

MEMORANDUM

State of Alaska
Department of Law

TO: Chair
Board
Department

DATE: November 29, 1994

FILE NO.: 661-95-0214

TELEPHONE NO.: 465-3600

SUBJECT: Board Member's Conflict of
Interest Arising from Fishing
Interests (AS 39.52)

FROM: Martin M. Weinstein
Assistant Attorney General
Natural Resources Section - Juneau

You have requested advice under AS 39.52, the Alaska Executive Branch Ethics Act (Ethics Act), concerning possible conflicts of interest posed by Board member's ownership of a permit for fishing on the Z River, ownership of a fish processing company that processes Z River and Q Sound salmon, and membership in the W Association.

I. BACKGROUND

A. Mr. X's Interests in Fisheries on the Z River.

Mr. X owns a permit for the Z River.¹ Although Mr. X could fish commercially any district in the Z River, he has fished only on the D River. He fishes mainly for fall and summer chum salmon, but also harvests coho and king salmon. The Commercial Fisheries Entry Commission (CFEC) reports, as of October 7, 1994, that there are a total of 944 permits for the Z River. There are 165 Upper Z permits and 779 permits of category K. K permits are issued for either the Upper (72) or Lower (707) Z River districts.

In 1985, Mr. X became a commercial fish processor and established Company R. Based on records of the Division of Banking, Securities and Corporations, Mr. X is president of the company and holds its current business license. Mr. X's wife, son, daughter, and granddaughter participate in the processing business, which is the major source of the family's income.

The company custom-processes Z River fish taken in the sport, personal use, and subsistence fisheries, and also purchases fish for processing. In a normal year, Mr. X makes most

¹ The Commercial Fisheries Entry Commission also lists Mr. X as holder of a permit for fishing statewide. We do not have information on Mr. X's use of this permit.

of his purchases from the commercial salmon fisheries in certain Z River districts. In some years, he has purchased fish from the Q district.

B. Mr. X's Membership in Organizations with Interests in the Salmon Fisheries in the Z River.

Mr. X is a member of W Association.² Association W's stated purpose is to establish communication among all user groups and managers and "[t]o take whatever actions are necessary to insure that all fish stocks in the Z River drainage are managed in such a manner as to provide for a stable and healthy fishery in the future." Association W has approximately 200 members, with 16 voting board members representing areas throughout the Z River drainage.

Mr. X has been a delegate to the U.S./Canada Yukon River Salmon Treaty Negotiating Committee since 1988. The Committee concerns itself with matters related to the allocation of salmon between the U.S. and Canada in rivers that run between the two countries. Mr. X is also a life member of Association D.

II. QUESTIONS

1. Does Mr. X's ownership and use of a permit for the Z River fisheries create an impermissible conflict of interest when the Board deliberates on proposals concerning salmon issues in the Z River?

2. Does Mr. X's interest in Company R, a commercial business that processes fish and roe from the Z River and Q areas, create an impermissible conflict of interest when the Board deliberates on proposals concerning fish and roe allocation issues in the fisheries in the Z River and Q areas?

3. Does Mr. X's involvement as a former board director and co-chair of Association W create a conflict of interest when the Board deliberates on proposals and other matters submitted to the Board by Association W? And also, does Mr. X's general membership create a conflict of interest with regard to these matters?

III. SUMMARY ANSWER

In your review of the proposals, you should be guided by the principle that it would be a violation of the Act for Mr. X to participate as a Board member on proposals that

² At the time of his appointment to the Board, Mr. X was a member of the board of directors and served as co-chair of Association W. As of October 19, 1994, however, Mr. X has resigned from all policy-making positions in Association W.

significantly affect his financial interests as a permit holder and fisher in the Upper Z River fishery. Additionally, Mr. X possesses a significant financial interest in his fish processing business, and therefore should not participate as a Board member on proposals that would significantly affect his fish processing business. Lastly, Mr. X's general membership in Association W would not create an impermissible financial or personal conflict of interest that would automatically preclude his consideration of a proposal submitted by Association W. However, there would be a conflict if the Board considered a proposal submitted by Association W that he helped develop while he served on its board, or if he helped develop the proposal as a general member of Association W, or if he otherwise has a conflict based on his own financial interests.

IV. ANALYSIS

A. Mr. X's Financial Interests in the Z River Fisheries.

The Ethics Act provides that "a public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person." AS 39.52.120(a). Furthermore, the Act prohibits a public officer from using his official position to "take or withhold official action, in order to affect a matter in which the public officer has a personal or financial interest." AS 39.52.120(b)(4).³

Where a member of the Board has an interest in a matter before the Board, the Ethics Act requires that a determination be made as to whether the conflict is minor and inconsequential ("conflicts that are unavoidable in a free society") or substantial and material. AS 39.52.1 10(a)(3). The Act provides that there is no substantial impropriety, where, as to a specific matter

³ The Ethics Act defines "financial interest" to include

(A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership or an interest in a business, including property ownership, or a professional or private relationship that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;

AS 39.52.960(9)(A).

The Ethics Act defines "benefit" to mean

anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value.

AS 39.52.960(3).

(1) the personal or financial interest in the matter is insignificant or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or,

(2) [the] action or influence would have insignificant or conjectural effect on the matter.

AS 39.52.110(b)(1) and (2).

