery scheme in which permit holders profit from the harvests of other permit holders.

Grunert II, 139 P.3d at 1235, note 44.

Because of the factual circumstances and differing principles between the two sets of decisions, and because the regulatory system sustained in *Hebert* contemplated expanded opportunity for active fishermen within the entirety of a fishery administrative area, I don't see the court's *Hebert* decision as being put "at risk" either by the *Grunert* decisions or by legislative action, or inaction, on the amendment proposed by House Bill 188.

(2) and (3) Do the *Grunert* decisions threaten regulations limiting catch based on harvest objectives and vessel length? The analysis for evaluating the *Grunert* cases' effect on the regulations established for Prince William Sound (5 AAC 28.272(c)) and Chatham Strait

(5 AAC 28.170(f)) is somewhat similar to the *Hebert* analysis above. In *Grunert (II)*, the court rejected a regulation adopted by the board relating to cooperative fisheries. The court stated: "The legislature must give the board statutory authority to create a fishery scheme in which permit holders profit from the harvests of other permit holders." *Grunert (II)* at 1235, n.45. The situation that the court was concerned with in *Grunert (II)* was one where each individual fisherman shared in the profits of the entire fishery, as long as that fisherman fished a certain number of times. Hence, the fisherman who went out 50 times shared his profits with the fisherman who went out 15 times. This is where the major problem was for the court.

The regulations regarding Prince William Sound and Chatham Strait are different than what was struck down in *Grunert (II)*. For these regulations, each fisherman receives credit for what he harvests each time, and is only limited in the total amount he can harvest. There is no part of those regulations requiring an active fisherman to share his profits with an inactive fisherman. Hence, it appears that *Grunert (II)* focused on disallowing this cooperative fishery situation, specifically the one that occurred in Chignik. This could be viewed as a limited holding by the court that does not stretch to regulations that do not create a cooperative fishery. From my reading, the regulations for Prince William Sound and Chatham Strait do not create a cooperative fishery situation, but instead only limit the total number of fish that a fisherman can harvest.

A March 16 memo of Assistant Attorney General Steven A. Daugherty to Commissioner Denby Lloyd identifies 5 AAC 28.272(c) as the "vessel size class" Prince William Sound sablefish regulation, and I assume it is to that subsection to which you make reference.¹

¹ The text of 5 AAC 28.272(c) prescribes annual sablefish allocations that take into account vessel length as one factor of the allowable allocations:

(c) In the Prince William Sound Area, the holder of a CFEC limited entry permit or interim-use permit to take sablefish may not take more than the annual amount specified by the department. The department will determine the annual amount as follows:

(1) the annual amount will be the sum of one-half of the annual harvest objective divided by the number of permit holders registered to fish in the commercial sablefish fishery and one-half of the annual harvest objective multiplied by the average percentage of the harvest taken by the vessel category for which the CFEC permit was issued, as specified in 20 AAC 05.779, and divided by the number of permit holders registered to fish sablefish with the permits of that vessel category;

(2) the average percentages of harvest for the vessel categories described in (1) of this subsection are as follows:

(A) combined categories A, vessels with a length of 90 feet, and B, vessels with a maximum overall length of 60 feet: 18.53 percent;

Mr. Daugherty's memo relates that the regulation amounts to a quota, presumably allowable under the explicit language of AS 16.05.251(a)(3):

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

...
(3) setting *quotas*, bag limits, harvest levels, and sex and size limitations on the taking of fish[.] . . .

Since, independently of the amendment proposed by House Bill 188, the board has adopted in regulation a quota based, at least in part, on vessel size class, there is no reason to believe that legislative inaction on the bill would call that regulation into question.

Mr. Daugherty's March 16 memo identifies 5 AAC 28.170(f) as a quota for Northern Southeast Inside sablefish regulation and, again, I assume it is to that provision that you have reference.²

(B) category C, vessels with a maximum overall length of 50 feet: 70.33 percent;

(C) category D, vessels with a maximum overall length of 35 feet: 11.14 percent.

