

SCOMM

87:15

February 7, 1994

Carl:

Comments on HB 251

This bill has had two hearings already:

March 29, 1993

April 16, 1993

At the April hearing, Representative Nicholia presented an amendment package. You did not accept the amendments because you said you did not intend to move it out of committee.

My guess is that the same amendment package will be moved by her. This bill has no support on the record except that which you identified from former Governor Jay Hammond. The following people/organizations testified in opposition to the bill:

1. Aleutians East Borough
2. Robin Samuelson
3. Tom Elias, Chair, Board of Fish
4. Southeast Herring Coalition
5. Norman Anderson
6. United Fishermen of Alaska
7. Dale Kelley, Alaska Troller's Association

Support of Irene Nicholia's amendment:

1. Tate Hayes, Northern District Setnetter, Upper Cook Inlet

It appears that this bill does not have much support. We have it scheduled for Wednesday -- how would you like to proceed with it?

Cheryl

Alaska State Legislature

Representative Carl E. Moses



CHAIRMAN
HOUSE RULES COMMITTEE

CHAIRMAN
HOUSE SPECIAL FISHERIES COMMITTEE

MEMBER
FINANCE SUBCOMMITTEES
FISH AND GAME
PUBLIC SAFETY

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SPONSOR STATEMENT

HOUSE BILL 251 MANAGEMENT AND ALLOCATION OF FISHERY RESOURCES

House Bill 251 was introduced at the request of former Governor Jay Hammond and others who believe that the Board of Fisheries needs a definitive policy from the Alaska Legislature in managing and allocating fishery resources. The Constitution mandates that these resources be utilized to the maximum benefit of Alaska and its residents. Although there are federal Constitutional concerns in upholding the state constitution, it has become apparent to many fishermen in watching the struggles of the Board of Fisheries over the past years, that further policy guidelines are necessary in order to comply with the constitution to the extent legally possible.

House Bill 251 would establish a new management policy in statute which would make clear that the policy of the state is to maximize benefit to the state by managing our resources consistent with the sustained yield principle and in a manner that has the least adverse effect on the people of the state.

COMMENTS ON HOUSE BILL 251

I am placing before this committee amendments to the State Fisheries Management Policy.

Agree with sponsor's statement -- we need to provide policy guidance to the Board of Fisheries

Agree with Governor Hammond's priorities
first priority to conservation

management and allocation of our fisheries to benefit Alaskans first.

I suggest we amend this bill to include conservation.

The Legislature has not provided clear policy direction to the Board of Fisheries regarding the conservation and management of our fisheries.

Conservation decisions must be made at a level that covers the entire range of the species.

I'll give you an example of how conservation measures are taken now.

During our fishing season on the Yukon River, conservation measures are not taken until the salmon start their migration up river. The managers decide in-season that fishing time must be cut back or eliminated, including subsistence.

In-river fishermen are the only fishermen to take conservation measures.

The policy proposed in my amendment would direct managers at the Department of Fish and Game to look at entire migration range of the species and apply conservation measures throughout that migratory range.

Good management decisions must be based on sound scientific information.

We are still not at the point where we have adequate data to manage all our fisheries.

If this information is not available, we end up with status quo management.

If we have fisheries that are facing conservation problems, our policy should advocate erring on the side of management.

When we see a fisheries start to experience conservation problems, our management regimes must start taking preventative measures rather than waiting for and reacting to a crisis.

We need to separate decisions made for conservation from decisions made for allocation.

Conservation decisions should be made before it is ever decided who the users should be and how much fish they should be allocated.

I would like to see a day when the department provides a report to the board on the status of the fisheries, identifying conservation problems, and recommending conservation measures.

Then, let the Board of Fisheries deal with allocation decisions.

We need to look at how best our fisheries can be managed. Our fisheries are being managed for strong stocks at the expense of the weaker stocks where there are mixed stocks.

I am not advocating weak stock management -- a very controversial approach.

What I am advocating is the department getting a better handle on its fisheries management strategies.

We know management of terminal stream fisheries can be done in such a way as to provide for conservation of our fisheries resources.

We need to recognize this kind of management enables the state to comply with the constitutionally mandated sustained yield principle.

If our fisheries cannot be managed to provide protection to our weaker stocks, the department needs to bite the bullet and identify management measures that should be taken.

Our management plans need to include sustained harvest and allocation policies which not only address subsistence, commercial, sport fishing and personal use needs, but also include incidental catch.

Our habitat is critical to the well-being of our fisheries resources. Management plans should all address habitat.

Where we know we have conservation problems, we need to include strategies in our plans for restoration and rebuilding of our fisheries.

We have long been in need of a strong advocate for the resource!

It is the responsibility of the Board of Fisheries, the Commissioner and the Dept. of Fish and Game to protect and conserve the resource.

"Unless the resource is managed so that it may reproduce with a population surplus from year to year, there will, sooner or later, be no reason to quibble over allocation since the surplus or the species itself will become depleted."

The overriding priority of our fisheries management should be to conservation in order to maintain the resource for future generations.

AMENDMENTS

TO: HB 251

BY: Representative Irene Nicholia

page 1, line 1 -- Title Change

"An Act relating to the conservation, management and allocation of fishery resources."

page 3, beginning with line 13

Sec. 16.05.725. **STATE FISHERIES CONSERVATION AND MANAGEMENT POLICY.** (a) It is the policy of the State of Alaska to [utilize, develop, and] conserve, develop, and utilize the fisheries resources of the state for the maximum benefit and common use of the people of the state through management of fisheries resources consistent with the sustained yield principle and allocation of fisheries resources in a manner that has the least adverse effect on the people of the state. It is the intent of the legislature that fisheries management be implemented through fisheries management plans that

(1) encompass the migratory range of the species;

(2) are based on the best scientific information available, and when that information is not available, shall err on the side of conservation by taking preventative rather than reactive measures;

(3) provide for the separation of conservation and allocation decisions, with conservation measures encompassing the entire migratory range of the species;

(4) provide preference to those fisheries management strategies that afford greater assurance of compliance with the constitutional sustained yield mandate;

(5) develop short-term and long-term sustained harvest and allocation policies which address subsistence, commercial, sport fishing, and personal use needs as provided for in statute, as well as incidental catch;

(6) provide for the protection of fisheries habitat;

(7) include stock restoration/rebuilding strategies where there are known conservation problems; and

(8) include socio-economic data describing the contribution of the fisheries to the traditional, cultural and economic well-being of Alaska's communities.

Add new (b) and re-letter following section accordingly:

(b) The Board of Fisheries, the Commissioner, and the Alaska Department of Fish and Game are mandated by this policy to actively advocate the State's constitutional and statutory mandates to conserve and protect the fisheries resources.

HOUSE SPECIAL COMMITTEE ON FISHERIES
MARCH 29, 1993
8:30 a.m.

MEMBERS PRESENT

Representative Carl E. Moses, Chairman
Representative Harley Olberg, Vice-Chairman
Representative Gail Phillips

MEMBERS ABSENT

Representative Irene Nicholia
Representative Cliff Davidson

COMMITTEE CALENDAR

HB 218 "An Act repealing the restriction on the maximum length of salmon seine vessels; and providing for an effective date."

CSHB 218 (FSH) MOVED OUT WITH A DO PASS RECOMMENDATION

*HB 251 "An act relating to the management and allocation of fishery resources."

HEARD AND HELD IN COMMITTEE FOR FURTHER CONSIDERATION

(* first public hearing)

WITNESS REGISTER

Representative Carl Moses
State Capitol, Room 204
Juneau, Alaska 99801-1182
Phone: 465-4451
Position Statement: Prime Sponsor of HB 218 and HB 251

Geron Bruce, Special Assistant
Alaska Department of Fish and Game
P.O. Box 25526
Juneau, AK 99802-5526
Phone: 465-6143
Position Statement: Department has not developed a position yet on HB 251.

PREVIOUS ACTION

BILL: HB 218

SHORT TITLE: REPEAL 58 FT. LIMIT FOR SEINE VESSELS
BILL VERSION: CSHB 218(FSH)
SPONSOR(S): REPRESENTATIVE(S) MOSES
TITLE: "An Act relating to the maximum length of salmon seine vessels; and providing for an effective date."

