

Alaska's MARINE RESOURCES

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Charting New Courses for Alaska Salmon Fisheries: The Legal Waters

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Alaska's commercial salmon industry is in an economic crisis. Competition from farmed salmon, changes in consumer demand, and a worldwide economic slowdown—together with smaller sockeye salmon runs—are reducing the value of Alaska's salmon harvest.

This crisis has prompted discussions among fishermen, processors, fishery managers, and government officials about how to help the salmon industry.

Part of the discussion has focused on options for "restructuring" the management of salmon fisheries to reduce costs, increase value, or steer more of the benefits to Alaskans and their communities. Any change in the fisheries must, of course, be lawful. Two important questions are whether specific restructuring options would be allowed under Alaska's constitution, and who has the authority to make fundamental changes in how the fisheries are managed.

To help Alaskans better understand the legal and constitutional issues associated with restructuring the salmon fisheries, the University of Alaska's Marine Advisory Program and Institute for Social and Economic Research, along with the Washington Sea Grant Program, sponsored a workshop in October 2002. Lawyers with expertise in Alaska natural resources and fisheries law answered questions about different options for restructuring.

This paper offers an overview of the issues raised at the workshop and reviews some of the workshop discussion. The issues are complex, and the information here is not legal advice. It's a broad description of some of the legal issues Alaskans will have to think about in any restructuring of salmon fishery management.

*Small steps are more likely to move forward than big steps.
Jim Barnett, fisheries attorney*

Background

Entry to Alaska's salmon fisheries is limited—that is, the state government uses a system of entry permits to limit the number of fishermen and boats. Still, in many salmon fisheries there are more limited entry permits and boats than are needed to catch the fish. When prices and catch values were high, permit holders had little interest in reducing the number of boats. But as sockeye prices and fishing profits declined during the 1990s, permit holders began looking at ways to reduce the number of participants.

One option being talked about is buying back limited entry permits. Other options include co-ops, where only some of the permit holders fish but everybody shares the profits. Another possibility would be using a method based on harvest allocations, like the individual fishing quotas already used in some federally-managed fisheries.

Every restructuring option raises lots of questions. How would managers' ability to control catches and reach escapement goals be affected? Who would pay for permit buybacks, and how much? What should be the basis for allocations of fish to co-ops or other groups?

Also very important are social issues associated with any restructuring—how would individuals and communities be affected by specific changes? This paper talks only about legal issues. But if there is restructuring in salmon management, all Alaskans need to think about the effects of change on the people and the communities that rely on the salmon fisheries.



Bristol Bay gillnet fishing boats jockey for position to catch salmon.



Alaska's Constitution and Salmon Fisheries

Alaska's constitution, unlike any other state constitution or the federal constitution, guarantees open access and management of natural resources for the benefit of the people. The open access clauses of the constitution provide for "common use" and "no exclusive right of fishery" (see adjacent box). These provisions guarantee open fisheries and are fundamental to any discussion of restructuring Alaska's salmon fisheries.

The Alaska Supreme Court has said that "common use" means making it possible for the greatest number of people to participate in a fishery. Before statehood, Alaska's natural resources had been controlled by commercial interests from outside the state. Remembering that history, delegates to Alaska's constitutional convention wanted to insure that in the future all Alaskans would have access to the state's natural resources.

But over time open access is likely to translate into growing numbers of fishermen and boats in a fishery, making it harder for any individual fisherman to make a profit. And during the 1960s, Alaska faced a crisis in the salmon fisheries, caused by low runs and increasing participation.

The state legislature responded to that crisis by passing limited entry laws in 1962 and 1968; both were attempts to restrict entry mainly among non-resident fishermen. Courts said these early limited entry laws violated both federal and state constitutions.

Legislators then proposed amending the "no exclusive right of fishery" clause of the constitution. Voters have to approve constitutional amendments; before such amendments can appear on the ballot, two thirds of both the state house and senate have to agree. In a 1972 election, 78 percent of Alaskans who voted approved an amendment adding language to the constitution, stating that the prohibition on an exclusive right of fishery "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."

