July 31, 1995

The Honorable Alan Austerman
Representative
Alaska State Legislature
P.O. Box 2368
Kodiak, AK 99615

Re: Legality and Constitutionality of IFQ Programs
A.G. file no: 223-95-0472

Dear Representative Austerman:

I. Questions

You have asked four questions regarding Individual Fishing Quota (IFQ) programs. First, you have asked whether the Northern Pacific Halibut Act and the International Halibut Treaty preempt state management of halibut in state waters. Second, you have asked whether the IFQ program for halibut, adopted by the North Pacific Fishery Management Council (NPFMC), was legally implemented for state waters. Third, you have asked whether the IFQ program for sablefish was legally adopted and implemented for state waters. Finally, you have asked whether it would be constitutional for the state to adopt IFQ programs for state waters similar to those adopted by the NPFMC.

II. Background

In order to answer these questions, it is necessary to recognize the three maritime zones that are subject to federal or state jurisdiction for managing fisheries.

Waters that are immediately adjacent to or inside the coastline are usually called "internal waters." For example, in the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (hereinafter Magnuson Act), "internal waters of a State" are defined as "all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured." 16 U.S.C. § 1856(c)(3)(Law. Co-op. 1984 & Supp 1995).

The baseline is an important feature of the maritime zones. It consists of a series of straight lines which touch the coastline at various points. The baseline translates the natural undulations of bays and promontories into a series of connected straight lines of various lengths that conform to the general outline of the natural coast. It marks both the seaward boundary of "internal waters" and the start of the next maritime zone, the "territorial sea." *See, e.g.*, Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, *entered into force* Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205.

As noted above, the next zone, the "territorial sea" is a band that begins at the baseline and extends seaward for three miles. *Id.* The edge of the territorial sea generally marks the state's seaward boundary and the boundary of the state's fishery jurisdiction. 43 U.S.C. §§ 1312; 16 U.S.C. § 1856(a)(2).

The third zone, called the "exclusive economic zone" (hereinafter EEZ) is contiguous to the territorial sea and is also measured from the baseline. It extends from the edge of the territorial sea to a line two hundred miles off-shore from the baseline. Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10605 (1983); 16 U.S.C.S. § 1802(6) (Law. Co-op. Supp. 1995).

This brings us to the question of how the maritime boundaries, the federal fisheries laws, and the state constitution interact. Pursuant to the Supremacy Clause of the United States Constitution, art. VI, cl. 2, the laws of the United States, including both federal statutes and properly adopted federal regulations, take precedence over, or "preempt," state laws. *City of New York v. FCC*, 486 U.S. 57, 63-64, 100 L.Ed.2d 48 (1988). If it is impossible to comply with both federal law and state law, then the federal law preempts the state law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 99 L.Ed.2d 316, 325 (1988). In addition, federal law may preempt more restrictive state laws even when it would be possible to comply with both federal and state law if there is evidence that Congress has made a decision to "occupy the field" in the subject area. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

States have historically managed fishery resources in the waters adjacent to the state. *See, e.g., Davrod Corp. v. Coates*, 971 F.2d 778, 785-86 (1st Cir. 1992). The Magnuson Act does not normally diminish state jurisdiction over fisheries within the state's territorial sea, 16 U.S.C. § 1856(a)(1-2)(Law. Co-op. & Supp 1995); however, it does prohibit states from regulating fishing in waters outside the territorial sea unless the vessel is registered in the regulating state. *Id.* § 1856(a)(3). Further, the Magnuson Act provides for federal preemption of state jurisdiction over fishery resources within the territorial sea in limited circumstances. *Id.* § 1856(b). Through federal preemption, the state can be deprived of management authority over a fishery and the federal government can obtain exclusive management authority over that fishery. Before preemption can occur under the Magnuson Act, the Secretary of Commerce must (1) give notice and provide an opportunity for a hearing, and (2) determine that the state has taken action,

or has failed to take action, adversely affecting the implementation of a Magnuson Act federal fishery management plan for a fishery that predominately occurs in or beyond the EEZ. *Id.*

III. Short Answers

First, federal law premempts state management of halibut in state waters as a result of the Northern Pacific Halibut Act which implements a treaty between the United States and Canada. Second, the NPFMC halibut IFQ plan was legally adopted and implemented for state waters. Third, although NPFMC sablefish IFQ regulations purport to apply to IFQ holders in state waters, preemption procedures required by the Magnuson Act were not followed in their adoption. Thus, the state still retains management authority and the federal regulations may not prove enforceable in state waters. Fourth, IFQ systems appear to be a form of limited entry and are thus authorized by the Alaska Constitution. However, because a limited entry system must present the least possible impingement on the open access provisions of the state's constitution, the current NPFMC IFQ program, which was not designed to meet this stringent test, does not provide a model for an IFQ program that would have a high likelihood of surviving a constitutional challenge.

