

SCOMM

#34:5

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

December 6, 1982

FILE COPY

D.A. Hostak, Director
Division of Business Loans
and Veterans Affairs
Department of Commerce
and Economic Development
Pouch D
Juneau, Alaska 99811

Re: Constitutionality of Residence
Requirement for Fishing Loans
(AS 16.10.310).
Our file 366-161-83.

Dear Mr. Hostak:

In a November 26, 1982 opinion, this office concluded that the five-year durational residency requirements for commercial fishing loans in AS 16.10.310(a)(1) clearly are unconstitutional, that no good faith defense of the requirements could be advanced if they were challenged in court, and that the requirements were not severable. As a result, we concluded that the Department of Commerce and Economic Development, Division of Business Loans and Veterans' Affairs, had no choice but to suspend the program until the legislature had an opportunity to amend the enabling legislation.

Governor Sheffield asked us to review the conclusions of that opinion to determine whether the program legally can be

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 2

reinstated between now and the time the legislature has an opportunity to address the problem created by the five-year durational residency requirement. Governor Sheffield's request stemmed from a strong desire to minimize the adverse consequences resulting from suspension of the program at this time. 1/

In response to the governor's request, we have undertaken a thorough review of the November 26, 1982 opinion. Following that review, we remain satisfied that two of the conclusions reached in that opinion are correct: (1) the five-year durational residency requirements are unconstitutional; and (2) no good faith defense of those requirements could be advanced if they were challenged in court.

However, we are not as certain about the conclusion regarding the severability of those requirements from the remainder of the statute. Under Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), a two-step test for severability is employed. First, it must appear that legal effect can be given to the remainder of the statute after the offensive provision is stricken. Here, legal effect certainly can be given to all three subparagraphs of AS 16.10.310(a)(1) if the words "of five years" are deleted from each subparagraph. If those deletions

1/ This time period -- i.e., between Thanksgiving and early spring -- is the fishing off-season. Accordingly, it is the busiest time of year for financial transactions most directly impacted by a suspension of the commercial fishing loan program.

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 3

are made, the eligibility requirement in general would be that applicants "have been state residents for a continuous period [OF FIVE YEARS] immediately preceding the date of application for a loan." AS 16.10.310(a)(1)(A) (material in brackets deleted).

The second element of the Lynden Transport test is that it must appear the legislature intended the remainder of the statute to stand if the offensive provision was stricken. In AS 16.10.300, the legislature declared the policy underlying the commercial fishing loan program: "It is the policy of the state, under secs. 300-370 of this chapter, to promote the rehabilitation of the state's fisheries, development of a predominantly resident fishery, and continued maintenance of commercial fishing gear and vessels throughout the state by means of long-term low interest loans." Neither the rehabilitation of the state's fisheries nor the continued maintenance of commercial fishing gear and vessels is related, either directly or indirectly, to a durational residency requirement. If the five-year durational residency requirement is not severable and the program must be suspended as a result, these legislative purposes clearly will be thwarted. We believe the presence of legislative purposes wholly unrelated to the durational residency requirement may be viewed as evidence that the legislature intended the remainder of the statute to stand if the durational residency requirements were stricken.

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 4

Moreover, the express legislative purpose of promoting development of a predominately resident fishery and the implied legislative purpose of ensuring that only bona fide state resident commercial fishermen qualify for commercial fishing loans both can be accomplished quite easily without a statutory five-year durational residency requirement. Without that requirement, eligibility still would be limited by statute to those who "have been state residents for a continuous period" -- i.e., bona fide Alaska residents.

In other words, all of the legitimate legislative purposes underlying both the statutory commercial fishing loan program as a whole and the specific five-year durational residency requirements can be satisfied even if the five-year requirements are severed. As a result, we believe it is reasonable to conclude that the legislature would have intended the remainder of the statutory commercial fishing loan program to stand if the unconstitutional five-year durational residency requirements were stricken.

Accordingly, under Lynden Transport, the offensive five-year durational residency requirement can be found severable. We believe that is the result the Alaska Supreme Court would reach if the question was presented to it. As a result, we believe you should reinstitute the program under AS 16.10-.310(a)(1), but without the five-year durational residency re-

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 5

quirement. That conclusion is supported by AS 01.10.030, the state's general severability clause 2/, which the Alaska Supreme Court views as establishing at least a weak presumption in favor of severability. Williams v. Zobel, 619 P.2d 422 (Alaska 1980).

Once the five-year durational residency requirements are severed, the statute then requires only that applicants have been state residents for a continuous period immediately prior to applying for a loan as an objective test of residency. To establish a legally defensible objective standard for the length of the statutorily required continuous period of residency, we believe the Department of Commerce and Economic Development should adopt emergency regulations under AS 16.10.310(a)(3) and AS 44-.62.250.

The length of any period of residency required by such regulations should be within a range which could be defended in court. Under the cases cited in the November 26, 1982 opinion, 30 days clearly would be permissible. One year almost certainly

2/ AS 01.10.030 provides:

Any law heretofore or hereafter enacted by the Alaska Legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be effected [sic] thereby."

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 6

would be permissible. A good faith argument could be made that two years is permissible because of the highly transient nature of fishermen, although it is more likely than not that a two-year durational residency requirement would be found unconstitutional if challenged in court. To assist your department in adopting the necessary emergency regulations, we are attaching a draft finding of emergency, order of adoption, and amended regulation conforming to the requirements of AS 44.62.250. 3/

We are aware that the Alaska Supreme Court has acknowledged the doctrine of separation of powers. See e.g., Bradner v. Hammond, 553 P.2d 1 (Alaska 1976); Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975). Under that doctrine, some might criticize a policy under which the attorney general concludes that constitutionally offensive provisions are severed under the Lynden Transport analysis with the executive branch then proceeding to implement the remainder of the statute. 4/ It apparently was for this reason -- i.e. that severing the constitutional portion of the statute could be viewed as impermissible

3/ Your department must then follow the additional steps outlined in the Drafting Manual for Administrative Regulations. See checklist on pp. 12-13 and chapter 5.

4/ This is precisely what happened when this department proposed to settle a court challenge to the state's longevity bonus program by severing the program's unconstitutional residency requirements and establishing a one-year durational residence requirement in their place.

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 7

legislating by the executive branch -- that former Attorney General Condon concluded that you had no choice but to suspend the program pending a legislative solution.

However, in the extraordinary situation where a statutory requirement clearly is unconstitutional and cannot be defended in court, I believe the better result is for the legislative will expressed in the overall statutory scheme to be implemented without the constitutionally offensive provisions if they can be severed under the Lynden Transport analysis. This gives the executive branch much more flexibility when the legislature passes a statute which is unconstitutional in part. Under a policy where offensive provisions cannot be severed, the difficult choice is between continuing to implement an unconstitutional statute or suspending an entire program. However, if an offensive provision can be severed, the executive branch can implement the legislative will in a constitutional manner, thereby satisfying the programmatic desires expressed by the legislature without running afoul of constitutional constraints.

If the legislature is dissatisfied with this result, or disagrees with the attorney general's conclusion regarding severability, it always has the option of amending the statute or repealing it altogether. Ultimately, the legislature must take final responsibility for the statutes which govern the state.

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 8

To intrude as little as possible into the legislative sphere, Governor Sheffield has made it clear that the solution outlined above is to be an interim solution only. Under AS 44.62-.260(a), emergency regulations expire 120 days after they are adopted. At that time, if the legislature has not addressed the problem presented by the unconstitutional five-year durational residency requirements, the program should again be suspended.

We are sending copies of this opinion to Senator Kerttula and Representative Hayes to ensure that the legislature has notice that the program will be suspended upon expiration of the emergency regulation if there is no legislative action before then. Consequently, the legislature will have to act if it desires the program to continue beyond the expiration date of the emergency regulation.

The administration is considering proposing legislation to remedy this problem, although no decision has been made in that regard. However, any permanent solution to the problem created by the unconstitutional five-year durational residency requirement in AS 16.10.310(a)(1) must be provided by the legislature. The interim solution outlined above is simply a pragmatic approach to solving the problem temporarily to avoid the considerable hardship immediate suspension of the program would work on the commercial fishing industry while the legislature considers this matter.

D.A. Hostak, Director
Division of Business Loans & Veterans' Affairs
Dept. of Commerce & Economic Development
366-161-83

December 6, 1982
Page 9

We will be happy to work with you in putting this suggested interim solution into practice.

Sincerely,



Norman C. Gorsuch
Attorney General

NCG:GTK:d1m

Attachment

cc: Senator Jalmar Kerttula
Representative Joe L. Hayes



Alaska State Legislature

House of Representatives

November 5, 1982

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: The Honorable Joe Hayes
Speaker of the House
Anchorage

FROM: Mark K. Johnson
Juneau

Subjects: Proposed legislation regarding (a) Commercial Fishing Loan Act and (b) Fishermen's Mortgage and Note Fund.

Each of these programs was identified by the Attorney General in his letter of September 1, as posing constitutional problems because of durational residency requirements. After some research and reflection it was determined that attempts to cure the problems with these programs should be simple rather than complex.

In the Commercial Fishing Loan Act, AS 16.10.310-16.10.360, the Department of Commerce is given the authority to make loans to individual commercial fishermen and eligible business ventures for "the repair, restoration or upgrading of existing vessels and gear, for the purchase of entry permits and gear and for the construction and purchase of vessels...". The program also imposed a five year continuous residency requirement for eligibility for these loans.

The proposed legislation would delete the five year residency requirement entirely but expand a requirement that an applicant have actively participated in the fishery from one out of the last five years to three out of the last five years. Inasmuch as there is no residency requirement for the holding of a limited entry permit or on participation in the fishery as a crewmember, this may be a appropriate response.

Legislation creating the Fishermen's Mortgage and Note Fund, AS 16.10.650-16.10.720, also imposed a five year durational residency requirement on applicants for that program. The proposed legislative response would also delete this requirement from the law. But at the same time, the response would impose upon an applicant the burden of establishing that "he is likely to contribute to the economic stability of the state".

My understanding of the opinion of the U.S. Supreme Court in Zobel V. Williams, ___ U.S. ___, 72 L Ed 2d 672, (1982), is that the imposition of such a requirement is acceptable. Such a requirement does not suffer from the defect of being only backward looking but is rather, only concerned with the present and the future. I believe accordingly that such a requirement is a "legitimate state purpose". See the opinion of Justice Brennan at 72 L Ed 2d 672, at 684.