1. Mr. X's ownership of a permit.

Mr. X owns a permit for the Z River and fishes under it in the D River. Mr. X informs us that approximately 10 to 20 percent of his family's income is from fishing activities under his permit. In addition to his financial interest as a commercial fisher in the Z River fishery, Mr. X also possesses a financial interest in the ownership of the permit, the value of which will be affected by Board regulations that direct how or when the permit may be used or how many fish may be caught by permit holders in the Z River fishery.

Mr. X's use and ownership of the permit give him a significant financial interest in the Z River fishery. In such circumstances, we have advised that if the Chair determines that an allocation proposal will significantly affect the financial interests of the Board member as a fisher and permit holder in the fishery, then the Board member would have a conflict of interest and should not participate as a Board member when the Board deliberates and votes on the allocation proposal. 1993 Inf Op. Att'y Gen. (Oct. 20; 661-93- 0540). On the other hand, if the Chair determines that a particular proposal would have an insignificant or conjectural effect on the Board member's financial interests as a permit holder and fisher in the fishery, then the Board member should be allowed to participate. *Id.* at 8.

With these principles in mind, we believe that the Chair will have to review the proposals to be discussed at the meeting and determine, on a case-by-case basis, which of the proposals, if any, would significantly affect the financial interests of Mr. X. In reviewing the proposals to make the required determination regarding possible conflicts, we offer some advice. First, regardless of whether a proposal is labeled as "allocative" or "conservation oriented," you should focus on how the proposal will affect the financial interests of the Board member as a permit holder and fisher in the particular fishery in question. For example, some proposals that are primarily conservation oriented might restrict or enhance the fishing opportunities for fishers/permit holders of the Z River fishery, and therefore might significantly affect the financial interests of Mr. X. Similarly, some proposals that are allocative might reduce or enhance the

number of fish available to the Z River fishery, and therefore also might significantly affect the financial interests of Mr. X.

Additionally, possible conflicts could arise with respect to allocation matters that may not appear to relate directly to regulation of his fishery. Board decisions that affect the allocation of fish to other competing fisheries or user groups will have an impact on the financial interests of fishers and permit holders in the Z River Fishery, which might be sufficiently significant and certain to warrant a finding of a conflict for Mr. X.

2. Mr. X's financial interest in Company R.

Mr. X has provided the following information with regard to his fish processing business. In a normal year, most of his purchases are from the commercial fisheries in certain Z River districts. He primarily purchases chum salmon, mainly fall chum when available, but also king and coho salmon. He sometimes purchases salmon from a certain district of Q area. Less than 10 percent of his processing business is from fish purchased from Q area. He has not purchased fish from Q area during the past two years.

Company R is the major source of Mr. X's family income. Approximately one-half of its business is processing fish, and one-half processing meat. Fish processing consists of primary processing (freezing, canning, and vacuum packing) and secondary processing (smoking and custom packaging). Primary processing consists mainly of processing and selling commercially purchased salmon. Approximately 40 percent of fish processing is secondary processing and custom packaging of mainly sport, but also personal use and subsistence-caught, fish (salmon and other species such as trout) that are brought in for processing.

To the extent that it is necessary to determine Mr. X's conflicts based on his financial interest in the fish processing business, the same analysis that we discussed above applies: i.e., for proposals that significantly affect Mr. X's financial interests as a fish processor, he would have a conflict of interest. However, in making this determination, we note that there are important differences between a commercial fisher/permit holder and a fish processor that should be considered. Because a fish processor buys fish from different user groups in a particular fishery, and in some situations might not be dependent on a particular fishery, his business may not be significantly impacted by proposals that would significantly affect the financial interests of a particular group of fishers and permit holders. For example, an allocation proposal that only re-allocated fish among user groups within a fishery might not significantly affect the financial interests of a fish processor who could buy fish from any fisher in the fishery. This distinction as well as others should be considered carefully when evaluating the impact a proposal might have on the financial interests of a fish processor.

When making a determination regarding Mr. X's possible conflicts based on his financial interests as a fish processor, we again point out that if a proposal has an "insignificant"

or “conjectural” effect on his fish processing business, then Mr. X should be allowed to participate. AS 39.52.110(b)(2).

B. Mr. X's Membership in Association W.

You have asked whether Mr. X could take official action on any proposals submitted by Association W. This question has many facets. First, Mr. X may not participate on any proposal on which he independently has a conflict of interest. Because Mr. X commercially fishes on the Z River, he may have a financial interest in proposals submitted by Association W.

Second, we are informed that the situation currently before the Board concerns proposals submitted by Association W that Mr. X helped develop while he was a member of the board of directors of Association W. Here, we recommend that Mr. X not participate in the Board's consideration of these proposals. In our view, Mr. X's close association with these proposals gives rise to an impermissible personal interest in the matter before the Board. *See AS 39.52.120(b)(4); 9 AAC 52.020; 9 AAC 52.990(b)(4).*

Third, should Association W submit proposals in the future in which Mr. X has no financial interest, Mr. X may, in general, participate in the Board's consideration of the proposal as long as he did not personally participate in the development of the proposal.⁴

I believe I have answered your questions. If you have further questions, please do not hesitate to contact me.

MMW:ls:prm

cc: Mr. X

Bonnie E. Harris
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⁴ An exception to this principle may arise if the proposal provides a tangible benefit to Association W itself. *See AS 39.52.960(18); 1993 Inf. Op. Att’y Gen. At 5 (Feb. 17; 663-93-0257).* Should this occur, we recommend that you seek further guidance from the Attorney General.