IV. Discussion

A. The Northern Pacific Halibut Act Preempts State Management of Halibut in State Waters.

Since 1924, Pacific halibut fishing has been federally managed according to an international agreement with Canada. *See* 43 Stat. 648 (1924). Exclusive federal halibut management currently arises under the Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773-773k (Law. Co-op. 1994) [hereinafter Halibut Act], which implements a treaty between the United States and Canada that was entered into in 1953 and amended in 1979. *See* Protocol Amending the Convention Between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 29, 1979, 32 U.S.T. 2485 [hereinafter Halibut Treaty]. Under the Halibut Act, regulatory authority over halibut is held by the International Pacific Halibut Commission and the Secretary of Commerce. 16 U.S.C.S. § 773c (Law. Co-op. 1994); *United States v. Cameron*, 888 F.2d 1279, 1280 (9th Cir. 1989). The Halibut Treaty applies to all waters over which the United States has exclusive fisheries jurisdiction, including, "without distinction areas within and seaward of the territorial sea or internal waters," 32 U.S.T. at 2487. The Halibut Treaty thus reflects congressional intent to occupy the field of halibut management and therefore preempts state authority in matters pertaining to halibut management.

The Halibut Act gives regional fishery management councils authority to adopt additional regulations, including limited access regulations, subject to certain criteria.

16 U.S.C.S. § 773c(c). Although council regulations are required to comply with some Magnuson Act criteria, *id.*, it is the Halibut Act and not the Magnuson Act that controls in matters relating to the regulation of halibut fishing. *Id.; see also* 50 C.F.R. pt. 301 (1994); 50 C.F.R. pt. 676 (1994). The Halibut Act does not contain any provision providing for any regulation of halibut by states.

Thus, state management of halibut, within both the territorial sea and the internal waters of the state, has been preempted by the Halibut Treaty and its implementing statutes and regulations.[1]

B. The NPFMC IFQ Program for Halibut Was Legally Implemented and Adopted for State Waters.

The Halibut Act specifically authorizes regional fishery management councils to adopt additional regulations, including limited access regulations, for waters of the United States that are subject to the Halibut Treaty. 16 U.S.C.S. § 773c(c) (Law. Co-op 1994). The standards imposed for these regulations require adherence to the Magnuson Act's limited entry requirements, *see* 16 U.S.C. § 1853(b)(6) (Law. Co-op. 1984), and the standards also require promotion of conservation, nondiscrimination in allocation, and implementation so as to prevent any person or entity from acquiring an excessive share of halibut fishing privileges. 16 U.S.C.S. § 773c(c). However, because federal preemption of state management has already occurred as a result of the Halibut Treaty and the Halibut Act, the regional councils are not required to follow the preemptive steps set out in Magnuson Act. *See* 16 U.S.C.S. § 773c(c).

The Secretary of Commerce adopted the halibut IFQ regulations after taking into account the criteria that the Magnuson Act requires to be considered before adoption of a limited access program.[2] The IFQ regulations were also designed to serve conservation purposes, to be nondiscriminatory, and to prevent any person or entity from acquiring an excessive share in the halibut fishery. *See, e.g.*, 50 C.F.R. pt. 676 (1994). State management of halibut had already been preempted and no additional preemptive steps were required for new federal IFQ regulations. Therefore, the NPFMC IFQ program for halibut was legally adopted for state waters.

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[1] There are regulations pertaining to halibut in the Alaska Administrative Code (AAC), but these regulations are identical to federal regulations. They do not provide state jurisdiction but are printed in the AAC as a public service to fishers. *See* 50 C.F.R. pt. 301 (1994).

[2] *See, e.g.*, 57 Fed. Reg. 57,130, 57,130-43 (1992) (Preamble for proposed rule). *See also* 16 U.S.C.S. § 1853(b)(6) (Law. Co-op. 1984) (Criteria that must be considered in limiting entry include: (1) present participation, (2) historical fishing practices and dependence on the fishery, (3) economics of the fishery, (4) capability of fishing vessels to engage in other fisheries, (5) cultural and social framework, and (6) other relevant considerations).

C. The NPFMC's Adoption and Implementation of the Sablefish IFQ Program for State Waters Did Not Comply with Procedures Required by the Magnuson Act for Preemption of State Management.

Like the halibut IFQ regulations, the sablefish IFQ regulations meet the Magnuson Act's basic requirements for limited access programs. *Supra* note 2. However, unlike the halibut fishery, the sablefish fishery is not subject to an international treaty, nor is its management controlled by federal statutes outside of the Magnuson Act. As discussed above, in order for the NPFMC's regulations to control in state waters, the preemption requirements of the Magnuson Act must be met. *See* 16 U.S.C. § 1856(b).

