

HB

241

3/31/75

COMMITTEE REPORT

JUDICIARY

HOUSE

Mr. Speaker:

Date 3-31-75

The Committee on RESOURCES has had HB 241

under consideration. A Majority of the members of the Committee

() recommends it DO PASS

() recommends it DO NOT PASS

recommends it DO PASS WITH ATTACHED AMENDMENT(S)

() recommends it BE REPLACED WITH CS FOR _____ AND THAT

CS FOR _____ DO PASS

() "and" recommends it BE REFERRED TO THE _____

COMMITTEE

() reports it back WITHOUT RECOMMENDATION

() "other"

Members signing the Majority report:

<u>Robert Anderson</u>	_____	_____
<u>Mike Hirschbrenner</u>	<u>_____</u>	_____
<u>_____</u>	_____	_____

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Robert Anderson, Chairman

A M E N D M E N T

OFFERED IN THE HOUSE:

By: House Resources
COMM. FILE

To: Amdnd

HOUSE BILL No. HB 241

SENATE BILL No. _____

PAGE: 1

LINE: 15

Delete the words

"Some portion of"



Alaska House of Representatives



HUGH MALONE

POUCH V
JUNEAU
99801

P. O. BOX 9
KENAI
99611

M E M O R A N D U M

TO: Mr. John Elliott
Executive Director
Legislative Affairs Agency

February 24, 1975

FROM: Hugh Malone
Chairman
House Finance Committee

SUBJECT: Corrective Amendment AS 16.05.540 and AS 16.05.670(e)

Attached is a recent District Court Decision providing for a narrow interpretation of the Statutes regulating the operation of fishing gear. In my opinion the Court interpretation of the Statutes is too narrowly drawn, however, a strict interpretation of the Statutes might also be the same result on appeal. It is my belief that the Legislature intended that the gear license holder be present at the operation of fishing and that it take place under his direct charge and supervision. I am sure that the Legislature did not intend that the gear license operator had to have his hand on the net every time his helper did. Therefore I would request that you prepare corrective Amendments to the above Statutes, which would make very clear that the legislative intent is that the gear license holder must be present at the fishing site or on the boat during the operation of fishing and the gear operation take place under his supervision and control. I would appreciate having this bill as soon as possible. Thank you.

24
1975

Attachment

HM:ki's



LAW OFFICES OF
HAHN, JEWELL & STANFILL

A. ROBERT HAHN, JR.
ALLEN L. JEWELL
STAN D. STANFILL

542 WEST SECOND AVENUE
ANCHORAGE, ALASKA 99501
TELEPHONE 278-1544

HOMER, ALASKA
TELEPHONE 243-0709
SENAI, ALASKA
TELEPHONE 283-7759

October 1, 1974

Mr. Marvin Eppes
2751 N. Crosby Road
Oak Harbor, Washington 98277

Dear Marvin:

I today received and enclose for your examination the memorandum opinion by Judge Nicholas in your set net cases. As you can see, the court has taken the position that all persons holding licenses must be present at and physically assist in all operations of the fishery from the time the net is put into the water until its taken out. I believe that the position he has taken is an extremely strict interpretation of the statutes and might very well be open to amendment either by the legislature here in Alaska or in a higher court proceeding.

I talked with Judge Nicholas today and he indicated to me that he would really like to see the case appealed to a higher court and I got the impression that his initial opinion took a very narrow position as to "assistance" under the statutes in hopes that the matter would be appealed to a higher court. The Judge was extremely friendly in his conversation and indicated that he was grateful to the parties for proceeding as they had and getting all of the evidence on the record. All of which is, of course, small comfort in view of the fact that we felt that our position was correct and it is disappointing to have the court adopt such a restrictive definition of assistance.

The Judge told me that he would continue the matter for whatever period of time I needed to confer with you and possibly any other set net fishermen who might wish to combine their resources and challenge the decision. Thus, as you can see, the court is not treating the proceeding in any way as a criminal action, and is in fact eager to have the matter resolved at a higher level. The Judge indicated that he would ask only a very nominal fine

Mr. Marvin Eppes
October 1, 1974
Page 2

If you did not decide to press your appeal, such fine amounting to \$50 each for you, Jim, and Dick. The case as to Tom Anderson was, as you know, dismissed so there would be no fine in that regard. I have enclosed a copy of the Order of Dismissal as to Tom so that you can provide him with a copy of same.