Then, in 1973, the legislature adopted the Limited Entry Act, establishing the current limited entry system for the salmon fisheries. It has survived major court challenges.

The Alaska Supreme Court upheld the law in a 1983 decision in the *Ostrosky* case. But the court also recognized the continuing tension between open access and limited entry. In the 1988 *Johns* case, the court said 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

Open Access Clauses, Alaska Constitution

Article VIII. Section 3. Common Use.

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII. Section 15. No Exclusive Right Of Fishery.

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. (Language added in 1973.)*

We don't have any control over how many fish they grow in Norway or what the Japanese pay for it or what they grow in Chile. There is nothing we can do about that. The only thing we have a say about is how we do what we do. . . . We need to address the fact that we have too many boats, too many people, and too much expense chasing salmon all over the state of Alaska.

*Dan Coffey,
former chairman,
Alaska Board of Fisheries*

limited entry, namely prevention of economic distress to fishermen and resource conservation.”

The state in fact restricts access to most of its natural resources—for example, it issues leases for extraction of oil, minerals, and timber from state-owned lands. Such leases meet the constitutional requirement for broad access to natural resources because everyone has an equal opportunity to bid for leases, the successful bidders pay for the rights, and the leases are for a limited time.

In the management of Alaska's fisheries, however, there is a continuing tension between the social and constitutional goal of providing open access and the economic efficiencies that exclusive rights promote. The current economic crisis has made it clear that in some salmon fisheries, even with limited entry, there are still more fishermen and boats than are needed to catch the fish—and more than the fishery can support. We now turn to a summary of what workshop participants had to say about legal and constitutional issues affecting any potential changes in salmon management.

What Can We Do, Given the Requirement for Open Access? How Much Can Participation Be Restricted?

Workshop participants agreed that there isn't any firm answer to those

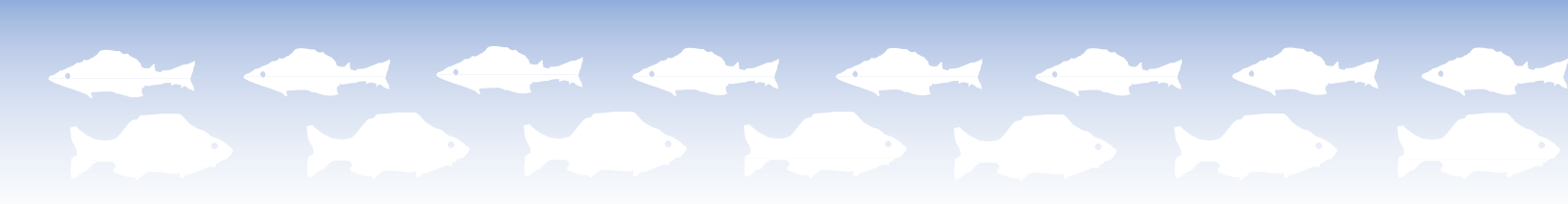
questions. Under our legal system, we don't really know what can or cannot be done—what the constitution allows—until the Alaska Supreme Court rules. The only way to find out is to try something and then let it be brought to the court. This adds greatly to the uncertainty the fishing industry faces as it deals with issues of restructuring.

Would Amending the Constitution Solve This Problem?

Changing the constitution with an amendment—as was done in 1973—could smooth the way for restructuring options that might otherwise be impossible, according to workshop participants. But amendments are difficult, time consuming, and risky.



Chignik tender boat removes salmon from purse seiner's net while it is in the water.



As we mentioned earlier, amending the constitution requires a two-thirds vote of each house of the legislature—to put the amendment on the ballot for voter approval—and a majority of the popular vote in a subsequent election. Also, if an amendment passes, it's always uncertain how the court will interpret it, bringing the risk of unintended consequences.