These last two pieces of proposed legislation represent the final areas in which legislative action is appropriate with the exception of the longevity bonus program. I will be spending some time on that issue to determine if some kind of legislative solution can be fashioned. I expect, however, that the likely conclusion is that the program must be scrapped altogether or funded at a dramatically higher level.

*Sec 1: AS 16.10.310 is amended to read:

Sec. 16.10.310. Powers of the department. (a) The department may
(1) make loans to

(A) individual commercial fishermen who have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43.010-16.43.380 for any three of the past five years and who actively participated in the fishery during that period, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of entry permits and gear, and for the construction and purchase of vessels; and

(B) corporations, partnerships or joint ventures, 100 per cent of which are owned by individual commercial fishermen who have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43.010-16.43.380 for any three of the last five years, and who actively participated in the fishery during that period, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of gear, and for the construction and purchase of vessels;

(2) designate agents and delegate its powers to them as necessary;
(3) adopt rules and regulations necessary to carry out its functions;
(4) establish amortization plans for repayment of loans, which may include extensions for poor fishing seasons;
(5) enter into agreements with private lending institutions, other state agencies or agencies of the federal government to carry out the purposes of AS 16.10.300-16.10.370.

(b) The department shall consult with the Department of Fish and Game on regulations and procedures established under AS 16.10.010-16.10.720.

*Sec. 1: AS 16.10.680 is amended to read:

Sec. 16.10.680. Eligibility for loans . (a) The commissioner may purchase a mortgage or note under AS 16.10.660(b) if it secures a loan to an individual who meets one of the requirements of (b) of this section and who

(1) does not qualify for a loan for the purposes described in AS 16.10.670 under a state loan program;

(2) has not previously participated in the loan program established in AS 16.10.650-16.10.720 or in any other state loan program for the purposes described in AS 16.10.670; and

(3) meets the guidelines established by the commissioner to determine whether the applicant is reasonably likely to succeed as a commercial fisherman and be able to repay the loan.

(b) In addition to the requirements of (a)(1)-(4) of this section, the commissioner may purchase a mortgage or note under AS 16.10.660(b) only if it secures a loan to an individual who demonstrates under guidelines established by the commissioner that he is likely to contribute to the economic stability of the state and

(1) because of his lack of training or the lack of employment opportunities in the area in which he resides, he does not have occupational opportunities available to him other than commercial fishing; or

(2) he is economically dependent on commercial fishing for a livelihood and commercial fishing has been a traditional way of life for him in Alaska.

(c) The commissioner may not refuse to purchase a mortgage or note from a private financial institution under AS 16.10.660(b) solely because the applicant for the loan does not have a credit history.

(d) In determining whether the applicant is reasonably likely to be able to repay the loan under (a)(4) of this section, the private financial institution shall consider the applicant's income from commercial fishing and from other sources.

FINDING OF EMERGENCY

The Department of Commerce and Economic Development finds that an emergency exists and that the attached amendment is necessary for the immediate preservation of the public peace, health, safety, or general welfare. A statement of the facts constituting the emergency is:

1. In a November 26, 1982 opinion, the Department of Law concluded that the five-year durational residency requirements for commercial fishing loans in AS 16.10.310(a)(1)(A), (B) and (C) are unconstitutional.
2. In a December 6, 1982 opinion, the Department of Law concluded that the five-year durational residency requirements for a commercial fishing loan are severable from the remainder of the statutory program.
3. The commercial fishing loan program was initially enacted in 1972. Since that time, it has become very important to the continued viability of the commercial fishing industry in Alaska. In addition to providing financing for vessels and gear, the commercial fishing loan program provides the only mechanism for financing the purchase of limited entry permits using the permits as collateral. If the program is suspended, it will work an immediate and considerable hardship on the commercial fishing industry in Alaska. Therefore, 03 AAC 80.100 must be amended to remove the requirement that an individual be a five-year resident to qualify for a commercial fishing loan for the immediate preservation of the general welfare of the industry.
4. The Department of Law concluded that the five-year durational residency requirement in AS 16.10.310(a)(1)(A), (B) and (C) was intended to ensure that only bona fide residents of Alaska qualify for commercial fishing loans. The legislature has not funded this department with a sufficient staff to make individual inquiries of each applicant for a commercial fishing loan to determine on an individualized basis whether that applicant is in fact a bona fide resident of Alaska and, at the same time, to make the necessary evaluation of an applicant's financial situation for purposes of obtaining a loan. As a result, some legally permissible screening requirement to test the bona fides of residency must be adopted.
5. The Department of Law informs us that a one-year durational residency requirement almost certainly is constitutional when a fundamental right or basic necessity of life is not involved, and that eligibility to apply for a commercial fishing loan is not a fundamental right nor a basic necessity of life.

ADOPTION ORDER

Under authority of AS 16.10.310(a)(3), the regulation is therefore adopted as an emergency regulation to take effect immediately upon filing by the lieutenant governor as provided in AS 44.62.180(3).

DATE: December 7, 1982
Juneau, Alaska

Richard A. Lyon, Commissioner.
Department of Commerce and
Economic Development

FILING CERTIFICATION

I, Stephen Alan McAlpine, Lieutenant Governor for the State of Alaska, certify that on December 7, 1982, at _____ .m., I filed the attached regulations according to the provisions of AS 44.62.

Stephen Alan McAlpine
Lieutenant Governor

3 AAC 80.100. DEFINITION OF TERMS. Unless the context requires otherwise, in this chapter and in the forms and instructions of the commissioner

. . .

(11) "resident" means a corporation, partnership or limited partnership 100 percent of which is owned by a resident commercial fisherman or an individual who, except for brief intervals, periods of military service, or attendance at an educational or training institution has resided in the state for one year [FIVE YEARS]; "residence" is determined by where the individual

(A) is registered to vote;

(B) maintains his permanent place of abode;

(C) files his tax returns;

(D) registers or licenses his personal property, including but not limited to cars, boats, trucks and trailers;

(E) is licensed to drive; and

(F) maintains bank accounts, savings accounts, lines of credit and other financial relationships. (Eff. 9/26/76, Reg. 59; am 5/16/81, Reg. 78; am / / , Reg.)

Authority: AS 16.10.310

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y. STATE CAPITOL
JUNEAU ALASKA 99801
907.465.1800

MEMORANDUM

November 29, 1982

SUBJECT: Fishermen's Mortgage and Note Program
(Work Order No. 13-0126)

TO: Representative Joe L. Hayes
ATTN: Mark Johnson

FROM: Billy G. Berrier *BGB*
Director
Division of Legal Services

You have asked that AS 16.10.680 concerning the fishermen's mortgage and note program be amended to delete the residency requirement and to add another amendment.

This program was repealed last year by Chapter 113, SLA 1982 effective June 25, 1982. All assets were transferred to the commercial fishing revolving loan fund (AS 16.10.340).

I note you have requested amendments to that fund (Work Order No. 13-0115) which seem to take care of the concerns. I am, therefore, cancelling Work Order No. 13-0126. If there are still problems I do not see, please call me.

BGB:jdn

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

November 26, 1982

D.A. Hostak, Director
Division of Business Loans
and Veterans Affairs
Department of Commerce
and Economic Development
Pouch D
Juneau, Alaska 99811

FILE COPY

Re: Constitutionality of Residence
Requirement for Fishing Loans
(AS 16.10.310).
Our file 366-161-83.

Dear Mr. Hostak:

You requested our opinion regarding the constitutionality of the five-year durational residency requirement for commercial fishing loans under AS 16.10.300--16.10.370. AS 16.10.310(a)(1), repealed and reenacted earlier this year (1982 SLA, ch. 113, § 7), provides:

(a) The department may

(1) make loans to

(A) individual commercial fishermen who have been state residents for a continuous period of five years immediately preceding the date of application for a loan under AS 16.10.300--16.10.370 and have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43 for any one of the past five years, and who actively participated in the fishery during that period, for the purchase of entry permits;

(B) an individual who has been a state resident for a continuous period of five years immediately preceding the date of application for a loan under AS 16.10.300--16.10.370, who (i) because of lack of training or lack of employment

opportunities in the area of residence does not have occupational opportunities available other than commercial fishing; or (ii) is economically dependent on commercial fishing for a livelihood and commercial fishing has been a traditional way of life for the individual in Alaska, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of entry permits and gear, and for the construction and purchase of vessels;

(C) corporations, partnerships, or joint ventures, 100 percent of which are owned by individual commercial fishermen who have been state residents for a continuous period of five years immediately preceding the date of application for a loan under AS 16.10.310(a)(1)(B) and have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43 for any one of the past five years, and who actively participated in the fishery during that period, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of gear, and for the construction and purchase of vessels.

A common feature of each of the three subparagraphs is a five-year durational residency requirement for eligibility to apply for loans. 1/

1/ Under subparagraphs (A) and (B), individuals who have been Alaska residents for a continuous period of five years immediately preceding the date of application for a loan may apply. Under subparagraph (C), corporations, partnerships, or joint ventures, 100 percent of which are owned by commercial fishermen who have been state residents for a continuous period of five years immediately preceding the date of application for a loan, may apply. Although each of the three subparagraphs differ in additional eligibility requirements and the purposes for which loans may be made, those differences do not affect the constitutionality of the five-year durational residency requirements imposed. Accordingly, there is no need to discuss each subparagraph separately.

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 3

For the reasons which follow, we believe each of the five-year durational residency requirements in AS 16.10.310(a)(1) is unconstitutional. Further, we believe this result is sufficiently clear that no good faith defense of the requirements could be made if they were challenged in court. Accordingly, we believe the commercial fishing loan program under AS 16.10.300 -- 16.10.370 must be suspended until the legislature changes the statutory scheme authorizing the program.

I. BACKGROUND

Durational residency requirements for eligibility to participate in state programs have been the subject of a number of judicial decisions, both in the Alaska Supreme Court and the United States Supreme Court. Because durational residency requirements have the effect of creating two classes of residents, only one of which is eligible to participate in the program, challenges to such requirements usually are based on the equal protection clauses of article I, section 1 of the Alaska Constitution and the Fourteenth Amendment to the United States Constitution.