Obviously the cheapest and easiest way for you to go would be to pay the fine and let the matter drop. An appeal to a higher court would run at a minimum around \$5,000 I'm sure before we got through. This would only be feasible if you could get up a joint effort with a number of other fishermen in the area. I would suggest that if you would consider an appeal, that you write to any of your friends who do fish the beach and ask them if they would be willing to contribute a certain amount to take the question of assistance up on appeal to a higher court. It would certainly appear to me that under the definition of assistance as rendered by the Kenai Judge, that it will be very difficult for other set net fishermen to remain strictly legal at all times. I would be delighted to handle the appeal as you well know, however, if it is the consensus of you and your fellow fishermen that some other attorney might do a better job, I will understand completely and will be only too happy to assist whoever is chosen for the task in his preparation with any information that I have as a result of handling the initial hearing.

It has been a real pleasure getting to know you and your fine family and we will definitely be looking forward to seeing you next spring. Please let me know as to your thinking with regard to the question of an appeal as soon as possible.

With warmest personal regards to you,

HAHN, JEWELL & STANFILL



A. Robert Hahn, Jr.

ARI/da
enclosure

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT KENAI

STATE OF ALASKA,)
Plaintiff,)
vs.)
MARVIN E. EPPES,)
Defendant.)

No. 74-10538 & 74-10636

MEMORANDUM OPINION

The statutes that the court is called upon to interpret are A.S. 16.05.540 and 16.05.670(e). The thrust of the two statutes as they pertain to the complaint at bar is two-pronged: (1) In order to operate a gill net one must have a license issued by the State; and (2) Such nets as are permitted by law may not be utilized unless the person to whom the nets are licensed operates or assists in the operation. It is the construction to be placed on the underlined language that will be taken up in this opinion.

Counsel for Defendant would have the Court rule that almost any single act required for gill net fishing would be a sufficient act for a person to be "assisting" in the operation of his set gill net. Using this rational if a person assisted in loading his nets into a boat, he need never be present while his nets were being fished by other person. It is this Courts opinion that the Legislature put the words "or assists" for the simple reason of allowing the licensee the opportunity of having some other person assist him in the legal operation of his fish nets should this become necessary.

First, the Court is called upon to define the word operation as it pertains to the use of gill nets. Or, more specifically, what activities are encompassed by the term and what activities are not to

be considered as part of the operation of the nets. The Court has been unable to find any cases that specifically define "operation" as it applies to fishing with nets. The word has been defined in general and non-specific terms: "operation" is doing some act or performance of some type of service, work, deed, production, creation or product of work". Wierman S.S. Corp. V. Snow, 222 F. Supp 892, 897 (Dist. Ct. Ore. 1963). It is quickly apparent that this definition does little to help us here. In Dale V. Saunders Bros., 157 N.Y.S. 1062, 171 App. Div. (1916) the Court dealt with the question of what was encompassed by the phrase "operation of a horse-drawn vehicle." The Court stated, at p. 1063, "the 'operation' of a vehicle drawn by horses, referred to in Workmen's Compensation Law.....as a hazardous employment is not confined merely to moving the vehicle, but relates to everthing incident to the employment, and includes the loading of a wagon with sand in the course of employment. (emphasis added). The rationale of this holding may be readily applied to the statutes at issue here. The legislature obviously intended to restrict the use of the gill nets, to some degree, to those persons to whom the nets were licensed. For if this were not their purpose there would be no justification for either the statute or the language requiring the licensee to personally participate in the utilization of the nets. With this conclusion in hand and mindful of the language in Dale V. Saunder supra, the operation of a gill net should include all activities involved in (1) placing the nets in the water; (2) the periodic checking of the nets and all activities necessary to such checking, including but not necessarily limited to pulling up the nets for this purpose, removing any fish from the nets, and returning the nets to the water after such checking; and (3) removing the nets from the water after the period for gill-net fishing has ended. All of these activities should be performed by the person to whom the nets are licensed, or at least partly performed by him in the event that assistance is required. ^{*} Conversely, none of these activities should be permitted without the participation of the licensee. Similarly, it should not be sufficient under the statute for

a licensee to direct from the shore any of the above mentioned activities when they are being undertaken by others in a boat; nor from a boat when the activities are being performed on shore.

By passage of the statute the legislature intended to restrict the use of gill nets to those in possession of a valid license. And the application for and acceptance of the license signifies an agreement by the licensee to abide by the statutes. For all of these reasons, and mindful of the general rule that criminal statutes are to be narrowly construed, the Court will consider a somewhat narrow construction of the word 'operation' to those activities directly related to gill net fishing.

