

**HB**

**394**



# STATE OF ALASKA

HOUSE OF REPRESENTATIVES

Box V, Juneau, Alaska 99811

(907) 465-2487 • 465-2498

REPRESENTATIVE CLIFF DAVIDSON • DISTRICT 27 • Box 746, Kodiak, Alaska 99615 • (907) 486-8250

TO: Senator Jan Faiks, Chair  
Senate Judiciary Committee

FROM: Representative Cliff Davidson *CD by Jan*

DATE: March 30, 1990

## HOUSE BILL 394

"An act relating to utilization of pollock and prohibiting the waste of pollock taken in a commercial fishery."

Pollock are a relatively small, low value fish that are valuable only because of their great abundance. Traditionally, pollock have been caught throughout the year by large trawler vessels. Pollock have provided a stable and reliable year round source of product to the onshore processing industry.

During the spring of each year pollock gather in huge aggregations to spawn. At that time the roe (or eggs) of the female pollock are an extremely valuable and desirable product. Last year in March and April of 1989, the large factory trawler fleet targeted the enormous pollock aggregations spawning in Shelikof Strait between Kodiak and the Alaska Peninsula. These huge vessels caught vast quantities of spawning pollock, throwing overboard everything but roe from the females.

As a result of this enormous waste, and the resulting publicity, the North Pacific Fishery Management Council proposed and passed an emergency regulation prohibiting the stripping of pollock roe in federal waters. That emergency regulation was signed by the Secretary of Commerce but is currently being litigated by an Seattle-based roe stripping company.

The roe stripping ban adopted in HB 394 is intended to parallel action by the federal government. Before the federal ban was implemented last month, the offshore factory/processors were able to begin stripping pollock roe once again. HB 394 is intended to ban the odious practice of roe stripping in state waters and send a message to the Secretary of Commerce that Alaskans do not support roe stripping.

## HB 394 Analysis

### Section 1.

The legislative findings establishing the justification for banning roe stripping in pollock.

### Section 2. Adds new sections to article 3.

#### AS 16.10.164

Establishes a state policy that roe stripping and not using the eatable flesh is wasteful, and determines that:

- 1) roe stripping should be eliminated to the fullest extent possible and;
- 2) commercially taken pollock should be utilized for human consumption to the fullest extent practicable.

#### AS 16.10.165

- a) Establishes that a person may not waste pollock
- b) Delegates to the Board of Fish the ability to make regulations under this act.
- c) Makes waste of pollock a class A misdemeanor.
- d) Definitions of terms used in this section

### Section 3.

Adds an immediate effective date.

\*Note: The language in AS.16.165 is very similar to the language used in the statute prohibiting the roe stripping of herring.



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
BILL ANALYSIS

DEPARTMENT Fish and Game	DIVISION Commercial Fisheries	BILL NUMBER HB 394	SPONSOR Davidson
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SHORT TITLE OF BILL  
Utilization of Pollock

DEPARTMENT POSITION  
Support

PREPARED BY Earl Krygier	DATE 01/10/90	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 1/11/90
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SUMMARY

OTHER AGENCIES AFFECTED BY BILL Public Safety	CONSTITUENT GROUP(S) AFFECTED BY BILL Commercial fishermen and fish processors
ORGANIZATIONAL SUPPORT FOR BILL	ORGANIZATIONAL OPPOSITION TO BILL

FISCAL IMPACT:  NONE  FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

This bill, in conjunction with federal fisheries management regulations recently passed by the North Pacific Fisheries Management Council (NPFMC), is intended to address the problem of pollock roe stripping which occurred in the Gulf of Alaska during the 1989 season. The pollock fishery is managed with a strict quota. In 1989, large factory trawlers moved into the Kodiak area during the pollock spawning season and quickly consumed all remaining quota by stripping the high value roe and discarding males and the usable flesh of the roe-stripped females. As a result, local fish and shore-based processors were left with a surplus.

ANALYSIS OF BILL/PROGRAM EFFECTS Without access to a haul

The effect of this bill would be to prohibit roe stripping in state waters and at shore-based processing facilities. This action, in conjunction with a similar federal regulation governing federal waters, would eliminate roe stripping in all catching and processing sectors of the industry.

and shore-based processors were left with a surplus.

AMENDMENTS PROPOSED

STATE OF ALASKA  
990 LEGISLATIVE SESSION

BILL VERSION: HB 394  
PUBLISH DATE: \_\_\_\_\_

### FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: Utilization of Pollock

Agency Affected: Fish and Game  
BRU: Commercial Fisheries

Sponsor: Davidson  
Requestor: Governor

Components: ATI

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0					
TRAVEL	0					
CONTRACTUAL	0					
SUPPLIES	0					
EQUIPMENT	0					
FIXED ASSETS & STRUCTURES	0					
LIABILITIES, CLAIMS	0					
OTHER	0					
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE	0	0	0	0	0	0
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**CHANGES:** (Thousands of Dollars)

GENERAL FUND						
OTHER FUNDS						
TOTAL	0	0	0	0	0	0

**ASSUMPTIONS:**

TIME	0	0	0	0	0	0
TIME	0	0	0	0	0	0
OTHER	0	0	0	0	0	0

NOTES: (Attach a separate page if necessary)

by: Bob Clasby  
Commercial Fisheries

Phone: 465-4210  
Date: 07/10/90

by Commissioner: [Signature]

Date: 11/1/90

in (by preparer):  
Director of Finance  
Executive Sponsor  
or  
Director of Management and Budget  
Responsible Agency(ies)

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S. 1070, 93  
(1972).

Sec. 16.10.125. Use of termination device on shellfish and bot-  
tom fish pot required. The Board of Fisheries shall, by regulation,  
prescribe a termination device or devices for all shellfish and bottom  
fish pots. In this section "termination device" means a biodegradable  
seam or panel or other device which renders the pot incapable of  
holding shellfish or bottom fish for more than six months when it is  
continuously immersed in sea water. (§ 3 ch 103 SLA 1977)

Sec. 16.10.130. Penalties for violation of AS 16.10.120 —  
16.10.125. A person who violates AS 16.10.120 — 16.10.125 is guilty  
of a misdemeanor, and upon conviction is punishable by imprisonment  
for not more than six months, or by a fine of not more than \$1,000, or  
by both. (§ 2 ch 26 SLA 1959; am § 4 ch 103 SLA 1977)

Collateral references. — Entrapment  
with respect to violation of fishing laws,  
75 ALR2d 709.