One risk is that a court could decide an amendment in fact amounts to a “revision” of the constitution—that is, a change broad enough to affect fundamental policy. Only a constitutional convention, like the one that drew up the original constitution, can revise it—and voters have to then ratify any revisions. No such convention has been called since the one that drafted the constitution.

Working within the existing framework of the constitution is preferable, in the view of workshop panelists. It is difficult to predict how the court will rule on any

particular restructuring plan. But under the law, courts always have to balance the welfare of fishermen with the constitutional requirement for open access to the fisheries.

Workshop panelists suggested that people assess the needs of the specific fisheries in their regions. Look at the regulations and hire experts to determine if a particular option is well suited to a specific fishery. Develop options in ways that leave them open to the largest number of participants, and then consider who might have the authority to make the options work.



I would say the court has been hanging some meat on the skeleton of the constitution. They have been fleshing out what did the framers mean and how did those provisions apply to what's going on today. . . . People sometimes ask, “How do you think the court will decide this?” Well, you are almost always going to hear a qualification in the response, because the fact is we just don't always know. . . .

We ought to look at this constitution as a good thing and not as something that is limited. . . . I would say, let's work within this framework. [A]nything we do in terms of restructuring—let's try to fit it with this idea, rather than try to amend it to allow us to do something that is more of a reaction to a current economic situation.

Mike Stanley, fisheries attorney

Restructuring Through the Board of Fisheries

If you are a fisherman out there and you are thinking about suing to get satisfaction, I would advise you to take your money and invest it in the Board [of Fisheries] process—hire experts, do everything you can up front, and your money will generally be better spent.

Lance Nelson, assistant attorney general, State of Alaska

Another issue workshop participants discussed was who has the authority to make changes in fisheries management. Under Alaska's constitution, authority to manage fisheries is vested in the legislature. The legislature has delegated management authority to the Board of Fisheries—a seven-member board, appointed by the governor. Each year, the board reviews hundreds of proposed changes to state fishing regulations. In general, it reviews different topics and areas on a set three-year cycle. A “call for proposals” is issued every winter, specifying which topics or areas will be open for regulatory change and when proposals are due (usually in April).

The board has the authority to open a fishery, restrict participation by gear type, allocate the harvest among different groups, and limit fishing

to a defined geographic area. The board's powers to set regulations are set out primarily in Alaska Statutes 16.05.251.

It can use the following criteria for making allocations: history; number of residents; the importance of providing residents the opportunity to obtain fish for personal and family consumption; the availability of alternative resources; and the importance to the economy of opportunities for residents and non-residents.

But panelists pointed out that these are just general allocation guidelines. Sometimes criteria like historical catch do not work—especially in a fishery with declining harvests. Panelists suggested that if the board makes clear what criteria it is using and justifies them—even if they are not specifically spelled out in statutes—it is easier to defend them from legal challenges.

1923

White Act language first wrote about "No Exclusive Right of Access."

1955

Framers of the constitution met and wrote Section 8 governing natural resources.

1959

Statehood and constitution goes into effect, governing natural resources

Timeline

Prior to statehood: fisheries were regulated by the federal government and dominated by the canned salmon industry headquartered outside of Alaska. The federal government allowed fishtraps.



What Can the Board Do?

Clearly, the Board of Fisheries has broad powers. But it has typically limited itself to working within the existing management system, as broadly determined by legislative policy. The legislature has not so far set any policy on restructuring the salmon fishery. This leaves fishermen wondering who to turn to with proposals for restructuring. Can they go to the board? Where is the dividing line between what the board can and cannot do?