An earlier opinion by this office discusses at great length the tests employed by the courts when a durational residency requirement is challenged as a denial of equal protection. 1982 Alaska Op. Atty. Gen. No. 7 (July 14) (expressing opinion that durational residency requirements for veterans loans are

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 4

unconstitutional). If the durational residency requirement at issue penalizes the exercise of the right to travel, either through infringement of a fundamental right (such as voting) or through denial of a basic necessity of life (such as welfare or medical services), it is unconstitutional as a denial of equal protection under the United States Constitution unless it furthers a compelling state interest. Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare); Memorial Hospital v. Maricopa County, 415 U.S. 450 (1974) (medical care). If it does not penalize the exercise of the right to travel, it is not unconstitutional as a denial of equal protection under the United States Constitution as long as it has a rational basis. Sosna v. Iowa, 419 U.S. 393 (1975). Under the Alaska Constitution, a durational residency requirement is not unconstitutional as a denial of equal protection if it substantially furthers the legitimate purposes of the legislation and the state interest in imposing the requirement outweighs the constitutional right involved. 2/ Williams v. Zobel, 619 P.2d

2/ As a general rule, the test for constitutionality under the Alaska Constitution when the exercise of the right to travel is not penalized is stricter than the rational basis test under the United States Constitution. Accordingly, if a challenged statute survives judicial scrutiny under the Alaska Constitution in the Alaska courts, it follows a fortiori that it is constitutional under the United States Constitution and no independent analysis is necessary. Williams v. Zobel, 619 P.2d 448, 457 (Alaska 1980); but see Zobel v. Williams, ___ U.S. ___, 72 L.Ed.2d 672 (1982).

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 5

422, 427 (Alaska 1980) ("Zobel I"), applying State v. Erickson,
574 P.2d 1 (Alaska 1978).

II. ANALYSIS

The first inquiry is whether the durational residency requirement penalizes the exercise of the right to travel either through infringement of a fundamental right or through denial of a basic necessity of life. In our opinion, the five-year durational residency requirement for a commercial fishing loan is neither an infringement of a fundamental right nor a denial of a basic necessity of life and therefore does not penalize the exercise of the right to travel.

Obtaining a commercial fishing loan is not a fundamental right for purposes of equal protection analysis. Cf. Williams v. Zobel, 619 P.2d 448, 457 (Alaska 1980) ("Zobel II") (equality in distribution of permanent fund earnings is not a fundamental right), reversed on other grounds ___ U.S. ___, 72 L.Ed.2d 672 (1982); Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1262 (1980) (eligibility to apply for a limited entry permit is not a fundamental right). It also seems clear that a commercial fishing loan is not a basic necessity of life. Cf. Zobel II at 455 ("a permanent fund earnings dividend is not a 'basic necessity'").

Accordingly, we believe the five-year durational residency requirements in AS 16.10.310(a)(1) do not have to satisfy

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 6

the compelling state interest test. This view is consistent with what appears to be the general rule applied by the United States Supreme Court that statutes providing for governmental payments of monetary benefits are entitled to a strong presumption of constitutionality and should be upheld if they have a rational basis. See, e.g., Califano v. Torres, 435 U.S. 1, 5 (1978), and cases cited. ^{3/}

Since we believe the courts would not measure the five-year durational residency requirements of AS 16.10.310(a)(1) against the more stringent compelling state interest test, its constitutionality under the United States Constitution depends on whether it has a rational basis. Under the Alaska Constitution, it depends on whether it meets the substantially-further-the-purposes/balancing test of Erickson. Because a classification satisfying the Erickson test a fortiori satisfies the federal rational basis test, see n. 2 supra, the question becomes whether the requirements meet the Erickson test.

Under that test, the court

must look to the purpose of the statute, viewing the legislation as a whole, and the circumstances surrounding it. It must be determined that this purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced therefore, the court must

^{3/} The Alaska Supreme Court cited Torres with apparent approval in Zobel II at 463.

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 7

then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved.

Erickson, 574 P.2d at 12 (footnotes omitted).

The first step in the analysis is to identify the purposes of the legislation and determine whether those purposes are legitimate.

In AS 16.10.300, the legislature declared the policy underlying the commercial fishing loan program: "It is the policy of the state, under secs. 300--370 of this chapter, to promote the rehabilitation of the state's fisheries, development of a predominantly resident fishery, and continued maintenance of commercial fishing gear and vessels throughout the state by means of long-term low interest loans." Three legislative purposes emerge from this statement: (1) promoting the rehabilitation of the state's fisheries; (2) promoting development of a predominantly resident fishery, and (3) promoting continued maintenance of commercial fishing gear and vessels throughout the state. Another obvious purpose -- albeit necessarily implied -- is that only bona fide state residents receive the commercial fishing loans authorized. A fifth plausible purpose -- again, only by implication -- is to limit those loans only to long-term (i.e., five-year) residents. Finally, a sixth plausible purpose -- again, only implied -- is to ensure that recipients of commercial fish-

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 8

ing loans have an opportunity to become aware of the rigors of that profession and obtain some experience in the field before becoming independent operators.

The first purpose -- promoting rehabilitation of the state's fisheries -- clearly is permissible. See Alaska Constitution, article VIII, §§ 4 and 5.

The second purpose identified is "to promote the development of a predominantly resident fishery." AS 13.10.300 (in part). To the extent this statement is evidence of a legislative purpose to restrict Alaska's commercial fisheries to Alaska residents, there is a question whether it is permissible. 4/ How-

4/ Originally, the courts considered that states owned the fish and wildlife resources within their borders. As a result, it was held that a state could limit the privilege of taking those resources to its own residents, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (oysters), and that a state could prohibit shipment of those resources outside its borders once they had been reduced to capture. *Geer v. Connecticut*, 161 U.S. 519 (1896) (game birds). However, in a long line of subsequent cases, the United States Supreme Court has made clear that a state does not own the fish and wildlife resources within its borders in a proprietary sense. In *Missouri v. Holland*, 252 U.S. 416, 434 (1920), a challenge to the federal Migratory Bird Treaty Act, Justice Holmes stated: "To put the claim of the state upon title is to lean upon a slender reed." "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer v. Witsell*, 334 U.S. 385, 402 (1948). Also see *Douglas v. Seacoast Products*, 431 U.S. 265, 284 (1977); *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 385-386 (1978); *Hughes v. Oklahoma*, 441 U.S. 322, 327-335 (1979); cf. *Brown v. Anderson*, 202 F.Supp. 96 (D. Alaska 1962) (three-judge panel) (statute granting commissioner and Board of Fish and Game authority to close registration

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 9

ever, courts will construe statutes to avoid constitutional problems if possible. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1978). That can be done here by reading this statement of purpose as manifesting a legislative intent that the state loans authorized be used to promote the development of a strong resident commercial fishing industry which will benefit the state through expanded employment opportunities, etc. This purpose clearly is permissible: "Encouraging and assisting the wholesome development of new business and industry in Alaska and rehabilitating and expanding existing business and industry are legitimate legislative purposes." De Armond v. Alaska State Development Corp., 376 P.2d 717, 721-722 (Alaska 1962).

The third purpose identified -- to promote continued maintenance of commercial fishing gear and vessels -- similarly is permissible under the state's general police power to legis-

4/ (Continued)

areas or districts to commercial fishing by nonresidents held unconstitutional).

The United States Supreme Court also has made clear that it is impermissible for a state to regulate solely for the purpose of giving its residents an economic advantage over nonresidents. See, e.g., Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (Louisiana statute prohibiting transport of shrimp outside Louisiana until head and shells removed struck down as economic protectionism); Toomer v. Witsell, supra (South Carolina nonresident fee of \$2,500 to take shrimp struck down where resident fee was \$25); Mullaney v. Anderson, 342 U.S. 415 (1952) (Alaska nonresident commercial fishing license fee of \$50 struck down where resident license fee was \$5).

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 10

late for the welfare of its citizens.

The fourth legislative purpose identified is to limit eligibility for state commercial fishing loans to state residents. A legislative purpose to prefer state residents over non-residents in the allocation of state monetary benefits is permissible. "Generally, a state has much more authority to draw distinctions between residents and nonresidents than between long-term and short-term residents." Zobel II at 436, n. 10 (Justice Rabinowitz, concurring) (citations omitted).

Such distinctions usually are challenged under the privileges and immunities clause of article IV, section 2 of the United States Constitution, which provides "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," not the equal protection clause of the Fourteenth Amendment. The definitive pronouncement regarding the constitutionality of limiting the recipients of state monetary benefits to state residents seems to be that by Justice Washington, sitting as Circuit Justice, in Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230): "[W]e cannot accede to the proposition that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 11

the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to its own citizens." The proposition that a state can limit its monetary benefits to its own residents apparently is no longer open to serious question.

The fifth possible legislative purpose -- to limit eligibility for commercial fishing loans only to long-term (i.e., five-year residents) -- is not permissible. The only ground advanced to support such a distinction between residents has been that long-term residents should be entitled to some reward for their past contributions to the state. This past contributions rationale was expressly found impermissible in Zobel v. Williams, ___ U.S. ___, 72 L.Ed.2d 672 (1982).

The final possible legislative purpose identified is to ensure that the recipients of commercial fishing loans had an opportunity to become aware of the rigors of that profession and to obtain some experience. We believe that this is permissible under the state's general police power to legislate for the welfare of its citizens.

The second element of the Erickson test is to determine whether the challenged classification -- here, the five-year durational residency requirement -- substantially furthers the legitimate purposes.

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 12

The first purpose identified is to promote rehabilitation of Alaska's fisheries. This apparently related to the former authorization in AS 16.10.310(a)(1)(B), repealed in 1976 SLA, ch. 190, § 2, for hatchery construction. The loans now authorized for the purchase of limited entry permits and the purchase and repair of vessels and gear bear little or no relation to rehabilitation of the fisheries. In fact, the opposite seems to be the case since improved vessels and gear would increase pressure on fisheries. While limiting such loans to five-year residents might mitigate this increased pressure, we believe the connection simply is too attenuated to be characterized as substantially furthering the purpose of rehabilitating Alaska's fisheries. (To the extent there is such a connection, it clearly would not survive the balancing element of the Erickson test, discussed below).