### Article 3. Herring Spawn.

Section	Section
172. Legislative policy on utilization of herring	173. Utilization of commercially taken herring
	175. Removal of herring from state

*Secs. 16.10.140 — 16.10.170. Taking of herring spawn; exceptions; certain restrictive covenants; penalties. [Repealed, § 2 ch 91 SLA 1970.]*

Sec. 16.10.172. Legislative policy on utilization of herring. The legislature finds the following: (1) extensive and valuable herring populations are available for harvest in waters subject to the jurisdiction of the state; (2) commercial markets are available for herring processed in several forms; (3) one processing technique presently employed involves deliberately permitting decomposition of the herring carcass to allow for removal and subsequent sale of the roe product, with the consequence that the flesh is unusable and discarded. The legislature declares that the process referred to in (3) of this section is wasteful and does not constitute utilization of this resource for the maximum benefit of the people. Therefore, it is the policy of the legislature that this process should be eliminated to the fullest extent possible. (§ 1 ch 9 SLA 1977)

**Sec. 16.10.173. Utilization of commercially taken herring.**

(a) A person may not waste or cause to be wasted any commercially taken herring. In this subsection, "person" has the meaning given in AS 01.10.060 and also includes a joint venture.

(b) In this section, "waste" means the failure to use the flesh of commercially taken herring for reduction to meal, production of fish food, human consumption, food for domestic animals, scientific or educational purposes, or round herring bait. Normal, inadvertent loss of flesh associated with the uses described in this subsection which cannot be prevented by practical means does not constitute waste. The commissioner may authorize other uses of commercially taken herring consistent with the intent of this section and AS 16.10.172 upon receipt of a request accompanied by a detailed justification.

(c) In this section, "flesh" means all muscular body tissue surrounding the bony skeleton of the herring.

(d) The Board of Fisheries may adopt regulations under the Administrative Procedure Act (AS 44.62) it considers necessary for implementation of this section. The board may delegate its authority under this section to the commissioner.

(e) The provisions of this section do not apply to herring taken commercially in the Bering Sea (including appurtenant bays, sounds, estuaries, and water of the state) north of 56° North Latitude, until January 1, 1979.

(f) A person who violates this section is guilty of a class A misdemeanor. (§ 1 ch 9 SLA 1977; am § 26 ch 132 SLA 1984)

**Effect of amendments.** — The 1984 amendment added subsection (f).

**Editor's notes.** — Section 1, ch. 23, SLA 1985 provides: "HERRING STRIPPING. (a) Notwithstanding AS 16.10.173, a person may strip commercially taken herring for the purpose of removing and selling the roe product if prior authorization is obtained from the commissioner of fish and game and the herring is taken from and the carcass disposal process occurs in the following fisheries of the Bering Sea during the following periods:

"(1) the Togiak fishery — south of the latitude of Cape Newenham and north of the latitude of Cape Menshikoff, until July 1, 1986;

"(2) the Security Cove/Goodnews Bay fishery — north of the latitude of Cape Newenham and south of the latitude of Dall Point, until July 1, 1987;

"(3) the Cape Romanzoff fishery — north of the latitude of Dall Point and south of the latitude of Black River, until July 1, 1987;

"(4) the Norton Sound fishery — north

of the latitude of Black River and south of the latitude of Cape Prince of Wales, until July 1, 1988;

"(5) the Kotzebue fishery — north of the latitude of Cape Prince of Wales and south of the latitude of Cape Krusenstern, until July 1, 1988.

"(b) The commissioner may authorize a person to dispose of herring carcasses under (a) of this section only if the person submits to the commissioner an operational plan demonstrating the intent to comply with the provisions of AS 16.10.172 and AS 16.10.173 by the dates specified under (a) of this section for the fishery in which the herring carcasses are to be disposed.

"(c) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) regarding disposal of herring carcasses for each administrative area where disposal occurs.

"(d) The provisions of AS 46.03.100 apply to the disposal of herring carcasses under this section."

**Sec. 16.10.175. Removal of herring from state.** (a) A person may not remove herring from the state before the herring has been frozen or otherwise processed for shipment.

(b) In this section, "processed for shipment" includes, but is not limited to, icing, stripping or salting of the herring; however, it does not include salting of the herring if five percent or more of the body weight of the herring consists of roe. (§ 3 ch 27 SLA 1980)

**Article 4. Migratory Fish and Shellfish.**

<p><b>Section</b>                  180. Legislative findings                  190. Regulations                  200. Unlawful taking prohibited                  210. Unlawful sale or offer prohibited</p>	<p><b>Section</b>                  220. Penalties for violation of AS                  16.10.200 and 16.10.210                  230. Exemptions</p>
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**Sec. 16.10.180. Legislative findings.** The legislature finds and recognizes these facts:

(1) migratory fish and migratory shellfish are present in commercial quantities inside and outside the territorial waters of the state;

(2) migratory fish and migratory shellfish taken from the waters of the state are indistinguishable, in most cases, from those taken from the adjacent high seas;

(3) substantial quantities of migratory fish and migratory shellfish move inshore and offshore intermittently and at various times during a given year and in so doing often enter and leave territorial waters of the state;

(4) to conserve the migratory fish and migratory shellfish found inside the waters of the state it is necessary to strictly enforce local laws and regulations;

(5) by making certain laws and regulations enacted or adopted for the regulation of the coastal fishery applicable to the adjacent high sea areas, enforcement of these laws and regulations is facilitated;

(6) conservation regulations should not be adopted to impose economic sanctions. (§ 1 ch 121 SLA 1960)

**NOTES TO DECISIONS**

A state may reasonably extend its jurisdiction to control fish and game resources outside the limited area of its territorial sovereignty, if such an exercise is based on the conservation principles inherent in their migratory characteristics and not based on artificial boundaries or political circumstances. *State v. Bundrant*, Sup. Ct. Op. No. 1232 (File Nos. 2295, 2435, 2444), 546 P.2d 530 (Alaska 1976), rehearing denied, 547 P.2d 838 (Alaska 1976).

Alaska's interest in regulating extrater-

ritorial fishing qualifies as one recognized for a legitimate exercise of police power. There is an established fishery with clear economic impact in the Bering Sea fishery area. The migratory habits of the crab are predictable and fishing outside the three-mile limit depends on growth and development within the limit. If the fishery outside the three-mile limit destroys the resource outside, it will similarly destroy the resource inside the three-mile limit. *State v. Bundrant*, Sup. Ct. Op. No. 1232 (File Nos. 2295, 2435, 2444), 546 P.2d 530

# Anchorage Daily

## News

VOL XLIV, NO. 83 88 PAGES

ANCHORAGE, ALASKA, FRIDAY, MARCH 24, 198

### Fleet dumps thousands

#### Pollock stripped of roe, then tossed; huge catch prompts

By HAL BERTON  
Daily News reporter

A factory trawler fleet massed off Kodiak this month scooped up more than 37,000 metric tons of pollock; but some of the ships kept only the valuable roe and dumped overboard thousands of tons of edible flesh.

