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STATE of ALASKA

MEMORANDUM

TO: Ella Anagick
Limited Entry Study Group

DATE: September 6, 1979

FILE NO:

TELEPHONE NO: 465-3686

FROM: AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Proposals to amend Limited Entry Act

By:
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Assistant Attorney General

You have transmitted to this department for our comments a variety of options being considered by the Limited Entry Study Group for amending Alaska's Limited Entry Act (AS 16.43). Although several permutations were provided, the basic theme remains constant -- that is, a desire to restrict or prohibit the transferability of limited entry permits. The proposals were generated out of a concern by some for the increasing market value of permits, and fall into three basic categories: nontransferability, a moratorium on transferability and restricted transferability. Overlapping these three options were the following questions:

1. Should a limited entry permit be of unlimited duration, or should its term be established by an amortization schedule? and

2. Should intra-family transfers of the permit be permitted?

Obviously, with respect to both the "nontransferability" and "restricted transferability" options, the question arises as to how new entry into the gear operation phase of Alaska's fisheries will be accomplished. One option is to allow (under the "restricted transferability" option) the permit holder to transfer the permit to any person who has served in a crewing capacity for a certain number of years. Alternatively, the Study Group is considering the establishment of an apprenticeship program. Under the "restricted transferability" option, the permittee could transfer to any person completing that program. Under the "nontransferability" option, the Commercial Fisheries Entry Commission, once it reacquired the permit (presumably on the death or retirement of the holder, or expiration of the permit) would issue the permit to a person having completed the apprenticeship program. Additionally, persons who have not obtained limited entry permits solely because they did not meet pertinent application deadlines might also be eligible for reacquired permits under this approach.

As we understand it, the apprenticeship program contemplated would provide that persons wishing to enter the program would apply initially to the Commission, who would then induce (through tax incentives), and/or require, gear operators to take on specified individuals as apprentices. The intent of this arrangement is to insure that persons in the apprenticeship program are chosen and evaluated by neutral, publicly-administered criteria, rather than by the industry itself.

As I am sure you're aware, one fundamental issue pervades all of the options under consideration: Would these altered methods of gaining entry into Alaska's fishery satisfy the requirements of the equal protection clauses of the 14th Amendment to the United States Constitution, and Art. I, § 1 of the Alaska Constitution? The issue is compounded both by the decision of the U.S. District Court for the District of Alaska in Bozanich v. Reetz, 297 F.Supp. 300 (1969), and by the use of the so-called intensified scrutiny test of equal protection employed by the Alaska Supreme Court.

Many of the options being considered by the study group bear some similarity to Alaska's original limited entry legislation. Ch. 186, SLA 1968. That legislation provided, inter alia, that to obtain a gear license in the future, one would have to either (1) already be a gear license holder for the pertinent registration area; or (2) have served as a crewman "for any three years" in the pertinent area. Id. at § 2; AS 16.05.536(a) (1968 Supp.). On the basis of rather slender statutory authority, the Department of Fish & Game further limited eligibility to those holding gear licenses "in 1965 or subsequent years," and persons who had crewed for three years "since January 1, 1960." Bozanich v. Reetz, supra at 303. Transfer of the permit was permissible "only if sickness, injury, death, unavailability or other incapacitation of the licensee would keep or may keep a commercial fishing vessel in port." AS 16.05.670(a) (1968 Supp.).

In Reetz v. Bozanich, supra, the lower federal court ruled that the 1968 law violated federal equal protection guarantees by creating, essentially, a "closed class," with new entry controlled by existing participants:

> An aspiring commercial licensee wishing to participate in salmon fishing may work for

> a locally-licensed employer for three years . . . Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interest of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under this scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in private interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

Id. at 304, 305.

As will be discussed infra, courts have generally ruled that there is nothing impermissible per se with creating a "closed class." Unfortunately, the difficulties with the opinion never received appellate consideration. The United States Supreme Court, in Reetz v. Bozanich, 397 U.S. 82 (1970), reversed the lower court's decision on the grounds that the three-judge panel should have "abstained" from deciding the issues presented, allowing state courts to first address the novel Alaska law questions posed by the litigation.

The state law questions raised in Bozanich v. Reetz, supra, involved interpretation of Art. VIII, §§ 3 and 15 of the Alaska Constitution, which provide, respectively, that "fish . . . and waters are reserved to the people for common use" and that "no exclusive right or special privilege of fisheries shall be created or authorized in the natural waters of the state." The lower federal court ruled in Bozanich v. Reetz that these constitutional provisions were also violated by the 1968 enactment. Again, the Supreme Court ruled that interpretation of these provisions should be provided, initially, by state courts, and it was to the Alaska judiciary

that plaintiffs next went. The ensuing Alaska Superior Court decision (Bozanich v. Norenberg, No. 70-389 Civil, March 15, 1971) was as confusing as Bozanich v. Reetz. The court concluded that the statute's classifications as to who could, and who could not, obtain a gear license "constituted an unreasonable classification." Id. at 4-5. The court did not explain why. The court did, however, erroneously conclude that fishing "is a fundamental right." The court also held that the Act violated Art. VIII, § 15, in that "the right to fish commercially is sought to be restricted by the Act and this would in effect grant an exclusive right of fishery." Id. at 6. The court's opinion contained no discussion on the constitutionality of the law under Art. VIII, § 3, the "common use" provision.

