

MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Frank Rue
Commissioner
Department of Fish and Game

DATE: March 21, 1996

FILE NO.: 663-96-0266

TELEPHONE NO.: 465-6725

SUBJECT: Interpretation of "Personal Use
Fishing"

FROM: Steven A. Daugherty
Assistant Attorney General
Natural Resources Section

I. QUESTIONS

You have asked for an interpretation of the term "personal use fishing." This term is defined at AS 16.05.940(24) and 5 AAC 77.001(f). You have asked whether the definitions of personal use fishing prohibit the sharing of fish or shellfish taken under the personal use regulations.

II. SHORT ANSWER

The statutory definition of personal use fishing, AS 16.05.940(24), does not prohibit the sharing of fish or shellfish taken under personal use regulations. The regulatory definition arguably prohibits sharing, other than with immediate family members, of fish or shellfish taken under personal use regulations. However, we believe that the prohibition on sharing is probably unenforceable.

III. DISCUSSION

A. Statutory and Regulatory Provisions at Issue.

Personal use fishing is defined in both statute and regulation. Under the regulatory definition:

"personal use fishing" means the taking, attempting to take or possession of finfish, shellfish, or aquatic plants by an individual for consumption as food or use as bait by that individual or his immediate family.

5 AAC 77.001(f).

Under the statutory definition:

"personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries[.]

AS 16.05.940(24).

B. Legislative and Regulatory History.

The Board of Fisheries ("board") adopted the regulatory definition of personal use fishing in 1982. At the time, the board lacked explicit statutory authority over personal use fisheries, and the definition was created under the board's general statutory authority for classifying fisheries because, although noncommercial, non-subsistence net fishing could technically be classified as sport fishing, the board determined that such a classification would create public confusion. *See* 5 AAC 77.001(a)(4); 1982 Inf. Op. Att'y Gen. (Mar. 30; A66-057-82A). The underlying purpose of the board's creation of the personal use fishing category was to allow efficient harvesting of fish by individuals who were precluded from participating in subsistence fisheries. *See, e.g.*, 5 AAC 77.001(a); Letter from Don W. Collinsworth, Commissioner, ADF&G, to Robert Willard, Chairman, Legislative Affairs Committee, Alaska Native Brotherhood (Sept. 6, 1984).

The statutory definition of personal use fishing was enacted in 1986 as part of a bill attempting to place Alaska back in compliance with the subsistence provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3113, 3114. *See* ch. 52, SLA 1986. The legislative history indicates that the definition and related provisions were intended to authorize the board to adopt regulations allocating fishery resources for purposes of personal use and to require the board to provide a "fair and reasonable" opportunity for sport, commercial, and personal use fishing. *See, e.g.*, 1985 House J. 584-585, 920-921, 1230-1231 (transmittal letter and letters of intent); secs. 3, 11, ch. 52, SLA 1986. These changes were part of a bill that limited subsistence to rural residents; the legislative history indicates that the personal use fishing category, like the personal use fishing category established by the board, was expected to serve essentially the same purposes as former subsistence fisheries.¹ However, unlike the personal use category established by the board, the legislative definition limited all personal use fishing to

¹ *See, e.g.*, 1985 House J. 584-585, 920-921, 1230-1231; Letter from Don W. Collinsworth, Commissioner, ADF&G, to Robert Willard, Chairman, Legislative Affairs Committee, Alaska Native Brotherhood (Sept. 6, 1984).

Alaska residents.² The statutory definition also prohibited sale and barter, but it did not contain any other provisions limiting the persons who could use personal use-caught fish. The fact that the board had already established the category of personal use fishing is acknowledged in the legislative history, but we have found nothing in the legislative history that compares the statutory definition to the pre-existing regulatory definition.

The regulatory record indicates that although the proposal for creation of personal use fisheries presented to the Board of Fisheries was very restrictive, the board adopted a much less restrictive regulatory scheme for personal use fisheries. As originally proposed, personal use fisheries could only be conducted where they would not negatively impact an existing resource use, and initial bag limits were proposed at very low levels. The board modified the proposed regulations to allow for the provision of personal use fisheries if they were in the broad public interest, and it also adopted bag limits based on amounts taken under subsistence regulations. The board explicitly rejected some uses permissible under subsistence regulations and provided that it was illegal to buy, sell, trade, or barter fish taken in a personal use fishery, but the board did not provide an explicit prohibition on sharing. *See* Board of Fisheries Proposal 107 (Apr. 1982); 5 AAC 77.010(b).

C. Sharing under the Regulatory and Statutory Definitions.

We have been unable to locate any detailed analysis of the statutory personal use fishing definition in the provision's legislative history. However, from the general materials contained in the legislative history, it appears clear that the legislature intended personal use fisheries to be used essentially as non-priority³ substitutes for subsistence. The statutory definition prohibits sale and barter, but it contains no provision to prohibit sharing.⁴

² The board regulations limited personal use finfish fishing to Alaska residents, but did not limit personal use fishing for shellfish and aquatic plants to Alaska residents. The board has not yet changed its regulations to reflect the statutory definition of personal use fishing. *See* 5 AAC 77.010.

