

# **LICENSE LIMITATION IN ALASKA'S COMMERCIAL FISHERIES**

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## **Introduction and Summary**

After two failed attempts to establish limited entry in its salmon fisheries,<sup>2</sup> pursuant to legislation adopted by the Alaska Legislature in 1973, Alaska placed its primary salmon fisheries under limitation by 1975. Alaska persisted in seeking limited entry largely in response to declining salmon resources coupled with increasing levels of participation. Alaska's system limited the number of gear licenses to a maximum number, which the Alaska Supreme Court has ruled<sup>3</sup> must be equal to or greater than the highest number of units of gear present in a particular fishery during the four years prior to limitation. With all prior participants eligible to apply, the number of eligible applicants was generally far greater than the maximum number. Under an elaborate system of grandfather rights, permanent entry permits have been awarded to those fishers who demonstrated the most dependence upon a particular fishery, as measured by their past participation and economic dependence. Eligible fishers may continue to fish until there is a final determination on their applications. Permanent entry permits are, for the most part, freely transferable and inheritable, subject to some restriction (for example, permits may neither be leased nor pledged as security for a debt).

<sup>1</sup> The views expressed are those of the author and are not represented to be the views of the Alaska Commercial Fisheries Entry Commission or the State of Alaska.

<sup>2</sup> See Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1258-1259 (Alaska 1980) [recounting successful court challenges to Alaska's prior attempts to limit entry into its salmon fisheries].

<sup>3</sup> Johns v. CFEC, 758 P.2d 1256 (Alaska 1988).

Salmon fishers helped design Alaska's program for Alaska's salmon fleet, which consisted largely of individual fishers who owned and operated their own vessels. The program achieved a moratorium on new entrants and a gradual reduction of units of gear toward the maximum number as individual claims to permits were resolved.

Alaska's license limitation program contributes to limiting fishing capacity, because it is coupled with other limitations on effort such as vessel size and gear restriction. Taken together, Alaska's license limitation and other management tools allow managers to calculate with some assurance the power of the fishing fleets they seek to control. Although the program is neutral as to residency, the percentages of permits held by Alaskans have tended to remain stable from the time of initial limitation.

Alaska's program has always been controversial. The allocation system is complicated, expensive, and requires years to complete. While the program has survived all major legal challenges, courts have modified the program. Although the percentage of permits held by Alaskan residents has remained stable, in some areas, the number of permits held by local, rural Alaska residents has declined. Additionally, the high cost of permits in valuable fisheries has made initial entry into some fisheries difficult.

Alaska's license limitation program is most useful in fisheries that resemble Alaska salmon fisheries. The more a fishery departs from the Alaska salmon fishery model (as a fleet of

individual owner-operators participating in a fishery managed for escapement and not by quota), Alaska's form of license limitation is less likely to be the best option.

Alaska has applied this license limitation system to some 67 fisheries, making Alaska's license limitation program one of the largest of its kind in the world. Today, international salmon farming threatens Alaska's traditional markets and world prices for salmon. The Alaska salmon industry and the State of Alaska are exploring options for restructuring Alaska's salmon industry to meet this aggressive challenge.

## **Background**

Alaska's salmon harvests declined from the late 1930's and into the early 1970's.<sup>4</sup> Despite this decline, the number of participants continued to increase, creating more demands upon the salmon resource. By 1972, a perception that traditional management measures (e.g., closures, gear and vessel size restrictions) were no longer sufficient to maintain salmon stocks led Alaska voters to approve a State constitutional amendment authorizing the limitation of entry into Alaska's commercial fisheries.

