

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: The Honorable Ron Otte
Commissioner
Department of Public Safety

Date: June 20, 1996

File No.: 663-96-0583

Tel. No.: 465-3428

Subject: Exchange of Sport-Caught
Fish for Processed Fish

From: Dean J. Guaneli
Chief Assistant Attorney General

This is in response to your inquiry whether it is feasible to prosecute either party when fresh sport-caught salmon plus cash is given in exchange for already-prepared smoked or canned salmon. The short answer to your question is no, if certain conditions are met.

As you know, there has been a longstanding administrative interpretation that has allowed the practice described above, despite a regulation that prohibits bartering sport-caught fish. For the reasons set out in this memorandum, we cannot say that this administrative interpretation is an unreasonable one. Given the longstanding interpretation, and the ambiguity in the law discussed below, a prosecution for this conduct is not likely to be successful if three conditions are met. First, the exchange must involve the same species of fish. Second, there must be a cash payment by the sport fisher for the processing service rendered by the commercial operator. And third, the amount of processed product given to the sport fisher must be equal to the amount of product that would remain after the processing of sport-caught fish. Naturally, our opinion would change if there were a new statute enacted or a new regulation adopted.

Background

As we understand it, in some areas sport fishers can obtain processed salmon by exchanging their fresh-caught fish plus a cash fee. While some exchange of one species of sport-caught fish for processed fish of a different species has occurred in the past, the prevalent practice seems only to involve the exchange of the same species, *e.g.*, freshly caught king salmon for processed king salmon. The sport fisher is given an amount of fish that is purportedly calculated to generally equal the weight of fish that would remain after the processing.

Your question arises because a regulation of the Board of Fisheries states that,
•No person may buy, sell, or barter sport-caught fish or their parts.• 5 AAC 75.015. This regulation is derived from the statutory definition of •sport fishing•:

•sport fishing• means the taking of or attempting to take for personal use, and *not for sale or barter*, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries.

AS 16.05.940(29) (emphasis added). The definition of •personal use fishing• similarly prohibits sale or barter:

•personal use fishing• means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and *not for sale or barter*, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries.

AS 16.05.940(24) (emphasis added).

Alaska Statute 16.05.940 does not contain a definition of •barter• that directly applies to sport or personal use fishing. It does define •barter,• however, for fish or game taken for subsistence uses. AS 16.05.940(2). That definition provides that •barter• includes the exchange or trade of fish for other fish. Given the complexity of the fishing industry in Alaska, without more in the way of legislative intent, we cannot simply assume that the legislature would have intended a definition used for subsistence purposes to also be used for sport fishing purposes.

An Exchange is Arguably Not a Barter if Money is Used

Because there is no specific statutory definition of •barter,• however, courts would likely look to the common meaning of the word. The dictionary definition is •to trade goods or services without the exchange of money; to exchange without using money. • *American Heritage Dictionary* at 109 (1982). *Black's Law Dictionary* defines the word to mean •To exchange goods or services without using money. • *Black's Law Dictionary* at 137 (5th ed. 1979).

One way to look at the exchange is to view it as separate transactions: (1) cash for processing and (2) fresh sport-caught fish for processed fish. In the remainder of this memorandum, we discuss the importance of assuring that no portion of the sport-caught fish is used to pay for the processing services, thus making the cash fee the sole compensation for the processing. If the cash fee and the processing are thus removed from the exchange, it can be argued that the remainder of the transaction is a straight trade of fresh fish for processed fish, i.e., an exchange of goods not involving money, or a barter. Looked at in this way, the practice would not be legal.

On the other hand, it could be concluded that, because money is used in these types of exchanges, they do not fit within the dictionary definition of •barter.• Thus, under this view, the practice would be legal.¹

Given the ambiguity of the regulation, and the lack of statutory definition, neither interpretation is unreasonable. When considering criminal prosecutions, however, we must keep in mind that ambiguities in statutory or regulatory provisions are ordinarily construed against the state. *E.g.*, *LeFever v. State*, 877 P.2d 1298, 1300 (Alaska App. 1994); *State v. Lowrence*, 858 P.2d 635, 638 (Alaska App. 1993); *DeNardo v. State*, 819 P.2d 903, 907 (Alaska App. 1991); *Waiste v. State*, 808 P.2d 286, 289 (Alaska App. 1991). Thus, in the absence of more definitive legislative intent or a new regulation, the most likely result is that prosecution would not be feasible.

As discussed in the next part of this memorandum, we believe this conclusion is supported by the history of administrative interpretation of the regulation.

Prior Administrative Interpretation

This specific situation was addressed over two decades ago, in a letter dated June 26, 1973, by Rupert E. Andrews, then Director of the Division of Sport Fish, in responding to an inquiry about the legality of fish exchanges. Mr. Andrews stated, in pertinent part:

This regulation specifically prohibits the use of sport caught fish as an item that can be used as payment for services rendered or exchanged for other goods.

For example, a fisherman cannot negotiate with you to have his fish smoked in which you retain a part of his catch as payment for processing

¹ A token or unreasonably low fee to mask the real intent of the parties will not remove a transaction from being a barter. For example, suppose a processor ordinarily gets two pounds of smoked salmon from a five-pound fish. If a sport fisher were to give five pounds of fresh-caught salmon plus 25 cents to a processor, and receive only one pound of smoked salmon in return, it could reasonably be inferred that the sport fisher was trading half his salmon in exchange for the smoking services. To guarantee that no part of the sport-caught fish is traded for the services, the sport fisher must receive the same amount of processed fish that would remain after processing. This is discussed later in this memorandum.

his fish. This also includes the circumstances in which the angler may have more fish than he needs and is willing to let you have a part of his catch in return for a reduced price (or free) quantity of smoked or canned fish.

