

MEMORANDUM

State of Alaska Department of Law

TO: Geron Bruce
Assistant Director
Commercial Fisheries Division

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TEL. NO.: 269-5241

THRU:

SUBJECT: Legal Issues re:
Commercial Fishing Crew
Data Collection

FROM: Lance B. Nelson
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I. Introduction.

At your request, I have reviewed the report "Improving Seafood Harvesting Labor Data Collection in Alaska Fisheries," (report) prepared by Northern Economics, Inc. for Southwest Alaska Municipal Conference in 2007. The various methodologies proposed as potential solutions do not present significant legal hurdles that could not be adequately addressed by legislation. There are no general, significant legal obstacles to legislation that would require reporting of the details of crew member activity by permit holders or crew members themselves. Nor should there be any legal problems in establishing reasonable confidentiality restrictions and disclosure conditions for such data.

II. Potential Issues, Answers, and Options.

A. General Issues.

Legislation is recommended, and probably required, to (1) establish standards for the collection of crew data through reporting requirements or to specifically authorize the Board of Fisheries or the commissioner of ADF&G to adopt such standards by regulation and (2) to address confidentiality requirements for such data. There are currently no statutory requirements for reporting crew activity reports. Nor is there express authority for either the Board of Fisheries or the Commissioner to require such reporting. While there may be an argument to support implied authority regulatory authority to require reporting, clear statutory authority would eliminate confusion and prevent litigation. And since legislation adequately addressing confidentiality and disclosure conditions would likely be required in any event, it makes sense to have specific

statutory authority requirements for reporting as well.

The Legislature clearly has the authority to require reporting of activities related to the harvest of a public resource. The harvest activities of crew members on commercial fishing vessels would be a proper and legal subject of reporting requirements.

The Legislature has very broad discretion to determine confidentiality requirements and disclosure conditions for commercial fishery harvest data. Alaska's commercial fishermen harvest a publicly-owned resource. There is probably no general constitutional or common law right to keep individual data on the commercial harvest of a public fishery resource confidential. The legislature has chosen, however, to classify certain harvest data received by the state as confidential and subject to disclosure only under specified conditions. AS 16.05.815. The legislature can generally tighten or loosen confidentiality requirements or disclosure conditions at its discretion.

For example, the legislature could establish a system for the disclosure of harvest data to crew members as well as permit holders for the time periods when the crew member is reported to be aboard the vessel. Any objection to that kind of system would be a political one, not a legal one. Or the legislature could make no allowance for a crew member's access to the harvest data, as it currently makes no allowance for vessel owners.

The access question becomes more complicated, however, when the information collected by the state may be intended for use as evidence to adjudicate an individual's right to participate in a fishery or receive some kind of fishery quota. In that case, due process considerations may require that the individual have some mechanism to access the raw data used by the state to determine the individual's qualifications to verify the accuracy of that data.

B. Specific Questions Raised in the Report.

On page nine of the executive summary of the report and page 55 of the body of the report, the following questions are raised:

The key question is whether including crew identifiers and other information on fish tickets and/or eLandings would necessarily give crew legal access to information on the fish tickets and, if so, to what information. This question will have to be answered by legal counsel and may require a court decision in the long run. If crewmember data are treated in the same manner as vessel owner data, crewmembers will not automatically have access to harvest and price information included on fish tickets. However if crewmembers are treated like permit holders, they would have access to harvest and value data that they are currently not able to access. Thus there are important unanswered questions regarding the use of fish tickets to record crew data:

- Will crew be able to access fish ticket data beyond their own participation?
- What is the functional effect of allowing access to more than just participation data?
- Is potential access by crewmembers to more than participation data a political obstacle that would stop forward progress in developing any new system of data collection?

These questions can be answered as follows:

- Including crew identifiers on fish tickets and/or eLandings would not automatically mean that crew members are entitled to access to information on fish tickets; that would be up to the legislature to specify in statute,¹ but giving a person access to records of that person's own activity when qualification for some kind of future quota or limited opportunity is at stake is likely to be given serious consideration by the legislature, and may be required by due process standards. Until the legislature adopts such a quota or limited opportunity program, however, due process considerations would probably not come into play.
- Whether crew members will be able to access data beyond their own participation will depend on the statutory language enacted by the legislature. Unless the additional data becomes relevant to potential quota or limited opportunity adjudications, it would be difficult to justify that kind of access as a public policy matter.
- The functional effect of allowing more than participation is a policy question, not a legal one.
- The question of additional access being a political obstacle is not a legal question.

C. Other Legal Issues Found in Report.

1. Limitations on eligibility for future crew quota shares.

On pages 38 and 43 of the Report, there is a suggested option identified as "Option 1.5 Create a New 'Professional Crew' License. The creation of a professional crew license itself would not present legal issues, but the proposed incentive to encourage voluntary applications for "professional crew licenses," namely limitations on eligibility for potential future crew quota

¹ Currently, AS 16.05.815(a)(6) provides that the department or CFEC may release "on request, the report of a person to the person whose fishing activity is the subject of the report, or to a designee of the person whose fishing activity is the subject of the report." So a crewman would likely be deemed to have access to any information that reported his fishing activity. But the legislature could restrict such access if it chose to.

shares, would probably be unconstitutional. These limitations would likely be ruled inconsistent with the equal access provisions of the Alaska Constitution because the restrictions placed on entry into a fishery would be related to administrative requirements rather than a person's relationship to a fishery resource.² Conditions on qualifications for future individual allocations would likely have to be based on factors more directly related to direct dependence on, and participation in, the fishery to be consistent with the Alaska Constitution.

Also, laws or regulations cannot bind future legislatures, boards, or commissioners, so the legislature could choose to ignore the restrictions on the ability to qualify for future quota programs when it finally gets around to enacting such a program.

2. Use of unemployment or federal income tax information.

On pages 48-49 of the report, there is a discussion about the possible use of the reporting system of utilized by the Alaska Department of Labor and Workforce Development to collect wage and salary employment and earnings, referred to as ES-202 forms. By law, vessel operators and crewmen are exempt from these reporting requirements. AS 23.20.526(a)(17), so there is no current reporting on ES-202 forms for crew activity, and crew income does not fit the reporting format for wage earners or salaried employees. But the legislature could enact a reporting program similar in general form to the ES-202 reports, although the wage or salary information would obviously need to be transformed to an income basis for fishermen. Enactment of such a program would not require compliance with minimum wage and unemployment insurance laws for vessel operators or crew.

On pages 49-50 of the report, there is also a discussion about the use of federal Internal Revenue Service forms to gather crew member data. We believe it is possible for a state to require by statute the filing of a copy of IRS forms, as is the case in states with state income taxes. In the alternative, the legislature could certainly require the filing of separate forms that have the same data provided in the IRS forms.

III. Conclusion.

In summary, there should be no significant legal obstacle to developing an effective system of crew data collection. Statutory changes will likely be required, but the legislature has wide discretion to fashion reasonable reporting requirements and confidentiality protections.

² Section 17 of article VIII of the Alaska Constitution 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.