

# MEMORANDUM

## State of Alaska Department of Law

TO: The Honorable Ed Flanagan  
Commissioner  
Department of Labor

DATE: February 17, 1999  
FILE NO: 661-98-0255  
TEL. NO: 269-5100  
SUBJECT: Test Fishing

FROM: Toby N. Steinberger  
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Commissioner Cashen requested our opinion on whether fishermen performing "test fishing" are entitled to benefits from the Fishermen's Fund established under AS 23.35.010 if they are injured while conducting "test fishing." It is our opinion that fishermen who are injured while they are performing test fishing are not entitled to benefits from the Fishermen's Fund because they were not commercial fishing when they were injured.

Under AS 16.05.050, the Department of Fish and Game contracts with the owner or master of a vessel to conduct test fishing.<sup>1</sup> The terms of the contracts vary. In some cases, the contract provides that, in return for conducting the test fishing, the owner or master of the vessel may receive a portion of the value of the fish delivered to the state. In some cases, the owner or the master of the vessel may keep and sell the fish. Yet, in other cases, the Department of Fish and Game may contract to have the vessel owner conduct test fishing for a fee unrelated to the value of the fish. Crewmembers of the fishing vessel will likely have commercial fishing licenses or fishing permits.

Under AS 23.35.070, "a fisherman, upon becoming disabled, is entitled to receive benefits . . . ." However, only fishermen actually engaged in commercial fishing at the time of their injury are entitled to benefits from the Fishermen's Fund. Alaska Statute 23.35.150(3) defines "fisherman" to mean a fisherman engaged in commercial fishing. Alaska Statute 23.35.150(3) reads:

(3) "fisherman" means a person who is licensed by the state to engage in commercial fishing under AS 16.05.480 or who is the holder of a permit issued under AS 16.43 and who, at the time injury is sustained or illness is contracted, is actually so engaged or

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<sup>1</sup> See generally *Kodiak Seafood Processors Ass'n. v. State*, 900 P.2d 1191 (Alaska 1995).

is occupied in Alaska in preparing or dismantling boats or gear used  
in commercial fishing;

(Emphasis added). Alaska Statute 16.05.940(5) defines "commercial fishing" as "the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels . . . ."

Test fishing is not considered "commercial fishing." In *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1197 (Alaska 1995), the Commissioner of the Department of Fish and Game issued a fishing permit to a fishing vessel owner/operator to conduct "exploratory fishing . . . in waters south of Kodiak Island currently closed to fishing for weathervane scallops." The permit allowed the owner/operator to keep and sell the scallops to be collected on the trip. Kodiak Seafood Processors Association argued that by allowing the owner/operator to keep and sell the fish caught, the commissioner illegally opened a commercial fishery. The court rejected the association's argument. It held that allowing a fisherman to sell the fish collected during a test fishery does not transform the test fishery into a commercial fishery. The court stated:

We turn first to the financial arrangement between Kandianis and ADF&G. Alaska Statute 16.05.050(15) would clearly allow the Commissioner to sell the fish caught and give the proceeds to the private fisher as consideration for the testing services provided. We reject KSPA's argument that allowing a fisher to sell the fish transforms a test fishery into a commercial fishery. There is no material difference between allowing the private fisher to sell the catch and having the Commissioner sell the catch and give the proceeds to the private fisher. The same quantity of fish would be caught, and the same compensation would be received by the fisher under either scenario. We therefore conclude that under AS 16.05.050, the Commissioner has the authority to finance test fisheries in the manner used here.

900 P.2d at 1197 (emphasis added). Since test fishing is not commercial fishing, fishermen who are injured while they are test fishing are not entitled to the benefits of the Fishermen's Fund because they were test fishing, not commercial fishing, when they were injured.

We trust this answers the questions raised in your request for advice. If you have any questions, please feel free to call us.