The sablefish IFQ regulations purport to apply to holders of federal IFQ permits fishing in waters of the State of Alaska.[3] Most sablefish fisheries in state waters fall within specific exceptions from the NPFMC regulations for sablefish fishing in Prince William Sound or under a limited entry program of the State of Alaska. 50 C.F.R. § 676.10(b) (1994). Federal authorities are attempting to apply the IFQ regulations to sablefish fisheries in state waters in the Kenai area and in the Aleutians, despite the fact that the NPFMC has not complied with Magnuson Act preemption requirements. However, the NPFMC regulations do not authorize federal IFQ holders to violate state regulations. *Id.* § 676.12(c).

The NPFMC has not expressed an intent to preempt state management, but does believe that it has authority to regulate holders of federal IFQs in state waters where there are no conflicting state regulations. The state has taken the position that there is no authority for federal regulation in state waters unless the preemption requirements of the Magnuson Act are met. *See Alliance Against IFQs v. Brown*, No. A93-480 CV (JKS), Memorandum of Alaska Concerning IFQ Issue (Aug. 26, 1994) (D. Alaska). The state is not currently litigating the validity of the sablefish regulations, but may decide to challenge them at a later time.[4]

In any case, it is clear that the state is still free to adopt regulations in addition to those of the NPFMC, or even regulations which are inconsistent with the NPFMC sablefish IFQ

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[3] At the June 1995 NPFMC meeting, the National Marine Fisheries Service (NMFS) announced that it was reinterpreting its sablefish regulations to apply only to holders of sablefish IFQ permits.

[4] The National Marine Fisheries Service (NMFS) has attributed the sablefish regulations to poor communications with the state and has agreed to attempt to resolve future jurisdictional issues prior to promulgating regulations. Further, NMFS has conceded that in the absence of a formal preemption proceeding, "all existing state laws would remain in effect, and the State would retain jurisdiction and authority to promulgate additional fishery laws that could nullify these federal measures in State waters." Letter from Steve Pennoyer, Alaska Regional Director, National Marine Fisheries Service, to Frank Rue, Commissioner, Alaska Department of Fish and Game (March 6, 1995).

program. Such regulations would be effective within state waters in the territorial sea unless, and until, the Secretary of Commerce completed the preemption process provided in 16 U.S.C. § 1856(b). State regulations would also remain effective in internal waters of the state because the Magnuson Act does not provide for preemption in these waters. 16 U.S.C. § 1856(b), (c)(4)(B). Federal IFQ holders cannot fish in a regulatory area within state waters unless the state opens the area for commercial sablefish fishing. *See* AS 16.05.920(a).

Although the state is not currently litigating the NPFMC's federal regulation within state waters, the state has not accepted the NPFMC's jurisdictional assertions. The state has not limited any of its sablefish fisheries to holders of federal IFQs, nor has it excluded federal IFQ holders from these fisheries;[5] thus, the provisions of the state constitution prohibiting exclusive rights of fishery are not implicated at this time because no exclusive rights of fishery have been granted within state waters.[6]

D. IFQ Programs Appear to Be a Form of Limited Entry Which Would Be Constitutional; However, the Federal IFQ Program Does Not Provide a Model Designed to Withstand Constitutional Challenge.

Alaska's Constitution contains a number of provisions, generally referred to as the "equal access clauses," that would be relevant to any attempt to implement a state IFQ system. Article VIII, section 15, of the constitution generally prohibits exclusive or special rights of fishery, but does allow for limitation of entry into any fishery for certain specified purposes. The common use clause provides, "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for their common use." Alaska Const. art. VIII, § 3. The uniform application clause provides:

> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

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[5] However, under federal law, holders of sablefish IFQs who fish in state waters in violation of the terms of an IFQ permit risk the possibility of suspension or revocation of the permit if the federal IFQ regulations are determined to be enforceable in state waters. *See* 15 C.F.R. § 300.

[6] We note that, if procedures for federal preemption are followed, state constitutional provisions will be preempted along with state regulations. Federal authorities will then be able to create exclusive fisheries in state waters regardless of any provision of the Alaska Constitution which might prohibit the state from taking similar action.

Alaska Const. art. VIII, § 17. In addition to the preceding "equal access clauses," Alaska's equal protection clause provides, "all persons are equal and entitled to equal rights, opportunities and protection under the law." Alaska Const. art. I, § 1.

1. The Alaska Constitution Allows Limitation of Entry Into Fisheries.

The Alaska Constitution explicitly provides that the state can limit entry into any fishery for specified purposes:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Alaska Const. art. VIII, § 15. The second sentence of section 15, the limited entry clause, was not present in the original constitution, but was added as an amendment that became effective after voter ratification in October of 1972.

The courts have recognized the tension between the limited entry clause and the equal access clauses. In *Ostrosky v. State*, however, the Alaska Supreme Court concluded, "the purpose of the amendment to Article VIII, section 15, was to grant the state the power to impose a limited entry system in any fishery, *notwithstanding any state constitutional provisions otherwise prohibiting such a system*." 667 P.2d 1184, 1190 (Alaska 1983) (emphasis added).[7]

2. An IFQ System Can Probably Be Considered a Method of Limiting Entry, and an IFQ System Could Serve the Purposes of the Limited Entry Amendment.