JRN-DATE	JRN-PG		ACTION
03/10/93	592	(H)	READ THE FIRST TIME/REFERRAL(S)
03/10/93	592	(H)	FISHERIES, RESOURCES
03/22/93		(H)	FSH AT 08:30 AM CAPITOL 17
03/22/93		(H)	MINUTE(FSH)
03/29/93	824	(H)	FSH RPT CS(FSH) NEW TITLE 2DP 1NR
03/29/93	824	(H)	DP: MOSES, PHILLIPS
03/29/93	824	(H)	NR: OLBERG
03/29/93	824	(H)	-ZERO FISCAL NOTE (F&G) NEW TITLE 3/29/93
03/26/93		(H)	MINUTE(FSH)
03/29/93		(H)	FSH AT 08:30 AM CAPITOL 17

BILL: HB 251

SHORT TITLE: MANAGEMENT AND ALLOCATION OF FISH
BILL VERSION:
SPONSOR(S): REPRESENTATIVE(S) MOSES
TITLE: "An Act relating to the management and allocation of fishery resources."

JRN-DATE	JRN-PG		ACTION
03/24/93	761	(H)	READ THE FIRST TIME/REFERRAL(S)
03/24/93	761	(H)	FISHERIES, RESOURCES, JUDICIARY
03/29/93		(H)	FSH AT 08:30 AM CAPITOL 17

ACTION NARRATIVE

TAPE 93-18, SIDE A
Number 000

CHAIRMAN CARL MOSES called the meeting to order at 8:32 a.m. He noted Representatives Moses, Olberg and Phillips in attendance and said the meeting would begin by bringing up once again HB 218 and then hearing HB 251.

HB 218: REPEAL 58 FT. LIMIT FOR SEINE VESSELS

CHAIRMAN MOSES, PRIME SPONSOR OF HB 218, informed the committee they had before them a proposed committee substitute for HB 218 (CSHB 218 (FSH)) which clarifies that the 58 foot limit is repealed in state law, but authority for making restrictions on length goes back to the Board of Fisheries, to be done on a fishery by fishery or regional basis. He added CSHB 218 (FSH) incorporates the change proposed by the Alaska Department of Fish and Game, the Board of Fisheries,

and fishing groups to switch the seine length restrictions to the Board over a three year period in order to match their meeting cycle.

VICE CHAIR HARLEY OLBERG MOVED to ADOPT CSHB 218 (FSH) for discussion purposes.

REPRESENTATIVE GAIL PHILLIPS asked if limit restrictions were a factor in other states.

CHAIRMAN MOSES was not aware of any.

REPRESENTATIVE PHILLIPS MOVED to PASS out CSHB 218 (FSH) from the committee with individual recommendations. There were no objections, and CSHB 218 (FSH) MOVED out of committee with individual recommendations.

HB 251: MANAGEMENT AND ALLOCATION OF FISH

CHAIRMAN MOSES, PRIME SPONSOR OF HB 251, told the committee HB 251 was introduced at the request of former Governor Jay Hammond and others who believe the Board of Fisheries needs a definitive policy from the Alaska Legislature for management and allocation of fisheries resources. According to the Chairman, the constitution mandates that these resources be utilized to the maximum benefit of Alaska and its residents. Although there are federal constitutional concerns, he noted it has become apparent to many fishermen in watching the struggles of the Board of Fisheries over the years that further policy guidelines are necessary in order to comply with the constitution to the extent legally possible.

CHAIRMAN MOSES advised HB 251 would establish such a policy in statute and make clear the policy of the state is to maximize benefits for the state's resources consistent with the sustained yield principle and with the least adverse impact on the people of the state.

Number 048

GERON BRUCE, SPECIAL ASSISTANT WITH THE ALASKA DEPARTMENT OF FISH AND GAME (ADF&G), told the committee the ADF&G was still reviewing HB 251 and had faxed it to members of the Board of Fisheries for their comments before developing a position.

MR. BRUCE gave a brief history of the efforts behind HB 251. Alaska's fishery resources were originally developed by residents of the Pacific Northwest and California, and MR. BRUCE noted the long struggle to wrestle control over those interests and get the resources into the hands of Alaskans. He said that the ADF&G supports efforts to achieve this goal.

MR. BRUCE explained that the legislature several years ago adopted criteria in an attempt to do this kind of thing, and one of the provisions talk about the number of residents and non-residents who have participated in the fishery in the past, and the number that can be reasonably expected to participate in the future. The purpose of this criteria was to do what is being proposed in HB 251. However, there are complications in dealing with federal law, especially the provisions not to discriminate against non-residents in matters affecting interstate commerce.

MR. BRUCE informed the committee the Department of Law has advised the Board of Fisheries not to utilize this particular criteria when they are making allocation decisions for Alaska's fisheries resources. It would be important in reviewing this legislation, he advised, to get an opinion from the Department of Law regarding whether or not the approach proposed in HB 251 would be a more effective tool to have and whether it would fall prey to the same problems the earlier criteria did.

MR. BRUCE also explained the recent history of this legislation. Two years ago when the Board of Fisheries took up proposals concerning the Bristol Bay fisheries, there was a section of regulation dealing with setnet fishing in the Kvichak section of the Naknek-Kvichak District. This setnet section allowed for additional time for setnetters in excess of what was given the driftnetters, recognizing that setnet gear was fixed and the driftnetters could move around and have other opportunities. The only way for the setnetters to make up for interceptions was to fish some extra time.

MR. BRUCE added the Board took public testimony and decided to remove section f from the regulation book, primarily because they were concerned there wasn't specific enough criteria to the department for implementing section f. The department believed it was putting them in the position of making an allocation call instead of the Board. The job of the department is to manage, not allocate.

MR. BRUCE passed out graphs developed by the Commercial Fisheries Entry Commission that showed the consequences of repealing section f, which caused people to question the wisdom of the Board's action. In the Naknek-Kvichak, only 30% of the value of the harvest in the driftnet fishery is taken by the residents of the state of Alaska, whereas in the setnet fishery, almost 75% is. The argument runs that by eliminating the section f provision, the opportunity for Alaskans to maximize benefits from the resources was reduced. The Board of Fisheries ended up revisiting this issue this past winter and reinstated the section f provision.

MR. BRUCE disclosed Governor Hammond's argument is that a lot of energy and time went into this exercise, and if there had been something in statute that would have made it clear that the Board should not do things that would reduce the opportunities for Alaskans to benefit from the fishery resources, they would have quickly disposed of the original proposal as not being in the interest of the state of Alaska.

Number 140

REPRESENTATIVE PHILLIPS expressed interest in the percentages in the graphs, noting there was probably a similar situation in Cook Inlet.

MR. BRUCE affirmed they would be waiting to hear from the Board of Fisheries and the Department of Law before completing their analysis. He explained that the original criteria was sponsored by Senator Vic Fischer in the mid-1980s. He said the criteria was used, except for the one provision concerning residents and non-residents, which they have been advised not to use. He believed HB 251 would certainly be challenged by residents from outside the state

There was some discussion between REPRESENTATIVE PHILLIPS and CHAIRMAN MOSES over who in their districts could be impacted by this legislation.

CHAIRMAN MOSES noted it was typical of attorneys to be overly cautious about something that might happen and the legislature should not always act on something that might happen.

HB 251 WAS HELD FOR FURTHER CONSIDERATION.

ADJOURNMENT

CHAIRMAN MOSES adjourned the meeting at 9 a.m.

HOUSE SPECIAL COMMITTEE ON FISHERIES

APRIL 16, 1993

8:30 a.m.

MEMBERS PRESENT

Representative Carl E. Moses, Chairman
Representative Harley Olberg, Vice-Chairman
Representative Gail Phillips
Representative Irene Nicholia

MEMBERS ABSENT

Representative Cliff Davidson

COMMITTEE CALENDAR

HB 251 "An Act relating to the management and allocation of fishery resources."

HELD IN COMMITTEE FOR FURTHER CONSIDERATION

(* first public hearing)

WITNESS REGISTER

Steve White, Assistant Attorney General
Alaska Department of Law
P. O. Box 110300
Juneau, AK 99811-0300
Phone: 465-3600
Position Statement: Believes HB 251 is unconstitutional.

Tom Elias, Chairman
Alaska Board of Fisheries
P.O. Box 25526
Juneau, AK 99802-5526
Phone: 465-4110
Position Statement: Opposed to HB 251.

Robin Samuelsen, Resources Director
Bristol Bay Native Association
P.O. Box 310
Dillingham, AK 99576
Phone: 842-5257
Position Statement: Opposed to HB 251.

Peggy Osterback
Aleutians East Borough
P.O. Box 101
Sand Point, AK 99661
Phone: 383-2696

Norman Anderson
General Delivery

Naknek, AK 99633
Phone: 246-4423
Position Statement: Opposed to HB 251.