The fishing frenzy of the 17-boat, Seattle-dominated fleet helped trigger Thurs-

day's unexpected shutdown of the major Gulf of Alaska pollock harvest and raise new questions about the ethics of deep-sea seafood.

"When the world is starving, the factory trawlers have decided to discard protein," said John Sevier, superintendent of the Alaska Pacific Seafoods, a Kodiak shore processor that uses the meaty flesh to manufacture

surimi. "It's wanton waste."

The closure order was issued by the National Marine Fisheries Service after determining that the entire year's Gulf harvest quota for pollock had been taken. The order is an economic blow to Kodiak, whose fishermen say their pollock season normally lasts through December and employs hundreds of people to harvest and pro-

cess the fish.

"This is the Seattle-ization of our fisheries," said Dave Harville, an island fisherman who serves shore-based plants with three boats. "They took our fish and shut down their competition. Now, they're going to go on out to the Bering Sea and fish the rest of the year. But we can't move our land."

## of tons of fish

### closure of Gulf of Alaska fishery

This year was the first time the U.S. factory fleet, which both catches and processes fish, has showed up off Kodiak. They were lured to the Gulf by the pollock roe, which fetches a high price from Japanese consumers. And in about a month's time, the fleet caught and processed about 60 percent of an annual harvest quota that last year went entirely

to shore-based plants.

The roe-stripping tactics of the factory fleet helped speed up the processing, according to Tyson Vogeler, a Kodiak-based North Pacific Fishery Management Council official attempting to monitor the harvest. Many ships reported spectacular catches of 500 to 900 metric

Please see Back Page, FISHERY

# THE BACK PAGE

## FISHERY: Fleet dumps thousands of tons of pollock after taking roe

tons per day, according to Vogeler.

The only way to handle such daily volumes of fish is to speed up the processing by cutting out the high-value roe, and jettisoning — rather than salvaging — the relatively low-value flesh.

Vogeler said precise data on roe-stripping was impossible to get because the U.S. factory ships — unlike foreign factory ships that used to dominate the fishery — don't have to carry federal observers.

Ted Evans, executive director of the Seattle-based Alaska Factory Trawlers Association, confirmed that at least some of the ships were roe-stripping. He said he didn't know how many.

Evans said he didn't like the waste but pointed out that federal regulations allow the practice. Foreign factory ships that used to fish off Kodiak also jettisoned pollock flesh, he said. And this year, at least one shore-based processor also was wasting pollock meat, he said.

"What degree of waste is acceptable," Evans said. "There are all kinds of philosophical viewpoints on that and we are certainly willing to participate in that debate."

Kodiak industry officials acknowledge that some fish were stripped in town and the carcasses hauled out to sea for dumping. But they say much more fish was wasted on the high seas, and such waste adds insult to the economic injury of the closure.

"There's a gigantic rape of the resource, that's what going on," said Reed Was-

son, president of Kodiak-based Eagle Fisheries.

John Peterson, the chairman of the North Pacific Fishery Management Council, the group that helps regulate the harvest, also questions roe stripping.

"It's just not right in my opinion to waste the fish that way," Peterson said. He would welcome proposals to end the practice, he said.

In the most efficient of factory and shore-based plants, almost all of the fish can be utilized. Flesh is processed into fillets, surimi or other products. And guts, heads, skin, bones and tail are made into fish meal or fertilizer.

Jeff Stephan, manager of the Kodiak-based Alaska Fishermen's Marketing Association, said his group introduced a proposal to force processors to use more of the fish, but the council has not yet seriously considered it.

The arrival of the Seattle factory fleet off Kodiak reflects the final phase of Americanization that has allowed U.S. fishermen, with first claim to the resource, to push almost all foreign ships out of the Alaska bottom fishery.

The fishery is conducted according to federal regulations that offer U.S. shore-based processors no preference over U.S. factory ships.

All must fight for a share of a pre-set annual quota.

Up until this year, U.S. factory ships chose to stay out of the Gulf of Alaska to concentrate on much larger Bering Sea fisheries, where pollock also have been stripped of roe. That allowed shore-based processors in Kodiak to prosper by contracting with small catcher boats to bring the fish onshore for processing.

This year's quota would have been enough to keep the Kodiak plants operating through December, if they processed at the same rate as last year, according to National Marine Fisheries Service statistics.

Instead, unless the council decides to reopen the fishery, they will process a more limited harvest of cod, flat fish, halibut and other species.

To prevent a repeat of 1989, Kodiak fishermen will ask the council to form a special fishing zone in the Gulf, according to Harville. The plan would require boats that choose to fish the

Gulf to remain there the entire year.

"If you want to fish in the Gulf, fine, but you can't then turn around and head for the Bering Sea," Harville said.

Meanwhile, Kodiak fishermen, as well as others in the industry, are pressing for new federal or industry funding to finance a greatly expanded observer program.

Peter Craig, a Kodiak-based state fishery official, said the observer program would help document waste that ranges beyond pollock.

Rock sole, another marketable fish, frequently is stripped of roe and the flesh wasted, Craig said. And many fish are fossed overboard by both factory trawlers and smaller catcher boats because they are too small to fit the processing machinery. The undersized fish are supposed to be reported as part of the catch, but some boats routinely flaunt the law, he said.

"Everybody ... has a waste problem," Craig said.

# Fish trashing angers Kodiak

By DANIEL R. SADDLER  
Times Writer

*Amc. Times  
2/2/89*

An Outside fleet of factory trawlers stripping valuable roe from pollack and discarding edible flesh in the Gulf of Alaska has outraged Kodiak's fishing community and prompted regulators to acknowledge the need to end the practice.

On Thursday, the National Marine Fisheries service ordered the Gulf pollack fishery closed, after fishermen took the entire 1989 allowable catch of 60,000 metric tons of pollack.

"We have reports that there was discarding of pollack carcasses, and only the roe was salvaged," Brooks said. "But I don't know if that was common practice with all operations."

"Our shore-based plants felt 60,000 tons would have gotten them through the year," said Dave Harville, owner of three shore-based trawlers and one longliner in Kodiak. "The factory trawler fleet moved in to the south end of island and just stripped roe until they put us out of business."

He said he could tell the larger ships were stripping roe by how fast they were going through the fish.

Ships stripping roe can use fish three times faster than the shore based processors who take time to fillet, process for surimi, and freeze pollack, he said.

Fishermen were getting \$4 per pound for untreated roe, while pollack flesh fetched about eight cents a pound, said Oscar Dyson, a Kodiak fisherman and member of the North Pacific Fisheries Management Council.

