

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 20, 2007

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

TO: Representative Peggy Wilson
Attn: Cliff Stone

FROM: Brian J. Kane *BJK*
Legislative Counsel

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

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

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

BJK:med
07-188.med



Alaska State Legislature

Representative Peggy Wilson
House District 2
Putting Alaska's Families First

SPONSOR STATEMENT House Bill 188

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

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

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

The bill is needed both to preserve the Board’s traditional management authority to adopt regulations necessary for the conservation and development of fisheries and to remove the cloud of doubt that the reasoning applied by the Alaska Supreme Court casts over existing regulations. This bill would ensure that existing regulations including long-standing allocations between fishing districts within the Bristol Bay administrative area, restrictions on transfers between districts within administrative areas, and equal share allocations allowing fisheries that are otherwise unmanageable to proceed and will not be subject to challenge under the same reasoning applied by the Alaska Supreme Court in *Grunert v. State*, 109 P.3d 924 (Alaska 2005) and *State of Alaska v. Grunert*, 139 P3d 1226 (Alaska 2006). Although it is unclear whether the court’s decisions would result in the invalidation of existing regulations, a number of regulations could be overturned if the court’s reasoning is carried to its logical conclusion.

March 13, 2007

25-LS0709-A

SPONSOR STATEMENT
House Bill 188

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

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

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MEMORANDUM

March 16, 2007

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

TO: Representative Peggy Wilson
Attn: Cliff Stone

FROM: Brian J. Kane *BJK*
Legislative Counsel

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

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

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

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

Representative Peggy Wilson

March 16, 2007

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

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

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

If I may be of further assistance, please advise.

BJK:ljw
07-140.ljw

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

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

MEMORANDUM

State of Alaska Department of Law

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

DATE: March 16, 2007

FILE NO.: 661-05-0439

THRU:

TEL. NO.: 907-269-5232

FAX: 907-279-2834

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

SUBJECT: House Bill 188

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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