Andy Rauwolf
Southeast Herring Coalition
P.O. Box 8555
Ketchikan, AK 99901
Phone: 225-3697
Position Statement: Opposed to HB 251.

Tate Hayes
Upper Cook Inlet setnetter
2310 20th Avenue
Anchorage, AK 99508
Phone: 272-3943
Position Statement: Would like to see more conservation elements in HB 251.

Dale Kelley, Executive Director
Alaska Trollers Association
130 Seward St., No. 505
Juneau, AK 99801
Phone: 586-9400
Position Statement: Testified in opposition to HB 251 on behalf of ATA and United Fishermen of Alaska.

ACTION NARRATIVE

TAPE 93- 20, SIDE A
Number 000

CHAIRMAN CARL MOSES called the meeting to order at 8:40 a.m. He noted Representatives Moses and Olberg in attendance and said the committee would hear once again HB 251, relating to the management and allocation of fishery resources.

Number 008
HB 251: MANAGEMENT AND ALLOCATION OF FISH

CHAIRMAN MOSES reminded the committee they had heard from the Alaska Department of Fish and Game concerning some of the history behind HB 251 in Bristol Bay. He indicated his intention was to hear further testimony on the bill over the teleconference, generate discussion, and hold the bill for further consideration.

Number 014

MR. STEVE WHITE, ASSISTANT ATTORNEY GENERAL WITH THE DEPARTMENT OF LAW, who has the responsibility of advising the Alaska Department of Fish and Game and the Board of Fisheries, testified that although HB 251 looked pretty innocuous on the face of it, there were potential constitutional problems with it. He said the constitutional problem arises in section 2 of the bill, which directs the Board of Fisheries to allocate resources in a manner that has the least adverse impact on the people of the state. He believes the intent of that section is to create a resident preference in fisheries allocation. The Department of Law has consistently held that preferences for residents over

non-residents, when in a commercial context, probably run up against several constitutional problems, number one being the Privileges and Immunities clause of the U.S. Constitution. That clause has been the principal reason that the state's local hire bills have been struck down by the Alaska Supreme Court. MR. WHITE said the Privileges and Immunities clause guarantees that a citizen of one state may do business in another state on terms of substantial equality.

According to MR. WHITE, the federal constitution allows discrimination against non-residents, but only if several conditions are found. There has to be a legitimate difference for the discrimination against non-residents. MR. WHITE said the courts have held that merely economic protectionism is not a legitimate purpose. There has to be another purpose for legislation of this type, such as conservation of the resource. The non-residents would have to be shown to be a "peculiar source of the evil" if the evil is conservation, and it would have to be shown that the non-resident component of the fishery creates a greater conservation problem than the resident population does. If the nonresidents do create a greater problem than the residents, it would have to be shown that there is no alternative way to cure that problem other than discriminating against nonresidents. The burden on the state is quite high, MR. WHITE said, and all the findings would be evidence for the record.

Several other constitutional clauses are implicated, MR. WHITE said, one being the commerce clause under the U.S. Constitution which says a state can not erect barriers against another state in matters of trade and commerce. If a non-resident discrimination would affect the travel of non-residents in a significant way, it could be considered a burden on interstate commerce. Finally, the Uniform Application clause in the resource section of the Alaska constitution says the resource laws must apply equally in similarly situated persons. If nonresidents and residents create the same management concerns, differences in how they are managed in order to favor one group over another would not be allowed, MR. WHITE said.

MR. WHITE also referenced a Department of Law memo from himself to HOUSE SPEAKER RAMONA BARNES responding to a proposal from one of her constituents concerning an uneven tax on non-resident commercial fishermen, guides and outfitters. The proposal would be to tax all those people 10% of their gross income from their businesses, but people who receive Permanent Fund Dividends (residents) would get a credit against that tax. According to MR. WHITE, that would be discrimination against nonresidents.

Besides the constitutional problems, MR. WHITE said HB 251 would create some internal conflicts with other state statutes. He said subsection b in Section 2 would supersede all other state laws in dealing with allocation. Theoretically it would supersede the subsistence law, MR. WHITE pointed out, and this would direct the Board of Fisheries to allocate fisheries to subsistence users in all cases as opposed to commercial, sport and personal use fisheries. The result would conflict with the existing subsistence law which creates a priority only in certain circumstances. MR. WHITE also said it may conflict with the law that sets up criteria for allocating among different user groups. He cautioned the committee to consider the far-reaching implications of HB 251 before adopting it.

Number 106

MR. TOM ELIAS, CHAIR OF THE BOARD OF FISHERIES, testified that in reviewing HB 251 he has many of the same concerns as MR. WHITE. The problem of resident versus nonresident always comes up before the Board of Fisheries he said, and while he sympathizes with the notion that residents should be given preferential treatment because of

their ownership of the resource, he did see problems that could arise. MR. ELIAS called the residential preference a good idea, but not workable given the context of the law.

Number 135

ROBIN SAMUELSEN, FORMER BOARD OF FISHERIES MEMBER, AND CURRENTLY RESOURCES DIRECTOR FOR THE BRISTOL BAY NATIVE ASSOCIATION, testified in opposition to HB 251. According to MR. SAMUELSEN, the management and allocation of fisheries has been worked out over time among the various user groups in the proper forum - the Board of Fish, with a lot of public meetings. MR. SAMUELSEN said his concerns echo those of MR. WHITE. Who will pay for these new changes in light of the budget cuts taken by the Division of Boards and the Department of Fish and Game, MR. SAMUELSEN asked. He said HB 251 is quite vague on what roles the Board, the Department, and the Commissioner have, and all that needs to be spelled out. There is more than what meets the eye in this bill, MR. SAMUELSEN warned, and if adopted with these vague interpretations, could be very disruptive to the user groups that have sat through countless board meetings coming to decisions.

Number 160

PEGGY OSTERBACK, TESTIFYING ON BEHALF OF THE ALEUTIANS EAST BOROUGH, said it was difficult to analyze HB 251 since its intent is not immediately clear. On the surface it looks like a paraphrasing of several sections of Article VIII of the Alaska Constitution. However, this particular paraphrasing appears to be aimed at basing fishing regulations and in-season management decisions on the basis of the number of Alaska residents in any segment of the fishery. If that is the case, MS. OSTERBACK cautioned, the amendment to Title 16 contained in HB 251 is fraught with equal protection and U.S. Commerce clause problems when it is applied to commercial fisheries management and allocations.

According to MS. OSTERBACK, it is true that the legislature has provided the Board of Fisheries with allocation criteria which include a comparison of the number of residents and nonresidents in each fishery. However, the Department of Law has repeatedly warned the board that it would be difficult, if not impossible, to come up with a viable application of this standard for commercial fisheries, she said.

The majority of the permits for salmon fisheries in the Aleutians East Borough are held by residents, MS. OSTERBACK pointed out, with a larger percentage of Area M permits held by residents than in both Bristol Bay fisheries. However, even as potential beneficiaries of such a preference, MS. OSTERBACK said the Aleutians East Borough could not support legislation that is bound to confuse allocation and management decisions and increase the number of lawsuits filed.

While they understood the desire to benefit Alaska residents, MS. OSTERBACK argued that in some cases the impediments are simply too great, in particular, the U.S. Constitution and the Commerce Clause. Looking closely at Article VIII, the Natural Resources Article of Alaska's Constitution, MS. OSTERBACK said the borough is not certain that the proposed statute accurately reflects the principles listed. The section 4 language, "subject to preferences among beneficial uses," does not say "subject to preferences among beneficial users." According to MS. OSTERBACK, it appears to the Aleutians East Borough that the "least adverse impact" language in HB 251 attempts to change the focus of the constitution to provide the opportunity for the Board of Fisheries and the Department of Fish and Game to make regulatory and in-season allocation

decisions based on the murky and dangerous concept that what's best for some individuals is somehow best for the state.

MS. OSTERBACK also argued that Section 17 is also relevant to this issue, because there can be no legal barrier to nonresidents holding interim use or entry permits, so that all commercial fisheries are similarly situated. Given that, attempting to impose a residency standard on allocation and management decisions could not be condoned, she said.

REPRESENTATIVE GAIL PHILLIPS AND REPRESENTATIVE IRENE NICHOLIA JOINED THE COMMITTEE.