² The text of 5 AAC 28.170(f) prescribes a form of sablefish allocation that makes use of an "equal quota share" concept that I take to be functionally the equivalent of "equal poundage per permit," the phrase you used in your transmittal memo:

(f) Except as provided in (j) of this section, in the Northern Southeast Inside Subdistrict, the holder of a CFEC permit or interim use permit for sablefish may not retain more sablefish in the directed fishery than *the annual amount of sablefish equal quota share* that is specified by the department. A permit holder must retain all visibly injured or dead sablefish. Sablefish that are not visibly injured or dead may be released unharmed, but the permit holder must record the live releases in a logbook by gear settings. *The department shall determine the annual amount of sablefish equal quota share by dividing the annual harvest objective by the number of CFEC permits and interim use permits eligible to be fished in the fishery.* The department shall use the best available information, including harvest rate and biological data, to set the annual harvest objective.

These quota shares are subject to later-year adjustment under 5 AAC 28.170(j) and (k):

(j) If a permit holder's harvest exceeds the permit holder's equal quota share established under (f) or (g) of this section for that year, by not more than five percent, the department shall reduce the permit holder's

This question may be analyzed and answered in the same manner as the preceding examination, and that for substantially the same reasons -- clearly authorized ability for the board to adopt a quota under AS 16.05.251(a)(3) and a comprehensive treatment of the subject fishery that accounts for the active participants in the fishery (determine "equal quota share by dividing the annual harvest objective by the number of CFEC permits and interim use permits eligible to be fished in the fishery") without class or gear distinction.

(4) and (5) Would the amendment or HB 188 allow allocations based on participation or catch or landings history in the fishery? The two questions have, in common, reference to allocation of a part of the fishery "based on catch history or landings history." However, AS 16.05.251(e) does not now, and would not under the amendment proposed by House Bill 188, support use of individual catch history and landing history -- in other words, the record of individual participation in a fishery -- as the device or means to make fishery allocations. Mr. Daugherty makes this point in the paragraphs that conclude his March 16 memo, and the authorities there cited support that outcome.

The changes proposed by HB 188 (adding the phrase "and within") do not provide the board any power to allocate to individual fisherman. Hence, the bill does not provide authority for the board to allocate resources to permit holders based on number of years participating in the fishery, personal catch history, or landings history. There is nothing in AS 16.05.251(e) that refers to individual fishermen, and this bill does not add any language to that effect. The specific portion of AS 16.05.251 I believe you are referring to in your question is subsection (e)(1), which uses as a criteria "the history of each personal use, sport, guided sport, and commercial fishery. . . ." This criteria only makes mention of "fishery," not an individual fisherman. Adding the phrase "and within" does not open up the possibility for an allocation to individual fisherman based on any personal statistics; the statistics utilized by the board remain those that are relevant to the fishery as a whole. HB 188 provides for the board to merely allocate within a fishery, not

equal quota share for the following year by the amount of the overage. The adjusted equal quota share is the permit holder's quota share for that year. If a permit holder's harvest exceeds the permit holder's equal quota share by more than five percent, the proceeds from the sale of the overage in excess of five percent shall be surrendered to the state. A permit holder may not assume that the ability to adjust a quota share under this section is an opportunity to knowingly exceed a quota share or to exceed the equal quota share in an amount greater than five percent as such actions may be prosecuted under AS 16.05.722 or AS 16.05.723.

(k) If a permit holder's harvest is less than the permit holder's equal quota share established under (f) or (g) of this section for that year, the department shall increase the permit holder's equal quota share only for the following year by the amount of the underage that does not exceed five percent of the equal quota share.

to individual fishermen. Any changes that would effect individual fishermen would require more extensive statutory revisions than adding the words "and within" to AS 16.05.251(e).