In 1973, the Alaska Legislature enacted the Limited Entry Act which established a three-member commission authorized to limit entry into commercial fisheries when doing so would promote the conservation and sustained yield management of those fisheries and the economic health and

<sup>4</sup> Young (1983). *Fishing by Permit: Restricted Common Property in Practice*. p. 125 in Vol. 13, No. 2 *Ocean Development and International Law Journal*. Crane, Roussak & Co., Inc.

stability of commercial fishing.<sup>5</sup> By 1975, the commission had limited the primary 19 salmon fisheries (for reference, a “fishery” consists of a region, type of gear, and fishery resource). Today, the commission has limited some 67 fisheries and issued more than 14,000 limited entry permits to fishers in these limited fisheries.

Salmon fishers helped design Alaska’s license limitation program to address Alaska’s salmon fleet in which captains of vessels, who had been required to hold gear licenses, tended to be the sole owners and operators of their vessels. This owner/operator aspect of the salmon fisheries resulted in a close correlation between the number of gear licenses held and the number of units of gear.<sup>6</sup> Additionally, the Alaska Board of Fisheries has consistently imposed limits upon vessel size and the amount of gear employed from a vessel. Coupled with these additional controls, limiting the number of units of gear helps to limit overall fishing power.

Another relevant feature of Alaska’s salmon fisheries is the fact that they are not managed by harvest quota. For the most part, salmon are caught when they return to spawn and die in their rivers of origin. Fishery managers must ensure that a sufficient number of fish escape up the river to reproduce and sustain the resource, while avoiding potential damage from overescapement. In what can sometimes be a very short period, the fleet has an opportunity to catch all remaining fish not needed for escapement.

<sup>5</sup> Alaska Statute (hereinafter AS) 16.43.010.

<sup>6</sup> In fact, there were some unlicensed partners whose interests have been very difficult to fully accommodate within the system without undermining its purposes. *See, for example, State, CFEC v. Templeton*, 598 P. 2d 77 (Alaska 1979); *CFEC v. Apokedak*, 606 P.2d 1255 (Alaska 1980); *CFEC v. Apokedak*, 680 P.2d 486 (Alaska 1984); *CFEC v. Russo*, 833 P.2d 7 (Alaska 1992).

The primary purpose of Alaska's limitation program is to establish a form of moratorium that does more than simply block new entrants. For each limited fishery, a qualification date is established. The maximum number of permits to be issued is based upon the highest number of units of gear in the fishery in any one of the four years prior to the qualification date. During the eligibility period prior to the qualification date, large numbers of fishers have come and gone from the fishery. Therefore, the number of individual applicants for permanent entry permits who participated prior to the qualification date is invariably much greater than the maximum number. The commission must gradually reduce the number of entry permits to the maximum number through an elaborate grandfathering system.

The Entry Commission ranks each applicant against all other applicants according to the hardship the applicant would suffer if unable to receive an entry permit upon initial issuance (most permits are transferable once they are issued). To determine this ranking, the extent of an applicant's past participation and economic dependence upon the fishery are measured. The commission issues permanent entry permits to the applicants with the highest scores and continues to issue permits moving down through the ranked applicants until the maximum number of permits is issued. Nonetheless, the commission is authorized to exceed the maximum number in order to issue permanent entry permits to those individuals who would otherwise suffer "significant economic hardship."<sup>7</sup>

<sup>7</sup> AS 16.43.270(a).

Processing and adjudicating applications for permanent entry permits is expensive and time-consuming. Each application requires detailed fact finding. Following the initial denial of an application, a hearing officer must conduct an evidentiary hearing on behalf of a denied applicant who can demonstrate a genuine issue. Following a final administrative review by the commissioners, an applicant can go to state court to challenge the commission's final decision. Applicants are often represented by attorneys and by law can continue to participate in a limited fishery for as long as they can keep a pending application alive before the commission or a court.