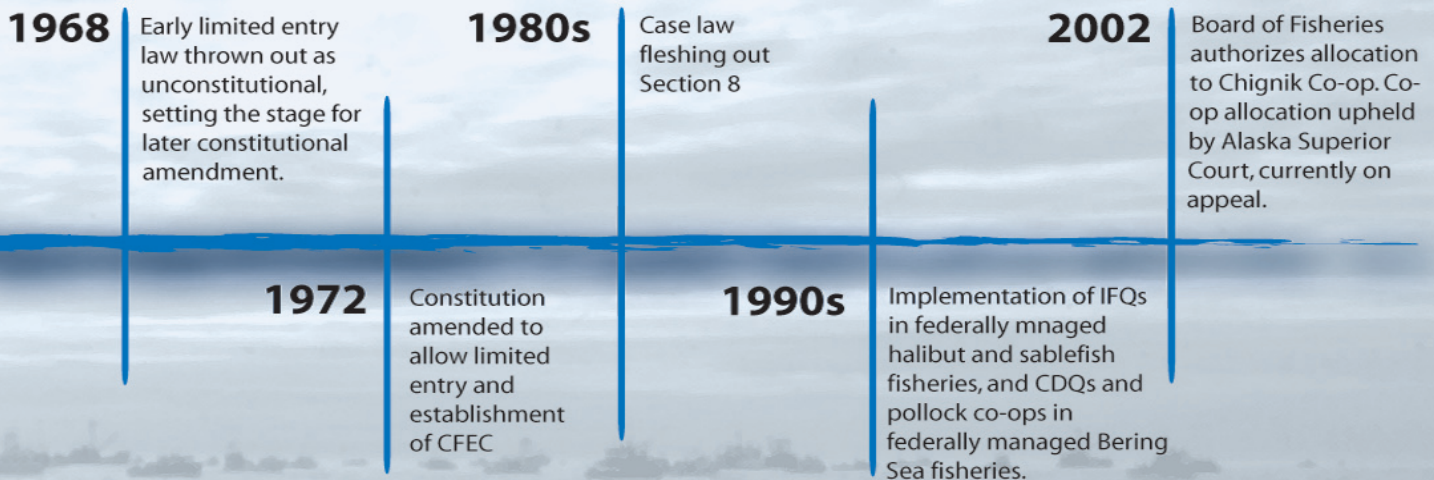
Workshop participants said the board could do a lot if it chose to—but it lacks staff, expertise, and time to initiate broad policy changes on its own. Panelists noted that the federal government solved this problem by providing significant funding and staff to its North Pacific Fishery Management Council. The council has both the authority and the

means to plan for restructuring federally-managed fisheries off Alaska. According to workshop participants, the state legislature could do the same by providing the existing board—or a new entity—with authority and resources to restructure the salmon industry.

Fishermen could benefit from going to the board for support in restructuring efforts, panelists said. They advised fishermen to learn the politics of the board and the legislature and to explain what they want to do and why. There are no quick fixes or one-size-fits-all solutions. Fishermen need to think about what would be best for their individual fisheries, to consult lawyers along the way, and to work creatively while insuring that important principles—such as equal treatment under the law—are met.

Develop your solutions for your location and then make sure those solutions don't have statutory and regulatory impediments that prevent them from happening. I happen to believe that the Board of Fish is a good place to get a lot of your answers.

*Dan Coffey,
former chairman,
Alaska Board of Fisheries*





Options for Restructuring

We now are authorized to determine a number range that would be optimal for a fishery for the long term. . . . We don't know if we have an answer we can rely upon until and unless we get a favorable decision from the Supreme Court. That can leave matters somewhat in doubt for a number of years.

*Bruce Twomley, chairman
Commercial Fisheries
Entry Commission*

When we were doing the Chignik co-op . . . one of the things that was important to us [was] this choice concept. You could choose to join the co-op and the co-op couldn't exclude you. The superior court agreed with us.

*Dan Coffey,
former chairman,
Alaska Board of Fisheries*

Buying Permits Back

One way to reduce the number of boats and fishermen is to buy back or “retire” permits. With fewer boats catching the same number of fish, the remaining permit holders stand a better chance of making money.