Further, the direct allocation of fishery resources among fishermen based on the fishermen's individual catch histories in the fishery likely impinges on the common use section and "no exclusive right of fishery" section of the state constitution. Under the common use doctrine, fishery resources are "owned" or held by the state in trust for all citizens of the state until the resource is lawfully reduced to physical possession of the fisherman. *Isakson v. Rickey*, 550 P.2d 359, 367 (Alaska 1976). Until the fish is in the physical possession of the fisherman, the fisherman has no claim to the fish. If the Board of Fisheries was to allocate fishery resources to an individual fisherman and then exercise its fishery management authority to ensure that the fisherman harvested that allocation of fish, the board has given an interest in a specific portion of the harvest of those fish to the fisherman and conferred a special privilege of fishery on the fisherman.³ The creation of private interests in a fishery resource before the resource is caught by a fisherman seems to be the kind of special privilege that the common use and "no exclusive right of fishery" sections were intended to prohibit.⁴ The 1971 limited entry amendment of the "no exclusive right of fishery" section, effective in October 1972, did nothing to make this kind of special privilege of fishery constitutional.⁵ That amendment allows the state to

³ The possible details of a scheme to allocate fishery resources among fishermen based on the fishermen's individualized catch histories in the fishery are wholly unknown at this time but those details will be critical to the constitutionality of the allocation scheme. Of particular importance will be, the determination of how the allocation to new entrants into the fishery would be determined and whether the allocation for new entrants would be based on the prior history of the previous permit holder.

⁴ The Natural Resources Committee of the Alaska Constitutional Convention explained the purpose of the common use clause in part, as follows:

Game fish, wildlife, fisheries, and water are recognized as belonging to the state so long as in a natural state. These resources are subject to a private right only when they have been acquired or utilized as provided by law. For example, a private person has no right to buy and sell wild animals in their natural state, but once an animal is taken in compliance with law, it becomes the property of the taker, subject to use or disposition within the law. . . .

⁶ Proceedings of the Alaska Constitutional Convention, Appendix 5, Proposal 8 at 75; Proposal 8A at 98. (Emphasis added)

⁵ The common use clause "mandates that limited entry be achieved through the least possible 'privatization' of the common resource." *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), at 1196 (Rabinowitz, J. dissenting).

limit entry into the commercial fishing user groups only as necessary to achieve certain conservation and socio-economic goals. It did not authorize the state to grant other kinds of exclusive rights or special privileges of fishery that were not directly related to limiting access to a commercial fishing user group.

The direct allocation of fishery resources among individual fishermen based on their catch histories in the fishery is analogous to the allocation of game resources among big game guides that was considered by the Alaska Supreme Court in the *Owsichuk* case. *Owsichuk v. State, Guide Licensing and Control Board*, 763 P.2d 488 (Alaska 1988). The *Owsichuk* case involved grants of exclusive access to game in an area to certain big game guides for the purpose of providing guide services to sport hunters. Under former provisions of AS 08.54, the Guide Licensing and Control Board granted exclusive guide areas and joint use areas to licensed big game guides. Within an exclusive guide area or joint use area, one or more big game guides were given the authority to provide guiding services to sport hunters. All guides who were not authorized to operate within a guide area were prohibited from providing guide services in that area. Guide areas were assigned in large part based on a guide's previous use, occupancy, and investment in an area. Such criteria favored established guides at the expense of new entrants into the guiding profession. *Id.* at 496. The Alaska Supreme Court found that a grant of a special privilege to operate in a guide area that was based primarily on seniority ran counter to the notion of common use. "[T]he common use clause . . . , reveals an anti-monopoly intent to prohibit 'exclusive grants' and 'special privilege[s]' wholly apart from the limits imposed by other constitutional provisions." *Id.* Thus, the court found that the guide areas were inconsistent with the common use provision of the Alaska Constitution and therefore unconstitutional. *Id.* at 498. The *Owsichuk* case involved only the common use section of the Alaska Constitution. However, in the context of direct allocations within a fishery, the "no exclusive right of fishery" section is also implicated. If the "no exclusive right of fishery" section is to have any independent effect, distinct from that already provided under the common use clause, the "no exclusive right of fishery" section will have to be applied even more rigorously to prevent exclusive rights and special privileges of fishery. To assume that the "no exclusive right of fishery" section confers no more protection against privatization of fishery resources than is provided under the common use section is to nullify the express and specific prohibition against exclusive rights and special privileges of fishery. The court has consistently declined to nullify provisions of the Alaska Constitution.⁶

Mr. Daugherty's memo makes the point that the proposed amendment to AS 16.05.251(e) made by House Bill 188 is essential to maintain the historical efforts of the Board of Fisheries to regulate within a fishery against the possibility that application of the

⁶ *Owsichuk*, 763 P.2d at 496; *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974).