"It's gonna be a disaster if its allowed to shut down our poliack fishery for the rest of the year," Dyson said. "I'd imagine 1,000 cannery workers will be out of work this Sep. the fall pollack fishery would have closed."

"It's the first time we've had pollack fishery of this magnitude outside Shelikof Strait," said Brooks. "We were fairly suprised by it ourself."

While roe stripping is legal, the North Pacific Fisheries Management Council acknowledges its problems. Last year, they closed pollack fishing in the Bering Sea during the spawning season when excessive roe fishing threatened stocks, Brooks said.

Brooks said the roe stripping didn't pose a problem to the continued health of the pollock stocks, because any fish caught were included in the total allowable catch.

However, he admitted the process is legal, and predicted the council would study the issue this summer, and eventually ban the practice.

"I think (a ban on roe stripping) has to happen," Brooks said. "How quickly it will happen, I don't know. Over time, discarding the enormous amounts of fish is simply not going to be accepted as a practice that can be sustained."


Jim Campbell, former director of the North Pacific Council, called for an end to roe stripping, the reservation of some share of the pollack catch for on-shore processors, and studies to see if regulators can allow a greater harvest of pollack this year.

"I'm suprised the owners of the large factory trawlers, primarily from Washington made this move to take that total allocation," Campbell said. "They must have known that doing this would inflame Alaskans and the general public."

Pollack stocks are down from their highs of the early 1980s, and as the domestic fishing fleet has taken over from the foreign fleets that formerly took groundfish under joint ventures with the U.S., the demand for the fish has increased.

This year, the domestic fleet had more than enough capacity to catch all the allowable groundfish catch in the Gulf and Bering Sea.

**Anchorage Daily News**



Winner, 1976 Pulitzer Prize Gold Medal for Public Service

**Gerald E. Grilly**  
Publisher

**Howard Weaver**  
Managing Editor

**Michael Carey**  
Editorial Page Editor

Katherine Fanning, Editor and Publisher 1971 to 1983  
Lawrence Fanning, Editor and Publisher 1967 to 1971

Founded in 1946 by Norman C. Brown

# Troubled waters off Kodiak Island

A Seattle-dominated fishing fleet's month-long orgy of roe-stripping off Kodiak has yielded a severe blow to the community's fishermen. The fleet moved in, took more than 37,000 metric tons of pollock, stripped the valuable roe from the fish, and tossed much of the flesh back in the water — after which federal authorities shut down the major Gulf of Alaska pollock harvest.

Capping it all off, the Seattle fleet departed the area for the Bering Sea after slaughtering the pollock, the most abundant of the North Pacific bottomfish — leaving Kodiak fishermen to depend on a more limited harvest of other fish.

The debacle raises anew questions about the fairness of fishing regulations. Current regulations permitted the Outside fishermen to devour within a matter of weeks a fishery that otherwise would have contributed to Kodiak's economy through December.

More importantly, the episode renews revulsion at the obscene waste of tons of edible fish. To fish processors, the high-value roe is much preferred over the low-value pollock meat. The decision to strip the roe and throw the fish overboard is a business one. The practice, however, visits horrendous abuse upon the resource — abuse that no resource, fish or otherwise, can long endure.

The bald waste at the scene of a roe-stripping is stunning. Those who have witnessed some of the more frenzied operations report mile upon mile of dead fish in the water. The decaying fish float in the huge masses, then sink to the ocean bottom.

Few involved in the process can claim clean hands on the waste issue. In fact, some of the fish caught by the Seattle fleet were stripped in Kodiak and the fish carcasses hauled out to sea and dumped.

Regulations advancing the stable, long-term interest of the fishery and of Alaska are needed. And a central component of the regulatory process should be a stepped-up system of observer coverage. Observers have proven their value in policing fishing regulations, and a growing body of opinion is urging expansion of the tactic.

The course toward a sane fishing policy must weather a gale of conflicting economic and governmental interests. But the difficulties should not deter attempts to reach that goal. For nothing less than the wise use and preservation of the resource depends on it.



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Office of General Counsel  
P.O. Box - 21109  
Juneau, Alaska 99802-1109  
Telephone (907) 586-7414

March 26, 1990

Representative Cliff Davidson  
Alaska State Legislature  
P. O. Box V  
Juneau, Alaska 99811

Re: Speedwell, Inc. v. Mosbacher, Civil (W.D. WA.)

Dear Representative Davidson:

This letter is to advise you of the lawsuit recently filed in United States District Court in Seattle challenging the Secretary of Commerce's emergency rule limiting pollock roe stripping in the fisheries of the United States exclusive economic zone off Alaska. Plaintiff Speedwell, Inc., is a Seattle-based corporation engaged in processing pollock and other groundfish within the exclusive economic zone in the Gulf of Alaska and the Bering Sea. Speedwell first argues that the Secretary of Commerce violated various Federal procedural and substantive requirements in promulgating the emergency rule. Speedwell then argues that because the State of Alaska has not prohibited roe stripping in waters and on land under its jurisdiction, the emergency rule is ineffective and moreover that it actually grants a preference to shoreside processing plants, floaters operating solely within the territorial sea, and the Alaska fishermen who land fish at those plants. Speedwell requests a court order setting aside the emergency rule, but alternatively seeks an order requiring the Secretary of Commerce to formally preempt Alaska state law and apply the Federal roe stripping limitation within Alaska under section 306(b) of the Magnuson Fishery Conservation and Management Act, at Title 16, United States Code, section 1856(b).

I understand that you have sponsored legislation that would limit pollock roe stripping by shore plants and processing vessels operating within the territorial sea of Alaska. Prompt enactment of this companion State legislation is desirable for two reasons. First, enactment of the State legislation would negate Speedwell's argument that a Federal emergency rule applicable only within the exclusive economic zone cannot adequately implement a roe stripping limitation in the entire Alaska pollock fishery. Second, the State legislation would undermine Speedwell's argument that the Secretary of Commerce has tried to benefit Alaska-based operations at the expense of non-Alaska operations, and would remove any basis for Secretarial preemption under Magnuson Act section 306(b).



I have enclosed a copy of the plaintiff's complaint in this lawsuit for your information. Please call me if you would like to discuss any of these issues in more detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Pollard". The signature is written in a cursive style with a large, looped "P" at the end.