In the same vein the Court will require, under the language of the statutes permitting a licensee to assist in the operation of the gear, the same type of affirmative conduct in furtherance of successful gill net fishing. In 1960 OP. Atty Gen No. 12, the attorney general stated that the licensee must assist in the operation of the licensed gear (nets). The presumption leaps out that active and affirmative participation in the utilization of the gill nets in accordance with the guidelines suggested above is required by the statute. The legislation was aimed at prohibiting one person from operating gill nets licensed to another and that is precisely the conduct engaged in by the defendant in this case.

In view of the above, it is the Courts opinion that a licensee must be present at, and physically assist, in all operations of gill net fishing, from the time the net is placed in the water, until it is removed from the water at the close of the fishing period; however, he may be assisted by any other person who is licensed as a commercial fisherman, should the need arise.

DATED this 24 day of September, 1974 at Kenai,
Alaska.


MAGISTRATE

February 14, 1975

Governor Jay Hammond
Capitol Hill
Juneau, Alaska

Honorable Sir,

Cook Inlet Fishermen's Fund members present at a February 9, 1975 meeting strongly recommend that we start Cook Inlet on a minimum of a three (3) day (18 hour periods) a week fishery, as even a three day per week fishery is a test fishery.

This recommendation is made on the basis that there has never been adequate evidence that the type of closures that we have had helps build the salmon runs. For example, the King Salmon and early Red Salmon closure for the past 13 years. (The Department of Fish & Game still doesn't know the strength of these runs.)

If on a three day per week fishery we find that any given stream still is lacking an adequate escapement, let us enhance this stream with the use of gravel incubators.

Another matter that we are all concerned with is the decision made by Magistrate Jess Nicholas last fall in regards to the case of State of Alaska vs. Marvin E. Eppes Case No. 74-10636 & 74-10538 defining what the word "assist" means in Section 16:05.540 'Limitation of Fishing' Gear Licenses in the Commercial Fishing Regulation book page 7.) Enclosed is a copy of the above case. Having fished before, you no doubt realize that legal gill net fishing will be virtually impossible under the above ruling.

We feel the Legislature should amend or change the wording to read: (Section 16:05.540 Limitations of Fishery - on issuance of Fishing gear licenses.) "Assist" shall be defined as being present on the location and helping with any portion of the operation. Any other licensed crew member may also operate or assist in the operation of the above said gear.

This is protection a family set Gill Net Unit must have; and can see where problems might also arise aboard a drift Gill netter.

Floyd Blossom


Cook Inlet Fishermen's Fund Representative

Enc. 2

copies to: W.I. Palmer - Executive Secretary
Clem Tillion - Senator
Representative - Hugh Malone
Representative - Leo Rhodes
Jim Reardon - Board of Fish & Game
James Brooks.- Comm. of Fish & Game

House Resource Committee
Nels A. Anderson, Jr - Chairman
Room 106 Capitol Bldg.
Meeting Time 8:00 a.m.

HOUSE RESOURCE COMMITTEE SCHEDULE

March 31- HB #130 and HB 241

HB #130- An act relating to initial issuance of commercial fishing entry permits for Prince Williams Sound.

HB #241- An act relating to the operation of fishing gear.

April 2- HJR #13 and HB #312

HJR #13- Relating to the Perenosa timber sale of Afognak Island.

HB #312- Relating to King Crab marketing and control

April 4- HB #278 and HB #313

HB #278- Fishery Water Protection Reports

HB #313- Relating to interference with or pollution of water inhabited by fish or shellfish.

JOINT HOUSE-SENATE CONFIRMATION HEARINGS ON:

FISH AND GAME BOARD MEMBERS

April 8- Hearing on: Mr. Nick Gregory, Egegik; Mr. Nick Szabow, Kodiak;
Mr. Darrell Farman, Anchorage;

2:00 p.m., Room 106 Capitol Bldg.

April 10- Hearing on: Mr. Burton Bliss, Wasilla; Mr. Gordon Jensen, Petersburg;
Mr. Jim Beaton, Juneau; Mr. Clint Buckmaster, Sitka;

2:00 p.m., Room 106 Capitol Bldg.

HOUSE RESOURCES COMMITTEE REPORT

HB # ~~241~~ HB ~~241~~

241

A recent court case has interpreted AS 16.05.540: so restrictively as to require a gear licensee to actually have his hands on each net each time the net is placed, checked, and removed, during rather than just being present at the site of the immediate fishing operation while a crew member acted at his instruction. The original legislative intent was only to keep licenses from being operated by "remote control" from a town on shore or even from Seattle.

The current bill, including a minor amendment suggested by the sponsor, would instead require that the licensee be present "at the gear site and operating, assisting, or supervising the immediate fishing operation," which would more closely fit the original legislative intent and still take into account practical realities of commercial fishing.