The second permissible purpose of the legislation is to promote development of a strong resident commercial fishing industry. This permissible purpose appears inextricably linked to the fourth purpose identified: limiting the benefits of the commercial fishing loan program to state residents only. To accomplish these purposes, the legislature has limited eligibility for loans to five-year residents, AS 16.10.310(a)(1)(A) and (B), and corporations, partnerships and joint ventures wholly owned by five-year residents. AS 16.10.310(a)(1)(C). The five-year dura-

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 13

tional residency requirement thus appears to be a mechanism to ensure that only the resident fishing industry -- i.e., bona fide state residents -- qualify for the loans.

A state may require some period of residency to ensure that individuals seeking a state benefit are bona fide residents. ^{5/} Sosna v. Iowa, 419 U.S. 393 (1975); Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971); Vlandis v. Kline, 412 U.S. 441, 452-53 (1973) (dicta); Zobel II. In other words, a durational residency requirement in general bears a fair and substantial relationship to testing the bona fides of residency. The precise length of residency required seems immaterial to the "fair and substantial relationship" inquiry under Erickson; indeed, the longer the period of residency required, it would seem, the more likely it is that the applicant is a bona fide resident. ^{6/} The more im-

^{5/} Indeed, even in cases involving fundamental rights and basic necessities of life, the courts recognize that some minimum period of residency may be required to prevent fraud. The precise length of that period may be based on the particular facts presented. Compare Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee permitted to apply no more than 30-day residency requirement for voting), with Marston v. Lewis, 410 U.S. 679 (1973) (Arizona permitted to apply 50-day residency requirement for voting).

^{6/} But see Thomas v. Bailey, 595 P.2d 1, 18 (1979) (Justice Rabinowitz concurring): "Whether or not the state has a justifiable concern that state land be distributed to bona fide residents of Alaska to the exclusion of non-resident applicants, requiring a minimum of three years actual domicile to establish bona fide residence status in the state simply bears no substantial relationship to the asserted purpose of the requirement." (Footnote omitted).

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 14

portant question, discussed below, is whether the state's interest in requiring that length of residence outweighs the rights of those denied the benefit.

The third legitimate purpose identified is the "continued maintenance of commercial fishing gear and vessels throughout the state." AS 16.10.300. We believe a five-year durational residency requirement for a commercial fishing loan bears virtually no relationship to this purpose. It is a well-known fact that a substantial portion of the commercial fishing fleet in Alaska is owned and operated by nonresidents. Moreover, it is not unreasonable to speculate that an additional portion of the commercial fishing fleet in Alaska is owned by Alaska residents who have resided here for less than five years. Both of these groups would be completely excluded from the benefits of the commercial fishing loan program by virtue of the five-year durational residency requirement. As a result, the requirement does not bear a fair and substantial relationship to the "continued maintenance of commercial fishing gear and vessels throughout the state" but, instead, may make achievement of that goal less likely than it would be if the program was open to all fishermen.

The final legitimate purpose identified is to ensure that recipients of commercial fishing loans are aware of the rigorous life of a commercial fisherman and acquire the necessary skills to pursue that profession. However, the five-year dura-

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 15

tional residency classification is insufficiently tailored to reach this end. On the one hand, it excludes less-than-five-year residents who are experienced fishermen; on the other hand, the five-year durational residency requirements standing alone would permit any five-year resident to apply regardless of experience. In other words, the classification does not further the legitimate purpose. This familiarity and experience rationale for a three-year durational residency requirement for lobster and crab fishing licenses was rejected on this basis in Massey v. Apollonio, 387 F.Supp. 373 (D. Maine 1974).

Moreover, this legitimate purpose appears to be advanced far more effectively by other statutory eligibility requirements. AS 16.10.310(a)(1)(A) and AS 16.10.310(a)(1)(C) require that applicants must have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43 for any one of the past five years and have actively participated in the fishery during that period. Alternative requirements in AS 16.10.310(a)(1)(B) are that an individual either reside in an area with no occupational opportunities other than commercial fishing or be economically dependent on commercial fishing for a livelihood if commercial fishing has been a traditional way of life for him.

The final step in the Erickson analysis is to balance the state interest furthered by the classification -- i.e., the

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 16

durational residency requirement -- against the nature of the individual right infringed. The only permissible state interests furthered by the durational residency requirement are ensuring that only the resident fishing industry, i.e., bona fide state resident commercial fishermen, qualify for the economic benefits afforded by the state's commercial fishing loan program. The individual right infringed is that bona fide Alaska residents who do not meet the five-year requirement are absolutely precluded from participating in the program. The balance, then, is between the state's need to require five years of residency against the deprivation that less-than-five-year residents suffer.

We believe there is no question that the Alaska Supreme Court would strike the balance in favor of the less-than-five-year resident and hold the five-year durational residency requirement unconstitutional. Initially, we note that the Alaska Supreme Court historically has viewed durational residency requirements less favorably than the United States Supreme Court. Compare State v. Adams, 522 P.2d 1125 (Alaska 1974) (one-year durational residency requirement for divorce held unconstitutional under Alaska Constitution), with Sosna v. Iowa, 419 U.S. 393 (1975) (one-year durational residency requirement for divorce held constitutional under United States Constitution). Justice Rabinowitz, concurring in Thomas v. Bailey, 595 P.2d 1 (Alaska 1979), stated that residence of three years duration was not rea-

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 17

sonably required to ensure that only bona fide state residents qualified for grants of state land. 7/ Senior Justice Dimond, joined by Justice Matthews, dissenting in Zobel II, pointed out that "it has never been questioned that durational residency requirements, when valid, must be reasonable in length."

Of course, what is reasonable to one person may not be reasonable to another. However, we believe even more deferential courts would hold that the state's interest in imposing a five-year durational residency requirement to test the bona fides of residency is outweighed by the less-than-five-year resident's right to be treated equally, and would find the requirement unreasonable. In Vlandis v. Kline, 412 U.S. 414 (1973), the United States Supreme Court struck down Connecticut's four-year durational residency requirement for reduced state university tuition. The Court held that the four-year requirement created an irrebuttable presumption of nonresidency, and that the state's refusal to provide a procedure by which individuals with less than four years residency could prove that they were bona fide residents of the state constituted a denial of due process. Although the Vlandis dissenters may be correct in their argument that this due process legal theory is not sound 8/, we believe

7/ See note 6, supra.

8/ Justice Rehnquist, joined by Chief Justice Burger and Justice Douglas, pointed out in his dissent in Vlandis that the ma-

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 18

the effect of the decision is clear: a four-year durational residency requirement is clearly unconstitutional.

In Vlandis, the Court noted the special problems involved when a state attempts to determine the bona fide residence of a highly mobile population:

We are aware, of course, of the special problems involved in determining the bona fide residence of college students who come from out of State to attend that State's public university. . . .

. . . The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

412 U.S. at 452-454. The Court then noted relevant criteria established by the Connecticut Attorney General: year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc.

This leaves a question as to what length of durational residency may be required. Under Sosna and Zobel II, one year appears to be constitutionally permissible when fundamental

8/ (Continued)

majority's theory that an irrebuttable presumption violates due process relied on principles of substantive due process -- i.e., "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely." Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). This theory is not generally favored. See 412 U.S. at 467-468 and cases cited.

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 19

rights and basic necessities of life are not involved. Under Vlandis, it seems clear that four years may not be required. Justice Rabinowitz, concurring in Thomas v. Bailey, supra, disapproved three years durational residency. Also see Massey v. Apollonio, supra (three-year durational residency requirement for lobster and crab fishing license unconstitutional under federal rational basis test).

We are vigorously defending the two-year durational residency requirement in AS 14.43.125(b) for eligibility to apply for scholarship loans under AS 14.43.090--14.43.160. Andress v. Baxter et al., No. A82-307 Civil (D. Alaska, filed August 3, 1982). Our defense is based on the fact that the residency of college students is difficult to determine, since their physical abode once they have entered college almost universally is on or adjacent to the campus they are attending. When this is coupled with the extremely liberal benefits provided qualifying student applicants, we believe a period of residency longer than one year is defensible.

Similar considerations apply to commercial fishermen. Fishermen comprise a highly mobile population. Alaska's fisheries attract residents of many states who, of necessity, must spend a considerable amount of time in Alaska. While here, it is quite easy to obtain many of the normal indicia of Alaska residence: housing, mailing address, voter registration, driv-

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 20

er's license, etc. Following repeal of the personal income tax, there are few negative consequences attached to declaring Alaska residency.

Finally, the commercial fishing loan program is extremely attractive to prospective fishermen. The interest rate on loans under the program may not exceed 10½ percent. AS 16.10.320(a)(2). More importantly, a loan to a qualifying Alaska resident under AS 16.10.333 is the only legal way to finance the purchase of a limited entry permit using the permit itself as collateral for the loan. 9/ AS 16.43.150(g). With the price of limited entry permits ranging as high as \$250,000 and up, the desirability of using the permit itself as collateral is obvious.

These considerations may make it permissible for the state to require more than a one-year durational residency requirement. We will have more guidance on this question following a decision in Andress. However, we believe that the five-year durational residency requirements in AS 16.10.310(a)(1) clearly are unconstitutional and cannot be defended in the absence of

9/ AS 44.81.220(a)(20) authorizes the Alaska Commercial Fishing and Agriculture Bank ("CFAB") to make loans to five-year residents with at least one year of experience in commercial fishing. However, we understand that CFAB is not making such loans at this time. The five-year eligibility requirement in AS 44.81.220(a)(20) suffers the same constitutional defect as the requirement in AS 16.10.320(a)(1). We are sending CFAB a copy of this opinion, suggesting that legislative consideration of AS 16.10.320(a)(1) also encompass the eligibility requirement in AS 44.81.210(a)(20).

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 21

some compelling reason. 10/

III. EFFECT OF OPINION

As set out above, it is our conclusion that the five-year durational residency requirements in AS 16.10.310(a)(1) clearly are unconstitutional. The remaining question is what effect our opinion should have on your administration of the program.

We recently undertook a thorough review of this question. Following that review, we concluded that three courses of action are possible. First, if we believe there is a significant probability that the statute would be found constitutional if challenged in court, the agency charged with administering the statute should continue implementing it. Under these circumstances, we believe the legislative will, as expressed in the statute, should be followed by the executive branch unless and until the statute is ruled unconstitutional by the courts.

Second, if a good faith argument can be made that the statute is constitutional but we believe it probably would be held unconstitutional if challenged in court, we will so state and, if appropriate (i.e. subject to practical considerations

10/ The three-year durational residency requirement for running for state legislature was upheld in *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974) on the ground that the state had a compelling interest in ensuring the candidate is exposed to his prospective constituents and legislators are familiar with the diverse character of the state. No such compelling state interests are present here.