Jonathan Pollard  
NOAA Staff Attorney

Attachment

# MEMORANDUM

# State of Alaska

TO: Honorable Don Collinsworth  
Commissioner  
Dept. of Fish & Game

DATE: October 7, 1986

FILE NO: 663-86-0453

TELEPHONE NO: 465-3600

FROM: Harold M. Brown  
Attorney General

SUBJECT: Herring processing  
under AS 16.10.175

By: Larri Irene Spengler  
Assistant Attorney General  
Department of Law

You have asked for an analysis of whether AS 16.10.175 violates the commerce clause of the United States Constitution. The statute prohibits the removal of herring from Alaska unless the herring has first been "frozen or otherwise processed for shipment." Based upon principles of statutory construction, the legislative history of this section, and the commerce clause test, we believe that the statute could be defended against a commerce clause challenge. 1/

## PRESUMPTION OF CONSTITUTIONALITY

In examining whether a state statute is constitutional, the first step is an acknowledgement of the presumption followed with virtual uniformity by the courts that favors the validity of an act of the legislature and that dictates that all doubts must be resolved in support of an act. 2A N. Singer, Sutherland Statutory Construction § 45.11 (4th ed. 1984). The Alaska Supreme Court has recognized the "well-established rule of statutory construction" that if possible courts should construe statutes to avoid unconstitutionality. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978). That rule

recognizes that the legislature, like the courts, is pledged to support the state and federal

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1/ You also inquired whether the definition of "processed for shipment" in AS 16.10.175(b) was unconstitutionally vague. We believe that it is not, and any ambiguities could be clarified by the Board of Fisheries. Under AS 16.05.251(a)(4), the Board of Fisheries has the authority to adopt regulations "establishing the methods and means employed in the pursuit, capture and transportation of fish." That authority would encompass the adoption of regulations interpreting or clarifying AS 16.10.175(b); this would be advisable if the statutory list -- "icing, stripping or salting" -- has been the source of misunderstanding, or enforcement problems.

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constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits.

Id.

Thus, in examining AS 16.10.175 and its legislative history in light of the commerce clause test, any doubts about the validity of the statute must be resolved in favor of its constitutionality.

#### THE COMMERCE CLAUSE

The commerce clause, article I, section 8, clause 3 of the United States Constitution, provides that "Congress shall have power ... to regulate commerce ... among the several states." It has been consistently construed by the Supreme Court "not only as an authorization for Congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." Hughes v. Oklahoma, 441 U.S. 322, 326 (1979) (footnote omitted). Hughes found unconstitutional an Oklahoma statute making it illegal to ship for sale outside Oklahoma minnows procured from waters within the state. The court first overruled its decision in Geer v. Connecticut, 161 U.S. 519 (1896), which had essentially held that the commerce clause had no bearing on any state's actions involving its wildlife. Then the court articulated the usual commerce clause analysis, which requires an inquiry into:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and if so,

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma 441 U.S. 322, 366 (1979).

Oklahoma had defended its statute as a conservation measure, designed to protect minnows from depletion. The court, however, found that the statute on its face discriminated against interstate commerce, and that it could not withstand the strict

scrutiny to which facially discriminatory laws must be subjected because a less discriminatory conservation measure could have been selected. Id. at 338.

On the other hand, the Supreme Court recently upheld a ban by Maine on the importation of a species of minnow used as bait fish. Maine v. Taylor, 477 U.S. \_\_\_, 91 L.Ed.2d 110 (1986). The Court noted that statutes which affirmatively discriminate against interstate transactions, such as the one challenged in that case, are subjected to a more demanding scrutiny than statutes that burden such transactions only incidentally. 91 L.Ed.2d at 120-21. The Court held that even under strict scrutiny Maine had a legitimate purpose in guarding against environmental risks. Id. at 127. The Court approved that purpose, despite the view of the court of appeals in reviewing the case that there were "signs of protectionist intent." Id. The Supreme Court noted:

Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually per se rule of invalidity." [Citations omitted.] But there is little reason in this case to believe that the legitimate justifications the state has put forward for its statute are merely a sham or "post hoc rationalization."

Id. (emphasis added). As discussed below, similarities can be found between AS 16.10.175 and the Maine statute when the commerce clause test is applied to the Alaska statute.

#### THE STATUTE

The legislature enacted AS 16.10.175 in 1980. Section 3, ch. 27, SLA 1980. The provision states:

(a) A person may not remove herring from the state before the herring has been frozen or otherwise processed for shipment.

(b) In this section, "processed for shipment" includes, but is not limited to, icing, stripping or salting of the herring; however, it does not include salting of the herring if five percent or more of the body weight of the herring consists of roe.

It is not apparent from the face of this statute what purpose the legislature intended the requirement to further. You note in your memorandum of inquiry that the prohibition could "either be a method of insuring some degree of in-state labor for economic considerations, or it could be to ensure that a quality product reaches the market as a way of maintaining a good reputation for that product." You also note that the legislature has not imposed quality assurance laws on all fish exported from the state.

As explained below, while some legislators may have been interested in expanding the state's economy, the legislature was very concerned about the wasteful practice of handling herring by discarding the carcasses and keeping only the roe. This practice had been declared wasteful and prohibited several years earlier, but the prohibition had apparently been avoided to some extent by vessels exiting state waters and then discarding the carcasses. The legislature sought to close that loophole by requiring processing "for shipment" (rather than complete processing) before removal from state waters. (Apparently no practice had developed which involved intentional discarding salmon carcasses to obtain salmon roe. Thus there was no similar prohibition on disposal of salmon carcasses, and no need to require that salmon be processed for shipment to prevent their carcasses from being wasted.)

#### LEGISLATIVE HISTORY

The original bill (HB 590) that eventually became ch. 27, SLA 1980, contained only the language currently present in AS 16.10.175(a). The House Resources Committee Substitute for HB 590 was accepted by the House, and eventually adopted by the Senate. 1980 House J. 684-86; 1980 Senate J. 822-23. Sections 1 and 2 of the committee substitute related to AS 16.10.172 and AS 16.10.173. Those statutes, adopted three years earlier (sec. 1, ch. 9, SLA 1977), (1) express a legislative policy against discarding herring carcasses from which the roe has been removed by stripping, which the legislature declares to be wasteful, and (2) prohibit the failure to use the flesh of commercially taken herring for specified purposes.

The committee substitute for HB 590 in 1980 authorized certain exceptions to the prohibition on "waste." Sec. 1 and 2, ch. 27, SLA 1980. Those exceptions provide that, notwithstanding the prohibition on waste in AS 16.10.173, herring carcasses could be discarded if the herring were taken from waters with a sufficient herring population to support a stripping industry

without substantially reducing the amount of herring available for other uses, and if

the stripping process is conducted in an area of the state where local industry either does not exist, or if it does exist, it is insufficient to provide reasonable economic support to the people who live in the area.

Sec. 1(b), ch. 27, SLA 1980 (emphasis added).

