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Shell game: state scallop fishery faces scrutiny

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A bill extending the limited entry program for scallops is making its way through the Alaska State Senate, but not without scrutiny.

On March 11, an amendment to Senate Bill 54 passed in the Resources Committee to shorten the length of the program as a result of concerns raised in hearings from legislators and in public comment about consolidation in the fishery over the last decade under parallel state and federal limited entry.

When the bill was introduced by Resources Committee Chair Sen. Cathy Giessel, R-Anchorage, in February, it would have extended the program by 10 years until 2023. Before the bill was introduced, discussion revolved around making it permanent.

The concerns have arisen because a small group of partners from Washington led by Jim Stone of Lakewood have come to control virtually the entire scallop harvest valued at about \$4.5 million in 2012.

Including American Seafoods, that core group now controls six of nine state and federal permits for the scallop fishery along with the F/V Ocean Hunter, one of the two vessels that still fish in state waters. Since 2009, the Ocean Hunter has harvested scallops in state waters on behalf of the Alaska Scallop Association members with “lease fees” paid to the permit holders who do not associate their permits with a vessel.

According to a 2006 federal report on the scallop fishery, about \$244,000 in “lease fees” were paid from Stone’s Ocean Fisheries LLC and Mark Kandianis’ Provider Inc. in 2003 to permit holders who were not actively fishing.

The scallop limited entry program administered by the Commercial Fisheries Entry Commission, or CFEC, is scheduled to sunset at the end of 2013, a result of the last extension of the program passed by the legislature in 2008.

Because some of the scallop beds around Alaska straddle the three-mile boundary between state and federal waters, the state limited entry program operates in conjunction with the federal program.

Gov. Sean Parnell told Journal correspondent Bob Tkacz on Feb. 28 that CFEC asked him to have the bill introduced under his sponsorship, but he did not do so because of the number and scope of other bills he is sponsoring. Instead, Giessel brought it forward.

“I support the bill,” Parnell said.

Quick consolidation

Soon after the 2008 extension was approved by the Alaska legislature, partnerships involving Stone, Glenn and Egil Mikkelsen, John Lemar and Tom Minio subsequently formed two new LLCs on May 7, 2008, and then acquired three federal licenses over three days in June 2008.

Two of those permits were purchased from Mark and Teresa Kandianis.

Associated with those federal licenses purchased in 2008 were two state permits that had been relinquished, and a third that is now under suspension because it has not been assigned to a vessel after being acquired by the partners.

Bill Harrington of Kodiak runs the Kilkenny, which is the only other boat other than the Stone group's Ocean Hunter now operating in state waters, and he delivers fresh scallops mainly to Homer. Max Hulse of Eagle River has also previously delivered fresh scallops.

Hulse said he intends to fish again in the future, and he and Harrington have gone on the legislative record supporting the program's extension.

At the March 11 Resources Committee hearing, a letter from Kodiak fishermen George Hutchings questioned the current system and objected to a letter from the federal North Pacific Fishery Management Council to the Alaska legislature in support of extending the scallop limited entry in state waters.

That letter from the North Pacific council came at the request of Stone, who brought the matter to the council on the last day of its meeting in Portland, Ore., in February during the "staff tasking" agenda item.

At the time, Stone passed around to the council a copy of a similar letter written in 2007 to the legislature, and a 2007 Alaska Department of Fish and Game report on the scallop fishery.

Council member Duncan Fields of Kodiak asked Stone, "Are there additional issues we should consider as we write the letter as opposed to 2007?"

In response, Stone said, "Mr. Fields, no. Everything is identical. I believe there was one change in ownership of a permit, federal and state. I don't believe there's anything else. Quotas are very similar, quotas are slightly down. There are no other issues."

However, there have been at least four federal license transfers since the 2007 ADFG report and the last council letter to the legislature was written, with Stone personally involved in three of the transactions.

When contacted by the Journal, Stone said he "misspoke" before the council regarding license transfers since 2007 because he did not have the information in front of him.