Constitutional provisions are to be "given a reasonable and practical interpretation in accordance with common sense." *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992). Interpretation of a constitutional provision requires an examination of the plain meaning of a provision, its purpose, and the intent of the framers. *Id*. Where the constitutional provision in question is an amendment, ratified by the voters, "it is also necessary to look to the meaning that the voters would have placed on [the] provision." *State v. Lewis*, 559 P.2d 630, 637 (1977);

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[7] However, while the other equal access clauses do not serve as a bar to limited entry, a limited entry program must minimize impingement on equal access values. *See Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1266 (Alaska 1988). *See also infra* section IV.D.3.a.

see also State v. Gonzalez, 825 P.2d 920, 928 (Alaska App. 1992). "While prior practice and the framer's purposes are not necessarily conclusive, an historical perspective is essential to an enlightened contemporary interpretation of" the constitution. *Hootch v. Alaska State-Operated School*, 536 P.2d 793, 800 (Alaska 1975). It must also be remembered that constitutional provisions are not static, "must be construed in light of changing social conditions," *id.* at 804, and must be considered "adaptable to changing conditions and circumstances unanticipated at the time . . . written." *Warwick v. State ex rel. Chance*, 548 P.2d 384, 391 (Alaska 1976). At the same time, "exceptions to general constitution provisions must be narrowly and strictly construed." 16 C.J.S. *Constitutional Law* § 18 (1984).

Thus, an analysis of whether an IFQ system might be constitutional requires an exploration of the history of the limited entry amendment and of its purposes.

a. History of the limited entry amendment.

The amendment of article VIII, section 15, followed a decade of rapid growth of participation in Alaska's commercial fisheries and unsuccessful efforts to limit that growth, particularly in the lucrative Bristol Bay salmon fishery where the number of commercial licenses more than doubled between 1960 and 1970. *See Alaska Fisheries Policy: Economics, Resources, and Management*, 306-331 (Arlon R. Tussing, et al. eds., 1972); *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1258-59 (Alaska 1980). *See also Bozanich v. Reetz*, 297 F. Supp. 300 (D. Alaska 1969), *vacated on other grounds and remanded*, 397 U.S. 82 (1970); *Bozanich v. Noerenberg*, Civil No. 70-389 (Alaska Super. Ct., 1st Judicial Dist., March 8, 1971).

The original language proposed for the limited entry amendment stated: "The State may restrict entry to any fishery for purposes of conservation of the resource, to relieve economic distress among fishermen and those dependent upon them for a livelihood and to insure fair competition among those engaged in commercial fishing." S.J. Res. 10, 7th Leg., 1971. The intent of the amendment, according to its sponsor, Governor William A. Egan, was to "insure that this section, which prohibits exclusive rights of fishery, does not stand in the way of the ability of the state to institute programs for reasonable management of its fisheries." 1971 Senate J. 116. As an alternative, the legislature considered an amendment that would have simply added the clause "except as authorized by law," effectively repealing the section as a constitutional constraint. *See* 1971 House J. 761; H.J. Res. 31, 7th Leg., 1971.

During the legislative process, the original language of the proposed amendment was altered to focus on prevention of economic distress instead of relief, and to include the development of aquaculture. The language pertaining to insuring fair competition among those engaged in commercial fishing was dropped. *See* Comm. Substitute for S.J. Res. 10, 7th Leg., 1971. Legislative history indicates that the final language of the amendment was altered "to show

that the state's power to limit entry is a specific exception to the 'exclusive right' prohibition," and to *broaden* the grounds for restricting entry *"to include conservation not only of the fisheries themselves, but of the capital and labor resources which are expended in harvesting them*." House Comm. Substitute for Comm. Substitute for S.J. Res. 10, 7th Leg., 1st Sess. (1971)(emphasis added); 1971 House J. 761; *see also Ostrosky v. State*, 667 P.2d 1184, 1189 (Alaska 1983).

b. The meaning of the term "limit entry."

The legislative history of the amendment of article VIII, section 15 of the Alaska Constitution indicates that the drafters believed that allowing the state to "limit entry" provided a new tool for fisheries management. *See, e.g.*, 1971 House J. 760. The language of the amendment does not mandate a specific method of limiting entry. We have reviewed the legislative history of both the limited entry amendment and the Limited Entry Act, AS 16.43, which was passed in the first legislative session after the adoption of the amendment. Nothing in this history indicates that in drafting the limited entry amendment the legislature was thinking of a particular form of limited entry, or that when the legislature adopted the Limited Entry Act, it considered the Act to be the only permissible form of limiting entry into Alaska's fisheries.