Although the Alaska Supreme Court has issued some 71 decisions addressing Alaska's limited entry program, the court has upheld the program in all major respects.<sup>8</sup>

Once issued, most permanent entry permits are transferable for value and inheritable, but they are subject to a number of restrictions.<sup>9</sup> They can be transferred only to a living individual who can demonstrate present ability to participate actively in the fishery. As a general rule, no individual may hold more than one permit in a given fishery, and no one may fish more than one permit in a fishery.<sup>10</sup> Permits may not be held by a corporation or a partnership.<sup>11</sup> To avoid intemperate transfers, a permit holder may permanently transfer a permit only after 60-day's notice, during which time the holder can rescind any agreement to transfer. Additionally, a permit may not be leased, pledged as security for a debt (with the exception of two State-

<sup>8</sup> See for example, *Crivello v. State*, CFEC, 59 P. 3d 741 (Alaska 2002).

<sup>9</sup> See for example, AS 16.43.150.

<sup>10</sup> AS 16.43.140 provides limited exceptions for the purpose of fishing an entire unit of gear or for the purpose of fleet consolidation.

<sup>11</sup> AS 16.43.450--AS 16.43.520 (2002) provide limited exceptions for the Bering Sea hair crab fishery and weathervane scallop fishery where the commission is authorized to limit the number of vessels under certain conditions and issue entry permits to vessel owners, which may be corporations and partnerships.

authorized loan programs), or be executed upon to satisfy a judgment (with some recent exceptions). Furthermore, the individual permit holder must be on board and must personally sign for each sale of fish under the permit. The Alaska Legislature declared entry permits to be use privileges subject to cancellation or modification by the state without compensation.<sup>12</sup>

### **Controversy Over Transfer of Entry Permits**

The relatively free transferability of entry permits has remained controversial. On the positive side, the Alaska Legislature intended an entry permit to give its holder a permanent stake in the fishery in the hope of providing an incentive to conserve the resource, to obey conservation laws, and to promote investment in aquaculture to rebuild salmon stocks. With respect to aquaculture, fishers in some limited salmon fisheries have elected to tax themselves in order to develop non-profit hatcheries. The Legislature also intended free transferability to ease hardship to an individual disabled from the fishery and to fishing families intending to maintain their access to a fishery. Finally, for the sake of simplicity and economy, the Legislature intended to leave redistribution of entry permits largely to the marketplace to avoid involving the state in a system of reissuance of entry permits.<sup>13</sup>

<sup>12</sup> AS 16.43.150(e).

<sup>13</sup> See generally, State v. Ostrosky, 667 P.2d 1184 (Alaska 1983) [upholding transferability of Alaska limited entry permits].

While the Limited Entry Act is neutral with respect to residency, overall transferability has tended to serve residents of the State of Alaska. Approximately 78 percent of Alaska's limited entry permits are held by Alaskan residents. As of year-end 2002, Alaskans held 11,502 of the more than fourteen thousand permanent entry permits issued. More than one-half of the Alaskans holding entry permits are rural residents living in areas where other sources of cash income are very limited.<sup>14</sup>

Depending on the perceived value of a fishery, the current costs of entry permits range from several thousand to several hundred thousand dollars. A high market value is a mixed blessing. On the one hand, it may reflect the perceived economic health of the fishery. On the other hand, the high price may present an obstacle to a local individual seeking to enter the fishery as a captain for the first time. For those individuals who borrow funds to purchase an entry permit, retiring that debt may create an incentive to fish that much harder and to make more demands on the resource.

Additionally, transferability may disadvantage some Alaskans. In some rural areas of the state, more permits have been transferred from the area than have been transferred to the area. This net rural drain of entry permits in areas where economic alternatives to commercial fishing are very limited is a serious concern. Furthermore, as the result of court decisions, child support claimants and the Internal Revenue Service assert the right to seize and force the sale of entry permits to satisfy their claims.