Again, the lower court's conclusions that for unstated reasons, (1) the classifications drawn by the Act were "arbitrary"; (2) fishing is a "fundamental right"; and (3) any "restriction" on commercial fishing creates an exclusive fishery, never received appellate scrutiny. Rather, in the 1972 general election, Art. VIII, § 15 was amended to remove any state constitutional impediment to the creation of a viable limited entry program. Thus, your options do not violate Art. VIII, § 15. */

We do not know why the superior court in Norenberg believed the 1968 Act to be in contravention of federal equal protection guarantees. However, the "closed class" concept found defective in Bozanich v. Reetz, supra, was also present in Norenberg. If the court in Bozanich v. Reetz was correct, the proposals recommended by the Limited Entry Study Group would be constitutionally infirm. If entry into the fishery is preconditioned on a certain number of years of crewing experience, the case would seem directly on point.

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*/ The lower court's holding in Bozanich v. Norenberg was, in our view, wrong, and therefore, the constitutional amendment was unnecessary. The court in that case did correctly note that the "exclusive fishery" prohibition was borrowed from § 1 of the White Act. 48 U.S.C. § 222. That prohibition -- limiting the ability of the Department of Interior to establish fishing regulations in Alaska -- did not constitute a prohibition on the establishment of restrictions, including restrictions that discriminated between persons wishing to engage in the fishery. Dow v. Ickes, 123 F.2d 909 (D.C. Cir. 1941). All that was proscribed was the establishment of absolute monopolies -- in which identified individuals were accorded exclusive fishing rights. Hynes v. Grimes Packing Co. 337 U.S. 86, 123 (1948).

If an apprenticeship program is utilized, the degree to which existing gear operators retained discretion in the choice or evaluation of apprentices obviously governs the applicability of the rule from Reetz.

There is reason to believe that the court was wrong in Bozanich v. Reetz. At the outset, the court ignored Kotch v. Bd. of River Pilot Commissioners for the Port of New Orleans, 330 U.S. 552 (1947). That case involved a challenge to New Orleans' apprenticeship program for river pilots. Under the local law, a person could become a licensed pilot only if he had completed an apprenticeship program run by the pilots themselves. Unlike Bozanich v. Reetz, where the court hypothesized possible industry control over new entrants, the record in Kotch was rather clear that, in fact, the apprenticeship program had been utilized to limit new entry into the field of piloting to the sons and other close relatives of existing pilots. Nonetheless, the "closed class" aspect of the apprenticeship program withstood an equal protection attack. The case can be distinguished, because of the emphasis placed by the court on the peculiar advantages of an apprenticeship program in the pilotage trade. Of greatest importance in the present context, the court noted that the legislative branch was surely aware of the potential for "nepotism" and "favoritism" in an apprenticeship program. However, the court held that the decision as to whether those potential ills outweighed the advantages of an apprenticeship program was a political question, best left to legislative judgment. In other words, there is nothing constitutionally infirm per se with creating a closed class.

The same result has been uniformally reached with respect to liquor licensing. Commonly, state liquor laws will establish quotas for the maximum number of liquor licenses based upon area population -- quotas which will have already been reached before the enactment of the legislation. As a result, the law operates to create a "monopoly" for existing liquor dispensers. These quota systems have not been successfully attacked on equal protection grounds. Estate of Morrison v. Idaho Tax Comm'n, 572 P.2d 865 (Idaho 1977); State v. City of Jacksonville, 25 So.2d 569 (Fla. 1946); Zadrow v. State, 143 N.W. 639 (Wis. 1913).

In support of its perceived illegality of "closed class" legislation, the court in Bozanich v. Reetz, supra, cited the Washington case of Bacich v. Huse, 59 P.2d 1101

(Wash. 1936), in which the court struck down an early attempt at limited entry. The legislation at issue in that case took effect in December, 1934, and provided that only those persons who had held gear licenses in 1932-33 could obtain gear licenses in the future. The licenses were not transferable.