Some of the many issues involved in buybacks include who pays to buy the permits back, who gets bought out, and how much they are paid. How the buybacks are structured greatly affects who will benefit from them.

Current state law allows for buybacks financed by industry. If the state government bought back permits, the legislature would first have to pass a law to finance and govern the buyback.

But buybacks in any of their forms may prove unconstitutional. Reducing the number of permits in a limited entry fishery may cause the fishery to become too “exclusive,” conflicting with the “no exclusive right of fishery” clause in Alaska’s constitution.

In a state or federal buyback program, the government would have to justify reducing the number of permits. One way of doing that would be determining the “optimum number” of permits. The Commercial Fisheries Entry Commission, which controls the number of permit holders in state-managed fisheries, has the authority under state law to determine the “optimum number” of permits for any given fishery.

But optimum-number studies are complex, depend on variables that can change rapidly, and may take years to complete. And they are subject to court challenges. Courts might even decide on a new “optimum number” of permits. Workshop participants pointed out that the complexities of developing a defensible optimum number—coupled with the potential for courts to become involved—could leave fishermen facing uncertainty for years.

Establishing Co-ops

To form a fishing cooperative, either all or some of the permit holders in a fishery agree that only some of the co-op members will fish, but all will share in the profits. Some of the permit holders in the Chignik purse seine fishery petitioned the Alaska Board of Fisheries in 2001 to approve such a co-op. They asked the board to give separate allocations—and assign separate fishing times—to those who wanted to form a co-op and those who wanted to fish independently. The board approved, but some independent Chignik permit holders challenged the co-op in court. The trial court upheld the board’s decision, but the fishermen appealed to the Alaska Supreme Court. As of late 2003, the court had not yet ruled on the appeal.

Attorneys at the workshop agreed that an important reason the trial court found the co-op legal was that it was open to all permit holders.

Any permit holder could join and be treated the same as all other co-op members.

Quota Shares for Salmon?

In recent years, the federal government has dramatically restructured management of several fisheries off Alaska through individual fishing quotas (IFQs) for halibut and sablefish and community development quotas (CDQs) for Bering Sea fisheries. IFQs are issued to individuals, based on their historical catch and other factors. CDQs are allocations of part of the allowable harvest to specific coastal communities.

Workshop panelists agreed that the Board of Fisheries already has the authority to allocate fish harvests among permit holders. It is under this authority that the board allocated the harvest between Chignik co-op members and independents.

And some panelists thought the state legislature might be able to shape a quota share system, similar to the federal system, that would not violate the constitutional ban on creating

exclusive rights to fish. But they questioned whether such a system would even be feasible in the salmon fishery. Unlike halibut or pollock, salmon come in short, intense runs—and managers are often unable to predict the precise run size and timing from year to year.

Panelists said that CDQs, on the other hand, are much more likely to be found unconstitutional, if only certain communities or geographic areas are eligible.

What about Fish Traps?

Some fishermen have suggested re-introducing fish traps in some salmon fisheries, to reduce costs and improve quality. Fish traps have been illegal since statehood. However, there is no constitutional ban on fish traps—they are prohibited by Alaska Statutes 16.10.070 and 16.10.100. Before fish traps could be used, the state legislature would have to repeal the statutes that ban them. The Board of Fisheries would then have to authorize groups to use fish traps and establish allocations for those traps.

In federal fisheries management, the opportunities for [legal] challenge are less extensive than in state fisheries management issues.

Jim Barnett, fisheries attorney

What is attractive to me about a shared quota system is that everybody gets in according to a measure of their dependence upon the fishery in the past. It strikes me as a much more gentle and accommodating decision—accommodating all of the people who are already in the fishery—than the one we are called upon to make under our statute. As long as there were adequate constraints on consolidating too many quota shares in too few hands, I would argue that the shared quota would be entirely consistent with the least possible infringement on open entry fisheries.

Bruce Twomley, chairman, Commercial Fisheries Entry Commission



Annette Island Packing Company employees gather salmon from traps.