³ The record indicates that although personal use fisheries were not intended to have a priority over sport and commercial fisheries, they were also not considered lower in priority. The legislation treated personal use fisheries on the same basis as sport and commercial fisheries and subjected them to the same allocation criteria.

⁴ Any argument that the term "personal use" in the statute means that fish must be used directly by the person who harvested them and cannot be used to feed family members must be rejected because the legislative history indicates that the "personal use" category would allow individuals not eligible for subsistence to harvest fishery resources to feed their families.

The regulatory definition arguably prohibits sharing, other than with immediate family members, of personal use-caught fish. The board did not perform any detailed analysis of its definition of personal use fishing. The definition was not controversial. Without debate,⁵ the board approved language stating "[p]ersonal use fishing' means the taking, attempting to take or possession of finfish, shellfish or aquatic plants by an individual for consumption as food or use as bait *by that individual or his immediate family.*" Board of Fisheries Proposal 107 (Apr. 1982) (emphasis added); *see also* 5 AAC 77.001(f). The question at issue is what words are modified by the emphasized phrase "by that individual or his immediate family." If it modifies only the phrase immediately before it—"use as bait"—then arguably the earlier phrase—"consumption as food"—is not limited. In that case, any consumptive use would be permissible, and sharing, even outside the immediate family, for consumption as food would also be permissible. On the other hand, if the emphasized phrase also modifies the "consumption as food" phrase, then personal use-caught salmon may be consumed only by the individual or that person's immediate family and may not be shared outside that immediate family.

We have previously advised that we believe that the latter interpretation is better because we have been unable to determine that there is any regulatory intent that supports a distinction between those who can use fish for consumption and those who can use it as bait. *See* 1991 Inf. Op. Att'y Gen. (Jan. 3; 663-91-0046) (personal use-caught salmon may not be used as dog food). Our review of the record does not change this advice; however, it does indicate a need for further regulation because the prohibition on sharing is probably unenforceable.

Any attempt to enforce the existing regulation to prohibit sharing outside the immediate family would be difficult for several reasons. First, as discussed above, there is an argument that the regulation does not prohibit sharing so long as the personal use-caught fish are used for consumption as food. Although we do not believe that this is the correct interpretation, criminal provisions are generally strictly construed, and thus the ambiguity in the regulation might make convictions difficult. This is particularly true since there is another provision, adopted contemporaneously, that provides clear and explicit prohibitions, 5 AAC 77.010(b), and it can be argued that this may be "surplusage" that serves no purpose if the definition is sufficient to prohibit such transactions.⁶ Second, the term "immediate family" is not defined, and in some situations this might also present a problem (i.e., is an aunt who maintains a separate residence "immediate family"?). Third, and perhaps most important, because the regulation was adopted

⁵ There was a question as to why the definition provided for taking for bait, and it was explained that this would allow the harvest of bait by commercial fishers.

⁶ Under rules of construction, courts will normally attempt to give some meaning to each word or phrase; there is a presumption against considering anything to be surplusage. *See, e.g., Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1045 (Alaska 1992).

prior to the statutory definition, it can be argued that the legislative definition rather than the regulatory definition should be applied.⁷

IV. CONCLUSION

The statutory definition of personal use fishing, AS 16.05.940(24), does not prohibit the sharing of fish or shellfish taken under personal use regulations. The regulatory definition arguably prohibits sharing, other than with immediate family members, of fish or shellfish taken under personal use regulations. However, we believe that the prohibition is probably unenforceable. The board has the authority under AS 16.05.251(a)(6) and AS 16.05.251(a)(12) to further regulate such fishing for the purposes of conservation and development.⁸ This authority should be used to revisit and clarify the personal use regulations. The Board should also use this opportunity to amend those portions of the regulations that are inconsistent with the legislative limitation of personal use to Alaska residents.

SAD:prm

⁷ In the normal case, regulations that interpret, clarify, or expand upon a statute are given deference. However, if it is determined that a later-enacted statute conflicts with an earlier-adopted regulation, the later-enacted statute controls. 1A Norman J. Singer, *Sutherland Statutory Construction* §§ 31.02, 31.06 (5th ed. 1992). In the case of AS 16.05.940(24), sharing is not prohibited, and it can be argued that sharing is allowed under the statute under the maxim "*expressio unius est exclusio alterius*" because other activities (sale and barter) are expressly prohibited but sharing is not. See, e.g., *Burrell v. Burrell*, 696 P.2d 157, 165 (Alaska 1984); *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992). The earlier-adopted regulation, if given any effect at all, must be read to be consistent with the later-enacted statute.

⁸ Any regulation must be consistent with the statutory definition and statutory provisions.