Number 224

MR. NORMAN ANDERSON testified in opposition to HB 251, calling it a multi-faceted bill. He believes a portion of this bill is condoning the actions of the Department of Fish and Game in over-managing the Egegik fishery, which negatively impacted the Kvichak district.

Number 257

MR. ANDY RAUWOLF, REPRESENTING THE SOUTHEAST HERRING COALITION, testified in opposition to House Bill 251, arguing that it would restrict the Board of Fisheries' ability to act on proposals aimed at conservation and enhancement of a resource. Scientific studies indicate that some harvest THRESHOLDS now being used on depleted stocks are designed as tradeoffs, he said. His organization does not believe enough consideration to enhancing depleted stocks would be given if HB 251 were adopted. Maximum benefit, consistent with sustained yield, can only be vaguely defined at best, he said. According to MR. RAUWOLF, the Alaska Constitutional Convention concluded that sustained yield is not an absolute. In fisheries it would be impossible to calculate because it is not capable of precise specification. Under HB 251 MR. RAUWOLF argued, you wouldn't be able to require enhancement of depleted stocks.

Number 297

MR. TATE HAYES, a commercial setnetter in the northern district of Upper Cook Inlet, expressed concern about the future of Alaska's fisheries. Conservation must be the most important aspect of any management plan, he said. Management plans must be implemented and carried out throughout the entire migratory range for the species if conservation is to be ensured, he added, and management plans for different areas must be incorporated throughout in order to ensure sustained yield. All fisheries harvests, as well as incidental takes, must be incorporated in those plans, he said, since they all play a role in the future of the fisheries resources. He also stressed that the protection of fish habitat is crucial to Alaska's fisheries. A restoration strategy is needed to be in place before a disaster occurs, MR. HAYES argued. Management of fisheries must follow the constitutional mandate and statutes, and the Board of Fisheries should follow these guidelines.

REPRESENTATIVE NICHOLIA asked to put forth an amendment to HB 251.

CHAIRMAN MOSES responded that no amendments would be taken at this time since it was not his intent to act on the legislation.

Number 353

MS. DALE KELLEY, REPRESENTING THE UNITED FISHERMEN OF ALASKA AND THE ALASKA TROLLERS ASSOCIATION, testified in opposition to HB 251 on behalf of both groups. She explained their concerns that HB 251 would increase allocation disputes among Alaska residents and that it has questionable constitutionality. Resident fishermen who fish in fisheries dominated by nonresidents would be unfairly discriminated against and cause significant problems in the state, she argued. UFA and ATA believe there should be equal consideration for all permit-holders since they all benefit the state in significant ways, she added. Additionally, they believe that HB 251 totally disregards those benefits received by the predominantly resident support industry to the fleets - processing, gear sales, etc. The Board of Fish is the best forum to assess the maximum benefit to the state of Alaska, **MS. KELLEY** said. She pointed out that the Board is currently mandated to manage under sustained yield, with socio-economics a key part of their decision-making, based on statistical evidence and public testimony. She also questioned whether you can legally discriminate against nonresidents under the constitution. The Board of Fisheries process is not broken and does not need to be fixed, **MS. KELLEY** concluded.

Number 407

REPRESENTATIVE NICHOLIA offered the committee copies of a proposed amendment to HB 251. Management and allocation of our fisheries should benefit Alaskans first, she agreed. However, she suggested HB 251 be amended to include conservation because the Legislature has not provided clear policy to the Board of Fisheries regarding conservation and management of Alaska's fisheries. Conservation decisions must be made at a level that includes the entire migratory range of the species, she said.

REPRESENTATIVE NICHOLIA used the Yukon River fishery as an example of how conservation measures are taken now: during the fishing season, she said, conservation measures are not taken until the salmon start their way up the Yukon River. The managers decide in-season that fishing time must be cut back or eliminated, even for subsistence fishing. Yukon fishermen are the only fishermen to take conservation measures, she pointed out.

The policy proposed in **REPRESENTATIVE NICHOLIA's** amendment would direct managers at the Department of Fish and Game to apply conservation measures throughout the entire migratory range of the fish specie. Good management decisions must be made on sound scientific information, **REPRESENTATIVE NICHOLIA** asserted. However, she doesn't believe that the state has adequate data to manage all its fisheries. If this information is not available, according to **REPRESENTATIVE NICHOLIA**, the end result is status quo management. If fisheries have conservation problems, the policy should advocate erring on the side of management, she said, and when a fishery starts to experience conservation problems, managers must start taking preventative measures rather than waiting until a crisis occurs.

REPRESENTATIVE NICHOLIA also argued that decisions made for conservation should be separated from decisions made for allocation. Conservation decisions should be made before it is ever decided who the user should be and how much fish they should be allocated, she said. I

REPRESENTATIVE NICHOLIA said that fisheries with strong stocks are currently managed at the expense of the weak stocks.. Although she does not advocate "weak stock management," a very controversial approach, she said she does advocate the Department of Fish and Game getting a better handle on its fishery management strategies. Management of terminal stream fisheries can be done in such a way to provide conservation

of the resources, she added, and recognizing this kind of management enables the state to comply with the constitutionally mandated sustained yield principle. If fisheries cannot be managed to provide protection to weaker stocks, then ADF&G needs to bite the bullet and identify management measures that should be taken.

REPRESENTATIVE NICHOLIA said management plans need to include sustained harvest and allocation policies, which not only address the subsistence, commercial, sport fishing, and personal use fisheries, but also include incidental catch. Habitat is critical to the well-being of fishery resources, REPRESENTATIVE NICHOLIA pointed out. Management plans should all address habitat, she said. Unless the resource is managed so that it may reproduce with a population surplus from year to year, there will, sooner or later, be no reason to quibble over allocation since the surplus or the species itself will become depleted, she added. The overriding priority of our fisheries management should be towards conservation in order to maintain the resource for future generations, she concluded.

HB 251 WAS HELD FOR FURTHER CONSIDERATION.

ADJOURNMENT

CHAIRMAN MOSES adjourned the meeting at 9:15 a.m.

ALEUTIANS EAST BOROUGH

SERVING THE COMMUNITIES OF
KING COVE SAND POINT AKUTAN COLD BAY FALSE PASS NELSON LAGOON

Comments on HB 251

SUMMARY: This bill would amend the statutes by adding the following:

Sec. 16.05.725 STATE FISHERIES MANAGEMENT POLICY. (a) It is the policy of the State of Alaska to utilize, develop, and conserve the fisheries resources of the state for the maximum benefit and common use of the people of the state through management of fisheries resources consistent with the sustained yield principle and allocation of fisheries resources in a manner that has the least adverse effect on the people of the state.

(b) Notwithstanding any other provision of law, this policy shall govern the actions of the Board of Fisheries, the commissioner, and the department.

It is somewhat difficult to analyze this bill, since its intent is not immediately clear. On the surface it looks a paraphrasing of several sections of Article VIII of the Alaska Constitution. However, this particular paraphrasing appears to be aimed at basing fishing regulations and in season management decisions on the basis of the number of Alaska residents in any segment of the fishery.

If that is the case, this amendment to Title 16 is fraught with equal protection and U.S. Commerce clause problems when it is applied to commercial fisheries management and allocations.

It is true that the legislature has provided the Board of Fisheries with allocation criteria which include a comparison of the number of residents and nonresidents in each fishery. However, the Department of Law has repeatedly warned the board that it would be difficult if not impossible to come up with a viable application of this standard for commercial fisheries.

The majority of the permits for salmon fisheries in the Aleutians East Borough are held by residents. In fact, a larger percentage of Area M permits are held by residents than in both Bristol Bay fisheries. However, even as potential beneficiaries of such a preference, we cannot support legislation that is bound to confuse allocation and management decisions and increase the number of lawsuits filed.

While we understand the desire to benefit Alaska residents, in some cases the impediments are simply too great. The U.S. Constitution and the Commerce Clause certainly rank as a significant impediments.

Looking closely at Article VIII, the Natural Resources Article of Alaska's Constitution, we are not certain that the proposed statute accurately reflects the principles listed. I have included the appropriate sections here.

Section 1-Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Section 2-General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Section 3-Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4-Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

There are several other provisions in the Natural Resource Section of Alaska's Constitution, but the only other section that appears to be directly related to this bill is Section 17:

Section 17-Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation. (emphasis added)

The Section 4 language, "subject to preferences among beneficial uses," does not say "subject to preferences among beneficial users." It appears to AEB that the "least adverse impact" language in HB 251 attempts to change the focus of the constitution to provide the opportunity for the Board of Fisheries and the Department of Fish and Game to make regulatory and in-season allocation decisions based on the murky and dangerous concept that what's best for some individuals is somehow best for the state.