Representative Paul Seaton
March 26, 2007
Page 8

Grunert decisions' reasoning may be applied to challenge them.⁷ For the reasons discussed in his memo and in this one, the bill's amendment should not have the effect of opening the door to allocation at the level of individual harvesters. If, however, the legislature has doubt on that point, since the question is one of statutory interpretation (within the constraints of the "common use," "no exclusive rights of fishery," and "uniform application" provisions of article VIII), the legislature may consider revising the bill's "purpose and intent" statement to ensure that fishery participants and the court understand that the legislature has no other intent than to continue to allocate within a fishery and not as to participation by individuals.

If I may be of further assistance, please advise.

BJK:med:ljw
07-186.med

⁷ Mr. Daugherty lists three examples: (1) regulating fishing within different districts of a single administrative area; (2) regulating more than one gear type in a single limited entry fishery; and (3) allowing fishing when the available biomass will not allow a competitive fishery. I am not sure adding "within" in AS 16.05.251(e) affects examples (2) and (3). Given the definition of "fishery" in AS 16.05.940(14) -- which applies to AS 16.05.251 -- a different gear type will result in a different fishery; so HB 188 may not be relevant to Mr. Daugherty's second example. His third example -- which appears to involve quotas -- is governed by AS 16.05.251(a)(3)'s authorization of quotas.

LEGAL SERVICES

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MEMORANDUM

March 20, 2007

SUBJECT: Allocation within a fishery
(HB 188, Work Order No. 25-LS0709\A)

TO: Representative Peggy Wilson
Attn: Cliff Stone

FROM: Brian J. Kane *BJK*
Legislative Counsel

You have posed the following two questions: (1) Is it necessary to have explicit language in statute for the Board of Fisheries to allocate within a fishery? (2) Does adding the words "and within" in any way change what powers the Board of Fisheries has to allocate to individual fisherman?

(1) Sec. 1 of HB 188, states the legislature's intent to reaffirm the board's ability to allocate fishery resources within a fishery and to expressly overrule portions of the two *Grunert* cases holding that the board cannot allocate within a fishery. In order to achieve this goal, it is necessary to have this explicit language in statute granting the board this authority. In fact, the *Grunert* court stated that allocating within a single fishery - in this case regarding a cooperative fishery - was not part of the board's authority. *State v. Grunert*, 139 P.3d 1226 (Alaska 2006) (*Grunert II*). While this case dealt with a specific issue involving the Chignik cooperative fishery and emergency regulations adopted by the board, the court still made the statement that allocating within a fishery was not covered by existing AS 16.05.251(e). Hence, it is necessary to add the phrase "and within" if you intend for the board to, without a doubt, have the power to allocate within a single fishery.

(2) The changes made in HB 188 do not provide the board any power to allocate to individual fisherman. There is nothing in AS 16.05.251(e) that refers to individual fishermen, and this bill does not add any language to that effect. HB 188 provides for the board to merely allocate within a fishery, not individual fishermen. Any changes that would impact individual fishermen would require more extensive statutory revisions than adding the words "and within" to AS 16.05.251(e).

BJK:med
07-188.med

LEGAL SERVICES

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MEMORANDUM

March 16, 2007

SUBJECT: The impact of the phrase "and within" (HB 188)

TO: Representative Peggy Wilson
Attn: Cliff Stone

FROM: Brian J. Kane *BTK*
Legislative Counsel

You have asked what will be the impact of adding the phrase "and within" to AS 16.05.251(e) as you have done in HB 188?

Adding the phrase will make explicit an aspect of the authority of the Board of Fisheries that has been disputed -- the ability to allocate *within* a fishery.

The authority of the Board of Fisheries to allocate fishery resources among fishermen within a fishery has been unclear. The current statutes do not expressly provide for allocations within a fishery. The statutory authority of the board in regard to allocation speaks of allocation among fisheries. AS 16.05.251(e) states, in relevant part (emphasis added): "The Board of Fisheries may allocate fishery resources *among* personal use, sport, guided sport, and commercial fisheries. . . ." The remainder of that subsection goes on to set out seven factors that the board may use in allocating among fisheries.