Hutchings wrote to Giessel on March 7 that he was in Portland for the council meeting and would have stayed through the end "if scallops had been listed on the agenda."

"Being denied notice and an opportunity to be heard, I feel betrayed by the Council taking this action with no public input other than from the personal testimony from Mr. Jim Stone, who is the primary player in this game and voiced only his own opinion ..." Hutchings wrote to Giessel.

CFEC Commissioner Ben Brown confirmed for the committee that there was no advance notice that the council would consider a letter at that meeting, but said that there was significant opportunity for the public to participate when the program was initially developed.

Seaton questions constitutionality

The scallop fishery is the only vessel-based limited entry program in the state, and it was made vessel-based because assigning permits to individuals with fishing history would have resulted in 10 or 11 permits. That number was greater than the nine determined to be the most vessels the fishery could support.

Multiple federal permits may be fished off the same vessel, but only one state permit may be associated with a vessel.

At a House Finance Committee hearing for the CFEC budget Feb. 14, Rep. Paul Seaton, R-Homer, raised the constitutional question to Brown of CFEC. Seaton is also the chair of the House Fisheries Committee.

“I’m concerned, I have been concerned for a long time, about the vessel entry permits,” Seaton told Brown. “They don’t require a person to participate in the fishery at all. I’m fearful that consolidation that has taken place in that fishery has reached a point where we may be running afoul of the constitutional prohibition on a special right of fisheries.”

Later in that hearing, Brown responded to Seaton’s critique of the scallop vessel-based program.

“The current operation, although it may not to be Rep. Seaton’s liking in every way, but it is not diminishing the resource,” Brown said.

Seaton had an answer for that as well.

“Time does go on and things change, and there wasn’t consolidation to a very few select people at the time (in 2008), which may run afoul of other parts of the constitution and a special right of fishery,” Seaton said to Brown.

After the hearing, Seaton questioned the CFEC advocacy for the scallop program further to Journal correspondent Tkacz.

“For several years there seems to have been a philosophy at the CFEC that they are the chief supporters of a position of policy instead of implementing the policy that is set by the legislature,” Seaton said shortly after SB 54 was introduced. “Although they were implementing the policy, to oppose a change in policy by the legislature is, I believe, beyond their real mission.”

If the bill passes the Senate, it may go to the House Fisheries Committee, which Seaton chairs, although that isn’t guaranteed. A determination won’t be made until the bill is on the Senate floor, and it could go to House Resources or another committee.

Brown addressed the constitutional question in the first Senate Resources Committee hearing on the bill March 4, stating that, “as an attorney, if this were unconstitutional somebody would have challenged it by now.”

But both Seaton and Hutchings disagree. In his letter, Hutchings said that if he had the financial resources, he would consider appealing to the state and federal court systems.

Alaska case law

There are two Alaska Supreme Court cases decided in 1988 and 2005 that are contributing to the question of constitutionality. The first is *Johns vs. CFEC*, in which a fisherman challenged the “optimum number” of permits that were to be issued for the state herring fishery.

In ruling for *Johns*, the Court addressed the tension inherent in the Limited Entry Act and the constitutional requirement for Alaska resources to be available to all Alaskans.

“The optimum number provision of the Limited Entry Act is the mechanism by which limited entry is meant to be restricted to its constitutional purposes,” the Court wrote. “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.”

In *Grunert vs. State*, decided in 2005, the Supreme Court struck down a cooperative fishery in Chignik approved by the Board of Fisheries.

Under that cooperative, designed to reduce fishing effort and improve quality at a time of depressed salmon prices, permit holders were paid lease fees by fishermen who took the harvest.

During the first year of the cooperative, 77 boats joined and only 18 fished.

In striking down the cooperative, the Court wrote: “Participation by the individual is inherent in the limited entry permit system. The Chignik cooperative fishery scheme is fundamentally at odds with this premise because it allows people who are not actually fishing to benefit from the fishery resource ... The co-op fisher in this scenario sharply diverges from the model of the economically dependent fisher whom the Limited Entry Act was intended to protect.”