If an angler brings in 50 pounds of fish for processing, he must receive an equal amount of fish final product in return depending on the type of processing that is used. For this final product, he pays a standard full fee.

While this is not a formal opinion, it is the interpretation of the Alaska Department of Fish and Game that the situation you describe in your letter . . . would be permitted. An angler may receive in return for fresh sport-caught fish, an immediate return of a finished product of canned or smoked fish for which a full fee for services rendered is paid. Each transaction must stand on its own merits and the methods you use for this transaction would be a determining factor in your or the angler's compliance with the •no sale or barter provisions. •

In summary, the intent of this regulation is to prevent an individual from making a profit on his sport-caught fish.

This administrative interpretation of the regulation has existed unchanged since 1973 and has reflected state enforcement practices in many areas of the state. To the extent that the last sentence in the above quote reflects that the *only* purpose of the regulation •is to prevent an individual from making a profit on his sport-caught fish, • we do not agree. Besides preventing sport fishermen from making a profit, clearly the intent is also to prevent sport-caught fish from being used as an item of trade that has monetary value, regardless of any element of profit.

Yet the practice described in this memorandum and in the 1973 Andrews letter does not make a profit for the sport fisher; nor does it allow the sport fisher to use the fish as an item of trade with monetary value, if certain conditions are met.

We note that there are processors that will process and several days later return the same fish, smoked or canned, to the angler for a fee. Non-resident fishers can do the same thing, but may end up having to pay shipping charges to have the fish delivered home after leaving the state. This kind of fee for services is unquestionably legal and, compared with the practice described in this memorandum, results in precisely the same amount of fish returned to the fisher, and presumably the same fee paid to the processor. Thus it would seem to have the same impact on the resource as if the fisher immediately receives the processed fish.

We cannot say that the 1973 administrative interpretation of the regulation is invalid, for several reasons: (1) the interpretation is a longstanding one, and therefore entitled to

some weight; (2) the practice does not meet the dictionary definition of •barter,• if money is used and no part of the catch is used to pay for processing; and (3) the practice would seem to have no detrimental impact on the resource, compared to the nearly identical legal practice of paying for the processing of, and receiving, the precise fish caught some time later.

The existence of this longstanding administrative interpretation potentially impacts criminal prosecution because it may give rise to a defense of •mistake of law.• *Ostrosky v. State*, 704 P.2d 786, 791-92 (Alaska App. 1985). In other words, a person charged with bartering in sport-caught fish may claim that he or she reasonably relied on the 1973 Andrews letter and on state enforcement policies since then. A person raising such a claim bears the burden of proving entitlement to the defense, and we cannot say for certain whether it would be successful without a specific factual scenario to analyze. Nonetheless, in light of this defense, and in the absence of a new statute or a new regulation, a prosecution for this conduct would be problematical, as long as three conditions are met. The three conditions are described in the next part of this memorandum.

Requirements

To avoid prosecution for bartering sport-caught fish, the following three conditions must be met. If these conditions are *not* met, we believe that a person would not be able to successfully rely on a defense of •mistake of law,• and prosecution can and should proceed.

First, the exchange must involve the same species of fish. Therefore, fresh halibut cannot be exchanged for smoked salmon, and fresh king salmon cannot be exchanged for smoked pink salmon. The rationale for this condition is to avoid giving sport fishers an incentive to take more of a species than they would otherwise take. A sport fisher who takes his or her limit of pink salmon, for example, might not continue fishing day after day because he or she might not be able to use a large amount of pink salmon. If, however, fishers were permitted to trade pink salmon for processed halibut, king salmon, or some other seafood, they might continue to fish for pink salmon more than they might otherwise.

Second, there must be a cash payment by the sport fisher for the processing service rendered by the commercial operator. The rationale for this condition is to assure that the sport-caught fish is not being used as barter for the processing. Naturally, there may be price competition among commercial operators, so the fee may vary. Thus the third condition is critical.

Third, and most important, the amount of processed product given to the sport fisher must be equal to the amount of product that would remain after the processing of the sport-caught fish.

If the commercial operator returns *less* product than the amount remaining after processing, it is likely that part of the sport-caught fish is being used as barter for the processing service. If the commercial operator gives more product than the amount remaining after processing, it may mean that the sport fisher is buying processed sport-caught fish. Thus the amount of product given to the sport fisher must be equal to the amount remaining after processing.

A subsidiary issue arises from the practice of exchanging sport-caught fish plus cash for processed fish. Because the commercial operator has accepted sport-caught fish, the operator is prohibited by regulation from selling that fish. The only way for the operator to use the fish is to process it and use it in exchange for other sport-caught fish, as described in this memorandum. Because the fish will thus have a special status, commercial operators should keep the fish segregated from commercially saleable fish and may wish to adopt a practice of labeling the processed fish as •Not for Sale or Barter.•

This opinion will no doubt create difficulties for commercial operators and for enforcement personnel. A statute or regulation that directly addresses this question, eliminates ambiguities, and sets appropriate standards is certainly warranted. Please contact us if you have further questions.

DJG:rew