License limitation is the most commonly known form of control over entry into a fishery, *Limited Entry As A Fishery Management Tool*, 158 (R. Bruce Rettig and J.C. Ginter, eds., 1978), and prior to the limited entry amendment, previous unsuccessful efforts to reduce the gear in Alaska's fisheries focused on gear license moratoriums and restrictions on gear license eligibility. *See, e.g., Alaska Fisheries Policy: Economics, Resources, and Management*, 306-331 (Arlon R. Tussing, et al. eds., 1972); *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1258-59 (Alaska 1980). However, "any control of a fishery that curtails or restricts the addition of fishermen, fishing vessels, or equipment is limited entry." *Limited Entry As A Fishery Management Tool* at 158. Thus, other methods of controlling access to fisheries, such as quotas for fishermen or vessels, could be considered limited entry. *See id*. at 158, 193-94, 213, 217-219.

While, at the time that the limited entry amendment was adopted, license limitations may have been the most common conception of how entry into fisheries would be limited, this should not be determinative. The need for flexibility and adaptability in a constitutional provision must be considered. *See supra*. License limitations may have been well suited as a means of limiting entry and dealing with problems that had arisen in fisheries at the time of the amendment, but such limitations may not provide the most suitable management tool for other fisheries or for other problems such as increasing efficiency within fisheries, waste of

bycatch, and market problems resulting from large harvests during short intensive fishing seasons.[8]

IFQ management could take a number of different forms. However, regardless of what form an IFQ management program took, we believe that the practical result of an IFQ system would be that participation in fisheries, i.e., "entry" into fisheries, would be limited. Participation would be limited to persons holding an IFQ, a permit that differs from the present limited entry permit primarily because the amount of fish that can be harvested under an IFQ is restricted.[9] IFQs are typically for rather small amounts of fish. Thus, an IFQ system would allow a larger number of permits to be issued and allow larger numbers of individuals to hold permits for a fishery than would be the case under the state's current limited entry program. For these reasons, it is possible that, for some fisheries, an IFQ system could be designed which would impinge on the equal access values of the Alaska Constitution less than a limited license program.[10] Consequently, the constitutionality of an IFQ system should be determined by the same requirements that have been imposed on the current Limited Entry Act, and an IFQ system that served the purposes of the limited entry amendment and minimized impingement on equal access values would probably be found constitutional.

c. IFQs could be designed to address the purposes of the limited entry amendment.

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[8] We note that problems in the salmon net fisheries provided the primary impetus for adoption of the limited entry amendment and the subsequent Limited Entry Act. Salmon net fisheries, because of their uncertain returns and rapid pace, are not well suited for an IFQ system. *See, e.g.*, Ben Muse, *Individual Fisherman's Quotas and Fisheries Values* 2 (November 16, 1988) (a paper prepared for a meeting of the Alaska chapter of the American Fisheries Society).

[9] By limiting the amount of fish that fishers can take, an IFQ system reduces the "race for the fish" mentality of commercial fisheries and virtually eliminates direct competition between fishermen for fishery resources. Thus, an IFQ system might be more problematic if the limited entry amendment had been passed in its original form, which included in its purposes insuring "fair competition" among commercial fishers. However, as adopted, the limited entry amendment focuses on prevention of economic distress and on conservation of resources, including capital and labor as well as the fisheries themselves. IFQ systems are well suited for addressing these purposes.

[10] Under a limited license program, the number of licenses that can be issued is quite constrained; the legislature has recently addressed this problem, in part, by providing for licenses with restricted fishing capacity, *see* 82 SLA 1985. However, even under a restricted capacity license program, fishers who might be able to participate in an IFQ fishery might be excluded because they were unable to compete in a fishery that is still driven by a "race for the fish" (i.e., fishers who use small boats and supply fresh fish to restaurants and grocery stores). Further, an IFQ program might provide greater opportunity for both new entrants and expansion in fishing capacity by existing participants than would be provided under a restricted capacity limited entry program.

Under the limited entry amendment, entry into a fishery may be restricted only "for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State." Alaska Const. art. VIII, § 15. Neither the language of the provision nor its history makes it clear whether these purposes are to be read disjunctively, as three separate grounds for limiting entry, or conjunctively, requiring all three purposes to be addressed before limiting entry into a fishery. Because the purposes are not closely related to each other and there is some indication in the legislative history that the terms were "three grounds," *see* 1971 House J. 761, it would normally be permissible to read the terms as disjunctive. *See, e.g.*, Norman J. Singer, 1A *Sutherland Stat. Const.* § 21.14 (5th ed. 1993); 16 C.J.S. *Constitutional Law* § 20 (1984); *Territory of Alaska v. Five Gallons of Alcohol*, 10 Alaska 1 (D. Alaska 1940). However, "exceptions to general constitution provisions must be narrowly and strictly construed." 16 C.J.S. *Constitutional Law* § 18 (1984). Therefore, while it is not clear that all three purposes are necessary for limiting entry, if an IFQ program is developed, it should be designed to address all three purposes in order to minimize the risk of being found unconstitutional.

