

MEMORANDUM

STATE OF ALASKA COMMERCIAL FISHERIES ENTRY COMMISSION

TO: Senator Ben Stevens
Attn: Cheryl Sutton

DATE: October 24, 2003

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FROM: Bruce Twomley, Chairman
 Commercial Fisheries Entry Commission

SUBJECT: Legislative counsel opinion
concerning regulatory prohibition
against fishing in more than one
salmon net area in a season.

Introduction

In response to your request, on October 15, 2003, legislative counsel offered an opinion¹ that the Board of Fisheries regulatory prohibition against salmon fishermen fishing in more than one net area during the same season conflicted with the limited entry statute and was likely vulnerable to a constitutional challenge.

I disagree. I believe the Board's regulatory provision is consistent with statutory authority, and the Alaska Supreme Court has solidly upheld the Board's authority to require superexclusive area registration.

Discussion and Analysis

Alaska salmon fishermen have been required to choose a single net area in which to fish since well before statehood.² The Alaska Board of Fisheries has continued this requirement.³ The Alaska Commercial Fisheries Entry Commission has adopted complementary regulations.⁴

As noted, the requirement on Alaska salmon fishermen preceded adoption of the Limited Entry Act in 1973.⁵ From the time of the legislature's enactment, the Limited Entry Act has included the following provision:

Sec. 16.43.950. Applications of regulations of Board of Fisheries.

Nothing in this chapter limits the powers of the Board of Fisheries, including the power to determine legal types of gear and the power to establish size limitations or other uniform restrictions applying to a certain type of gear. Holders of interim-use permits or entry permits issued under this chapter are subject to all regulations adopted by the Board of Fisheries.

¹ Work Order No. 23-25 1329.

² *State v. Hebert*, 803 P.2d 803, 866 (Alaska 1990).

³ 5 AAC 39.115.

⁴ 20 AAC 05.1940, 20 AAC 05.1942, and 20 AAC 05.1944.

⁵ 79 SLA 1973.

Legislative counsel's opinion did not take this statutory requirement into account. Instead, legislative counsel relied primarily on one section of the Limited Entry Act, AS 16.43.140(c) which authorizes a person to hold more than one interim-use or entry permit for the purpose of "fishing in more than one administrative area" This is not a very remarkable provision, because, categorically, an individual wishing to fish more than one salmon net area, of course, would need more than one interim-use or entry permit to do so. However, by its terms, the statute fails to authorize an individual holding more than one entry permit to fish in more than one administrative area in a single season. Thus, an individual holding more than one entry permit for more than one salmon net area, under AS 16.43.950, remains subject to regulations of the Board of Fisheries, including the salmon net area requirement.

Additionally, the Alaska Supreme Court in State v. Hebert, 803 P.2d 863 (Alaska 1990), made clear the Board of Fisheries' authority to require superexclusive area registration in the face of a broad challenge that included statutory and constitutional claims.

Legislative counsel attempted to distinguish Hebert on the premise the case dealt with "certain fishing districts within a single herring fishery" ⁶ This was not the case. Hebert addressed the Board's superexclusive area requirement with respect to a number of separate herring fisheries up and down the coast of Western Alaska. ⁷ CFEC limited entry to these fisheries in 1987. ⁸ The herring requirement so closely parallels the single salmon net area requirement, that the Alaska Supreme Court pointed to the salmon net area requirement with approval ⁹ as an analogy:

In our view the [superexclusive] regulation does not violate any of the article VIII clauses. The regulation does not limit one's ability to fish in a superexclusive district except in the sense that one may not fish in more than one district in any one year. Regulations of this sort were common in Alaska prior to statehood. When the framers of our constitution met in 1956, exclusive registration was used throughout the commercial salmon fishery. Thus, for example, no fisherman could fish in the Bristol Bay registration area and in any other registration district, such as the Yukon area, in any one year There is no suggestion in the debates of the delegates to Alaska's Constitutional Convention that this regulatory device was meant to be prohibited by the article VIII equal access clauses. In view of the importance of the salmon fishing industry in Alaska, especially in the 1950's, it is not possible to conclude that the constitutional framers intended to prohibit this method of regulation.

I believe the Alaska Supreme Court's upholding of the Board's superexclusive area registration requirements in Hebert makes clear the Board's authority to impose the salmon net area requirement under the governing statutes and the Alaska Constitution.

⁶ Legislative counsel opinion at 4.

⁷ Hebert at 864.

⁸ 20 AAC 05.310(d); 20 AAC 05.320(b).

⁹ Hebert at 866-867 (footnote omitted).

Conclusion

For the reasons stated, I believe the Board of Fisheries' single salmon net area requirement presents no conflict with statutes governing the Board and CFEC. Additionally, superexclusive area registration is one of the Board's regulatory tools that the Alaska Supreme Court has fully upheld.

Of course, I agree with legislative counsel's advice the legislature has the power, if it chooses, to modify the single salmon net area requirement. However, I would urge caution. The Alaska Supreme Court's discussion in Hebert highlights the importance of this kind of regulation to local Alaska fishermen, and we have further cautioned¹⁰ eliminating the single salmon net area requirement could create a greater market for unfished salmon permits in desirable areas and could create more fishing pressure in those areas at the peak of the salmon season.

¹⁰ Outline of Options for Fleet Consolidation in Alaska's Salmon Fisheries (CFEC 1998 at 21-23).