This concern articulated in 1980 for "reasonable economic support" for people who live in the areas in which the fishing occurs is expressed in the very bill (HB 590) that imposed the prohibition on removing herring from the state unless "processed for shipment." Some legislators may have believed that one of the reasons the prohibition was enacted was to further local industries. For example, in 1980 in response to a request for an explanation of how the committee substitute differed from the original HB 590, Representative Halford stated:

The original bill was designed to prohibit removal of herring from the state waters without processing. It was designed to protect local jobs in the processing industry and to protect the herring from the waste. But, generally, what was explained in committee is the result of the original bill would be that there would be less jobs for Alaskan fishermen; there would be less jobs in the fishing fleet; there would be less jobs in local processing, because the capacity isn't there. So the fish simply couldn't be taken. They'd be taken by the high seas fishery, and instead of allowing Alaskans to utilize the processes that are available, those same processes would be carried out on the high seas fishery, and the economic benefit would not come to Alaska.

1980 House J. 654-56; tape 1, side A, House proceedings for March 17, 1980. On the Senate side, the only floor remarks were made by Senator Mulcahy:

It has been called the in-state herring processing bill, and while I don't think it's quite that, it is a move in that direction .... It's aimed at on-shore Alaska labor in a developing fishery and it's kind of a compromise between total in-state

Alaska processing and the need for a little more flexibility in a developing fishery.

1980 Senate J. 822-23; tape 1, side A, Senate proceedings for April 22, 1980.

While some legislators may have believed that one of the purposes underlying the legislative enactment of AS 16.10.175 was to promote local economic benefits, that clearly was not the sole legislative goal. As Representative Halford explained, the 1980 prohibition against removing herring from the state unless "processed for shipment" was designed to effectuate more fully the prohibition enacted by the legislature in 1977 in AS 16.10.173 on waste of herring:

This [1980] bill is not a step backward. It is a step forward because what happened when [the 1977 act] took effect to cover waste, the processors started light salting and export of the herring. The original bill that you introduced [in 1977] was to stop that process ... and this bill does that .... It stops an abuse, although it allows the industry and people involved to deal with it in an economic sense so that they are not hurt by that stoppage.

1980 House J. 685-86; tape 1, side A, House proceedings for March 19, 1980.

Other discussion on the House floor demonstrates extensive concern among legislators about the exceptions to the prohibition against waste provided in the 1980 bill. For example, Representative Eliason expressed his support for the legislative policy in AS 16.10.172 against allowing the processing of herring in a manner designed solely to obtain the roe, while discarding the carcasses. 1980 House J. 654-56; tape 1, side A, House proceedings for March 17, 1980. He describes the method, explaining that the males are discarded completely and the female carcasses are discarded after the roe is extracted. Id. He, and other representatives, spoke vigorously against providing a waiver that would allow this practice to occur, which they considered to be waste. Id. Representative Halford responded by explaining that the bill would phase out the harvest for roe alone by 1983, which would allow the industry time to develop methods for handling the carcasses, and that thus the bill would ultimately "reach the goal that I think all Alaskans want, which is utilization without waste of the fishery."

Id.

If the legislature had been interested solely in developing in-state jobs, it presumably would have required processing in state; "processing" is defined by Board of Fisheries regulation 5 AAC 39.975(29) as the "completion" of cooking, canning, smoking, salting, drying, or freezing. Instead, the legislature only required processing "for shipment," defined in AS 16.10.175(b) as icing, stripping, or salting. However, salting was not acceptable if 5 percent or more of the herring weight was roe, presumably since that would have fostered the practice which the legislature was trying to control -- lightly salting the catch and then discarding the carcasses and keeping the roe.

Thus, it appears that a primary legislative purpose of the prohibition in AS 16.10.175 on removing herring from the state unless "processed for shipment" was to further the policy against waste and to promote full utilization of herring. The legislature was apparently seeking to curb the practice of lightly salting the herring, removing it from the state, and then extracting the roe and discarding the carcasses, an act which would have been illegal under AS 16.10.173 if it had occurred in state waters. <sup>2/</sup> This goal of reducing waste and promoting full utilization appears to be separate from the effect of promoting local economic development.

#### CONSTITUTIONALITY

Preliminarily, the prohibition in AS 16.10.175 against removing herring from the state unless "processed for shipment" does on its face discriminate against interstate commerce. Thus, a court would apply strict scrutiny in an analysis. The next inquiry under the commerce clause test is whether the statute serves a legitimate local purpose. To the extent that one purpose is the protection of local economic interests, that is not considered "legitimate." Dean Milk Company v. Madison, 340 U.S. 349, 354 (1951).

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<sup>2/</sup> Not all the members of the Legislature were convinced the abuse was occurring. Representative Eliason, at least, expressed doubt that the carcasses of a "food fish" would actually be discarded. 1980 House J. 654-56; tape 1, side A, House proceedings for March 17, 1980.

While there is evidence that economic benefits to Alaska were one factor certain legislators weighed in reviewing the statute, there also is ample evidence of a major legislative concern about the prevention of waste and the promotion of full utilization of the herring resource both in the legislative history and in the companion statutes. 1980 House J. 654-56 and 683-86 (tape 1, side A, House proceedings for March 17 and for March 19, 1980); AS 16.10.172; AS 16.10.173. As the Supreme Court noted in Maine v. Tavor, 477 U.S. \_\_\_\_\_, \_\_\_\_\_, 91 L.Ed.2d 110, 128 (1986), "there is very little reason in this case to believe that the legitimate justifications the state has put forward for its statutes are merely a sham." The Court affirmed the legitimacy of state's interest in use of its natural resources:

The commerce clause significantly limits the ability of states and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' [citation omitted], it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

91 L.Ed.2d at 129 (emphasis added).

The legitimacy of waste prevention has been specifically recognized by at least one court. In 1981, in Bristol Herring Marketing Cooperative v. Skoog, No. A81-043 Civ. (D. Alaska 1981), the federal district court in Alaska preliminarily enjoined the enforcement of a regulation that prohibited foreign vessels in state waters from catching or processing fish, or from transporting fish outside the state unless processing had been completed. 5 AAC 39.198. <sup>3/</sup> The court ruled that the prohibition in state waters on foreign fish-related activities probably constituted an impermissible burden on commerce, and in particular, on foreign commerce, and enjoined the offending regulation. It also preliminarily enjoined AS 16.10.175, apparently based on the misunderstanding that the statute

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<sup>3/</sup> The case was settled, and thus the court did not reach the merits, beyond the preliminary injunction stage.

required that more than simply processing-for-shipment occur in state waters. However, the court in its April 1, 1981 preliminary injunction order required that the foreign vessels which would be permitted to operate in state waters under the injunction "shall comply with the management and conservation statutes and regulations" of the state, and "shall not waste herring." Preliminary injunction, pp. 2 and 4. Thus, while striking down the state's attempt to prohibit foreign vessels from operating in state waters, the court recognized the legitimacy of the state's interest in prohibiting waste of herring.