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 22

of office priorities and resource availability), seek leave to file an action under article III, section 16 of the Alaska Constitution 11/ to obtain a judicial determination of the statute's constitutionality.

However, where no good faith argument can be made that the statute is constitutional, we believe it is the obligation of the attorney general to say so and, as the legal advisor to the governor and other state officers, AS 44.23.020(a), to direct that the program be shut down.

Very rarely will it be impossible to make a good faith argument that a statute is constitutional. However, we believe the five-year durational residency requirement in AS 16.10-.310(a)(1) is one of those rare exceptions. We reach this conclusion on the basis of the thorough case law review undertaken above. Durational residency requirements longer than one year

11/ That provision provides in part that the governor "may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions." The intent of the section was to give the governor all the power necessary to prevent subordinate officials from acting in an unconstitutional manner or contrary to statute. 3 Alaska Const. Conv. Min. 1986, 2022. In such an action, of course, the central inquiry is the legality of the questioned activity (here, applying the five-year durational residency requirement). Under this provision, the effect of a referendum repeal of the Elected Public Officers Retirement System (EPORS) was tested in State ex rel. Hammond v. Allen, 625 P.2d 844 (Alaska 1981).

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 23

have been upheld as constitutional only under exceptional circumstances. The United States Supreme Court struck down a four-year durational residency requirement for highly mobile college students in Vlandis v. Kline, supra. A three-year durational residency requirement for fishing licenses was struck down on equal protection grounds in Massey v. Apollonio, supra. Justice Rabinowitz of the Alaska Supreme Court had no difficulty in finding a three-year durational residency requirement for a grant of state land unconstitutional in Thomas v. Bailey, supra (concurring opinion).

A good faith argument can be made that a durational residency requirement less than four years but more than one year is constitutional for the grant of state monetary benefits for a highly mobile group such as college students or commercial fishermen. However, this does not mean that you can continue to implement the program but with a shorter durational residency requirement than the five years specified in AS 16.10.310(a)(1). If that change is to be made, it must be made by the legislature. The attorney general, like the courts, has no authority to rewrite the law. The Alaska Constitution, article II, section 14, clearly vests the power to pass legislation in the legislature, not the executive branch.

Moreover, we do not believe you can continue to implement the program with only a minimal residency requirement (i.e.,

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

November 26, 1982
Page 24

30 days), as opposed to the five-year durational residency requirement as enacted by the legislature. That would require a finding that the five-year requirement is severable from the rest of the statute. Under Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), a two-step test for severability is required. First it must appear that legal effect can be given to the remainder of the statute after the offensive provision is stricken. Here, the statute clearly can be given legal effect if the five-year durational residency requirement is removed.

Second, it must appear that the legislature intended the provision to stand if the offensive provision was struck. We believe the answer to this inquiry is not clear. We recognize that AS 01.10.030 provides in part that laws are to be construed as containing the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby." However, the Alaska Supreme Court stated in Lynden Transport that AS 01.10.030 creates only a weak presumption in favor of severability. Given the highly mobile nature of fishermen, the ease with which traditional indicia of residency can be obtained, the lack of adverse consequences to establishing such minimum indicia, and the extreme attractiveness of the program, we cannot say that the legislature would have passed this statute without

D.A. Hostak, Director
Div. of Business Loans & Veterans Affairs
Dept. of Commerce & Economic Development
366-161-83

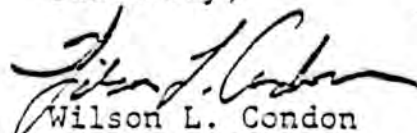
November 26, 1982
Page 25

some durational residency requirement.

As a result, we believe you have no choice but to shut down the commercial fishing loan program under AS 16.10.300--16-10.370. No further loan commitments should be granted under that program following your receipt of this opinion 12/ We are providing copies of this opinion to Governor Hammond and Governor-elect Sheffield, and will urge them to take whatever steps are necessary to bring this matter to the attention of the Thirteenth Alaska Legislature which will be convening early next year.

If you have further questions, please contact us at your convenience.

Sincerely,



Wilson L. Condon
Attorney General

WLC:GTK:d1m

cc: Governor Hammond
Governor-Elect Sheffield
Alaska Commercial Fishing Agriculture Bank

12/ Loan commitments already made should be honored to avoid undue hardship to those who have changed circumstances in reliance on those commitments.



Cass M. Parsons
Executive Director

UNITED FISHERMEN OF ALASKA

MAILING ADDRESS & OFFICE
197 SOUTH FRANKLIN ST.
JUNEAU, ALASKA 99801
907 586-2820

FILE COPY

March 8, 1983

Honorable Rick Uehling
Chairman
House Special Committee on Loans
Pouch V
Juneau, Alaska 99811

Dear Representative Uehling:

I would like to comment on House Bill 15, loans to commercial fishermen, on behalf of the United Fishermen of Alaska. The UFA is a fishermen's organization of 1500 individual members and 18 member fishing groups from many gear types and regions throughout the state. We feel particularly qualified to testify on the state's loan programs to fishermen.

The UFA Board of Directors voted to support a two year residency requirement for the following specific reasons:

- 1) Fishermen are a very mobile group, and as such, their permanent place of residency is difficult to ascertain. Even those fishermen who have legally resided in one state for years move around with the fishing seasons and often establish temporary residences in other towns. With the major supporting infra-structure facilities located outside the state, legal Alaska state residents often spend many months in other states, building, repairing and supplying their vessels. These fishermen often establish a temporary residence outside the state of Alaska.
- 2) A very high percentage of the Alaskan fleet is comprised of vessels registered to ports outside Alaska. The fishermen aboard these boats are legal residents of another state but fish in Alaska for many months and often establish temporary residence here. A study by Natural Resources Consultants reports the following percentages of out-of-state registered vessels* per fishery, fishing in Alaskan waters throughout the year:

*over 5 net ton vessels only

Honorable Rick Uehling
March 8, 1983
Page Two

17% Salmon
69% King crab
48% Tanner crab
15% Halibut
16% Herring
29% Ground fish

These traits of the fishing industry point to an enormous similarity in the patterns of resident and non-resident fishermen during the course of a year. The UFA believes that a longer period than one year is necessary to differentiate between the non-resident who may appear to be a resident and the legal resident.

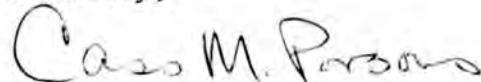
The UFA also supports legislation which would require that loans given out to fishermen from the state be paid back upon termination of the fishermen's residency. We feel that a requirement of this nature would assist the state in dissuading loan recipients from defaulting.

The UFA has voted to support a "3 of the last 5 year's" fishing experience requirement with the last year of experience immediately preceding the year during which the loan is applied for. At least three year's experience are necessary to ensure that the individual has gained the knowledge and ability to succeed in the fishery. More than 3 year's experience required may preclude younger individuals from entering the fishery.

The UFA is also concerned that the state loan program has not met the needs of rural and urban lower-income people who depend on fisheries for their livelihoods.

Thank you.

Sincerely,



Cass M. Parsons
UFA Executive Director

CMP/jb

MEMBER
JOINT GAS PIPELINE COMMITTEE
HOUSE FINANCE SUBCOMMITTEE ON
ADMINISTRATION, REVENUE
AND THE GOVERNOR'S OFFICE

HOUSE OF REPRESENTATIVES
Representative
RICK UEHLING

POUCH V
JUNEAU, ALASKA 99811
(907) 485-4821

HAND DELIVERED

February 21, 1983

FILE COPY

Hon. Richard Lyon
Commissioner of Commerce
and Economic Development
State of Alaska
Juneau, Alaska 99811

Dear Dick:

House Bill 15, entitled "An Act relating to eligibility for commercial fishing loans," is scheduled to be heard by the House Special Committee on State Loans at 3:00 p.m., on Tuesday, February 22, 1983, in room 118 of the Capitol.

On behalf of the committee, I request that the Department of Commerce and Economic Development provide testimony in regard to this bill. Since HB 15 affects the Commercial Fishing Revolving Loan Fund, your input would be relevant.

The committee is most interested in your opinion on the adequacy of the proposed change as it affects the legality of the residency requirement.

I look forward to your participation in this important hearing. Bill Lovell of the committee staff is available to assist your office in making necessary arrangements. Thank you.

With best regards,

Rick
Rick Uehling
Chairman, Special Committee on State Loans

RU:w1
Enclosure: 1 copy of HB 15

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

March 16, 1983

The Honorable Rick Uehling
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

FILE COPY

Re: CSHB 15 (Loans)

Dear Representative Uehling:

You asked us to review Committee Substitute for House Bill 15 (Loans) to determine the legality of certain new sections of the bill added by the committee. Specifically, you asked for our opinion regarding section 2, which would mandate that at least 10 percent of available money be used for commercial fishing loans of \$35,000 or less, and section 3, which would accelerate the loan if a borrower ceases to be a state resident.

Unfortunately, although your request was delivered to this office on March 9, 1983, I did not receive it until March 14, 1983. As a result, I have not been able to review it in the kind of depth which would be most desirable. However, in the limited time which was available, I have developed some thoughts.

First, I see no constitutional problem with section 2. That section would require that at least 10 percent of the money that is available for commercial fishing loans be allocated for loans of \$35,000 or less. This would be a permissible exercise of the legislature's power to establish the basic guidelines for administration of the loan program by the executive branch.

On the other hand, section 3 does raise constitutional questions. However, it is my opinion that the provision would be found constitutional if challenged in the courts. This confirms my earlier off-the-cuff advice I gave to the House Special Committee on State Loans.

Section 3 would add a new subsection to AS 16.10.320. That subsection would provide in substance that a commercial fishing loan to a qualified state resident would be accelerated and repayment would be required within 120 days after the borrower ceases to be a state resident.

Initially, it is clear that the state constitutionally can limit monetary benefits, including below-market-rate commercial fishing loans in particular, to bona fide state residents. See 1982 Op. Att'y Gen. No. 12 (Alaska November 26). However, a constitutional question is raised by making such a loan due and payable 120 days after changing residency, since such a provision may be viewed as penalizing the right of Alaska residents to migrate to other states.