The first purpose, conservation of resources, is a purpose for which an IFQ system is suitable. The legislative history of the limited entry amendment indicates that this reference included conservation "not only of the fisheries themselves, but of the capital and labor resources which are expended in harvesting them." 1971 House J. 761. The legislative history also noted that "limited entry finds its primary significance more in the context of economics than biology." *Id.* Therefore, this purpose can be satisfied by reducing overcapitalization, promoting economic efficiency, or addressing concerns for the biological management of a fishery. An IFQ system could serve any or all of these purposes.

Similarly, the second purpose, preventing economic distress among fishermen and those dependent on them for a livelihood, can also be achieved through an IFQ system. This purpose can be served if continued open access management would lead to economic distress among fishers and those dependent on them for a livelihood. Where there is already a limited entry fishery, substitution or addition of an IFQ system would serve this purpose if the IFQ system would be better suited to prevent economic distress or would achieve the same purpose as an existing limited license program.[11]

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[11] An IFQ system might be better suited for preventing economic distress than a limited license system for a number of reasons including (1) a greater number of participants, (2) better prices as a result of longer fishing seasons and greater ability to adapt to market conditions, (3) increased opportunity to sell bycatch species which might be discarded in a more rapidly paced limited license fishery, and (4) increased financing opportunities due to more predictable catch levels.

Finally, the third purpose, promotion of efficient development of aquaculture, might be addressed in a variety of ways. Although aquaculture is sometimes narrowly defined as fish farming or hydroponics, the term can be more generally defined as "the art of cultivating the natural produce of the water," *Webster's Third New International Dictionary of the English Language Unabridged* 108 (1966). Under this more general definition, operation of fish hatcheries, and even encouragement of management practices that increase the survival of fish in the wild or that reduce bycatch waste and discard could be considered promotion of aquaculture.

The existing Limited Entry Act has withstood challenges to its constitutionality despite the fact that it contains no explicit provisions dealing directly with enhancement or promotion of aquaculture. The free transferability provisions of the Limited Entry Act have been held to include the purpose of advancing "the causes of conservation, aquaculture, and the adherence to fish and game laws by giving gear license holders a stake in the resource." *State v. Ostrosky*, 667 P.2d 1184, 1195 (Alaska 1983). Further, aquaculture is encouraged through statutes that provide that Limited Entry Permit holders can form associations for salmon enhancement and, in some cases, can levy and collect assessments on members for fishery enhancement purposes. *See, e.g.*, AS 16.10.380; AS 16.10.540. Statutes authorizing an IFQ system could contain similar or even more explicit provisions for benefiting aquaculture and sound fisheries management. In that way they could serve the purpose of efficient development of aquaculture.

3. Constitutional Concerns May Prevent the Federal IFQ System from Serving As a Viable Model for a State IFQ System.

Even though an IFQ system appears to be generally permissible under the limited entry clause of the Alaska Constitution, there are a number of constitutional concerns that must be addressed when drafting the specifics of any system. Although the NPFMC IFQ system might be defensible, these issues weigh against the adoption of a state IFQ system exactly mirroring the federal model.

a. Constitutional requirements of least possible impingement on open access.

Although the courts have generally upheld the principle of limited entry, they have adopted a test of "least possible impingement," suggesting that to be constitutional:

> [A] limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation.

Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256, 1266 (Alaska 1988).[12] The court has stated that this purpose is achieved under the Limited Entry Act through the provisions of AS 16.43.290, which requires the Commercial Fisheries Entry Commission (CFEC) to establish the optimum number of permits. *Id*. at 1265-66. Under this provision, the CFEC may revise the optimum number in response to changed circumstances, and it must either issue additional permits or buy back permits to reach that optimum number. AS 16.43.300-16.43.330. Referring to the optimum number provision, the court has stated:

> Without this mechanism, limited entry has the potential to be a system which has the effect of creating an exclusive fishery to ensure the wealth of permit holders and permit values, while exceeding the constitutional purposes of limited entry.

Johns, 758 P.2d at 1266.

Thus, any state IFQ system must serve an important state purpose and must be narrowly tailored to avoid unnecessary impingement on the equal access principles of article VIII. If it can be shown that an IFQ system will serve the purposes of conservation of resources, prevention of economic distress, and promotion of the efficient development of aquaculture, then it will pass the "important state interest" test. An IFQ system, however, would also have to be implemented in a manner that involved the least possible impingement on equal access values. *See* 1991 Inf. Op. Att'y Gen. (Sept. 27; 993-90-0049/993-91-105) (Kenai River guide limitation unconstitutional because system discriminatory against new entrants); *McDowell v. State*, 785 P.2d 1, 10 (subsistence legislation unconstitutional because, although it served an important state purpose, the means were extremely crude in that they were both over and under inclusive).