Thus, the second part of the commerce clause test can be answered in favor of the processing-for-shipment requirement. It has a legitimate purpose, although some might argue that it may also have had about it "an aura of economic protectionism." Maine v. Taylor, 477 U.S. at \_\_\_\_\_, 91 L.Ed.2d at 124 (1986).

The third question under the commerce clause test is whether alternative means could discourage waste and promote utilization without discriminating against interstate commerce. Enacted three years before the statute under examination here, AS 16.10.173 prohibits waste of commercially taken herring. Sec. 1, ch. 9, SLA 1977. As discussed above in detail, the legislature appears to have identified a method used to circumvent the prohibition on waste; vessels were at least believed to have left the state without processing the herring and then later extracted the roe and simply disposed of the carcasses. 1980 House J. 685-86; tape 1, side A, House proceedings for March 19, 1980. The prohibition on export of unprocessed herring was aimed at least in part at halting that perceived abuse. Id.

It is possible to imagine other ways the legislature might have sought to attack the problem. For example, it could have adopted a stronger antiwaste provision, with severe enforcement penalties. Another possibility would have been an attempt to prohibit future fishing in state waters by vessels which violated the waste provisions. The problem with these solutions is that they could not address the disposal of carcasses beyond state waters, because the legislature could not prohibit vessels from dumping carcasses once they were beyond the state's jurisdiction.

In closing the loophole, the legislature appears to have selected the narrowest method feasible. As discussed above,

the legislature did not require complete processing <sup>4/</sup> -- cooking, canning, smoking, salting, drying, or freezing -- to occur in state waters. Rather, the legislature only required enough processing "for shipment" to prevent the abuse in question. Under AS 16.10.175(b), the herring could simply be iced or stripped. Under that provision, the herring could even be salted, as long as less than 5 percent of the herring weight was roe. It could be argued that the legislature's prohibition was overbroad, in that the entire processed-for-shipping requirement could have been applied only to herring harvested for roe (roe comprising 5 percent or more of the body weight). However, the vast majority of the commercial herring is for roe herring. For example, the Department of Fish and Game informs me that in 1986, 87 percent of the total commercial harvest was for roe herring and the majority of the remaining 13 percent was harvested for bait, which would be used fresh or processed immediately by freezing in any case. So the breadth of the statute coincides fairly well with the breadth of the potential problem harvests.

It appears that the legislature had available no other mechanism to prevent the removal of herring from the state and the subsequent disposal of the carcasses. Further, the legislature chose to impose the least onerous requirements possible to solve the problem of waste.

The method chosen by the Alaska legislature to combat waste of herring can be contrasted with the primary processing requirements imposed in Alaska on the timber industry, and struck down in South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). The court noted there that the only purpose of the "naked restraint on export of unprocessed logs" was promoting employment in the state, and thus ruled it unconstitutional. Id. at 99.

Similarly, in Pike v. Bruce Church Inc., 399 U.S. 137 (1970), the court struck down an Arizona statute requiring cantaloupes grown in Arizona to be crated in Arizona, which promoted the reputation of the Arizona cantaloupe industry. The court noted that to comply with this statute the challenger would have to "build and operate an unneeded \$200,000 packing plant" in Arizona. Id. at 145. The court stated that it has viewed

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<sup>4/</sup> 5 AAC 39.975(29).

with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere.

Id. (emphasis added).

The former Alaska timber requirement and the Arizona cantaloupe requirement can be contrasted to the Alaska requirement that herring be processed for shipment in state waters. The achievement of the goal -- prevention of waste of herring -- could not "more efficiently be performed elsewhere." Once the vessels leave the state's jurisdiction, the legislature has no leverage over the wasteful practice it is attempting to control.

#### CONCLUSION

In general, statutes are presumed constitutional. 2A. N. Singer, Sutherland Statutory Construction § 45.11 (4th ed. 1984). In the absence of clear legislative intent, we can not presume that the legislature enacted AS 16.10.175 solely to further an improper protectionist purpose, especially in light of the evidence that the legislature was greatly concerned about waste and under-utilization of herring in general.

As noted above, the legislative history relating to the purpose of this statute is mixed, but at least one primary purpose of AS 16.10.175 is legitimate. The goal of reducing waste and promoting full utilization of herring cannot be effectuated by other means, despite the fact that the means used affects interstate commerce. Thus, although we cannot guarantee that AS 16.10.175 would be upheld in court, we believe it could be defended in good faith against a commerce clause challenge, especially in light of the presumption of constitutional validity and the recent United States Supreme Court analysis in Maine v. Tavlor, 477 U.S. \_\_\_, 91 L.Ed.2d 110 (1986).

LIS:cck

cc: Steve Pennoyer  
Ken Parker  
Dept. of Fish & Game

warrant. A reasonable search is one made (a) upon probable cause that fruits of a crime or evidence relating to the crime will be found; (b) under circumstances which would make the securing of a warrant impracticable. 1961 Op. Att'y Gen. No. 19.

A search may be made pursuant to a valid arrest, providing that the arrest is made prior to the search. 1961 Op. Att'y Gen. No. 19.

The amendment requiring a written signed statement of the reason for the search is objectionable but valid. It is objectionable because it unnecessarily ties the hands of the field agents charged with

enforcement of the fish and game laws, and is a provision which is quite uncommon, if not unique. 1959 Op. Att'y Gen. No. 15.

The statutory requirement that fish and game agents fill out a form stating the objects of search will not make an otherwise invalid search valid, but it may invalidate an otherwise valid search if not complied with. 1961 Op. Att'y Gen. No. 15.

In the case of a vessel, the limits of the area open to search probably include the entire vessel. 1961 Op. Att'y Gen. No. 19.

#### NOTES TO DECISIONS

**Observation of items in plain view.** — The mere observation of items which are in plain view or which are open and apparent, is not a search. Consequently, evidence based on such observations is admissible so long as the observing officer was legally in the position where the observations were made. *Klockenbrink v. State*, Sup. Ct. Op. No. 631 (File No. 1149), 472 P.2d 958 (1970).

This section requires that notice be given to the person "in control" of crab pots. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Failure to notify owner of crab pots was not a violation of this section where officers of the Department of Fish and Game approached the crab pots to conduct a search to check the extent of compliance with a regulation providing that fishermen could place their crab pots in the water up to 72 hours prior to the opening of the season and the owner was not present, attending to his crab pots; there being no "person in control of the property or object to be searched," the officers were unable to give the fisherman the required notice. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Notice required for search of vessel,

See 16.05.190. Seizure and disposition of equipment. Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter or a regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter or a regulation of the department shall be seized

building, etc. — The considerations leading to the conclusion that no notice was required for a search of crab pots would not apply to the search of a vessel, building or other effects in which the owner would have a reasonable expectation of privacy. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

**Crab pots outside protection of notice requirements.** — The legislature intended crab pots set in state waters to be outside the protection of the notice requirements of this section. *Wamsor v. State*, Sup. Ct. Op. No. 1953 (File No. 3615), 600 P.2d 1359 (1979).