AEB believes that Section 17 is also relevant to this issue, because there can be no legal bar to nonresidents holding interim use or entry permits so all commercial fisheries are similarly situated. Given that, attempting to impose a residency standard on allocation and management decisions could not be condoned.

NATURAL RESOURCES DEPARTMENT

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MEMORANDUM

State of Alaska

Department of Law

TO: Hon. Don Collinsworth
Commissioner
Dept. of Fish and Game

DATE: November 15, 1988

FILE NO.: 663-89-0200

TEL. NO.: 465-3600

SUBJECT: State residency as an
allocation criteria:
potential constitutional
problems

FROM: ^{LIS}
Larri Irene Spengler
Assistant Attorney General
Natural Resources Section

You have asked whether the Board of Fisheries may validly consider the number of state residents and nonstate residents who participate in commercial fisheries in allocating commercial fishing opportunity. From your memorandum of inquiry, we gather that the board has not considered this factor, but that there is some concern among members of the public that it might. Since there is no actual situation before us to evaluate, this memorandum will not analyze the abstract question in much depth. However, in brief, it is very likely that consideration of the residency/nonresidency of participants in commercial fisheries in making allocation decisions would raise constitutional problems.

This question arises because AS 16.05.251(e) requires the Board of Fisheries to

establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

....

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

In 5 AAC 39.205, the board has adopted the seven factors used as examples in AS 16.05.251(e). Neither the statute nor the regulation require the board to use all of the factors in every allocation decision, and apparently the board has chosen not to consider the state residency or nonresidency of individuals participating in commercial fisheries among which the board

allocates. That restraint on the board's part is well-advised. Allocating commercial fishing opportunity based on the state residency or nonresidency of the participants would potentially violate at least two provisions of the United States Constitution: article I, section 8, clause 3 (the commerce clause), and article IV, section 2 (the privileges and immunities clause.)

The privileges and immunities clause of the United States Constitution provides:

The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.

Article IV, section 2.

The Alaska Supreme Court has recognized that under United States Supreme Court decisions the "primary purpose of this clause is to prevent states from enacting measures which discriminate against nonresidents for reasons of economic protectionism." Robison v. Francis, 713 P.2d 259, 263 (Alaska 1986). It is hard to imagine how the Board of Fisheries would consider the state residency of commercial fishery participants for any other purpose than economic protectionism, potentially running afoul of the privileges and immunities clause.

The commerce clause of the United States Constitution provides:

Congress shall have power . . . to regulate commerce within foreign nations, and among the several states, and with Indian tribes.

Article I, section 8, clause 3. The test for the commerce clause analysis was discussed by the United States Supreme Court in Hughes vs. Oklahoma, 441 U.S. 322, 336 (1979). The court said that under the commerce clause it must inquire

(1) whether the challenged statute regulates evenhandedly with 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and if so,

Hon. Don Collinsworth
Commissioner, ADF&G
Our File 663-89-0200

November 15, 1988
Page 3

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Clearly, an allocation decision which purposefully allocated commercial fishing opportunity away from nonstate residents would, in most circumstances this department can envision, discriminate against interstate commerce at least in practical effect. Thus, under the test, the analysis would be whether the allocation serves a "legitimate local purpose." Referencing back to the disapproval the United States Supreme Court has evidenced toward measures which "discriminate against nonresidents for reasons of economic protectionism," explained in Robison, it appears that an allocation based on such considerations would be constitutionally vulnerable.

As discussed above, because there is no particular situation before us to evaluate, this opinion does not contain an in-depth analysis of the possible constitutional problems with allocating commercial fishing opportunity to state residents and away from nonstate residents. However, speaking generally, allocation based on such considerations would be very likely to at least violate the United States Constitution's privileges and immunities clause and the commerce clause.

LIS:d1m

cc: Elizabeth Stewart, Director
Division of Boards
Department of Fish and Game

Ken Parker, Director
Commercial Fisheries Division
Department of Fish and Game

Gary Slaven, Chairman
Board of Fisheries
P.O. Box 205
Petersburg, AK 99833

MEMORANDUM

State of Alaska Department of Law

TO: Hon. Carl L. Rosier
Commissioner
Alaska Department of
Fish and Game

DATE: March 19, 1992
FILE NO.: 663-92-0347
TEL. NO.: 465-3600
SUBJECT: Allocation of southeast
chinook salmon

Stephen M. White

FROM: Stephen M. White
Assistant Attorney General
Natural Resources -- Juneau

You informed us that the Alaska Trollers Association petitioned the Alaska Board of Fisheries ("Board") to allocate a portion of the available chinook salmon quota to the commercial troll fleet. In essence, this allocation would create an allocation to southeast Alaska chinook anglers (sport fishers).

You have asked the following questions concerning this proposal. We have given our answer and discussion after each question.

Question 1. Can the Board adopt regulations for anglers who use commercial services and facilities, like charter boats and lodges, that are different from regulations for anglers who do not use them?

Answer: Uncertain. Under existing statutes, it is not clear whether the legislature has given the Board statutory authority to allocate fishery resources between anglers who use commercial services and those who do not.

Discussion:

A. General Principles Governing Board Regulations.

For all of these questions, we believe it would be helpful to review legal principles that govern Board regulations.

The Alaska Supreme Court has held that the Board of Fisheries, when it adopts regulations, must comply with two general principles. Under the first principle, the Board must stay within its statutory authority. That is, the Board must pursue permissible purposes, and it must use means that are within its powers. Meier v. State, 739 P.2d 172, 173 (Alaska 1987). This is because "administrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim." Rutter v. State, 688 P.2d 1343, 1349 (Alaska 1983).

The Board was created "[f]or the purposes of the conservation and development of the fishery resources of the state" AS 16.05.221. For sport fishing, the legislature has given the Board authority to adopt regulations needed for conservation, development, and utilization of fisheries. AS 16.05.251(a)(12). The Alaska Supreme Court has held that the words "conserving" and "developing" involve the utilization of resources, and these purposes permit the board to establish priorities for use between fishing groups due to sharp competition between them for a limited fishery resource. Meier, 739 P.2d at 174.

Under the second general principle, Board regulations must be reasonable and not arbitrary. That is, the regulations must be consistent with and reasonably necessary to the purposes for which the Board was created, i.e., conservation and development. Meier, 739 P.2d at 173. 1/

B. Board's Statutory Authority to Adopt Different Sport Fishing Regulations for Users of Commercial Support Services.

The permissible ways that the Board can regulate sport fisheries are set out in AS 16.05.251(a). The Board can regulate, among other ways, by (1) establishing open and closed seasons and areas for taking fish, (2) setting quotas, bag limits, harvest levels, and sex and size limitations, and (3) establishing methods and means employed in the pursuit, capture, and transport of fish. AS 16.05.251(2), (3), and (4).

It is not clear from your request what type of different regulations are envisioned for sport anglers who use commercial services. The most restrictive regulations would cause an outright ban on the use of these services.

If an absolute ban is intended, we have previously advised that, under the Board's power to establish "methods and means," it has statutory authority to absolutely prohibit support services. Such a prohibition, however, cannot be arbitrary or unreasonable, and in this context, it must be consistent with and reasonably necessary to the conservation and development of southeast Alaska chinook stocks. Gilbert v. State, 803 P.2d 391 (Alaska 1990). Also, it must satisfy constitutional requirements such as equal protection. (See discussion in Question 3.)

1/ This principle is reiterated in AS 16.05.251(d), which says that Board regulations must, consistent with sustained yield and the subsistence law, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishers.

On the other hand, the Board may elect to allow anglers to use support services, but adopt more restrictive area, season, period, bag, possession, or equipment regulations for them. As we understand it, the intended purpose of this type of regulation would not be conservation. The fish that would be spared by these regulations would not contribute to escapement, but instead would be available for harvest by anglers who do not use these services. The purpose, then, would be allocation.

Concerning allocations, the Alaska Supreme Court held that the Board's duty under AS 16.05.221(a) to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users. Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 903 (Alaska 1981). In that case, the court held that the Board's allocation power permitted it to establish priorities for use between commercial and recreational fishermen as a response to sharp competition between the two groups for a limited fishery resource. Id. In a later case, where there was keen competition between two subgroups of commercial fishermen, i.e., between commercial setnet and driftnet fishermen in Bristol Bay, the court said that the Board's power allows it to allocate salmon between these two subgroups. Meier, 739 P.2d at 174.