Economic dependence and investment in the fishery would be valid factors to consider in establishing criteria for an IFQ system, *see Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980). However, it would also be necessary to provide an opportunity for new entrants to the fishery.[13] Further, provisions to prevent the IFQ

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[12] The equal protection clause of article I, section 1 is also implicated by limited entry decisions. However, a limitation that meets the requirements of an important state interest and least possible impingement--necessary for burdens on the equal access clauses, *see McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989)--would also meet the requirements of the equal protection clause. *See Baker v. State*, 878 P.2d 642, 644-45 (Alaska Ct. App. 1994).

[13] We note that the barriers to entry in an IFQ system may be lower than the barriers in a limited license system, particularly if the IFQ system allows sales of small amounts of quota and imposes restrictions to prevent the concentration of large quantities of quota. At the NPFMC meeting in March of 1995, the NPFMC (continued...)

system from being a system which creates "an exclusive fishery to ensure the wealth of permit holders and permit values" would be necessary. *See, e.g., Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1266 (Alaska 1988).[14] It would be necessary to restrict IFQ programs to only those areas of the state where they would serve the purposes of the limited entry amendment. It would also be important, in order to avoid an impermissible abdication of public trust responsibilities, *see Owsichek v. State*, 763 P.2d 488, 496-97 (Alaska 1988), for the state to either make the IFQ permits of limited duration or to retain authority to revoke or modify the IFQ program in response to changing economic conditions and public needs.[15]

b. The NPFMC IFQ regulations are not designed to meet the test of least possible impingement.

Although the NPFMC IFQ system was not designed specifically to address the three purposes of the limited entry amendment, an examination of the preambles of the proposed and adopted regulations indicates that primary goals of the IFQ system include biological and economic resource conservation, economic stability for fishers and fishing communities, and reduction of bycatch loss and discard mortality. *See, e.g.*, 57 Fed. Reg. 57, 130, 57, 132 (1992). Thus, the NPFMC IFQ regulations appear to serve the purposes of the limited entry amendment.

The NPFMC IFQ regulations also have a number of provisions designed to promote access to the IFQ fisheries. These include provisions for transferability, 50 C.F.R. § 676.21 (1994), restrictions on transferability, *id*. § 676.21(b), restrictions on the amount of quota share which an individual can use, *id*. § 676.22(e)-(h), requirements that IFQ holders must

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[13](...continued)
addressed the problem of providing opportunity for new entrants in the federal IFQ system by providing limited small vessel and jig exemptions and by continuing the community development quota (CDQ) program.

[14] An exploration of possible means of providing continued opportunities for new entrants and of preventing the system from ensuring the wealth of permit holders is beyond the scope of this analysis. However, we note that economic pressures, combined with a limitation of the amount of quota that individuals can hold, may be sufficient. We also note that IFQs do not have to be permanent, but can be limited to terms, *see e.g.*, Ben Muse and Kurt Schelle, Commercial Fisheries Entry Commission, *Individual Fisherman's Quota: A Preliminary Review of Some Recent Programs*, 98-102 (1989), and that other methods, such as having a percentage of each permit holder's quota revert to the state and be made available for sale on the open market each year, or providing for periodic reevaluation of an IFQ system, might also be means of preventing an IFQ system from ensuring the wealth of an exclusive class of permit holders. Another option might be for the state to retain ownership of IFQs and simply lease them out, much as it has done with tideland leases. *See, e.g., Owsichek v. State*, 763 P.2d 488, 496-497 (Alaska 1988).

[15] This responsibility is achieved under the current limited entry program through the optimum number provision. *See supra*.

be on board vessels which are harvesting fish in IFQ fisheries, *id*. § 676.13(f) and restrictions on the transferability of IFQ shares between different sizes and types of vessels. *Id*. § 676.21(a). Other measures that promote access include CDQ fisheries and small vessel and jig exemptions that have recently been adopted by the NPFMC.[16] The NPFMC regulations also provide that IFQ shares do not constitute "either an absolute right to the resource or any interest that is subject to the 'takings' provision of the Fifth Amendment of the U.S. Constitution," *id*. at § 676.20(g), and may be revoked or amended under the Magnuson Act and other applicable law. *Id*.

Nonetheless, the NPFMC regulations probably do not provide an adequate model for a state IFQ system because the NPFMC regulations are not designed to survive the "least possible impingement" test. The NPFMC system contains a number of provisions that may be in conflict with open access values. First, the NPFMC regulations contain transferability restrictions that discourage new entrants into the fishery by limiting transfers to current IFQ holders or to individuals who have at least 150 days of experience as crew members in a United States commercial fishery. *See* 50 C.F.R §§ 676.11, 676.21(i). Although this may serve legitimate purposes (i.e., ensuring that permit holders are familiar with the means of operating vessels and gear safely and reducing the opportunity for investment speculation in IFQs), it also presents an obstacle to new entrants.[17]

Second, the NPFMC regulations allow some leases of quota shares,[18] a measure that would allow some non-participating permit holders to retain and reap benefits from their quota shares instead of transferring them to potential entrants into the fishery.[19] Further, the NPFMC IFQ system does not have a provision equivalent to the Limited Entry Act's optimum number provision that allows the issuance of new permits or the buy-back of existing permits in

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[16] *See supra* note 13.