In the limited time available I have been unable to find any cases directly on point. However, it appears that the courts apply a balancing test in such a context to determine whether the state's interest in preserving the statutory scheme outweighs the penalty imposed on the individual. See e.g. Williams v. Zobel, 619 P.2d 422, 427 (Alaska 1980) (plurality opinion); id. at 431 n. 1 (Rabinowitz, C.J., concurring); id. at 439 (Connor, J., dissenting); Williams v. Zobel, 619 P.2d 448, 453 (Alaska 1980), reversed on other grounds, Zobel v. Williams, ___ U.S. ___, 72 L.Ed.2d 672 (1982).

In striking the balance here, we believe the courts would find that legitimate state objectives underlying section 3 outweigh any individual rights involved. Several legitimate state interests would be served by accelerating loans upon a change in residence. The most important, obviously, would be ensuring that direct state monetary benefits (i.e., subsidized loans) run only to bona fide state residents. This clearly is a permissible state objective. If loans to residents are accelerated and repaid at the time the borrower moves out of the state, that money immediately becomes available to loan to another bona fide state resident. In this way, only bona fide state residents will receive the benefits of the state loan program.

A second permissible state interest in acceleration upon a change in residency is safeguarding the fiscal integrity of the loan program. Loan administration, including bringing delinquent loans current and effecting foreclosure if necessary, will be significantly easier if the borrower is a state resident. If loans to nonresidents remain outstanding, the state may have to foreclose on collateral which is no longer within the state, may have to exercise long-arm jurisdiction over borrowers, etc. In that event, the state's ability to preserve the integrity of the revolving loan fund will be hampered significantly.

Finally, as the House Special Committee on State Loans letter of intent accompanying CSHB 15 (Loans) makes clear, one of the most difficult problems facing the commercial fishing loan program has been ensuring that only bona fide state residents

qualify. The committee noted that traditional indicia of residency are very easy to obtain. As a result, it is conceivable that nonresident loan applicants could come to Alaska for the minimum period required to qualify for a loan -- e.g., the two years which CSHB 15 (Loans) would require -- only to return immediately to some other state upon receiving the loan. An immediate acceleration clause would give the state the power to terminate the loan without the necessity of proving residency fraud at the time the loan was made. In other words, it provides a significant safeguard against residency fraud.

Against these permissible state interests must be balanced the individual's right to migrate from one state to another. We have no idea how the courts would strike the balance. Particularly with respect to loans for limited entry permits, the courts may be inclined to strike the balance in favor of the individual since the commercial fishing loan program is the only currently available mechanism for financing the purchase of a limited entry permit using the permit as collateral for the loan. 1/ In other words, no alternative financing might be available to a borrower migrating to another state.

However, against this individual interest, a number of additional factors must be balanced. The first is that nonresidents simply do not have the same right to state benefits that state residents have. Moreover, if enacted, the acceleration provision would be a part of every loan contract. A borrower may be estopped to assert that the provision is invalid. Finally, and most significantly, any decision to change residency necessarily carries with it certain consequences in terms of state benefits. Following a change in residency, the individual no longer is eligible for benefits afforded residents by his former state of residence while he is eligible for benefits afforded by his new state of residence. In this case, it would seem that one of the benefits for which eligibility would be lost is a continuing state subsidized loan.

This does not mean that a state could require

1/ The Commercial Fishing and Agriculture Bank is authorized to finance limited entry permits using the permit as collateral. However, because of constitutional challenges to the limited entry program, CFAB currently is not taking permits as collateral for loans to finance the purchase of permits.

The Honorable Rick Uehling

March 16, 1983
Page 4

forfeiture of all previous benefits upon a change in residency. For example, a statute requiring repayment of all previously granted benefits would present precisely the kind of barrier to interstate migration which at least four members of the United States Supreme Court found impermissible in Zobel v. Williams, supra. (See concurring opinion of Justice Brennan.)

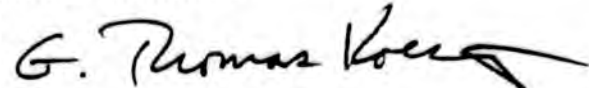
However, that is not what section 3 would accomplish. All it would do is require a person ceasing Alaska residence to forego the continuing future state subsidy of the loan.

Summarizing, it is our opinion that section 3, which would accelerate a commercial fishing loan if a borrower ceases to be a state resident, probably would be found constitutional if challenged in court. However, the question is not entirely free from doubt, and we cannot give a certain answer.

We hope this answers your question. If we can be of further assistance, please contact us at your convenience.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
G. Thomas Koester
Assistant Attorney General

GTK:dln

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3800

March 21, 1983

The Honorable Rick Uehling
House of Representatives
Pouch V
Juneau, Alaska 99811

FILE COPY

Dear Representative Uehling:

This letter is in response to your request for a brief written summary of the Department of Law's testimony before your committee on the subject of the constitutionality of a two-year residency requirement for commercial fishing loans.

Simply, we believe that the two-year requirement is very defensible under either the state or federal constitution. On the other hand, the law in this area is uncertain; any length of time beyond one year is past the present boundaries of judicially approved requirements and therefore carries a substantial risk of being found unconstitutional. If, however, any program can sustain a two-year residency requirement, both the student loan program and the commercial fishing loan program present the most compelling circumstances for such an extension. Both programs must address the very real problems of mobility of loan recipients coupled with an extremely generous loan program. Consequently, the normal superficial indicia of a subjective intent to consider oneself a citizen of the State of Alaska, such as voter registration, drivers license, and even the one-year residency requirement, are not as valid as they would be in other programs. As a result, we believe that a court could readily find that there is a rationale basis for choosing a two-year residency requirement over either a one-year residency requirement or any of the other objective standards normally used by the legislature.

If you have any questions, or if you wish further testimony on this or any other residency requirement, please do not hesitate to call.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
Robert M. Maynard
Assistant Attorney General

RMM:mr

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3800

February 22, 1983

The Honorable Rick Uehling
Representative
Chairman, House Special
Committee on State Loans
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

FILE COPY

Re House Bill 15
Our File AG #053-83

Dear Representative Uehling:

Attorney General Gorsuch referred your February 16, 1983 letter regarding House Bill 15 to me. You specifically inquired whether House Bill 15 would be effective in eliminating the unconstitutional five-year durational residency requirement previously contained in the commercial fishing loan statute, AS 16.10.310(a).

House Bill 15 changes the current five-year durational residency requirement to qualify for a commercial fishing loan to one year. Under our previous opinion on this subject, we believe a one-year requirement, if enacted, would be constitutional. See 1982 Op. Att'y Gen. No. 12 (Alaska November 26).

In reviewing House Bill 15, the House Special Committee on State Loans should be aware that a similar bill on this subject has been introduced at Governor Sheffield's request. See Senate Bill 73. That bill also would change the residency requirement from five years to one year.

There is a difference between that bill and House Bill 15 in terms of the other eligibility requirements which would be imposed for a commercial fishing loan. Governor Sheffield's bill retains the requirement that an applicant for a commercial fishing loan have participated in a commercial fishery for one year prior to applying for the loan, as is the case under current law. However, in light of the policy underlying the commercial fishing loan program set out in AS 16.10.300 -- i.e., to promote "the development of a predominantly resident fishery" (emphasis added) -- the governor's bill would require that the year of participation be the year immediately preceding application for a loan. The result is that the governor's bill would

require that an applicant be a resident commercial fisherman during the year immediately preceding application for a loan before the applicant is eligible for a loan.

House Bill 15, on the other hand, would require that an applicant have participated in commercial fishing during three of the past five years. However, House Bill 15 would not require that an applicant have been a commercial fisherman during the year immediately preceding application for a loan -- i.e., the year in which he must have been a resident. Under House Bill 15, a nonresident commercial fisherman who participated in Alaska fisheries during three of the previous five years but then moved to Alaska to take a job in another industry still would be eligible for a commercial fishing loan while a resident Alaska commercial fisherman with two years experience in the fishery would not.

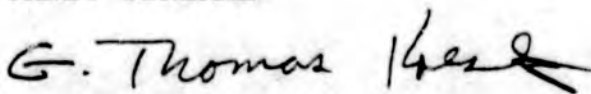
Of course, it is for the legislature to determine the eligibility requirements for applicants for state loans. However, please call on us at your convenience if we can be of any assistance as you make that determination.

We hope this answers your question regarding the one-year durational residency requirement contained in House Bill 15.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:



G. Thomas Koester
Assistant Attorney General

Introduced: 1/17/83
Referred: Resources and Finance

(LOANS BE MADE TO RURAL
FISHERMAN) PURSUE
FISHING INDUSTRY
WOULD CONTINUE

FILE COPY

2 YEAR QUESTION -

BY HAYES, FLOOD, LINDAUER
SZYMANSKI AND TISCHER

1 IN THE HOUSE

2

HOUSE BILL NO. 15

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to eligibility for commercial fish-
7 ing loans."

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

9 * Section 1. AS 16.10.310(a) is amended to read:

10 (a) The department may

11 (1) make loans to

12 (A) individual commercial fishermen who have been
13 state residents for a continuous period of one year [FIVE YEARS],
14 immediately preceding the date of application for a loan under
15 AS 16.10.300 - 16.10.370 and have had a crewmember or commercial
16 fishing license under AS 16.05.480 or a permit under AS 16.43 for
17 any three ~~[ONE]~~ ^{THE PAST YEAR - INCLUDED} of the past five years, and who actively partic-
18 ipated in the fishery during that period, for the purchase of
19 entry permits;

20 (B) an individual who has been a state resident for a
21 continuous period of one year [FIVE YEARS] immediately preceding
22 the date of application for a loan under AS 16.10.300 - 16.10.-
23 370, who

24 (i) because of lack of training or lack of em-
25 ployment opportunities in the area of residence does not
26 have occupational opportunities available other than commer-
27 cial fishing; or

28 (ii) is economically dependent on commercial
29 fishing for a livelihood and for whom commercial fishing has

— FISHERIES FOR RURAL
AREA —

— A.Z.D.A.

— A.R.C.