**Officers' action did not violate section.** — Action by state fish and wildlife officers in pulling defendant's gear, marking the contents, and seizing samples of the bait, did not violate this section although such actions were taken without giving defendant notice of the officers' intentions. *Wamsor v. State*, Sup. Ct. Op. No. 1953 (File No. 3645), 600 P.2d 1359 (1979).

Applied in *Dye v. State*, Ct. App. Op. No. 125 (File No. 5599), 650 P.2d 418 (1982); *Gudjonsson v. State*, Ct. App. Op. No. 275 (File Nos. 7291, 7292), 667 P.2d 1251 (1983).

by any peace officer designated in AS 16.05.150. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or a regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter or a regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any. (§ 23 art I ch 94 SLA 1959)

#### NOTES TO DECISIONS

**Due process requirements.** — The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *F/V Am. Eagle*, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

When the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. *F/V Am. Eagle*, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Due process does not require that any owner of a vessel seized by the state for suspected use in illegal activity has an absolute right to obtain release of the property upon the posting of an adequate bond. To permit this would frustrate one purpose of forfeitures, which is to prevent possible use of the property in further illicit acts. *F/V Am. Eagle*, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

A seizure is a prerequisite to forfeiture under the provisions of this section. *Itubino v. State*, Sup. Ct. Op. No. 216 (File No. 395), 391 P.2d 946 (1964).

**Forfeiture nets upon the thing itself.** — In case of forfeiture, the decree of the court acts upon the thing itself and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. *United States v. Pollastrine*, 8 Alaska 104 (1929).

It divests titles and liens. — A forfeiture necessarily divests every existing right, whether of title or lien or other interest, in the thing forfeited. There is no reason why it should not extinguish the right of a lienholder equally with that of the owner. It binds the interests of all the world. *United States v. Pollastrine*, 8 Alaska 104 (1929).

**Section distinguishes between mandatory and discretionary forfeiture.** — This section distinguishes between mandatory forfeiture of contraband (fish, game, birds) upon conviction, and discretionary forfeiture of paraphernalia (guns, traps, aircraft, etc.). *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 238c), 645 P.2d 629 (1976).

Not between criminal or civil forfeiture proceedings. — The distinction which the legislature sought to draw between contraband and paraphernalia is between mandatory and discretionary forfeiture, not between requiring criminal or civil forfeiture proceedings. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 238c), 645 P.2d 629 (1976).

Forfeitures, even when civil in form, are basically criminal in nature. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 238d), 645 P.2d 629 (1976).

The quasi-criminal nature of forfeiture proceedings under this section and AS 16.05.195 has been recognized by the state supreme court in *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976); *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

"Order of the court" may refer to orders rendered following criminal conviction. — Since the "case" and "fine" referred to in this section concern criminal proceedings, it is reasonable to interpret an "order of the court" as likewise referring to orders rendered subsequent to a criminal conviction, as well as those following a separate civil action. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

Valid forfeiture where defendant convicted under AS 16.05.920. — Where defendant was convicted under AS 16.05.920, which makes certain acts unlawful, in order to effect a valid forfeiture of defendant's aircraft, it was not necessary for the state to institute a separate

civil in rem proceeding against the aircraft. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

While forfeiture is a civil remedy unless otherwise provided by statute, this section, as it applied to a defendant who was convicted under AS 16.05.920, did so provide. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

For cases construing seizure and forfeiture under the provision of ACLA 1949, § 30-2-10, see *United States v. One Fish Trap*, 7 Alaska 216 (1924); *United States v. The Pacific*, 7 Alaska 260 (1924); *United States v. One Floating Fish Trap*, 7 Alaska 334 (1925); 7 Alaska 334 (1925).

Applied in *Jordan v. State*, Ct. App. Op. No. 360 (File No. 7782), 681 P.2d 346 (1984).

Quoted in *Wamser v. State*, Sup. Ct. Op. No. 1953 (File No. 3646), 600 P.2d 1359 (1979).

Cited in *Wacek v. State*, Sup. Ct. Op. No. 1108 (File No. 2166), 530 P.2d 751 (1975); *Reynolds v. State*, Ct. App. Op. No. 182 (File No. 6432), 655 P.2d 1313 (1982).

**Sec. 16.05.195. Forfeiture of equipment.** (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation adopted under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation adopted under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation adopted under it.

(b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation adopted under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from arising out of its use.

(e) Forfeiture may not be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol. (§ 3 ch 124 SLA 1974; am § 1 ch 18 SLA 1983)

Effect of amendments. — The 1983 amendment added the second sentence of subsection (f).

#### NOTES TO DECISIONS

Purposes for forfeiture. — See *State v. Rice*, Sup. Ct. Op. No. 2321 (File Nos. 4777, 4778), 626 P.2d 104 (1981).

Strict construction against government. — As a general rule, forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Due process requirements. — The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

When the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Due process does not require that any owner of a vessel seized by the state for suspected use in illegal activity has an absolute right to obtain release of the prop-

erty upon the posting of an adequate bond. To permit this would frustrate one purpose of forfeitures, which is to prevent possible use of the property in further illicit acts. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Where the seizure of a fishing vessel is authorized by a judicially approved warrant issued upon probable cause and the state files a civil complaint on the next working day following the seizure, and the owners are promptly notified, the owners are afforded procedural due process. *State v. Baranof*, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), 677 P.2d 1245 (1984), cert. denied, 496 U.S. 823, 105 S. Ct. 98, 83 L. Ed. 2d 43 (1984).

Section not preempted by federal law. — The Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., does not preempt state regulation of king crab harvesting in the extraterritorial fishery conservation zone by vessels registered in Alaska. *State v. F/V Baranof*, Sup. Ct. Op. No. 2787 (File Nos. 7287, 7324), 677 P.2d 1256 (1984).

The federal Fishery Management and Conservation Act does not preempt Alaskan king crab regulation of vessels registered in Alaska. *State v. Baranof*, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), 677 P.2d 1245 (1984), cert. denied, 496 U.S. 823, 105 S. Ct. 98, 83 L. Ed. 2d 43 (1984).

Concurrent state jurisdiction of in rem admiralty forfeiture actions. — In rem admiralty forfeiture actions brought by the state to enforce violations of law may be brought in state courts under con-