Federal control

There is also a federal ownership cap of two licenses for any “individual, corporation, partnership, or other legal entity.”

According to the final rule for the scallop fishery published in the Dec. 14, 2000, Federal Register, “The two-license ownership limit is intended to prevent any person from obtaining an excessive share of harvest privileges in the scallop fishery as required by national standard 4 of the Magnuson-Stevens Act. The Council determined that holding more than two scallop LLP licenses would constitute an excessive share in the context of this relatively small fishery.”

Despite federal intent language to limit any person to two permits, and a similar state intention limiting to one per vessel, federal regulators have said the current ownership structures for Stone and his partners are legal.

The National Marine Fisheries Service Restricted Access Management Division said the federal program does not specify legal corporate ownership structures, and because each entity has a different name, it is considered a different entity even if the shareholders are the same.

Stone also noted that while the same group of individuals holds multiple permits, no one person has the equivalent to ownership of even one entire vessel.

And Stone asserts that opportunity still exists for new participants to enter the fishery if they so desire, although individuals testified at the first Senate Resources hearing that they would like to participate were the fishery more accessible to small, new, participants.

Lobbyists on board

Legislators and participants aren't the only ones weighing in on the program.

The United Fishermen of Alaska, of which the Alaska Scallop Association is a member, submitted a letter unanimously supporting the program. The Alaska Scallop Association, with its address at Stone's Lakewood, Wash., residence, has hired several lobbyists to help make its case.

According to the state's lobbyist directory, former CFEC Chairman Frank Homan, Gerald McCune, Thomas Meiners and former United Fishermen of Alaska President Bobby Thorstenson are being paid a total of \$47,000 to lobby for SB 54.

Homan, who Tkacz reported for Laws for the Sea has been accompanied by current CFEC Commissioner Brown in the halls of the Capitol, described his lobbying interests on behalf of the scallop association as supporting a program "promoting local ownership and control of the state issued permits" and said it enabled several smaller Alaskan scallopers to participate in the fishery.

"These fisheries were once owned and controlled by entirely out of state interests and would likely revert to such control if the Program were to sunset," Homan wrote in his disclosure.

The necessity of limited access was a point made by ADFG Commissioner Cora Campbell, Brown and others in the first Senate Resources Committee hearing March 4.

Proponents of extending the program have said ADFG would not be able to manage the fishery if it were in open access.

The quota for the state waters fishery is limited, they have said, and open access could lead to overfishing so quickly that the state might not allow a fishery at all.

In his letter to the committee, Hutchings of Kodiak, disputed that claim by noting the state water fishery could operate as other parallel fisheries do under open access.

Prior commissioners of ADFG have told the legislature that the department has authority to require 100 percent observer coverage, which allows real-time catch reporting and prevents exceeding crab bycatch limits, as well as the ability to set a separate harvest in state waters or to close areas to prevent localized depletion.

The high start-up costs and small state harvest also make it unlikely several boats would rush into the fishery under open access.

"If State scallop fishery is allowed to revert to open access, new participants that are motivated to fish more cleanly could target scallops," Hutchings wrote. "The same folks that want to keep other participants out of their regulation-created monopoly have overblown the fears of unrestricted fishing and disproportionate harvests."

There is no question that Alaska scallop stocks are in good shape and are managed conservatively. The Alaska Scallop Association's marketing efforts have also helped the wholesale price leap to \$10 per pound in 2012.

According to its members' public testimony, the cooperative paid \$1.6 million in crew shares, bought \$850,000 worth of fuel in Alaska, had \$480,000 in maintenance work done on their vessels and bought another \$335,000 in groceries and supplies last year.

As a small fishery with what is now only two boats operating in state waters, managing the harvest is extremely simple.

That's not the only thing Seaton is considering, however.

"We need to look at this in all aspects," Seaton told the CFEC's Brown in February, "and not just in ease of management."

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