While transferability of entry permits remains controversial, alternatives to transferability also

<sup>14</sup> *Commercial Fisheries Entry Commission 2002 Annual Report.*



present problems. If entry permits were to revert to the state to be reissued among applicants according to a ranking system, the process would be very expensive and time-consuming. If permits were reissued periodically through a lottery, fishers would be denied the opportunity to plan for their business. If permits were awarded periodically by competitive bid, the individual dependency on fishing protected by the current grandfathering system would be ignored, and individuals with better access to capital would benefit. Additionally, limiting the time during which an individual could hold an entry permit would eliminate the long-term stakes in a fishery believed by the legislature to be necessary to promote conservation. Finally, eliminating transferability would remove an incentive for the holder to maintain or enhance the value of the permit through conservation of the resource.<sup>15</sup>

Other sources of controversy include unhappiness among denied applicants for permits and the continuing issue whether commercial fishers pay sufficient revenues to the State of Alaska in return for their fishing privileges. Despite the controversy, Alaska's license limitation system has won general acceptance and has twice been supported by the voters. As stated, the electorate passed a constitutional amendment forming the basis for limited entry in 1972. Subsequently in 1976, the voters defeated a referendum to abolish limited entry in Alaska by a margin of almost two to one. As a further indication that support is not limited to those fishers holding entry permits, a frustrated fisher with a long-standing pending application for a permit declared to this author: "even if I don't get my entry permit, I do want the system to survive." On the other hand, with Alaska's population shifting toward urban centers and nonfishing employment, individuals have questioned whether the limited entry system would survive a referendum today.

<sup>15</sup> See generally, *A Review of the Issue of Transferability of Limited Entry Permits*, CFEC Discussion paper 00-1N (March 2000).

## **Effects of Alaska's License Limitation Program and Current Stresses**

Alaska's license limitation system, within its limited objectives,<sup>16</sup> has helped to contain growth in fishing effort. However, beyond fisheries which bear close resemblance to the Alaskan salmon fisheries for which the program was designed, it may be less effective.

The primary objective of Alaska's license limitation system is to limit growth in the numbers of participants in its fisheries. Prior to limitation, the number of participants in Alaska's salmon fisheries continued to grow despite the decline of salmon harvests. Having observed more and more participants crowding into once declining salmon fisheries, Alaska's record salmon harvests, during the 1980's and early 1990's, would likely have attracted many new participants. Despite downward pressure on salmon prices due to increased worldwide supply of farmed and wild salmon, Alaska's salmon fisheries have remained attractive to salmon fishers. And there would likely have been other sources of pressure. For example, the construction of the Alaska pipeline during the 1970's drew a large work force into Alaska. Upon completion of the pipeline, displaced former pipeline workers who wished to remain in Alaska could well have sought to enter Alaska's salmon fisheries.

<sup>16</sup> In addition to containing growth in fishing effort, legislation establishing Alaska's license limitation program originally included fisher-financed fleet reduction through buy-out of limited entry permits, vessels and gear. AS 16.43.290 and following. The program has not been implemented because the Attorney General issued an opinion concluding the funding method for the program violated the State Constitution. 1985 Op. Att'y Gen. No. 2 (May 23). Very recent legislation has repaired the funding mechanism. Chapter 135 SLA 2002. However, before this legislative repair of the funding mechanism, the Alaska Supreme Court further inhibited fleet reduction by declaring, under the State Constitution, a limited fishery can become too exclusive requiring the introduction of additional limited entry permits. Johns v. CFEC, 758 P.2d 1256, 1266 (Alaska 1988).

Additionally, the troubles that have befallen West Coast salmon fisheries beginning in the 1970's would likely have spawned additional interest in Alaska's salmon fisheries by displaced West Coast salmon fishers. Alaska's system of limitation was barely in place when the *Boldt* case was decided in 1974.<sup>17</sup> The *Boldt* decision required a substantial portion of the salmon harvests in the northwestern United States be reserved for certain Native American tribes. That decision dislocated large numbers of northwest salmon fishers, who would likely have looked to Alaska to offset their losses. In short, had Alaska's license limitation system not stood as a bulwark, these various pressures likely would have caused growth in the numbers of participants in Alaska's fisheries and even greater pressure upon the resources.

