

# LEGAL SERVICES

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## MEMORANDUM

October 15, 2003

**SUBJECT:** Prohibition against fishing in more than one salmon net gear fishery; (Work Order No. 23-LS1329)

**TO:** Senator Ben Stevens  
Attn: Cheryl Sutton

**FROM:** George Utermohle *GU*  
Legislative Counsel

You have asked whether the Board of Fisheries and the Alaska Commercial Fisheries Entry Commission have authority to prohibit entry permit and interim-use permit holders (permit holders) who hold salmon net gear permits for more than one salmon net gear fishery<sup>1</sup> from fishing in more than one salmon net gear fishery in the same year.

At issue in your inquiry is a Board of Fisheries regulation which states:

A person who holds salmon net gear permits for more than one registration area listed in 5 AAC 39.120(d) shall designate upon a form provided by the Commercial Fisheries Entry Commission the single area in which he desires to salmon net fish in that year. The area so designated must be an area for which the person holds a valid salmon net permit.

5 AAC 39.115 (emphasis added).<sup>2</sup> The Alaska Commercial Fisheries Entry Commission has adopted similar and complementary regulations. See, 20 AAC 05.1940, 20 AAC 05.1942, and 20 AAC 05.1944.

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<sup>1</sup> A fishery is a specific administrative area in which a specific fishery resource is taken with a specific type of gear; however, the Board of Fisheries or the Alaska Commercial Fisheries Entry Commission may designate a fishery to include more than one specific administrative area, type of gear, or fishery resource. AS 16.05.940(14); AS 16.43.990(4).

<sup>2</sup> An even more encompassing version of this provision is 5 AAC 15.359(b)(6), which applies to entry permit holders who participate in the Chignik cooperative purse seine salmon fishery, and which states:

(b) Chignik Area CFEC salmon purse seine permit holders may receive a permit issued by the commissioner, or the commissioner's

The effect of these regulations is to require a person who holds more than one salmon net gear entry or interim-use permit to designate the single registration area<sup>3</sup> in which that person will fish during a year. During that year the permit holder may not fish in other registration/administrative areas under the other salmon net gear permits that the person may hold.

ONE: The prohibition against participation in more than one salmon net gear fishery during a year seems to contradict statutory provisions of AS 16.43. Under AS 16.43.140(c)<sup>4</sup>, a person is expressly allowed to hold more than one entry permit or interim-use permit in order to fish more than one type of gear or in more than one administrative area. And, under AS 16.43.150(a)<sup>5</sup>, an entry permit authorizes the permit

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designee, to form an annual cooperative fishery only under the following conditions:

. . .

(6) a CFEC permit holder who participates in the annual cooperative fishery

(A) in the Chignik Area may not participate in any other commercial salmon net registration area as either a permit holder or crew member from June 1 through August 31 of that year;

. . .

<sup>3</sup> Registration areas established by the Board of Fisheries for defining and regulating commercial fisheries are virtually identical to the administrative areas established by the Alaska Commercial Fisheries Entry Commission for regulating entry into commercial fisheries.

<sup>4</sup> AS 16.43.140(c) states, in relevant part (emphasis added):

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

(1) fishing more than one type of gear;

(2) fishing in more than one administrative area;

(3) harvesting particular species for which separate interim-use or entry permits are issued;

. . .

<sup>5</sup> AS 16.43.150(a) states (emphasis added):

(a) Except as may be otherwise provided under AS 16.43.270(d), an entry permit authorizes the permittee to operate a unit of gear within a specified fishery.

holder to "operate a unit of gear within a specified fishery." These two statutes seem to clearly authorize a person to hold entry permits and interim-use permits for more than one salmon net gear fishery and to fish in each of those fisheries. These statutes do not make the ability of the permit holder to fish in more than one salmon net gear fishery subject to regulations of the Board of Fisheries.

The Board of Fisheries cites AS 16.05.251(a) as the source of its authority to limit participation in salmon net gear fisheries; however that statute does not give explicit authority to limit participation in salmon net gear fisheries. Any authority that the board might have to limit participation in salmon net gear fisheries must be implied from the language of AS 16.05.251(a). AS 16.05.251(a) grants powers to the board to manage fisheries in the state. The authority of the board to regulate commercial, sport, guided sport, subsistence and personal use fishing as needed for the conservation, development, and utilization of fisheries under AS 16.05.251(a)(6) is a particularly broad grant of authority for the board to do what the board determines is best for the fisheries of the state. The Alaska Supreme Court has shown a repeated willingness to broadly construe the authority of the Board of Fisheries (and the Board of Game and Department of Fish and Game) to do what is considered best for the fish and game resources of the state. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981); see, O'Callahan v. Rue, 996 P.2d 88 (Alaska 2000); and Interior Alaska Airboat Association v. State, Board of Game, 18 P.3d 686 (Alaska 2001).