What Did We Learn?

The workshop raised a lot of issues—many more than we are able to present here. But it's clear that legal and constitutional issues will shape the ongoing debate over restructuring Alaska's salmon fisheries. In summary, attorneys at the workshop said:

- *Alaska's constitutional open access provisions make restructuring more difficult*, because it's so hard to balance the constitutional requirement for open access to the fisheries with measures that restrict the numbers of boats and fishermen.
- *Any restructuring option is fraught with uncertainty*, because it's often not clear if a change violates the constitution, until a court rules in a specific case.
- *Avoid amending the constitution*. Changing the constitution is difficult and risky. It's preferable to use the flexibility in the existing constitutional framework.
- *Fishermen can win the support of the Board of Fisheries by documenting restructuring options tailored to their own fisheries*. They should be aware that the board has considerable authority to make management changes.
- *Buybacks of permits are problematical*, in part because reducing numbers of permits too much may violate the constitutional ban on creating "exclusive" fishery rights.
- *Co-operatives and quota shares are restructuring ideas with promise*. But CDQs are more likely to face constitutional challenges.
- *Every fishery is unique, and any changes should be tailored to local conditions*. Consider the needs of your regional fisheries and work to find creative solutions.

If you try to get too specific with your constitution, you may well have unintended consequences down the road. . . . The constitution is your bedrock enabling legal document. . . . I think that just as a matter of policy people need to be not thinking of putting legislation into a constitutional format.

Mike Stanley, fisheries attorney

I encourage fishermen and others facing these issues to contemplate that for every solution to the predicament we are in, there are downsides – and before you embrace anything, make sure you are fully acquainted with the risks.

*Bruce Twomley, Chairman
Commercial Fisheries Entry Commission*



Selected Cases on Open Access Issues

State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), appeal dismissed, *Ostrosky v. Alaska*, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). The court recognizes the inherent tension between limited entry and open access.

Johns v. CFEC, 758 P.2d 1256 (Alaska 1988). The court stated that: “To be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses.”

Owsichek v. State, Guide Licensing and Control Board, 763 P.2d 488 (Alaska 1988). The court used common use provisions to strike down exclusive guiding areas.

McDowell v. State of Alaska, 785 P.2d 1 (Alaska 1989). The court used the constitution’s common use provisions to strike down a rural preference for subsistence use.

State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995). The court used the constitution’s common use provisions to strike down proximity to the resource as criterion for Tier II subsistence use.

Workshop Panelists

Jim Barnett has practiced law in Alaska since 1974. He is a former deputy commissioner of the Alaska Department of Natural Resources. He has represented Bristol Bay Economic Development Corporation for the past seven years and has participated in many regional fisheries projects to develop solutions to the current fisheries crisis.

Bruce Twomley, chairman of the Commercial Fisheries Entry Commission, has been on the commission since 1982, when he was appointed by Governor Jay Hammond. He’s been re-appointed by four succeeding governors. Before joining the commission, he spent 10 years suing the state and federal governments as a lawyer with Alaska Legal Services Corporation.

Lance Nelson has been an assistant state attorney general in the Natural Resources Section in Anchorage for more than 18 years. He’s been the primary attorney for the Alaska Board of Fisheries for several years and has worked on fishery issues for more than 14 years.

Dan Coffey is a lifelong Alaska resident who works as an attorney in Anchorage, specializing in real estate and commercial law. Governor Tony Knowles appointed him chairman of the Alaska Board of Fisheries in 1996; he served two terms, including time as chairman.

Mike Stanley is an attorney in private practice in Juneau, emphasizing fisheries and administrative law. He represents clients in fisheries litigation in state and federal courts and before such agencies as the Commercial Fisheries Entry Commission and the Board of Fisheries. Before opening his private practice in 1985, he was an attorney with the Alaska region of the National Oceanic and Atmospheric Administration.



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