Alaska's limited entry system does more than simply limit the number of participants, because it does not operate by itself. The State Board of Fisheries has consistently provided gear and vessel restrictions applicable to commercial salmon fishers. These restrictions, when coupled with license limitation, result in a limitation of overall fishing capacity and further allow fishery managers to calculate with some assurance the amount of fishing power to be managed.

An example of the utility of the program can be taken from the Southeast Alaska roe herring purse seine fishery, which is subject to limitation resulting to date in 52 units of gear. Absent the limitation on the number of fishing operations, this fishery likely would not have opened in years of low stock assessment.

<sup>17</sup> United States v. Washington, 394 F.Supp. 312 (1974).

Despite limitation, the relatively small Southeast Alaska roe herring seine fleet has been so efficient and powerful that, during some seasons, fishery managers would not have risked an opening for as little as one-half hour, for fear of exceeding the quota and damaging the stocks. Although license limitation failed to facilitate a traditional fishery under these circumstances, it may have contributed to a practical solution. More than once, when the fishery otherwise would not have opened, permit holders gathered in the same room and agreed to fish cooperatively and to share the limited quota. This might not have been possible had limited entry not clearly defined the limited group of stakeholders.

As noted, however, the effectiveness of Alaska's license limitation program becomes questionable with respect to fisheries which depart from the Alaska salmon fishery model. An example has been the Southeast Alaska dungeness crab pot fishery. For the most part, the fishery consisted of a small boat fleet fishing fewer than 100 pots each. The only inseason gear limit placed upon the fishery by the Board of Fisheries is a limit of 300 pots per vessel. License limitation applied to this fishery would limit the number of fishing operations, but might have little effect upon the growth of fishing effort or capacity. Each entry permit holder could have moved to a larger vessel and fished up to 300 pots thereby substantially increasing pressure upon this fishery despite license limitation. This situation initially discouraged application of Alaska's license limitation system to the Southeast Alaska dungeness crab fishery.

In 1995, the Alaska Legislature addressed this problem by granting CFEC authority to restrict the individual fishing capacity employed under an entry permit (for example, quantity of fishing gear or vessel size).<sup>18</sup> Under this new authority, CFEC limited entry into the Southeast dungeness crab pot fishery and assigned pot restrictions to groups of individual entry permits, based on each applicant’s past catch. As the result, permits are placed to one of four tiers, each representing a portion of the 300 pot upper limit of gear established by the Board of Fisheries, as follows:

<b>TIER</b>	<b>NUMBER OF POTS</b>
A (100%)	300
B (75%)	225
C (50%)	150
D (25%)	75

Other departures from the salmon fishery model are fisheries where the number of licensed skippers is not closely related to the number of units of gear. Examples are the Bering Sea hair crab fishery and the weathervane scallop fishery. A few relatively large vessels had participated in these fisheries throughout the year.<sup>19</sup> In part because of the length of the seasons, owners of vessels may rely on alternating relief skippers. In some cases, owners may not personally operate their vessels at all. Alaska’s license limitation system, if applied to these fisheries, would fail to protect the interest of a vessel owner who was not a skipper. The system could also grant entry permits to a series of relief skippers currently operating the same vessel.

<sup>18</sup> AS 16.43.270(d) (§3 ch 82, SLA 1995).

<sup>19</sup> Decline in stocks has required closure of the hair crab fishery in recent years.

Subsequently, under license limitation, each of those skippers might be entitled to operate his or her separate vessel. In such fisheries, the application of Alaska's system could entail a risk of multiplying the number of fishing operations following license limitation.