Bacich v. Huse does not stand for the proposition that "closed class" legislation is unconstitutional. Rather, the court stressed the irrationality of "grandfathering" only those persons who had held gear licenses in two prior years, rather than in any year prior to the effective date of the Act. Of greatest importance to the court was the exclusion of the year 1934. Thus, as the court stressed, a person holding a gear license in 1933, but who is now pursuing non-fishing employment, could obtain a gear license under the Act, while someone who had become dependent on the fishery as of 1934 could not. The case of City of Spokane v. Coon, 100 P.2d 36 (Wash. 1940), provides an important limitation on Bacich. That case involved a challenge to the constitutionality of an ordinance which prohibited the use of frame structures for hospitals, unless the structure was being used as a hospital as of the effective date of the Act. The court distinguished Bacich by noting that, under Washington's fishery law, new entry into the fishery was prohibited, while under the ordinance in question, new hospitals were permitted, utilizing, albeit, more expensive construction techniques. Similarly, in the options you're considering, new entry into the fishery is not prohibited, but is subject to new burdens -- either crewing for a particular number of years, or a successful completion of an apprenticeship program.

In sum, Bozanich v. Reetz was not a well decided case. Nonetheless, the case exists. Because its reversal by the United States Supreme Court was not on the merits, lower courts in particular may feel compelled to give some deference to the case -- no matter how undeserved. Obviously, the option under consideration which would permanently prohibit transfer of a permit except to persons who had crewed in the fishery for a particular number of years would be most vulnerable under the case, while an option allowing a permits' reissuance by the commission to a person successfully completing an apprenticeship program effectively controlled by the state would be least vulnerable.

Bozanich v. Reetz aside, any change in the Act would undoubtedly give rise to an independent equal protection attack. It is in this respect that our advice is the most uncertain, because, quite candidly, equal protection jurisprudence in this state is, at best, unpredictable. Presumably, the

changes contemplated in the Limited Entry Act would occur because of a legislative decision that entry into the fishery would be less burdensome through an apprenticeship program than through purchasing a permit through the market system established by the present legislation. That should be a political decision, for which the court would not substitute its judgment. See Kotch v. Bd. of River Pilot Commissioners for the Port of New Orleans, supra. Unfortunately, our courts may not see it that way. The best that we can do is to outline the state's equal protection analysis, noting some questions that may arise.

At the outset, the privilege of taking Alaska's fish resources should be just that -- a privilege, and not a right. Herscher v. State Dept. of Commerce, 568 P.2d 996 (Alaska 1977); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976); Thomas v. Bailey, ___ P.2d ___ No. 1835 (Rabinowitz concurring) (April 10, 1979); Younker v. CFEC, ___ P.2d ___ (No. 1892, August 3, 1979). As a result, legislative distinctions drawn between those who may and who may not enjoy the privilege need only bear a fair and substantial -- that is, rational -- relationship with the actual purpose of the legislation. Id. With respect to an apprenticeship program, for example, the state would argue that allowing only those who had successfully completed the program to gain entry into the fishery would allow for freer entry than under the market system currently in place. The court, however, may come to a different conclusion, see Isakson v. Rickey, supra, and if that conclusion leads to the identification of a perceived suspect, see Bozanich v. Reetz, supra, the legislation may encounter difficulties.

A particular equal protection problem may arise with respect to allowing "late applicants" in addition to or in lieu of successful apprentices, to obtain expired and/or transferable permits. If only late filers are allowed to apply, a person who did not apply at all because he felt it would be fruitless to pursue a late application will certainly raise "me too" arguments. In the pending cases, the appellees are arguing that, in hindsight, the legislature should have anticipated alleged peculiar problems that make existing requirements marginally underinclusive. Equal protection jurisprudence, of course, is repleat with caveats that legislation need not be perfect or drawn with mathematical niceties. Nonetheless, that is precisely what is being asked by litigants, and should they prevail, any legislation -- with respect to fisheries or any other economic matter -- which, as a result of a lack of legislative prescience,

operates with putative unfairness towards at least one individual will be vulnerable. A similar uncertainty would have to be acknowledged with respect to intra-family transfers. One can, quite frankly, imagine, in this state, a serious court challenge to a statute permitting intra-family transfers to the immediate family by a person without immediate family who had established a longterm domestic relationship with a cousin or uncle. Ludicrous as that may sound, it is precisely the type of arguments which this department has been required to meet.

The present Limited Entry Act is, both by its terms and operation, neutral with respect to residents and nonresidents -- any person with a requisite capital can obtain a permit. If a nonresident can demonstrate that, in operation, a limitation on transferability to persons crewing for a particular number of years, or successfully completing an apprenticeship program, systematically discriminates against nonresidents, far more difficult constitutional problems might arise. The right to travel -- the right impinged by residency requirements -- is, in Alaska, a fundamental right, requiring a showing of necessity in order to further a compelling state interest. Thomas v. Bailey, supra (Rabinowitz concurring). It would be difficult for a residency requirement -- defacto or dejure --to withstand that kind of exacting scrutiny.

Undoubtedly, you had hoped for more unequivocal advice from this department. As I hope you can appreciate from this memorandum, the state of the law in this regard is simply to fluid in this state to permit any meaningful prediction.

JKT:dlm

cc: John Williams, Commissioner
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