— C.F.A.S. — COMMERCIAL FISHING

— COMMERCIAL

— FISHING REVOLVING ~~LOAN~~ FUND

1 been a traditional way of life [FOR HIM] in Alaska, for the
2 repair, restoration or upgrading of existing vessels and
3 gear, for the purchase of entry permits and gear, and for
4 the construction and purchase of vessels;

5 (C) corporations, partnerships, or joint ventures, 100
6 percent of which are owned by individual commercial fishermen who
7 have been state residents for a continuous period of one year
8 [FIVE YEARS] immediately preceding the date of application for a
9 loan under AS 16.10.310(a)(1)(B) and have had a crewmember or
10 commercial fishing license under AS 16.05.480 or a permit under
11 AS 16.43 for ~~any three~~ ^{THE PAST YEAR} [ONE] of the past [five years] and who
12 actively participated in the ^{ALASKA} fishery during that period, for the
13 repair, restoration or upgrading of existing vessels and gear,
14 for the purchase of gear, and for the construction and purchase
15 of vessels;

16 (2) designate agents and delegate its powers to them as
17 necessary;

18 (3) adopt regulations necessary to carry out its functions;

19 (4) establish amortization plans for repayment of loans,
20 which may include extensions for poor fishing seasons or for adverse
21 market conditions for Alaskan products;

22 (5) enter into agreements with private lending institu-
23 tions, other state agencies, or agencies of the federal government, to
24 carry out the purposes of AS 16.10.300 - 16.10.370;

25 (6) enter into agreements with other agencies or organiza-
26 tions to create an outreach program to make loans under AS 16.10.300 -
27 16.10.370 in rural areas of the state.

SEC. 2 THIS ACT TAKES EFFECT IMMEDIATELY
IN ACCORDANCE



Official Business

Alaska State Legislature

House of Representatives

Al Adams
Chairman
Committee on Finance

March 16, 1983

FILE COPY

WHILE IN SESSION
Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-3706

OUT OF SESSION
P.O. Box 333
Kotzebue, Alaska 99752
(907) 442-3320

1024 W. 6th
Anchorage, Alaska 99501
(907) 274-0615

MEMORANDUM

TO: House Finance Committee Members

FROM: Al Adams, Chair *ADA*
House Finance Committee

SUBJ: CS HB 15 (Loans), relating to the commercial fish loan program

Commercial Fishing Loan Program

AS 16.10.300 - .370 provides loans for commercial fishing. An eligible individual, corporation, partnership or joint venture may receive a loan for repair of vessels and gear, construction and purchase of vessels, or purchase of gear or limited entry permits. The amount of the loan may not exceed 90% of the appraised value of the collateral used to secure the loan. Loans up to \$300,000 are provided at 10.5 % interest for fifteen years.

Effect of the Bill on the Program

The bill seeks to address the potential unconstitutionality of the five year residency requirement in statute. Currently, the Department of Commerce and Economic Development (DCED) is operating under emergency regulations that provide for a one year residency requirement. However, these regulations expire April 6, 1983. It is hoped that the legislature will act on this bill before that date so that new regulations can be drafted reflecting legislative intent regarding residency for the program.

The bill also addresses the amount of funding available for loans under \$35,000 and an accelerated repayment plan for loan recipients who move Outside during the term of loan repayment.

Differences between CS HB 15 (Loans) and HB 15

Section 1 of the original bill provided for a one year residency requirement immediately preceding the date of application for the loan and required an applicant to have had a crew member or commercial fishing license for any three of the past five years. The CS has been modified to provide for a two year residency requirement, and possession of a license for the year immediately preceding the date of the loan application and any other two of the past five years.

The rationale behind the two year requirement is provided in the Loan Committee's proposed letter of intent. Basically, it is the Committee's desire that the program be protected from fraudulent applications to the extent constitutionally possible. Since residence is generally transitory throughout the year for a fisherman, the longer the residency requirement, the easier it will be for DCED to distinguish between a resident and a nonresident. The letter of intent has been approved by both the Department of Law and the Division of Legal Services, Legislative Affairs Agency.

The language of the CS regarding holding a license for a certain number of years is an attempt at compromise between the language provided in the original bill, and the Governor's bill on the same subject--SB 73.

Section 2 was added to the committee substitute at the request of Representative Fuller. It provides that at least 10% of the funding appropriated would be available for loans under \$35,000.

The Loan Committee Chair requests that the language of this section be changed slightly to make it clear that the intention is for 10% of the annual appropriation to be used for this purpose, not 10% of the entire revolving loan fund. He has provided language to the committee to address this problem.

Section 3 was added to the committee substitute at the request of Representative Goll. The language would provide that loan beneficiaries who move Outside during the term of loan repayment must pay off the loan within six months. The Department of Law has indicated that no legal problems will arise from this section.

Fiscal Note

DCED has requested one additional investigator

position. The department feels that the residency change will necessitate more careful review of applications. Currently, DCED passes along potentially fraudulent applications to the Office of Special Prosecutions in the Department of Law. Law does not have the personnel necessary to carefully investigate the volume of potentially fraudulent applications that have arisen due to the institution of a shorter residency requirement.

The costs associated with this position equal \$ 63,656.

CHAIRMAN
HOUSE SPECIAL COMMITTEE
ON STATE LOANS
VICE-CHAIRMAN
HOUSE RESOURCES COMMITTEE
HOUSE LABOR AND COMMERCE COMMITTEE
MEMBER
JOINT GAS PIPELINE COMMITTEE
HOUSE FINANCE SUBCOMMITTEE ON
ADMINISTRATION, REVENUE
AND THE GOVERNOR'S OFFICE

Alaska State Legislature



House of Representatives

Representative
RICK UEHLING

ANCHORAGE
DISTRICT 12 - SEAT A
1634 JUNEAU DRIVE
ANCHORAGE, ALASKA 99501
(907) 274-4256
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4821

FILE COPY

MEMORANDUM

TO: Representative Al Adams
Chairman, House Finance Committee

FROM: Representative Rick Uehling *RU*

DATE: March 16, 1983

RE: Commercial Fishing Loans Bill [CSHB 15 (Loans)]

I suggest that the Finance Committee consider adopting the following amendment for inclusion in CSHB 15:

Page 3, line 3--delete "available" and insert "appropriated".

I believe that this change will effectively address the particular intent of the loans committee substitute without unnecessary restraints on funds received into the Commercial Fishing Revolving Loan Fund, thus preserving the revolving nature of the fund.

I encourage the committee to give this proposed amendment your favorable consideration. Thank you.

RU/wl

FILE COPY

1 (g) A loan for clearing land may not

2 (1) exceed \$250,000;

3 (2) bear interest that is less than eight percent;

4 (3) have a term in excess of 20 years; or

5 (4) be made for clearing land that is not classified as class
6 3 or better by the United States Soil Conservation Service under the
7 land classification system used by the United States Soil Conservation
8 Service.

9 (h) The commissioner shall adopt regulations to establish other
10 terms for loans made under this chapter, consistent with the provisions
11 of this section, and may establish interest rates for loans under (a)(4)
12 of this section that

13 (1) encourage agricultural development;

14 (2) do not subsidize nonviable agricultural enterprises; and

15 (3) do not discriminate against viable existing agricultural
16 enterprises.

17 * Sec. 6. AS 03.10.050 is amended by adding a new subsection to read:

18 (d) A meeting of the agricultural revolving loan fund board to act
19 on applications for loans is exempt from the public meeting requirements
20 of AS 44.62.310.

21 ~~Sec. 7. AS 16.10.310 is repealed and reenacted to read:~~

22 Sec. 16.10.310. POWERS OF THE DEPARTMENT. (a) The department may

23 (1) make loans to

24 (A) individual commercial fishermen who have been state
25 residents for a continuous period of five years immediately preced-
26 ing the date of application for a loan under AS 16.10.300 - 16.10.-
27 370 and have had a crewmember or commercial fishing license under
28 AS 16.05.480 or a permit under AS 16.43 for any one of the past
29 five years, and who actively participated in the fishery during

1 that period, for the purchase of entry permits;

2 (B) an individual who has been a state resident for a
3 continuous period of five years immediately preceding the date of
4 application for a loan under AS 16.10.300 - 16.10.370, who (i)
5 because of lack of training or lack of employment opportunities in
6 the area of residence does not have occupational opportunities
7 available other than commercial fishing; or (ii) is economically
8 dependent on commercial fishing for a livelihood and commercial
9 fishing has been a traditional way of life for him in Alaska, for
10 the repair, restoration or upgrading of existing vessels and gear,
11 for the purchase of entry permits and gear, and for the construc-
12 tion and purchase of vessels;

13 (C) corporations, partnerships, or joint ventures, 100
14 percent of which are owned by individual commercial fishermen who
15 have been state residents for a continuous period of five years
16 immediately preceding the date of application for a loan under
17 AS 16.10.310(a)(1)(B) and have had a crewmember or commercial
18 fishing license under AS 16.05.480 or a permit under AS 16.43 for
19 any one of the past five years, and who actively participated in
20 the fishery during that period, for the repair, restoration or
21 upgrading of existing vessels and gear, for the purchase of gear,
22 and for the construction and purchase of vessels;

23 (2) designate agents and delegate its powers to them as
24 necessary;

25 (3) adopt regulations necessary to carry out its functions;

26 (4) establish amortization plans for repayment of loans,
27 which may include extensions for poor fishing seasons or for adverse
28 market conditions for Alaskan products;

29 (5) enter into agreements with private lending institutions,

1 other state agencies, or agencies of the federal government, to carry
2 out the purposes of AS 16.10.300 - 16.10.370;

3 (6) enter into agreements with other agencies or organiza-
4 tions to create an outreach program to make loans under AS 16.10.300 -
5 16.10.370 in rural areas of the state.

6 (b) The department shall consult with the Department of Fish and
7 Game on regulations and procedures established under this chapter.

8 * Sec. 8. AS 16.10.320(a) is repealed and reenacted to read:

9 (a) A loan under AS 16.10.310 - 16.10.370

10 (1) may not exceed a term of 15 years;

11 (2) may not bear interest exceeding 10 and one-half percent;

12 (3) shall be secured by a first priority lien and appropriate
13 security agreement; and

14 (4) may not exceed 90 percent of the appraised value of the
15 collateral used to secure the loan, except that a loan granted under
16 AS 16.10.333 for the purchase of an Alaska limited entry permit may not
17 exceed an amount determined in accordance with (f) or (h) of this
18 section.