Here, the Board would be allocating fishery resources between two "subgroups" of another overall user group, sport fishers. The two subgroups are (1) anglers who use commercial services and (2) those who do not. This raises the question of what authority the Board has to identify subgroups for allocation purposes.

Alaska Statute 16.05.251(e) directs the Board to establish criteria for making allocation decisions. 2/ Among the criteria that the Board may use are seven criteria that are listed in this statute. The Board has said that it will consider factors such as the seven statutory criteria when they are appropriate to allocation decisions. 5 AAC 39.205.

Six of the seven allocation criteria deal with the characteristics of "fisheries." AS 16.05.251(e)(1)-(3), (5)-(7). Thus, the legislature intended that allocations could be made between subgroups that are "fisheries."

2/ This statute has been interpreted to apply to allocations between commercial "subgroups" as well as to allocations among overall user groups, i.e., among personal use, sport, and commercial fishers. Peninsula Marketing Ass'n v. State, ___ P.2d ___, Op. No. 3754 (Alaska Sept. 20, 1991).

The statutes define a "fishery" as "a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear," with the Board having authority to designate that a fishery has more than one area, gear type, or resource. AS 16.05.940(12) (emphasis added). The terms "type of gear" and "gear" are defined in a statute that pertains to the Alaska Commercial Fisheries Entry Commission, and thus are also defined in the context of commercial fishing. See AS 16.43.990(4) and (8).

Accordingly, for allocations within the overall user group of commercial fishing, we believe that the statutes identify permissible subgroups according to (1) the geographic fishing area(s), (2) the fishery resource(s) harvested, and (3) the type(s) of apparatus used to harvest the resource, such as purse seine, drift gillnet, set gillnet, power troll, or hand troll. For a permissible allocation between two groups of commercial fishermen, the groups should differ by at least one of these characteristics.

For subgroups within the overall user group of sport fishing, however, the allocation statute—AS 16.05.251(e)—is not helpful. As mentioned above, this statute refers to competing "fisheries," which, in AS 16.05.940(12) and AS 16.05.990(4) and (8), are defined according to commercial fishing. Even if the allocation statute "fit" a sport fishery allocation, it would not help the present one. Since anglers who use commercial services share the same waters, fish with the same "gear", (i.e., rod and reel), and fish for the same resource (i.e., chinook salmon) as anglers who do not use these services, they cannot be considered separate "subgroups" under this statute.

On the other hand, it may be argued that the Board is not limited in its discretion to define subgroups for allocation purposes. That is, it could be argued that the Board is authorized to define sport fishing subgroup according to their "methods and means"—such as whether or not they use charter boats and lodges—and then allocate different fishing opportunities among them.

This argument would be aided by the fact that fish and game laws are to be "liberally construed." Kenai Peninsula, 628 P.2d at 897. Other case law holds that, when a statute delegating authority to an administrative agency does not expressly provide a standard, the standard may be implied from the general policy and purposes underlying the statute. Kenai Peninsula, 628 P.2d at 907.

Under these precedents, one can argue that the clear purpose of AS 16.05.251(e) is to allow the board to allocate "among . . . sport . . . fishing" and that the "methods and means" authority of AS 16.05.251(a)(4) is a permissible way to identify

allocation groups. Although we believe that the contrary argument is stronger, it is not conclusively so.

Question 2. Can the Board adopt regulations that set bag, possession, and size limit regulations for resident anglers that are different from such regulations for nonresident anglers?

Answer: Uncertain. Again, it is not clear whether the legislature has given the Board statutory authority to discriminate against nonresident anglers.

Discussion: As noted above, the Board must stay within its statutory authority. That is, the Board must pursue permissible purposes, and it must use means that are within its powers. Meier v. State, 739 P.2d 172, 173 (Alaska 1987). The question, therefore, is whether the Board has statutory authority to set bag, possession, and size limits that discriminate against nonresident anglers.

As we understand it, the reason that the Board would be adopting more restrictive regulations for nonresidents is not to allow the spared fish to escape to spawning streams, but instead, to enable resident anglers to catch them. Thus, the regulations would have to be justified on allocation, not conservation grounds.

There is statutory authority that would allow the Board to consider resident and nonresident use of fish when making allocations among fisheries. Alaska Statute 16.05.251(e) directs the Board to adopt allocation criteria, and it says that these may include (1) the participation of residents and nonresidents in each fishery, (2) the importance of each fishery in providing for residents' consumption, and (3) the importance of each fishery in providing recreational opportunities for residents and nonresidents. AS 16.05.251(e)(2), (3), (7).

The authority to account for resident and nonresident participation and recreational opportunities, and the authority to account for residents' consumption, is not clear legislative authority to establish different fishing opportunities for these two groups. However, it is not logical that the legislature, having authorized the Board to account for resident and nonresident use when deciding allocations, intended that these accountings would not be reflected in the decisions themselves. We believe that the authority to account for resident and nonresident use is a strong implication that the Board is authorized to treat residents and nonresidents as separate subgroups for allocation purposes.

On the other hand, we note that the legislature has clearly authorized the Board of Game to limit nonresidents' taking of big game in a particular situation. AS 16.05.256. 3/

A rule of statutory interpretation says that when a specific activity is designated by statute it must be inferred that all omitted activities are intentionally excluded. 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992). Here, the rule means that, if the legislature has granted a certain kind of authority in one area, its failure to grant the same type of authority in another area means that it withheld the authority in that second area.

Thus, it could be argued that the legislature's clear grant of authority to the Board of Game to discriminate against nonresidents, and its failure to give the Board of Fisheries the same clear authority, supports a conclusion that it did not intend for the latter to have this power. This is buttressed by the fact that the definition in AS 16.05.940(12) does not identify resident and nonresident anglers as separate "fisheries" when they fish in the same area for the same species with the same tackle.

Accordingly, we caution the Board against adopting different regulations for resident and nonresident anglers unless the legislature gives it clear authority to do so. If the Board does discriminate against nonresidents under its present authority, the Board should exercise restraint. Depending upon the method, degree, and purpose, such a discrimination may raise state and federal constitutional problems.

We have previously advised the Board about constitutional concerns that arise if state residency is used as an allocation criteria in commercial fisheries. 1988 Inf. Op. Att'y Gen. (Nov. 15; 663-89-0200). Except for violation of the Privileges and Immunities Clause of the federal constitution (U.S. Const. art. IV, § 2), these same concerns, as well as equal protection, would be raised by regulations that discriminate against nonresident sport fishers.

At this time, we do not know the manner in which the Board would discriminate against nonresidents. Once there is a specific proposal that identifies the method, degree, and purpose

3/ The legislature has enacted other laws that distinguish nonresidents. For example, it has set higher license and tag fees for nonresidents who take fish and game (AS 16.05.340(a), 16.05.480), and it has required nonresidents to be accompanied by guides when hunting certain big game species. (AS 16.05.407).

for treating nonresident anglers differently, we will be able to advise the Board on these constitutional issues.

Question 3. Can the Board limit the catch in a sport fishery in order to allocate to a limited entry commercial fishery the fish that the sport anglers might have caught if no catch limit were imposed? Would this be consistent with the common use and equal protection provisions of the Alaska Constitution?

Answer: Yes to both questions.

Discussion:

A. Statutory Authority.

As discussed in our answer to Question 1., the Board's allocation power allows it to establish priorities for use between commercial and recreational fishers. Kenai Peninsula, 628 P.2d at 903. In the Kenai Peninsula case, the Board adopted a policy that closed commercial fishing on late-run cohos so that sports fishers could catch them.

Here, the Board would be doing the opposite of its actions in Kenai Peninsula - it would be allocating in favor of commercial fishers to the detriment of sport fishers. Nevertheless, we believe that the holding of that case applies regardless of which user group benefits.

Like any other allocation, this one must be consistent with and reasonably necessary to the conservation and development of Alaska fishery resources. Meier, 739 P.2d at 174. Also, in making the allocation, the Board must consider the appropriate allocation criteria set out in AS 16.05.251(e). 5 AAC 39.205.