In the absence of the express authorization that HB 188 proposes, for the board to make allocations within a fishery, the board may already have implicit authority to allocate resources within a fishery under the general grant of authority to the board to regulate "commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries." AS 16.05.251(a)(12). The Alaska Supreme Court broadly construes the authority of the board under AS 16 in recognition of the important purpose of the board to provide for the sustained yield management and conservation of the fishery resources of the state. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897, 903 (Alaska 1981). See also, State v. Hebert, 743 P.2d 392 (Alaska Ct. App. 1987); *aff'd*, 803 P.2d 863 (Alaska 1990); O'Callaghan v. Rue, 996 P.2d 88 (Alaska 2000); Interior Alaska Airboat Association v. State, Board of Game, 18 P.3d 686 (Alaska 2001). The court may construe AS 16.05.251(a)(12) broadly to allow the board to allocate fishery resources among fishermen within a fishery already, without the explicit addition of "and within."

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The Alaska Supreme Court has acknowledged that the allocation of fishery resources among competing groups of commercial fishermen is both necessary and authorized under the sustained yield section of the Alaska Constitution.¹ State v. Hebert, 803 P.2d 863, 866 (Alaska 1990). The court also stated that the authority to make allocation decisions did not imply a power to limit admission to a user group because such authority may conflict with the common use, no exclusive right of fishery, and uniform application sections of the Alaska Constitution. Id. Thus the court has accorded much latitude to the Board of Fisheries to allocate fish among and within fishery user groups. In the Hebert case, the court upheld the concept of "superexclusive fishing areas," which allowed a fisherman to fish for herring in a specific subarea of the fishery, but if the fisherman chose to fish in that subarea, he/she could not fish in any other portion of the area outside of that subarea during that fishing season. Rather than viewing this approach as restricting entry in the user group for the fishery, the court found this approach to be a valid exercise of the board's power to allocate fishery resources within a fishery. Each fisherman was given the opportunity to choose where he/she would fish for herring in the area. If the fisherman chose to fish in a certain subarea then that was the only subarea where he/she could fish for herring in that season. A fisherman that did not fish in that subarea could fish in the remaining portions of the area.

The Hebert case supports the authority of the board to allocate fisheries within a fishery. However, the allocation scheme approved by the court in the Hebert case involved the allocation of fishing areas among subgroups of fishermen and not the allocation of the fishery resource. The fishermen that participated in the Hebert fisheries were only entitled to the fish that they were able to physically capture. The board did not make any direct allocation of the resource among fishermen in the fishery. Thus, the Hebert case does not provide meaningful guidance as to whether the court would sustain a board regulations that directly allocated the resource to fishermen within a fishery.

While, the thought that the board could already allocate within a fishery has been debated for some time now, it has only been an implied power up to this point. The amendment you propose in sec. 2 of HB 188 would make this authority explicit and eliminate the ongoing debate.

If I may be of further assistance, please advise.

BJK:ljw
07-140.ljw

¹ Article VIII, sec. 4, Constitution of the State of Alaska, states:

Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

MEMORANDUM

State of Alaska Department of Law

TO: Denby Lloyd
Commissioner
Alaska Dept. of Fish and Game

DATE: March 16, 2007

FILE NO.: 661-05-0439

THRU:

TEL. NO.: 907-269-5232

FAX: 907-279-2834

FROM: Steven A. Daugherty ^{S.D.}
Assistant Attorney General
Natural Resources - Anchorage

SUBJECT: House Bill 188

As a result of questions from legislators that you have received regarding House Bill 188, you requested advice regarding whether HB0188a would authorize the Alaska Board of Fisheries to allocate fishery resources: (1) to cooperative fishery organizations or (2) to individual fishermen based on their personal catch histories. For the reasons explained below, the answer to both questions is clearly "no."

House Bill 188 would simply preserve the historical authority and regulatory tools of the Board of Fisheries by allowing the Board to continue to allocate fishery resources "within" a fishery. The Board has traditionally used such tools as a method to maintain basic fairness when regulating fishing within different districts of a single administrative area, when regulating use of more than one gear type within a single limited entry fishery, and as a method to allow fishing to continue when the available biomass will not support a competitive fishery. The Board has also historically allowed mirroring of federal regulations allocating to sectors by vessel size and gear type within "parallel" groundfish fisheries in state waters. These practices may be subject to challenge if the reasoning used in the *Grunert* cases is applied.