[17] In *Bozanich v. Noerenberg*, No. 70-389 Civil (D. Alaska 1971), a case decided prior to adoption of the limited entry amendment, a statute limiting the issuance of gear licenses to those who had previously held a license or who had three years of experience in the fishery was held unconstitutional under the equal access clauses. The time requirements in the federal IFQ regulations are considerably shorter and do not require experience in the particular fishery for which an IFQ is sought, and thus might be found reasonable despite the burden they impose on entry into a fishery.

[18] Catcher vessels are allowed to lease 10 percent of their quota share, and the lease of freezer vessel quota share is unlimited. 50 C.F.R. § 221(f).

[19] There is a countervailing argument that leases may allow new entrants to get their feet into the fishery more easily than if a purchase of quota share was required. However, lease rights contribute to the wealth of the permit holder even when the permit holder does not participate in the fishery. Lease rights also increase the value of quota shares and discourage sale of quota share, and thus create an additional obstacle to new entrants.

response to changes in the fishery.[20] Instead, the NPFMC IFQ system relies on market forces to regulate entry into the fishery and increases or decreases the allocation of fish to shareholders on an annual basis in response to changes in the total allowable fixed gear catch. 50 C.F.R. § 676.20(f).[21]

The NPFMC IFQ system also allows corporations and partnerships to hold IFQs.[22] This may provide increased access to the fishery for some individuals because it allows pooling of resources in small partnerships and privately held corporations, However, it may also result in reduced turnover of IFQs, presenting a potential that fisheries may become, at least in part,[23] exclusive fisheries into which there is essentially no new entry. While holding of IFQs by corporations and partnerships would not necessarily be impermissible for a state IFQ system, the federal IFQ system was designed without regard to the Alaska Constitution's equal access values. Development of a state IFQ system would require careful evaluation of the effects of the IFQ program and of means by which impingement on equal access values could be minimized.

V. Conclusion

In summary, management of halibut in state waters is under exclusive federal authority, and the NPFMC halibut IFQ plan was legally adopted and implemented for state waters under the requirements of the Halibut Act. The NPFMC sablefish IFQ plan, although legally adopted for the EEZ, did not follow procedures required by the Magnuson Act for federal

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[20] The personal holding limits of the NPFMC IFQ plan do have some similarities with the Alaska optimum number provisions, in that they can be used to effectively set the minimum number of IFQ holders for an IFQ fishery. The personal holding limits can be altered by a change in federal regulations, and could thus be used to increase or decrease the minimum number of individuals in a fishery. However, unlike the Limited Entry Act, the federal IFQ regulations do not require such changes to be made in response to changing economic or biological conditions in a fishery.

[21] Increased value may provide some incentive for sale of quota share. However, it appears more likely that existing quota share holders will simply reap increased profits from increased allocations rather than sell some of their quota in response to increased allocations. We are not saying that reliance on market forces to regulate entry into a fishery would necessarily be unconstitutional, but a decision to rely on such forces could not be made on an arbitrary basis without a thorough exploration of alternatives.

[22] Transfers of catcher vessel IFQ are generally limited to individuals and initial IFQ holders. However, there are no restrictions on who may hold initial IFQ, and there is no restriction on ownership or transfer of freezer vessel IFQ. *See* 50 C.F.R. §§ 676.20, 676.21, 676.22.

[23] The danger is much greater for the freezer vessel IFQ program because freezer vessel IFQ can be transferred to corporations and can also be leased without restriction. This may be counterbalanced to some extent by the IFQ holding limits of 50 C.F.R. § 676.22, but these limits do not currently apply to initial quota shares.

regulation within state waters and may not prove enforceable in state waters. Finally, IFQ systems appear to be a form of limited entry and would thus be permissible under the Alaska Constitution.

Many elements of the NPFMC IFQ program could serve the purposes of the limited entry amendment of the Alaska Constitution. However, because state limited entry programs must involve the least possible impingement on the open access provisions of the Alaska Constitution, and because the NPFMC IFQ program was not designed to meet these requirements, adoption of the NPFMC program by the state, without further exploration of alternatives, might not result in a state IFQ program that would have a high likelihood of surviving constitutional analysis.

We hope this analysis answers your questions. Please contact us if further assistance is desired.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
Steven A. Daugherty
Assistant Attorney General

SAD:rah

cc: Senator Fred Zharoff
Frank Rue, Commissioner, ADF&G
Bruce Twomley, Chair, CFEC