B. Constitutional Issues.

The "common use" clause (Alaska Const. art. VIII, § 3) and two other clauses in the Alaska Constitution—the "no exclusive right" clause (Alaska Const. art. VIII, § 15) and the "uniform application" clause (Alaska Const. art. VIII, § 17)—are often referred to as the "equal access" clauses. See McDowell v. State, 785 P.2d 1, 8 n.14 (Alaska 1989). The Alaska Supreme Court has consistently held that these clauses are implicated only when the state places limits on the admission of persons to resource user groups. Id. Also, the court has consistently distinguished the

state's power to limit admission to user groups from the Board's power to allocate fishery resources. 4/

Placing a limit on the sport chinook catch in favor of increased catch by commercial trollers would be an allocation between these two user groups, not a limitation on admission to either of them. Accordingly, we believe that an action like this would not implicate the "common use" clause.

Equal protection in the regulation of fish and game is provided by one of the "equal access" clauses, that is, by the "uniform application" clause (Alaska Const. art. VIII, § 17). The supreme court stated that analysis under this clause may invoke "more stringent review" than analysis under the general equal protection clause of the Alaska Constitution, i.e., under article I, section 1. Gilbert v. State, 803 P.2d at 398. This statement leads us to believe that if an allocation satisfies the "uniform application" clause it will necessarily satisfy the more lenient provisions of the general equal protection clause.

The "uniform application" clause only applies to persons who are "similarly situated." Gilbert, 803 P.2d at 399. In the Gilbert case, the court noted several differences between the competing fisheries, including (1) where in the migratory route each fishery's effort was directed (one was an "intercept" fishery, the other was a "terminal" fishery), (2) how long the respective fisheries had existed, (3) their historic catch levels, and (4) the number of permit holders in each fishery. Because of these differences, the court concluded that the two groups of fishers were not "similarly situated." Id.

4/ For example, in Kenai Peninsula, the court said,

While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of the section.

Kenai Peninsula, 628 P.2d at 904. In McDowell, the court said, "The state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group." McDowell v. State, 785 P.2d at 8.

Resources

Judiciary

HB 251

MANAGEMENT AND ALLOCATION OF FISH

☐ additional referral to the _____ Committee

☐ zero fiscal note(s) _____

CHAIRMAN'S SIGNATURE

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 251

HISTORY IN THE HOUSE

HISTORY IN THE SENATE

1943 3/24	Read first time and referred to: <u>FSH RES Jud</u> _____ RPT CS() _____ New Title _____ DP _____ DNP _____ NR _____ AM _____ FN _____ OFN _____ Previous FN _____ RPT CS() _____ New Title _____ DP _____ DNP _____ NR _____ AM _____ FN _____ OFN _____ Previous FN _____ RPT CS() _____ New Title _____ DP _____ DNP _____ NR _____ AM _____ FN _____ OFN _____ Previous FN Read second time CS() Adopted Amended Advanced Read third time Return to second for specific amendment <table><tr><td>PASSED</td><td>EFD Same ___ or</td></tr><tr><td>Yeas</td><td>Yeas</td></tr><tr><td>Nays</td><td>Nays</td></tr><tr><td>Excused</td><td>Excused</td></tr><tr><td>Absent</td><td>Absent</td></tr></table> _____ Intent adopted Reconsideration Reconsideration not taken up <table><tr><td>PASSED ON RECON.</td><td>EFD Same ___ or</td></tr><tr><td>Yeas</td><td>Yeas</td></tr><tr><td>Nays</td><td>Nays</td></tr><tr><td>Excused</td><td>Excused</td></tr><tr><td>Absent</td><td>Absent</td></tr></table> _____ Intent adopted Reported correctly engrossed Signed by Speaker, to the Senate _____ Chief Clerk of the House	PASSED	EFD Same ___ or	Yeas	Yeas	Nays	Nays	Excused	Excused	Absent	Absent	PASSED ON RECON.	EFD Same ___ or	Yeas	Yeas	Nays	Nays	Excused	Excused	Absent	Absent
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HOUSE-SENATE HISTORY Continued

19	Received from the Senate Concur in Senate amendment Y ___ N ___ E ___ A ___ Efd same or Y ___ N ___ E ___ A ___ Failed to concur Senate amendment, ask Senate recede Y ___ N ___ E ___ A ___ Senate failed to \ receded from amendment Y ___ N ___ E ___ A ___ CC appointed by House _____ Chair CC appointed by Senate _____ Chair (H) Granted Limited Powers of Free Conference (S) Granted Limited Powers of Free Conference
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19	(H) Adopted CC Rpt _____ Y ___ N ___ E ___ A ___ Efd same or Y ___ N ___ E ___ A ___ (S) Adopted CC Rpt _____ Y ___ N ___ E ___ A ___ Efd same or Y ___ N ___ E ___ A ___ To enrolling Reported enrolled and sent to Governor _____ By Governor Chapter Number _____ Filed with Lieutenant Governor
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HOUSE BILL NO. 251

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE MOSES

Introduced: 3/24/93

Referred: House Special Committee on Fisheries, Resources, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the management and allocation of fishery resources."

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

3 * Section 1. AS 16.05.251(a) is amended to read:

4 (a) The Board of Fisheries may adopt regulations under [IT CONSIDERS
5 ADVISABLE IN ACCORDANCE WITH] AS 44.62 (Administrative Procedure Act),
6 that the board determines are consistent with the policy set out in AS 16.05.725
7 and are necessary, for

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

11 (2) establishing open and closed seasons and areas for the taking of
12 fish; if consistent with resource conservation and development goals, the board may
13 adopt regulations establishing restricted seasons and areas necessary for persons 60
14 years of age and older to participate in sport, personal use, or subsistence fishing;

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

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

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

7 (6) classifying as commercial fish, sport fish, guided sport fish,
8 personal use fish, subsistence fish, or predators or other categories essential for
9 regulatory purposes;

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

12 (8) investigating and determining the extent and effect of disease,
13 predation, and competition among fish in the state, exercising control measures
14 considered necessary to the resources of the state;

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

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

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

23 (12) regulating commercial, sport, guided sport, subsistence, and
24 personal use fishing as needed for the conservation, development, and utilization of
25 fisheries;

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

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

1 (B) will not unduly disrupt the fishery;

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

3 (D) can be coordinated with observer programs of other
4 agencies, including the National Marine Fisheries Service, North Pacific
5 Fishery Management Council, and the International Pacific Halibut
6 Commission;

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

9 (15) regulating resident or nonresident sport fishermen as needed for
10 the conservation, development, and utilization of fishery resources.

11 * Sec. 2. AS 16.05 is amended by adding a new section to article 5 to read:

12 Sec. 16.05.725. STATE FISHERIES MANAGEMENT POLICY. (a) It is the
13 policy of the State of Alaska to utilize, develop, and conserve the fisheries resources
14 of the state for the maximum benefit and common use of the people of the state
15 through management of fisheries resources consistent with the sustained yield principle
16 and allocation of fisheries resources in a manner that has the least adverse effect on
17 the people of the state.

18 (b) Notwithstanding any other provision of law, this policy shall govern the
19 actions of the Board of Fisheries, the commissioner, and the department.

Alaska State Legislature

Representative Carl E. Moses



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SPONSOR STATEMENT

HOUSE BILL 251 MANAGEMENT AND ALLOCATION OF FISHERY RESOURCES

House Bill 251 was introduced at the request of former Governor Jay Hammond and others who believe that the Board of Fisheries needs a definitive policy from the Alaska Legislature in managing and allocating fishery resources. The Constitution mandates that these resources be utilized to the maximum benefit of Alaska and its residents. Although there are federal Constitutional concerns in upholding the state constitution, it has become apparent to many fishermen in watching the struggles of the Board of Fisheries over the past years, that further policy guidelines are necessary in order to comply with the constitution to the extent legally possible.

House Bill 251 would establish a new management policy in statute which would make clear that the policy of the state is to maximize benefit to the state by managing our resources consistent with the sustained yield principle and in a manner that has the least adverse effect on the people of the state.

ALEUTIANS EAST BOROUGH

SERVING THE COMMUNITIES OF
■KING COVE ■SAND POINT ■AKUTAN ■COLD BAY ■FALSE PASS ■NELSON LAGOON

Comments on HB 251

SUMMARY: This bill would amend the statutes by adding the following:

Sec. 16.05.725 STATE FISHERIES MANAGEMENT POLICY: (a) It is the policy of the State of Alaska to utilize, develop, and conserve the fisheries resources of the state for the maximum benefit and common use of the people of the state through management of fisheries resources consistent with the sustained yield principle and allocation of fisheries resources in a manner that has the least adverse effect on the people of the state.

(b) Notwithstanding any other provision of law, this policy shall govern the actions of the Board of Fisheries, the commissioner, and the department.