In response, the Alaska Legislature established temporary moratoria on the entrance of new vessels into the Bering Sea hair crab fishery<sup>20</sup> and the weathervane scallop fishery.<sup>21</sup> Subsequently, during the 2002 session, the legislature passed AS 16.43.450 authorizing the Commission to implement a vessel-based limited entry program for the Bering Sea hair crab and weathervane scallop fisheries under certain conditions. Permits would be issued to owners of the vessels rather than operators of the vessels, and the vessel entry permits would expire on December 31, 2008, unless future legislation extends or eliminates the expiration date. In 2003, the commission adopted a vessel permit limited entry system for the Bering Sea hair crab pot fishery<sup>22</sup>

A more practical tool for limiting entry into fisheries managed by quota would be authority to assign individual transferable quota shares. However, the issue of individual transferable quotas has been controversial in Alaska.<sup>23</sup> In part, controversy in Alaska over individual transferable quotas prompted Alaska's Congressional Delegation to support the 5-year moratorium on implementation of any new individual transferable quota programs in federally managed

<sup>20</sup> A 16.43.901 (1996)

<sup>21</sup> AS 16.43.906. (1997)

<sup>22</sup> Commission Order (June 6, 2003); 20 AAC 05.1400 *and following*.

<sup>23</sup> Nonetheless, within its existing statutory authority to impose uniform inseason harvest limits, the Alaska Board of Fisheries has established individual annual limits based on an equal division of the annual quota among the participants in the Northern Southeast inside sablefish fishery. 5 AAC 28.170. These individual limits are not transferable.

fisheries imposed by the 1996 amendments to the Magnuson-Stevens Act.<sup>24</sup>

The rise in world salmon production and resulting decline in salmon prices have caused Alaska's salmon industry to suffer a significant loss of earnings. As salmon fishermen struggle financially, many have expressed interest in exploring ways of reducing harvesting costs to make the harvesting sector more viable.<sup>25</sup> To aid discussion of the future of Alaska's salmon industry, CFEC published the *Outline of Options for Fleet Consolidation in Alaska's Salmon Fisheries* (CFEC 1998), which critically examined a variety of remedies under consideration ranging from changes of law to private actions individuals could take. One such idea resulted in legislation: Chapter 134 SLA 2002 provided a new means for fleet reduction to occur through private initiative by authorizing an individual to hold up to two salmon permits for a fishery<sup>26</sup> for the purpose of fleet reduction. However, the individual cannot engage in fishing under the second permit. The new law provides a means whereby permit holders in a salmon fishery can form a qualified salmon fishery association and vote to assess themselves for the purpose of promoting the consolidation of the fishing fleet. The provisions in the law are similar to provisions in Alaska law providing for the formation of Regional Agriculture Associations.

Additionally, in response to the crisis in the salmon industry, the Bristol Bay Economic Development Corporation commissioned a study, *An Analysis of Options to Restructure the Bristol Bay Salmon Fishery* (2003), which, among other things, seriously examined the possibility of individual shares in the salmon harvest as a means of slowing the fishery and

<sup>24</sup> 16 USC 1853, §303(d).

<sup>25</sup> *Outline of Options for Fleet Consolidation in Alaska's Salmon Fisheries* (CFEC 1998).

<sup>26</sup> This fleet reduction provision is an exception to the general principle an individual may hold only one permit per fishery. AS 16.43.140.

capturing more wealth for the individual participants. Finally, CFEC is in the process of completing a study to determine the optimum number of permits for the Bristol Bay drift gillnet fishery. An optimum number determination is the statutory and constitutional requirement for considering the extent to which permits could be retired from the fishery without violating the Alaska Constitution.<sup>27</sup>

## **Conclusion**

In short, while license limitation alone may not fully contain growth in fishing capacity, it can do so when coupled with other limits upon fishing power. However, Alaska's license limitation system, while serving its objectives in its salmon fisheries, may be ineffective with respect to fisheries which depart from the Alaska salmon fishery model.

Competition from farmed salmon has prompted the state and fishery participants to examine ways to restructure the salmon industry and may lead to further modifications of Alaska's license limitation system.

<sup>27</sup> Johns v. CFEC, 758 P.2d 1256, 1266 (Alaska 1988)