In spite of the broad powers of the board and the willingness of the courts to construe those powers broadly, the powers of the board may not be exercised in a manner that is contrary to specific provisions of statute. The provisions of AS 16.43.140(c) and .150(a) are explicit in allowing a person to hold more than one entry permit or interim-use permit for the purpose of fishing in more than one administrative area and thereby authorizing a permittee to operate fishing gear in the area for which each permit is issued. In the absence of a provision specifically authorizing the board to supersede the provisions of AS 16.43.140(c) and .150(a), it is doubtful that the Alaska Supreme Court would interpret the general powers of the board to allow the board to limit the number of salmon net gear fisheries that a person may participate in if the person holds permits for more than one salmon net gear fishery.

The analogous regulations of the Alaska Commercial Fisheries Entry Commission that limit the number of salmon net gear fisheries in which a permit holder may participate also appear to be in conflict with the provisions of AS 16.43.140(c) and .150(a). An administrative agency such as the Alaska Commercial Fisheries Entry Commission is usually accorded some deference in the interpretation of its own statutes. An argument can be made that the commission has interpreted its authority under AS 16.43 to include

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The reference to AS 16.43.270(d) relates to the issuance of entry permits that authorize permit holders to use only a specified portion of the maximum amount of gear permitted by the Board of Fisheries for a specified fishery.

the power to limit the number of fisheries in which a permit holder may participate and that the commission's interpretation of its powers should be accorded deference by the courts. However, in this case, such an interpretation of the commission's powers appears to be in clear conflict with the provisions of AS 16.43.140(c) and .150(a) and thus a court probably would not accept the commission's interpretation.

TWO: The prohibition against participation in more than one salmon net gear fishery during a year also seems to run counter to the constitutional principles of open and equal access to fisheries that are established under the common use, no exclusive right of fisheries, and uniform applications sections of art. VIII of the Constitution of the State of Alaska. The Alaska Supreme Court has upheld the power of the Board of Fisheries to allocate fishery resources and fishing opportunities among user groups (sport, commercial, subsistence fishermen)<sup>6</sup>, fisheries (set gill net, drift gill net, seine, etc.)<sup>7</sup>, and subgroups within a fishery<sup>8</sup>. However, the board's restriction on the ability of a permit holder to fish in more than one salmon net gear fishery goes beyond the allocation of fishery resources and seeks to control participation in (access to) other fisheries. The Alaska Supreme Court closely scrutinizes limitations on access to fish and game user groups and requires that such limitations have a legitimate purpose; the purpose must countervail the important individual interest in open access; and the limitation must employ the least possible infringement on open access to a user group. Gilbert v. State, 803 P.2d 391, 398-99 (Alaska 1990).

It is difficult to speculate as to how the regulation prohibiting permit holders from participation in more than one fishery would fare under the stringent scrutiny that is applied by the courts to laws and regulations that implicate the rights of open and equal access to resource user groups. The acceptance of limitations on access to certain fishing districts within a single herring fishery by the Alaska Supreme Court in the Hebert case suggests the court may find that limitations on participation in multiple fisheries do not violate the open access provisions of the Alaska Constitution. However, the Hebert case dealt specifically with the allocation of fishing opportunities among districts within a fishery; it did not involve limitations on the number of separate herring fisheries that an entry permit holder could participate in if the permit holder held permits for multiple herring fisheries. These distinctions between the allocation scheme approved in the Hebert case and the prohibition against fishing more than one salmon net gear fishery in a year may prevent the Hebert case from providing useful guidance as to whether the prohibition against participating in multiple salmon net gear fisheries is constitutional.

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<sup>6</sup> Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981).

<sup>7</sup> Meier v. State, Board of Fisheries, 739 P.2d 172 (Alaska 1987).

<sup>8</sup> State v. Hebert, 803 P.2d 863 (Alaska 1990).

OPTIONS FOR LEGISLATIVE ACTION. The legislature has several options in regard to the regulatory prohibition against participation in multiple salmon net gear fisheries during one year.

If the legislature is comfortable with the status quo, the legislature can do nothing and let the regulations stand, or the legislature can amend the statutes governing the Board of Fisheries and the Alaska Commercial Fisheries Entry Commission to make clear that the board and commission have the power to prohibit permit holders from participating in more than one salmon net gear fishery during a year. I would recommend the latter option in order to remove any uncertainty as to the authority of the board and commission.

If the legislature is not comfortable with the status quo, then the legislature can annul the regulations<sup>9</sup> of the Board of Fisheries and the Alaska Commercial Fisheries Entry Commission (with a statement of legislative findings that the regulations are being annulled because they are not consistent with existing statutes and are beyond the authority of the board and commission to adopt), the legislature can expressly amend the powers of the board and commission to provide that they cannot prohibit permit holders from participating in multiple salmon net gear fisheries during one year, or the legislature can enact legislation to both annul the regulations and restrict the powers of the board and commission. I would recommend that the legislature be careful, in whatever approach it takes, to avoid creating any inference that the regulations were within the power of the board and commission and thus retrospectively ratifying the authority of the board and commission to adopt the regulations.

On the other hand, the legislature may decline to address the issue for the present and wait for the courts to possibly address the issue in the future.

If I may be of further assistance, please advise.

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<sup>9</sup> The regulations to be annulled would include, all or portions of, 5 AAC 15.359(b)(6), 5 AAC 39.115, 20 AAC 05.1940, 20 AAC 05.1942, and 20 AAC 05.1944.