

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

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Allocation of southeast
chinook salmon

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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

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.

such as equal protection. (See discussion in Question 3.)

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

^{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).

between subgroups that are "fisheries."

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 subgroups 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

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).

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 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.

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.

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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.

Here, the Board's use of applicable criteria in AS 16.05.251(e) should reveal whether troll fishers and sport fishers are "similarly situated." If they are not, then the equal protection clauses do not apply to an allocation between them.

We hope these answers will assist the Board. Please contact us if we can help further.

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