It is somewhat difficult to analyze this bill, since its intent is not immediately clear. On the surface, it looks a paraphrasing of several sections of Article VIII of the Alaska Constitution. However, this particular paraphrasing appears to be aimed at basing fishing regulations and in season management decisions on the basis of the number of Alaska residents in any segment of the fishery.

If that is the case, this amendment to Title 16 is fraught with equal protection and U.S. Commerce clause problems when it is applied to commercial fisheries management and allocations.

It is true that the legislature has provided the Board of Fisheries with allocation criteria which include a comparison of the number of residents and nonresidents in each fishery. However, the Department of Law has repeatedly warned the board that it would be difficult if not impossible to come up with a viable application of this standard for commercial fisheries.

The majority of the permits for salmon fisheries in the Aleutians East Borough are held by residents. In fact, a larger percentage of Area M permits are held by residents than in both Bristol Bay fisheries. However, even as potential beneficiaries of such a preference, we cannot support legislation that is bound to confuse allocation and management decisions and increase the number of lawsuits filed.

While we understand the desire to benefit Alaska residents, in some cases the impediments are simply too great. The U.S. Constitution and the Commerce Clause certainly rank as a significant impediments.

Looking closely at Article VIII, the Natural Resources Article of Alaska's Constitution, we are not certain that the proposed statute accurately reflects the principles listed. I have included the appropriate sections here.

Section 1-Statement of Policy. It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Section 2-General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Section 3-Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4-Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

There are several other provisions in the Natural Resource Section of Alaska's Constitution, but the only other section that appears to be directly related to this bill is Section 17:

Section 17-Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation. (emphasis added)

The Section 4 language, "subject to preferences among beneficial uses," does not say "subject to preferences among beneficial users." It appears to AEB that the "least adverse impact" language in HB 251 attempts to change the focus of the constitution to provide the opportunity for the Board of Fisheries and the Department of Fish and Game to make regulatory and in-season allocation decisions based on the murky and dangerous concept that what's best for some individuals is somehow best for the state.

AEB believes that Section 17 is also relevant to this issue, because there can be no legal bar to nonresidents holding interim use or entry permits so all commercial fisheries are similarly situated. Given that, attempting to impose a residency standard on allocation and management decisions could not be condoned.

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UNITED FISHERMEN OF ALASKA

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April 16, 1993

The Honorable Carl Moses, Chairman
and Committee Members
House Special Committee on Fisheries
Alaska State House of Representatives
The Capitol Building
Juneau, Alaska 99801-1182

Dear Chairman Moses and Committee Members:

United Fishermen of Alaska (UFA) is very concerned about HB 251: An Act relating to the management and allocation of fishery resources.

UFA believes the proposed language in Section 2 would give one user group preference over other user groups in the state of Alaska. For example, if one user group was made up of 100% residents, they would have preference over a commercial fishery which might be made up of 75% residents and 25% non-residents.

So, with the good intention of reaching all residents with a maximum benefit of the resources, many other residents would suffer. All allocation issues should be heard at the Board of Fisheries which gives all user groups equal ground. We oppose this bill for two reasons. The first is that we feel it is against the U.S. Constitution. The second reason is because we feel it would upset the balance of all the commercial fisheries in the state of Alaska.

Sincerely,


Jerry McCune
President

cc: The Honorable Walter J. Hickel, Governor
UFA Board of Directors

MEMBER ORGANIZATIONS

Alaska Crab Coalition • Alaska Longline Fisherman's Association • Alaska Trollers Association • Area K Seiners Association
Bering Sea Fishermen's Association • Bristol Bay Driftnetters Association • Concerned Area "M" Fishermen
Cook Inlet Aquaculture Association • Cordova District Fishermen United • Kenai Peninsula Fishermen's Association
North Pacific Fisheries Association • Northern Southeast Regional Aquaculture Association • Peninsula Marketing Association
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Seafood Producers Cooperative
Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association
United Cook Inlet Drift Association • Western Alaska Cooperative Marketing Association

AMENDMENTS

TO: HB 251

BY: Representative Irene Nicholia

page 1, line 1 -- Title Change

"An Act relating to the conservation, management and allocation of fishery resources."

page 3, beginning with line 13

Sec. 16.05.725. **STATE FISHERIES CONSERVATION AND MANAGEMENT POLICY.** (a) It is the policy of the State of Alaska to [utilize, develop, and] conserve, develop, and utilize the fisheries resources of the state for the maximum benefit and common use of the people of the state through management of fisheries resources consistent with the sustained yield principle and allocation of fisheries resources in a manner that has the least adverse effect on the people of the state. It is the intent of the legislature that fisheries management be implemented through fisheries management plans that

(1) encompass the migratory range of the species;

(2) are based on the best scientific information available, and when that information is not available, shall err on the side of conservation by taking preventative rather than reactive measures;

(3) provide for the separation of conservation and allocation decisions, with conservation measures encompassing the entire migratory range of the species;

(4) provide preference to those fisheries management strategies that afford greater assurance of compliance with the constitutional sustained yield mandate;

(5) develop short-term and long-term sustained harvest and allocation policies which address subsistence, commercial, sport fishing, and personal use needs as provided for in statute, as well as incidental catch;

(6) provide for the protection of fisheries habitat;

(7) include stock restoration/rebuilding strategies where there are known conservation problems; and

(8) include socio-economic data describing the contribution of the fisheries to the traditional, cultural and economic well-being of Alaska's communities.

Add new (b) and re-letter following section accordingly:

(b) The Board of Fisheries, the Commissioner, and the Alaska Department of Fish and Game are mandated by this policy to actively advocate the State's constitutional and statutory mandates to conserve and protect the fisheries resources.

COMMENTS ON HOUSE BILL 251

I am placing before this committee amendments to the State Fisheries Management Policy.

Agree with sponsor's statement -- we need to provide policy guidance to the Board of Fisheries

Agree with Governor Hammond's priorities
first priority to conservation

management and allocation of our fisheries to benefit Alaskans first.

I suggest we amend this bill to include conservation.

The Legislature has not provided clear policy direction to the Board of Fisheries regarding the conservation and management of our fisheries.

Conservation decisions must be made at a level that covers the entire range of the species.

I'll give you an example of how conservation measures are taken now.

During our fishing season on the Yukon River, conservation measures are not taken until the salmon start their migration up river. The managers decide in-season that fishing time must be cut back or eliminated, including subsistence.

In-river fishermen are the only fishermen to take conservation measures.

The policy proposed in my amendment would direct managers at the Department of Fish and Game to look at entire migration range of the species and apply conservation measures throughout that migratory range.

Good management decisions must be based on sound scientific information.

We are still not at the point where we have adequate data to manage all our fisheries.

If this information is not available, we end up with status quo management.

If we have fisheries that are facing conservation problems, our policy should advocate erring on the side of management.

When we see a fisheries start to experience conservation problems, our management regimes must start taking preventative measures rather than waiting for and reacting to a crisis.

We need to separate decisions made for conservation from decisions made for allocation.

Conservation decisions should be made before it is ever decided who the users should be and how much fish they should be allocated.

I would like to see a day when the department provides a report to the board on the status of the fisheries, identifying conservation problems, and recommending conservation measures.

Then, let the Board of Fisheries deal with allocation decisions.

We need to look at how best our fisheries can be managed. Our fisheries are being managed for strong stocks at the expense of the weaker stocks where there are mixed stocks.

I am not advocating weak stock management -- a very controversial approach.

What I am advocating is the department getting a better handle on its fisheries management strategies.

We know management of terminal stream fisheries can be done in such a way as to provide for conservation of our fisheries resources.

We need to recognize this kind of management enables the state to comply with the constitutionally mandated sustained yield principle.

If our fisheries cannot be managed to provide protection to our weaker stocks, the department needs to bite the bullet and identify management measures that should be taken.

Our management plans need to include sustained harvest and allocation policies which not only address subsistence, commercial, sport fishing and personal use needs, but also include incidental catch.

Our habitat is critical to the well-being of our fisheries resources. Management plans should all address habitat.

Where we know we have conservation problems, we need to include strategies in our plans for restoration and rebuilding of our fisheries.

We have long been in need of a strong advocate for the resource!

It is the responsibility of the Board of Fisheries, the Commissioner and the Dept. of Fish and Game to protect and conserve the resource.

"Unless the resource is managed so that it may reproduce with a population surplus from year to year, there will, sooner or later, be no reason to quibble over allocation since the surplus or the species itself will become depleted."

The overriding priority of our fisheries management should be to conservation in order to maintain the resource for future generations.