Preserving the Board's ability to allocate within fisheries would not authorize the Board to create or allocate to cooperative fisheries. In *State v. Grunert*, 139 P.3d 1226 (Alaska 2006) (*Grunert II*), the Alaska Supreme Court struck down a modified cooperative program which required active participation of all cooperative members. This modified cooperative regulation had been adopted in an attempt to address the Alaska Supreme Court's objections to the first cooperative fishery program struck down by the Court in *Grunert v. State*, 109 P.2d 924 (Alaska 2005) (*Grunert I*). In *Grunert II*, the Court reiterated its statement from *Grunert I* that the cooperative salmon fisheries are a "radical departure from the historical model of limited entry fisheries" and the

statement that the "legislature must first authorize the board to approve cooperative salmon fisheries." *Grunert II* at 1234. The Court went on to even more explicitly hold:

The legislature must give the board statutory authority to create a fishery scheme in which permit holders profit from the harvests of other permit holders.

Grunert II at 1235, n. 45. Given this directive from the Court, it is clear that simply reaffirming the Board's ability to allocate within fisheries will not authorize the Board to create or allocate to cooperative fisheries. Express statutory authorization is required before the Board may do so.

Similarly, because the Board has never had the authority to allocate to individual fishermen based on their catch histories, nothing in HB 188, which would reaffirm authority that the Board has traditionally exercised, would allow the Board to do. Significant statutory changes to the Board's authorities at AS 16.05.251,¹ to the fish and game confidentiality statute at AS 16.05.815,² and to the Limited Entry Act found in AS 16.43,³ would be necessary in order to allow the Board to allocate to individual fishermen based on their catch history.⁴ Further, because Alaska's constitution provides only a narrow exception to its "common use," "no exclusive rights of fishery," and "uniform application" provisions,⁵ to allow limited entry; such changes would require careful tailoring to "impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry."⁶ HB0188a does not even purport to

¹ AS 16.05.251 grants the Board no adjudicative authority; and the allocation criteria of AS 16.05.251(e) refer only to "fisheries" not individual fishery participants.

² Information concerning landings of fish is confidential under AS 16.05.815, and, because the Board must make its regulatory decisions based on a public record, the Board is not among the agencies and entities that may receive unaggregated landing information from ADF&G.

³ Under AS 16.43, the CFEC is the only entity with the ability to adjudicate eligibility for participation in fisheries.

⁴ The Board may, and has, established quotas, AS 16.05.251(a)(3), but these quotas are not based on individual catch histories. See, e.g., 5 AAC 28.170(f) (Northern Southeast Inside sablefish); 5 AAC 28.272(c) (Prince William Sound sablefish); 5 AAC 27.185(c) (Southeastern Alaska kelp allocations); 5 AAC 28.577(b) (establishing parallel pacific cod seasons based on federal quotas).

⁵ Alaska Const. art. VIII §§ 3, 15, 17.

⁶ *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1266 (Alaska 1988); see also 1996 Inf. Op. Att'y. Gen. 13-18 (Jan. 1; 223-95-0472) (indicating that the federal IFQ model would be unlikely to satisfy the requirements of the Alaska Constitution).

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Commissioner, ADF&G

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give the Board authority to allocate to individual fishermen based on their catch histories, and the bill could not be amended to achieve such a purpose without including extensive changes to other statutes.

For the reasons explained above, HB 188 clearly would not authorize the Alaska Board of Fisheries to allocate fishery resources: (1) to cooperative fishery organizations or (2) to individual fishermen based on their personal catch histories.

cc: Tim Barry, Legislative Liaison, ADF&G
David Bedford, Deputy Commissioner, ADF&G
John Hilsinger, Director of Commercial Fisheries, ADF&G
Patti Nelson, Deputy Director of Commercial Fisheries, ADF&G
Deborah Behr, Legislation and Regulations Attorney
Lance Nelson, Senior Assistant Attorney General
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John Bitney, Legislative Director, Office of the Governor