19 * Sec. 9. AS 16.10.320(d) is repealed and reenacted to read:

20 (d) Loans made to a borrower under AS 16.10.310(a)(1)(A) may not
21 exceed a total of \$300,000. Loans made to a borrower under AS 16.10.-
22 310(a)(1)(B) or (C) may not exceed a total of \$100,000. A loan to an
23 associate of the borrower is considered to be a loan to the borrower.
24 For the purposes of this section, "associate of the borrower" means

25 (1) a corporation or other organization of which the borrower
26 is an officer, director or partner, or is, directly or indirectly, the
27 beneficial owner of 10 percent or more of any class of equity securi-
28 ties;

29 (2) a person who is, directly or indirectly, the beneficial

1 owner of 10 percent or more of any class of equity securities of the
2 borrower;

3 (3) a trust or other estate in which the borrower has a
4 substantial beneficial interest or as to which the borrower serves as
5 trustee or in a similar fiduciary capacity.

6 * Sec. 10. AS 16.10.320(e) is amended to read:

7 (e) Two or more individual commercial fishermen who each satisfy
8 the requirements specified in AS 16.10.310(a)(1)(B) [AS 16.10.310(a)(1)-
9 (A)] may jointly obtain a commercial fishing loan for the construction
10 of a fishing vessel or the purchase of an existing fishing vessel.

11 Loans granted under this subsection

12 (1) may not exceed the amount specified in (d) [(a)(1)] of
13 this section multiplied by the number of qualified commercial fishermen
14 applying for the loan;

15 (2) may not exceed a term of 15 years;

16 (3) shall be secured by a first priority lien and appropriate
17 security agreement;

18 (4) may not bear interest exceeding 10 [NINE] and one-half
19 percent; and

20 (5) may not exceed 90 [75] percent of the appraised value of
21 the collateral used to secure the loan.

22 * Sec. 11. AS 16.10.320(f) is amended to read:

23 (f) Except as permitted in (h) of this section, a [A] loan made
24 [GRANTED] under AS 16.10.310(a)(1)(A) and (B) [AS 16.10.333(a)] for the
25 purchase of an Alaska limited entry permit may not exceed 90 percent of
26 the appraised value of the collateral used to secure the loan.

27 * Sec. 12. AS 16.10.320 is amended by adding new subsections to read:

28 (h) A loan for an entry permit under AS 16.10.310(a)(1)(B) may be
29 made for up to 100 percent of the appraised value of the collateral used

1 to secure the loan if the borrower demonstrates that (1) he has at least
2 three years of experience as a commercial fisherman in the fishery to
3 which the entry permit applies; and (2) he has not owned an Alaska
4 limited entry permit in the year immediately preceding the application
5 for the loan. In this subsection "three years of experience as a commer-
6 cial fisherman in the fishery" means that for an accumulated total of
7 three fishing seasons in the same fishery the borrower has actively
8 participated in the commercial harvest of fish under the direction of a
9 limited entry permit holder.

10 ✓ (i) If a loan is made to a borrower under AS 16.10.310(a)(1)(A), a
11 subsequent loan may not be made to the borrower or an associate of the
12 borrower under AS 16.10.310(a)(1)(B) or (C). If a loan is made to a
13 borrower under AS 16.10.310(a)(1)(B) or (C), a subsequent loan may be
14 made to the borrower or an associate of the borrower under AS 16.10.-
15 310(a)(1)(A) if the total of the loans received by the borrower or the
16 associate under AS 16.10.310 does not exceed \$300,000.

17 * Sec. 13. AS 16.10 is amended by adding a new section to read:

18 ✓ Sec. 16.10.325. GUARANTORS. A person may act as guarantor if the
19 borrower has insufficient collateral to secure a loan for the purposes
20 described in AS 16.10.310(a)(1)(B). The loan agreement shall specific-
21 ally describe the property of the guarantor to be used as collateral by
22 the borrower and shall be signed by the guarantor and the borrower. The
23 department shall provide the guarantor with a copy of all notices sent
24 to the borrower by the department. If the loan is for the purchase of
25 an entry permit, the guaranty by the guarantor may not constitute a
26 lien, mortgage, or encumbrance on or pledge of the entry permit.

27 * Sec. 14. AS 18.55.997 is amended to read:

28 Sec. 18.55.997. RESIDENTIAL LOANS. (a) In addition to the powers
29 authorized to a regional housing authority under AS 18.55.996, a regional

FILE COPY

JOURNAL SUPPLEMENT

1/26/83

No. 1

FISCAL NOTE

SB
79

I. REQUEST

Bill/Resolution No. _____
 Title An Act relating to eligibility for commercial fishing loans.
 Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Department of Commerce and Economic Development
 Program Category Affected Economic Development
 BRU, Program, Or Subprogram(s) Affected Division of Loans & Veterans' Aff
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		63.7	51.3	64.4	67.7	71.1

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND		63.7	51.3	64.4	67.7	71.1
FEDERAL FUNDS						
OTHER (Specify Source)						

III. ANALYSIS

Increased fund is required for the following reasons:

Five-year residents have a longer track record in Alaska, which makes their residency indicators much more obvious and more easily obtainable. A one-year residency requirement would require more investigative work into the residency background of the applicant.

During certain times of the year, many one-year residents do not have a prepared tax return, which is one of the main documents used in determining residency.

Contact with other states will be necessary in cases which involve prepared term residency to determine the actual dates of residence.

1/19/83 Prepared by D.A. Hostak, Director
 Agency: Dept. of Commerce & Econ. Dev.
 Phone 465-2555 Div of Loans & Veterans Aff

H. State Finance

FILE COPY

RECEIVED

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FEB 7 1983

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 15 LEGISLATIVE FINANCE
Title An Act relating to eligibility for commercial fishing loans.
Requested by _____ Date _____

II. FISCAL DETAIL
Agency Affected Department of Commerce and Economic Development
Program Category Affected Economic Development
BRU, Program, Or Subprogram(s) Affected Division of Loans & Veterans' Affairs
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		63.7	61.3	64.4		

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND		63.7	61.3	64.4		
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Increased fund is required for the following reasons:

1. Five-year residents have a longer track record in Alaska, which makes their residency indicators much more obvious and more easily obtainable. A one-year residency requirement would require more investigative work into the residency background of the applicant.
2. During certain times of the year, many one-year residents do not have a prepared tax return, which is one of the main documents used in determining residency.
3. Contact with other states will be necessary in cases which involve prepared term residency to determine the actual dates of residence.

IV. DATE _____ PREPARED BY D. A. Hostak, Director
AGENCY Department of Commerce & Economic Development
PHONE 464-2555 Division of Loans & Veterans' Affairs
Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)
OMB Reviewed by: Guy Bell *B*

48-73

INTRODUCTION AND REFERENCE OF SENATE BILLS

SB 73

SENATE BILL NO. 73 by the Rules Committee by Request of the Governor, entitled:

"An Act relating to commercial fishing loans; and providing for an effective date."

was read the first time and referred to Resources Committee and the Finance Committee.

Fiscal note appears in Senate Supplement No. 1.

Governor's transmittal letter accompanying SENATE BILL NO. 73 follows:

January 26, 1983

The Honorable Jalmar Kerttula
President of the Senate
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill amending the length of residency required to qualify for a commercial fishing loan.

The Department of Law has concluded that the five-year durational residency requirement for commercial fishing loans in AS 16.10.310(a) is unconstitutional. In the department's first opinion on that subject, dated November 26, 1982, it concluded that the unconstitutional five-year durational residency requirement was not severable from the remainder of the statute and, accordingly, that there was no alternative to shutting down the program. The program was, therefore, suspended.

Immediately upon taking office, I directed my Attorney General to review this conclusion. I was particularly concerned about the consequences of closing down the

SB 73 cont'd

program at this time since the winter, non-fishing season is the most important time of year for fishermen to make financial arrangements (i.e., commercial fishing loans) for the upcoming season. In an opinion dated December 6, 1982, Attorney General Norman C. Gorsuch concluded that the five-year durational residency requirement was severable, that a one-year durational residency requirement would be defensible, and that the Department of Commerce and Economic Development could adopt emergency regulations to reinstitute the program.

The Department of Commerce and Economic Development adopted an amendment to 3 AAC 80.100(11) as an emergency regulation on December 7, 1982 (filed by the Lieutenant governor on December 8, 1982) to reinstitute the program with a one-year residence requirement. However, at my direction they have not published notice that that regulation will be adopted as a "permanent" regulation. It is my belief that any permanent change in the five-year requirement should be made by the legislature. To that end, the attached bill changes the statutory five-year durational residency requirement to a one-year one.

The emergency regulation will expire at midnight on April 6, 1983. At that time, in the absence of legislative action amending the statute, the commercial fishing loan program again will be suspended until the legislature acts to reinstitute the program. In the meantime, one-year Alaska resident commercial fishermen may continue to apply for loans. However, after that date, applications no longer will be accepted unless the legislature acts.

Given the interest which this program and its brief suspension have generated, as well as its importance to Alaska's commercial fishing industry, I urge you to act on this measure without delay.

Sincerely,

/s/ Bill Sheffield
Bill Sheffield
Governor

SB 74

SENATE BILL NO. 74 by Senators Pettyjohn, Sturgulewski, Halford, Faika, Paul Fischer and Kelly, entitled:

"An Act relating to sexual abuse of a minor."

was read the first time and referred to the Health, Education and Social Services Committee and the Judiciary Committee.

FILE COPY

JOURNAL SUPPLEMENT

1/26/83

No. 1

FISCAL NOTE

SB
79

I. REQUEST

Bill/Resolution No. _____
 Title An Act relating to eligibility for commercial fishing loans.
 Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Department of Commerce and Economic Development
 Program Category Affected Economic Development
 BRU, Program, Or Subprogram(s) Affected Division of Loans & Veterans Aff
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		63.7	61.3	64.4	67.7	71.1

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND		63.7	61.3	64.4	67.7	71.1
FEDERAL FUNDS						
OTHER (Specify Source)						

III. ANALYSIS

Increased fund is required for the following reasons:

Five-year residents have a longer track record in Alaska, which makes their residency indicators much more obvious and more easily obtainable. A one-year residency requirement would require more investigative work into the residency background of the applicant.

During certain times of the year, many one-year residents do not have a prepared tax return, which is one of the main documents used in determining residency.

Contact with other states will be necessary in cases which involve prepared term residency to determine the actual dates of residence.

1/19/83 Prepared by D.A. Hostak, Director
 Agency: Dept. of Commerce & Econ. Dev.
 Phone 465-2555 Div of Loans & Veterans Aff